The right to progressively free higher education in terms of International and South African Law

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“Let us think of education as the means of developing our great abilities, because in each of us there is a private hope and dream which, fulfilled, can be translated into benefit for everyone and greater strength of the nation.”

– John F Kennedy –

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ABSTRACT

Protest action in relation to increasing tuition fees at the level of tertiary education has become quite a regular occurrence in South Africa. It is in this context that this study ponders the question whether, in the light of international law, but also constitutional law interpreted in the light of international law, South African law and state action must recognise and implement *progressively free* higher education. Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 requires higher education to "be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education." A proper understanding of South Africa's international and constitutional duties in relation to free higher education requires a critical appreciation of the purport of Article 13(2)(c). The primary objective of this study is to determine whether a legal argument exists in both international and South African law for an obligation that higher education must be made progressively free. The thesis has seven chapters. Following an introductory *first chapter*, which "sets the scene," the *second chapter* will focus specifically on the international law position regarding the right to progressively free higher education. It will examine the international right to education, addressing also primary and secondary education, to then focus on higher education. The crucial question here is whether Article 13(2)(c) of the ICESCR conceives of progressively free higher education as a mandatory instrument, or whether it is rather the goal of "equal access," however achieved, that is legally binding. The *third chapter* analyses the relevance of international law to South African law and jurisprudence, in principle. It examines the different roles played by international law in South Africa under sections 39(1)(b), 231, 232 and 233 of the Constitution, 1996. Central to the discussion here is a discussion of the important Constitutional Court case of *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), in which the court addressed the issue of the role of international law in South Africa. The *fourth chapter* focuses on the right to education as this is protected in South Africa under section 29 of the Constitution. Section 29(1) protects a right to "basic education" and a right to "further education." The discussion notably examines whether section 29(1)(b) on "further education" should be considered to encompass the right to progressively free higher education. It also has a look at the relevant legislation in the sphere of higher

education, namely, the Higher Education Act 101 of 1997 and the National Student Financial Aid Scheme Act 55 of 1999, *inter alia* to ascertain whether the progressive introduction of free higher education is, as it were, seen to be implicitly covered by section 29(1)(b) of the Constitution. The chapter identifies the insufficiencies of the current legislative framework in so far as this relates to the progressive introduction of free higher education. The *fifth chapter* focuses on the ground-breaking cases of the Constitutional Court dealing with socio-economic rights, that is, the cases which laid the foundation for the adjudication of socio-economic rights in South Africa. Because the right to further education can also be categorised as a socio-economic right, a discussion of these cases is warranted, to provide guidance on the likely (and desirable) interpretation of section 29(1)(b) of the Constitution by the courts. The analysis notably discusses the impact of the doctrine of the separation of powers on the adjudication of socio-economic rights. The funding of higher education in South Africa is then analysed in the *sixth chapter*. The chapter examines different funding models, income streams, and the purpose of the National Student Financial Aid Scheme and its shortcomings. The chapter further explores the role of the private sector in the funding of higher education. The chapter identifies the nature of the challenges faced by students in accessing higher education because of high tuition fees. A final *seventh chapter* affirmatively holds that both international and South African law should be read to require the progressive introduction of free higher education. A number of recommendations to guide future state action in relation to the financial accessibility of higher education are made.

KEYWORDS

The right to education, the right to basic eduaction, the right to further education, the right to higher education, progressively free higher education, socio-economic rights, progressive realisation, international law, international human rights agreements, International Covenant on Economic, Social and Cultural Rights, funding, adequate followship system, constitutional rights, limitation of rights

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
ConJIL	Connecticut Journal of International Law
CLR	Connecticut Law Review
CC	Constitutional Court
CCR	Constitutional Court Review
CRC	Convention on the Rights of the Child
EJE	European Journal of Education
ES	Education Studies
ECHR	European Court of Human Rights
ECSR	Economic, Social and Cultural rights
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
EU	European Union
FJIL	Florida Journal of International Law
FILJ	Fordham International Law Journal
GLJ	Georgetown Law Journal
GYIL	German Yearbook of International Law
HKLJ	Hong Kong Law Journal
HRQ	Human Rights Quarterly
IICLR	Indiana International and Comparative Law Review
ICLQ	International and Comparative Law Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJL	International Journal of Law
IJLI	International Journal of Legal Information

ILDC	Oxford Reports on International Law in Domestic Courts
JAL	Journal of African Law
JCR	Journal of Conflict Resolution
JETERAPS	Journal of Emerging Trends in Educational Research and Policy Studies
JFHE	Journal of Further and Higher Education
JIBC	Journal of Internet Banking and Commerce
JSC	Journal of Social Science
JSP	Journal of Social Policy
JSIE	Journal of Studies in International Education
LDD	Law, Democracy and Development
LRCWPS	Legal Resource Centre Working Paper Series
LRE	London Review of Education
MULR	Melbourne University Law Review
NSFAS	National Student Financial Aid Scheme
PF	Political Forum
PLPJ	Pacific Law Policy Journal
PELJ	Potchefstroom Electronic Law Journal
SAJEJ	South African Judicial Education Journal
SAJHR	South African Journal on Human Rights
SAJS	South African Journal of Science
SALJ	South African Law Journal
SAPL	SA Public Law
SLR	Stellenbosch Law Review
SCA	Supreme Court of Appeal
TVET	Technical and Vocational Education and Training
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNALIL	United Nations Audio-Visual Library of International Law
USA	United States of America
UZLJ	University of Zimbabwe Law Journal
VJTL	Vanderbilt Journal of Transnational Law
YLJ	Yale Law Journal

CHAPTER 1: FREE HIGHER EDUCATION AS AN INTERNATIONAL AND A CONSTITUTIONAL OBLIGATION: AN OVERVIEW

1.1 The importance of education, specifically higher education

> The right to education flows directly from the right to life. The right to life and the dignity of an individual cannot be assured unless it is accompanied by the right to education.[1]

The quotation above signifies the importance of education and being educated in modern day times. This view has also been echoed by the U.N. Committee on Economic, Social and Cultural Rights, the independent expert committee supervising implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the Committee"), which argues that education is an empowerment right. This is so because education is both a "human right in itself and an indispensable means of realising other human rights."[2] An informed and educated citizenry is in a better position to exercise its enshrined human rights in appropriate circumstances. The exercise of educational rights is the premise for the effective exercise of other rights. For instance, an educated citizenry is better placed to exercise its right to vote which, in turn, indirectly affects its social well-being. Education enables people to be aware of their other human rights and responsibilities. As much as educational rights are empowerment rights, they are also awareness rights, because education enables the human mind to wander freely and widely.[3]

Having regard to the comment of the Committee on the importance of education, one is left with the intriguing question of whether a state that is denying or preventing its citizens an opportunity to access education is not in fact denying them life itself. Answering this question is neither easy nor straightforward. It requires thorough reflection and analysis beyond the scope of the question which this thesis seeks to answer.

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1 *Mohini Jain v State of Karnataka* (1992) 3 SCC 666.

2 General Comment No. 13: The right to education (art. 13 of the ICESCR) UN Doc. E/C.12/1991/10 at para 1 (General Comment No. 13).

3 Beiter *The Protection of the Right to Education by International Law* 28-30; Mehedi "The content of the right to education" UN Doc. E/CN.4/Sub.2/1999/10 paras 1-4; and Tomaševski, Report of the Special Rapporteur on the Right to Education, UN Doc. E/CN.4/2001/52 paras 11-14.

What is the significance of education? The Supreme Court of the United States of America has made an effort to answer this question. In 1954, in the landmark case of *Brown v Board of Education of Topeka*,[4] the Court grappled with the term "education" and sought to underline the importance of education in the modern world. The Court was of the view that education is perhaps the "most important function of state and local governments".[5] The Court referred to various indicators of the importance of education, namely compulsory school attendance laws and great expenditures for education. In the mind of the court, it would be difficult for a child to succeed in life if he or she was denied the opportunity of an education.

The Court's views are as applicable to any other country which prioritises education, including South Africa. Acknowledging that education is an important human right, it is not difficult to fathom why many states around the world make provision for educational rights in their respective domestic constitutions.[6] South Africa is no exception to this. Educational rights are enshrined in the Bill of Rights of South Africa,[7] where, the Constitution imposes various obligations on the government to respect, protect, promote and fulfil[8] the educational rights provided for in section 29 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

The term education has different meanings depending on the specific context in which it is used. It can have a wide and a narrow definition. M'Bow explains that education in the wider sense means

> all activities by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enable that group to subsist. Education in the narrow sense means instructions

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4 *Brown v Board of Education of Topeka* 374 US 483 1954.

5 *Brown v Board of Education of Topeka* at para 493. The Court eloquently held that: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation to good citizenship. Today it is a principal instrument in awakening the child to the cultural values, in preparing him for later professional training, and helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

6 The International Covenant on Economic, Social and Cultural Rights, which provides for the protection of the right to education in Article 13, has been ratified by 170 states. This indicates that at least 170 states around the world recognise educational rights as human rights to be protected. See the website of the U.N. High Commission for Human Rights at https://indicators.orchr.org in this regard.

7 Section 29 of the Constitution.

8 Section 7(2) of the Constitution.

> imparted within a national, provincial or local education system, whether public or private.[9]

The real distinction is therefore between formal and informal education. Not all education is acquired in the classroom. Education is also acquired outside the classroom. The latter is as valuable as education acquired in the classroom.[10] In this thesis, whenever reference is made to education, it is primarily to education in the narrower sense (formal education). Realising that education is an internationally recognised and protected human right, the question arises — what does education entail from an international law perspective? International law recognises three levels of education, namely, primary, secondary and higher education.[11]

All three of these levels of education must be accessible, available, adaptable and acceptable.[12] International law explicitly requires that primary education be compulsory and available free to all. The language used in respect of secondary and higher education is, however, different from that of primary education. Secondary education must be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education. On the other hand, higher education — must be made available — though not generally — equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education. This reflects the wording used by the ICESCR. Article 13 recognises the importance of education on all its levels. This thesis primarily focusses on higher education and/or the right to access to higher education (university education).

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9 M'Bow "Introduction" 11.

10 Formal education refers to classroom-based education, which is instruction by trained teachers at a formal institution of learning. Informal education, on the other hand, refers to education that happens outside the classroom, for instance, in the context of community-based organisations, libraries, cultural groups etc. These are some useful distinctions between formal and informal education: "Formal learning occurs in a structured and organized environment like training/education institutions or on the job. It is an intentional learning from the learner's perspective, leading to degrees and certifications. Formal learning is a structured model that presents a rigid curriculum, corresponding to laws and norms. It is rather presentational education. Informal learning is the education that is beyond limitations and goes on outside of a traditional formal learning environment like university, school or college. It is an education that is seen as learning which goes on in our daily life or learning projects undertaken by us to teach ourselves."

11 ICESCR, Article 13(2)(a)-(c).

12 General Comment No.13 para 6.

1.2 The importance of free education, specifically free higher education

Having an educated citizenry is to the benefit of any community and/or nation, especially to developing countries, given the various socio-economic challenges and the potential for economic growth in such countries. To have an educated citizenry for economic growth requires education, especially higher education. This is even more so in a country such as South Africa, where there are persistent inequalities as a result of its colonial and apartheid history. The importance of higher education in a country like South Africa can therefore not be denied. It may be argued that higher education is the most important activity organised in modern societies.[13] Throughout history, universities have been well-known to dominate the domain of the transmission of specialised knowledge.[14] However, the contribution of higher education institutions should not be reduced to the transmission of knowledge only. It stretches beyond that. The Green Paper on Higher Education Transformation, 1996 ("Green Paper") (prepared by the Department of Education) states that higher education has several interrelated purposes:

> - To meet the learning needs and aspirations of individuals through the development of their intellectual abilities and aptitudes. Higher education equips individuals to make the best use of their talents and of the opportunities offered by society for self-fulfilment. Higher education is thus a key allocator of life chances.
> - Higher education provides the labour market, in a knowledge-driven and knowledge-dependent society, with the high-level competencies and expertise necessary for the growth and prosperity of a modern economy. It teaches and trains people to fulfil specialised social functions, enter the learned professions, or pursue vocations in administration, trade, industry and the arts.
> - Higher education is responsible for the socialisation of enlightened, responsible and constructively critical citizens. Citizenship of this nature presupposes a commitment to the common good, but it also implies a reflective capacity and a willingness to review and renew prevailing ideas, policies and practices.
> - Higher education is directly engaged in the creation, transmission and evaluation of knowledge. Its purpose is to ensure the continued pursuit of academic scholarship and

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13 Regent Business School 2016 https://regent.ac.za/campus-news/benefits-of-tertiary-education-in-south-africa, see also Pouris and Inglesi-Lotz 2014 *SAJS* 1, who argued that: "Tertiary education contributes to social and economic development through four major missions: the formation of human capital, the building of knowledge bases (primarily through research and knowledge development), the dissemination and use of knowledge (primarily through interaction with knowledge users) and the maintenance of knowledge (inter-generational storage and transmission of knowledge)."

14 Pouris and Inglesi-Lotz 2014 *SAJS* 1.

> intellectual inquiry in all fields of human understanding, through research and teaching.[15]

A close examination of the interrelated purposes of higher education reveals that higher education is designed to benefit society at large. In other words, it is a public good. The state's role is to respect, protect, facilitate, promote, and fulfil access to this important public good. This the state is to achieve by, for instance, ensuring that: (i) students have access to good quality higher education; (ii) as many as possible students who qualify for higher education are accommodated at higher education institutions; and (iii) sufficient funding for higher education is available. One of the major factors barring access to higher education, especially for students from poor backgrounds, is high tuition fees. Deserving students are barred from accessing higher education due to their lack of financial resources. A very low percentage of the South Africa population can afford to pay their tuition fees.[16] This problem can be addressed through the progressive introduction of free higher education. For instance, if free higher education is progressively introduced, more qualifying students, especially from poor backgrounds, will be able to access it. Removing financial barriers to access to higher education is the obligation of the state in terms of both the Constitution and international law.[17]

1.3 Legal obligations under South African and international law to make higher education free

In South Africa, the Constitution is the supreme law of the Republic. Any law inconsistent with the Constitution is invalid. Furthermore, the obligations imposed by the Constitution must be fulfilled.[18] One of the obligations imposed by the Constitution is to be found in section 39(1)(b), which states that when interpreting the Bill of Rights, a court, tribunal or forum *must* consider international law. Moreover, section 231(2) of the Constitution stipulates that "international

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15 Green Paper on Higher Education Transformation, December 1996 paras 1.1-1.4.

16 Statistics South Africa: 2021 http://www.statssa.gov.za/?page_id=737&id=4=4.

17 Section 29(1)(b) read together with Section 7(2) of the Constitution obliges the state to progressively fulfil the right to available and accessible further education. These sections read together encompass the obligation of the state to remove barriers to access to further education, in this context higher education.

18 Section 2 of the Constitution, dealing with the supremacy of the Constitution.

agreements, unless of a technical nature, bind the Republic once adopted by parliament."[19]

The ICESCR is an international agreement as is alluded to in section 231(2) of the Constitution. Having been ratified by South Africa,[20] its provisions are binding on the Republic on the international plane. It is this Covenant which in terms of Article 13(2)(c) introduces the obligation on states to progressively introduce free higher education.[21] In South Africa neither the Constitution nor the Higher Education Act 101 of 1997 ("Higher Education Act") explicitly provide for the progressive introduction of free higher education. The Constitution in section 29(1)(b), guarantees the right of everyone to further education, which the state "through reasonable measures, must make progressively available and accessible."[22] Interpreted exclusively, the Constitution does not impose an explicit obligation to progressively introduce free higher education.

However, the Constitution is not a legal document to be interpreted in a vacuum. That much is clear from section 39(1)(b) of the Constitution. The Covenant ratified by South Africa is further binding on the Republic. In terms of the words used in Article 13(2)(c) it requires the progressive introduction of free higher education. Importantly, nothing in section 29(1)(b) of the Constitution suggests that the progressive introduction of free higher education is impermissible. With that in mind section 29(1)(b) could be interpreted in harmony with Article 13(2)(c) of the Covenant to encompass the progressive introduction of free higher education.

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19 Section 231(2) of the Constitution.

20 The Republic of South Africa ratified the ICESCR in January 2015. As required by the ICESCR, the South African government submitted its initial report to the Committee in April 2017.

21 Article 13(2): "The State Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
(a) Primary education shall be compulsory and available free to all;
(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
(c) Higher education shall be made equally accessible, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved."

22 Section 29(1)(b) of the Constitution.

1.4 International law, the right to education, and free higher education

The Universal Declaration of Human Rights (UDHR) of 1948 is the first international instrument to make provision for education as a fundamental human right.[23] Article 26 thereof protects the right to education, stating that:

> 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
> 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human right and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
> 3. Parents have a prior right to choose the kind of education that shall be given to their children.

The UDHR as a Resolution of the U.N. General Assembly being non-binding, the provisions of Article 26 were subsequently given a legally binding form in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. The UDHR and the ICESCR form part of what is commonly termed the International Bill of Human Rights. Apart from the UDHR and the ICESCR, this also includes the International Covenant on Civil and Political Rights, also of 1966. The International Bill of Human Rights "purports to lay down universally accepted human rights standards."[24]

The right to education forms part of a group of rights collectively referred to in international law as economic, social and cultural rights (ESCR). Article 13 of the Covenant "may arguably be viewed as the most important formation of the right to education in an international agreement".[25] Article 13 provides that:

> 1. The States parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and

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23 Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
24 Beiter *The Protection of the Right to Education by International Law* 341.
25 Beiter *The Protection of the Right to Education by International Law* 341.

further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
   (a) Primary education shall be compulsory and available free to all;
   (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
   (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
   (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
   (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in community with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Hence, the right to education, in terms of international law, apart from formulating binding educational aims (Article 13(1)), includes primary education, which must be compulsory and available free to all, and secondary and higher education, which the state, based on the availability of resources, must progressively make available and accessible (Article 13(2)(a), (b), and (c), respectively). Alongside this social aspect, the right to education entails a freedom aspect. This covers the right of parents to ensure the religious and moral education of their children in conformity with their own convictions and the right of anybody to establish private schools (Article 13(3) and (4), respectively).[26]

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[26] Beiter *The Protection of the Right to Education by International Law* 47-83.

It may be noted that Article 13(2)(a) of the Covenant states that primary education "shall be compulsory and available free to all." However, the wording on the provision of free education changes when it comes to secondary and higher education. In terms of article 13(2)(b) and (c), education "shall be made … accessible to all … by every appropriate means, and in particular by the progressive introduction of free education." While primary education must *be* free, secondary and higher education must *be made* free. The latter entails a gradual process, the progressive realisation of free education. Yet it refers to a definite obligation to move towards free education also on these levels.

The phrase of progressively free secondary and higher education concretises the provisions of the UDHR. Article 26 thereof had provided more broadly that education "shall be free, *at least* in the elementary and fundamental stages" (own emphasis). Following a *literal* interpretation of the phrase "progressive introduction of free education," states parties would be legally obliged to do exactly that, namely, progressively to make secondary and higher education free. Article 13(2)(c) of the ICESCR, it seems, provides a basis for a valid legal argument in support of progressively free higher education.

Importantly, Article 13(2)(c) cannot be interpreted in a vacuum. It must be interpreted in conjunction with Articles 13(2)(e), 2(1) and 4 of the Covenant. Article 13(2)(e) firstly requires of states parties to develop a system of schools at all levels of education. Secondly, it urges states parties to establish a fellowship system in pursuance of educational rights at all levels. Thirdly, states parties are urged to improve the material conditions of teaching staff continuously to facilitate the availability of good quality education. The relationship between Article 13(2)(c) and (e) is a very important one, in that one may ask what the significance of the requirement of the introduction of a fellowship system – as it were, a system of study finance for students – is in relation to the obligation to make (secondary and) higher education free.

Article 13(2)(c) on free higher education must further be understood in the light of Articles 2(1) and 4 of the Covenant. Article 2(1) is the linchpin of the Covenant. It applies with regard to all the substantive rights provisions of the Covenant. It

describes the overall nature of positive obligations on states parties when it comes to implementing Covenant rights, including those of Article 13(2)(c). It provides:

> Each State Party to the … Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the …Covenant by all appropriate means, including particularly the adoption of legislative measures[27].

Article 4 is a general limitation clause applicable to all Covenant rights, including the right to higher education. In terms of Article 4:

> The State Parties to the … Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the … Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 4 permits State Parties to limit the operation of the rights in the Covenant, provided such limitation occurs for the purpose of "promoting the general welfare in a democratic society". This article makes it clear that no right is absolute and that any right codified can be limited if it is in the interest of furthering important goals related to the general welfare in a democratic society. Limitations must, however, comply with the strict requirements of Article 4.[28]

On the international plane, the UDHR and the ICESCR are not the only international instruments dealing with educational rights. Globally, there are also further the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention against the Discrimination in Education of 1960 (CDE)[29] and the U.N. Convention on the Rights of the Child (CRC) of 1989. Regionally, of importance for South Africa, there are the African Charter on Human and Peoples' Rights (Banjul Charter) of 1981 and the African Charter on the Rights and Welfare of the Child (ACRWC) of 1990. Article 4 of the CDE requires states parties:

> to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to

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27 Article 2(1).

28 Article 4 is not dissimilar to section 36 of the Constitution of South Africa, the limitation clause applicable to all rights protected in the Bill of Rights.

29 Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation on 14 December 1960.

> promote equality of opportunity and of treatment in the matter of education and in particular:
>
> (a) to make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;…

While mentioning the element of free education for primary education, the CDE, adopted prior to the ICESCR, omits any express reference thereto in as far as secondary and higher education are concerned. This does not mean that the element could not be considered implicit in the obligation to make secondary and higher education "accessible". Article 28 of the CRC states that:

> 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall in particular:
>
> (a) Make primary education compulsory and available free to all;
>
> (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
>
> (c) Make higher education accessible to all on the basis of capacity by every appropriate means.

Free education is referred to in the context of primary and secondary education. It is omitted with regard to higher education. Again, it could be considered covered by the concept of "accessibility" in relation to higher education. Yet the question arises as to what to make of the omission, seeing that the CRC was adopted after the ICESCR. One might argue that, for human rights law, a general principle of interpretation requires standards, once agreed on, only to be added to, but never subtracted from.

The Banjul Charter merely states succinctly, in Article 17(1), that "every individual shall have the right to education."[30] The ACRWC provides as follows in Article 11(3):

> State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
>
> (a) provide free and compulsory basic education:

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30 Article 17(1) of the Banjul Charter.

> (b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all;
> (c) make higher education accessible to all on the basis of capacity and ability by every appropriate means.

As in the CRC, free education is mentioned only in relation to primary and secondary education. Yet again, accessibility with regard to higher education could also include free education. It is very noteworthy that the African Commission on Human and Peoples' Rights, in its soft law *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*,[31] adopted in 2011, interprets Article 17(1) of the Banjul Charter as entailing the obligation of states parties:

> To ensure that higher education is made generally available and accessible to all, on the basis of capacity, by all appropriate means, and in particular by the progressive introduction of free education.[32]

This statement is essentially identical to that contained in Article 13(2)(c) of the ICESCR. Hence, as the African interpretation and the most important provision of global international human rights law in this respect, Article 13(2)(c) of the ICESCR, expressly requires higher education to be made accessible, in particular by the progressive introduction of free education. The thesis will focus on this phrase and its interpretation.

Viewed from an international law angle, it could be argued that the arguments of the #Feesmustfall campaign[33] against the increase of fees at South African universities, are in law not entirely unfounded. That argument could be made because high university fees create a barrier for poor students to access higher education. This is clearly inconsistent with the spirit and purport – and the actual wording – of article 13(2)(c) of the Covenant, which relate to enhancing accessibility, in particular through the introduction of free education. Article 13(2)(c) of the Covenant envisages a situation where free higher education is progressively introduced.

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31 Adopted on 24 October 2011.

32 Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights para 71(e).

33 A student movement in South Africa, originating in 2015, its main objectives were to stop increases in student fees as well as to increase government funding of universities.

However, increments in university fees achieve the opposite result, namely the exclusion of the poor from accessing higher education.

Nevertheless, Article 13(2)(c) requires closer scrutiny to determine its actual purport. The crucial questions are, firstly, does Article 13(2)(c), when interpreted *teleologically*, still require of states parties that higher education – the focus of this thesis – be made progressively free? Or is the introduction of free education just mentioned as an example of a conceivable step states parties may take to make higher education equally accessible? In other words, is the objective of Article 13(2)(c) rather that higher education must be equally accessible, leaving the choice of means to states parties. Would a fellowship system thus, for example, also suffice?

Secondly, if progressively free higher education is prescribed under international law, does the requirement of progressively free higher education in any way form an element that should be read into section 29(1)(b) of the Constitution, protecting the right to further (including higher) education? These are questions this thesis will attempt to address and answer in the chapters to follow.

1.5 Progressive realisation of, and deliberately retrogressive measures in relation to, the right to education under international law

It has been noted above that Article 2(1) of the ICESCR, as a point of departure, requires all Covenant rights to be realised progressively. In the final analysis, however, this is subject to the precise wording of the individual rights provisions concerned – which must, therefore, be analysed separately. From the outset, an important matter to understand is that not all levels of education are subject to the requirement of progressive realisation under international law in an identical manner. Notably, whereas primary education is not really subject to the standard of progressive realisation at all, secondary and higher education are. Primary education that is compulsory and free of charge, in terms of international law, is immediately realisable. Primary education is thus prioritised over the more advanced levels of education. This means that

> the achievement of the right to basic education is the first degree of the realisation in the process of ultimately fulfilling all forms of education.[34]

Secondary and higher education are to be realised progressively. Yet, there is a higher degree of urgency in realising secondary education than in realising higher education.[35] The Committee, in its General Comment No. 13 on the Right to Education,[36] states that:

> [T]he obligations of States parties in relation to primary, secondary, higher … education are not identical. Given the wording of article 13(2), States parties are obliged to prioritize the introduction of compulsory, free primary education. … The obligation to provide primary education for all is an immediate duty of all States parties.[37]

In the same vein, specifically addressing free education, the Committee states:

> "[P]rogressive introduction of free education" means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education.[38]

Given the importance of the role of primary education for a person to be successful in life, it is plausible why free and compulsory primary education for all is considered part of the minimum core of the right to education under international law,[39] to be realised immediately.[40] To be a part of the minimum core of a right means that it will be extremely difficult for states to rely on the absence of resources as a justification for not implementing free and compulsory primary education for all.[41]

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34 Arendse 2011 *PELJ* 104.

35 Beiter *The Protection of the Right to Education by International Law* 92.

36 General Comments are interpretative guidelines formulated by the Committee on Economic, Social and Cultural Rights. They are not binding but are of clear authoritative value.

37 General Comment No. 13 para 51.

38 General Comment No. 13 para 14.

39 Coomans "Clarifying the core elements of the right to education" 16-19. General Comment No. 13 para 57; African Guidelines, para. 71 a. and b. See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), a document formulated by experts of international law, which provides at para 9 as follows: "Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...]. Thus, for example, a State Party in which any significant number of individuals is deprived … of the most basic forms of education is, *prima facie*, violating the Covenant.' Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties."

40 General Comment No. 13 para 51.

41 Specifically, on the aspect of the availability of resources, the Maastricht Guidelines note at para 10 as follows: "In many cases, compliance with [minimum core] obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realisation of the rights may depend upon the availability of adequate financial and material resources. Nonetheless,

This is where primary, secondary and higher education differ in the manner of their implementation under international law. The term "progressive realisation" will play a central role in subsequent chapters of this thesis. It is prudent at this stage, therefore, to address the substance of the notion of progressive realisation. The Committee, in its General Comment No 3, which addresses the general nature and scope of states parties' obligations under the Covenant, interprets progressive realisation to mean that state parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realisation of the right to education and other Covenant rights.[42]

Cohen argues that the use of the word "progressively" makes it particularly difficult to act *retrogressively*.[43] Cohen's view is supported by General Comment No 3, which states that:

> [t]here is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[44]

The right to primary education is not subject to "progressive realisation." It may also not encounter retrogression. Both the right to secondary and the right to higher education are subject to progressive realisation. This covers a continuing obligation on states parties to move as expeditiously and effectively as possible toward free secondary and higher education (assuming that the reference to "the progressive introduction of free education" is read as requiring exactly that). In this quest, there is a prohibition of taking deliberate retrogressive measures, in the context of education, for instance, in the form of closing educational institutions, reducing education budgets, or introducing or increasing tuition fees, etc. Retrogressive

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… resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights."

42 General Comment No. 3 The nature of State parties' obligations UN Doc. E/1991/23 para 9 (General Comment No. 3).

43 Cohen M "Bezuinigingen en het recht op onderwijs" [Rationalisation and the right to education] in 1983 *NJCM-Bulletin* (Nederlands Juristen Comité voor de Mensenrechten-Bulletin) 18:5 379-388, at 385-386, as quoted by Beiter *The Protection of the Right to Education by International Law* 400.

44 General Comment No. 3 para 45.

measures are prohibited in as far as they cannot be justified in the context of all the rights in the Covenant (suggesting that trade-offs between rights might be legitimate) and by reference to the full use of available resources. Hence, as in the case of non-compliance with minimum core obligations, it will be extremely difficult for states to rely on the absence of resources as a justification for taking deliberately retrogressive measures.

1.6 The right to education under the South African Constitution, 1996

In South African constitutional law, the right to education is seen to form part of a group of rights collectively known as socio-economic rights, but it probably also constitutes a cultural right under the Constitution. Educational rights in South Africa are enshrined in section 29 of the Constitution. Section 29 provides as follows:

> (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 compatible public educational institutions.
> (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Section 29 reveals some similarities with Article 13 of the ICESCR. For instance, Section 29(1) broadly protects the social aspect of the right to education, equivalent to Article 13(2) of the Covenant. Interestingly, Section 29(2), which protects language rights in education, has no equivalent in the Covenant. Furthermore, Section 29(3) and (4) protect the freedom aspect of education found in Article 13(3)

and (4) of the Covenant. At first sight, therefore Article 13 and Section 29 reflect at least some similarity in structure and content.

Section 29(1) protects two rights, the right to basic education and that to further education. The South African Constitution, despite requiring the provision of basic education, does not define the term basic education.[45] For a proper definition one might perhaps obtain guidance by placing reliance on an international policy document, the Jomtien Declaration on Education for All of 1990 ("Jomtien Declaration"). The Jomtien Declaration defines basic education as "the foundation for lifelong learning and human development on which countries may build, systematically, further levels and types of education and training."[46] Neither the Constitution, the South African Schools Act 84 of 1996 nor the Higher Education Act define the terms basic and further education. Further education is generally considered to cover all education beyond basic education.[47]

Basic education under the Constitution probably includes what are primary and secondary education under international law. Further education probably means higher education and all other forms of post-secondary education and training. Ultimately, in South Africa there is a national Department for Basic Education and another for Higher Education and Training.[48] The meaning of primary and secondary education, in turn, must be assessed in the light of UNESCO's International Standard Classification of Education: ISCED 2011. Roughly, primary education means the first six years of schooling, and secondary education the 7th to the 12th year of schooling.[49] At the international level, only the ACRWC uses the term "basic" education in Article 11(3)(a). But here it is used as the equivalent of just primary education. The Constitutional Court, in *Moko v Acting Principal of Malusi Secondary School and Others* (*Moko*),[50] was confronted with the complex question of where

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45 Simbo 2012 *LDD* 164: "The lack of a concrete and precise definition of basic education means that no one knows what the term exactly means in South Africa and compliance with section 29(1)(a) by the government is therefore difficult."

46 World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs. Adopted by the World Conference on Education for All, Meeting Basic Learning Needs, Jomtien, Thailand (1990) Article 1(4).

47 Maidment 2017 http://educonnect.co.za/higher-education-versus-further-education.

48 The website of the Department of Higher Education and training is particularly helpful in understanding the different departments, see http://dhet.gov.za/SitePages/AboutUsNew.aspx.

49 UNESCO's International Standard Classification of Education: ISCED 2011 (2012) paras 120-150.

50 [2020] ZACC 30.

basic education ends and further education begins. The Constitutional Court per Khampepe J formed the view that:

> …schools education culminating in the "nationally recognised qualification" of the National Senior Certificate is basic education under section 29(1)(a).[51]

From the Constitutional Court's interpretation of the term basic education it is evident that, from a South African perspective, basic education is education from Grade 1 to 12, including the matric examinations. In arriving at this conclusion, the Court reasoned that

> [t]o limit basic education under section 29(1)(a) either to only primary school education or education up until Grade 9 or the age of 15 is, in my view, an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right. For example, it would be highly problematic for our school system, and dare I say for our society as a whole, if section 29(1)(a) only required the state to provide desks for learners at primary and not secondary schools, or only up until Grade 9. Or if the state could plead "insufficient resources" for providing sufficient Grade 10-12 teachers because those grades fell under further education in 29(1)(b), the right to which is not immediately realisable, but must be made "progressively available and accessible."[52]

The Court pointed out the practical and polarising effect it would have if basic education was to be narrowly restricted to primary school education. The Court favoured a broader approach to the interpretation of the term basic education to include Grade 12 and the matric examination. From this perspective, further education would be education beyond Grade 12. This thesis will focus primarily on the right to further education. Further education includes higher/tertiary/university education. This submission echoes the then Minister of Higher Education's understanding of further education as including higher education.[53] The Minister's understanding of further education is confirmed by the Constitutional Court in the

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51 Para 31.

52 Para 32.

53 The then Minister of Higher Education explained government's obligation in terms of Section 29 as follows: "The Department and Government generally, reads the constitution to clearly articulate that basic education, including adult education, is a fundamental/basic right that must be provided to all who need it; while further education, which can be interpreted as including Higher Education (HE) (also referred to as university education) and Technical Vocational Education and Training (TVET), are secondary rights that must be made progressively available and accessible to those who merit it (meet the academic requirements)." See the 2017 Report of the Commission of Enquiry into Higher Education and Training to the President of the Republic of South Africa 58 at para 78.

Moko judgment.[54] Further education is divided into two categories, namely, Technical Vocational Education and Training (TVET) and higher/tertiary/university education. The focus of this thesis will primarily be on university education, although reference will also be made to TVET colleges. In terms of section 29(1)(b) of the Constitution, everyone has the right to further education "which the state, through reasonable measures, must make progressively available and accessible". It may be noted that, unlike other socio-economic rights, such as the rights to housing and health care in sections 26 and 27, respectively, the right to further education is not explicitly made subject to "available resources".[55]

The government of South Africa thus has a specific constitutional duty to make further education progressively available and accessible through reasonable measures.[56] Interestingly, unlike Article 13(2) of the ICESCR, section 29(1) of the Constitution does not impose an explicit obligation of free education for either basic or further education. The precise interpretation to be attributed to section 29(1)(b) of the Constitution, including the government's duty, will be explored in this thesis.

Both section 36 of the Constitution and the reasonableness approach developed by the Constitutional Court in its socio-economic rights jurisprudence play an important role in understanding the nature, scope, and potential limits of the right to further education in Section 29(1)(b). Section 36 provides:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
> (a) The nature of the right;
> (b) The importance of the purpose of the limitation;
> (c) The nature and extent of the limitation;
> (d) The relation between the limitation and its purpose; and
> (e) Less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

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54 *Moko* at para 37.

55 One can doubt whether the omission of "available resources" has any significant effect on the interpretation of section 29(1)(b). It is difficult to think of a valid reason as to why the right to further education would be adjudicated differently from the other socio-economic rights.

56 Section 29(1)(b) of the Constitution.

Section 36 is the national equivalent of Article 4 of the Covenant. It allows limitations of rights in the Bill of Rights in clearly defined instances, as outlined above. As in the case of the ICESCR, its purpose, rather than being permissive of limitation, is to clearly restrict limitation.

1.7 Progressive realisation of, and deliberately retrogressive measures in relation to, the right to further education under Section 29(1)(b) of the Constitution

The Constitutional Court's so-called reasonableness approach, developed in its socio-economic rights jurisprudence, which is to be discussed in depth later on,[57] broadly accommodates a wide state discretion in deciding on the measures, manner, and pace of realising the right to higher education, or any other socio-economic rights for that matter, quite in accordance with ideas held by the Committee in its General Comment No. 3. The Constitutional Court has rejected the minimum core approach of international law with regard to national socio-economic rights interpretation. As regrettable as that may be, it is not of any major significance with regard to further or higher education, as these would clearly not be considered part of the minimum core in any event.

This discussion leads one to consider the South African position when it comes to higher education. In South Africa, as under the ICESCR, higher education is subject to progressive realisation – thus the wording of Article 29(1)(b) of the Constitution, stating that further education must be made progressively available and accessible.

Moreover, South Africa has ratified the Covenant, meaning that its prohibition on deliberately retrogressive measures would be binding on South Africa. South Africa would thus be prohibited from taking any deliberate retrogressive measures in relation to the right to education, including the right to higher education, unless such measures could be strictly justified as set out above. Under the Covenant, introducing or increasing study fees could be seen to constitute a deliberately retrogressive measure. From an international law perspective, therefore, the question arises whether the increase of tuition fees or decrease in governmental

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57 The Constitutional Court's socio-economic rights jurisprudence will be discussed in chapter 5.

funding of universities in South Africa constitutes a retrogressive measure, and if it does, whether it can be justified.

Viewed from a South African perspective, section 29(1)(b) of the Constitution protects the right to *further* education, "which the state, through reasonable measures, must make progressively available and accessible."[58] By way of contrast, *basic* education under the Constitution must be made available *immediately*.[59] Section 29(1)(a) protects the right to basic education without a proviso referring to progressive realisation. From the perspective of Section 29(1)(b) of the Constitution, it may be asked whether an increase in university fees does not constitute a barrier for the poor to access higher education and as a consequence results in the failure by government to deliver on its constitutional obligation to make further education progressively available and accessible. Fees and equal access to higher education institutions appear to be interrelated and/or inseparable; in other words, university fees cannot be dealt with thoroughly without discussing the government's obligation to make further education progressively available and accessible, as required under the Constitution.

1.8 The relationship between international law and South African law

The drafters of the South African Constitution of 1996 realised the importance of international law. The 1996 Constitution accords international law a certain significance in the South African legal order.[60] International law plays an important role in South Africa's legal system in two ways.

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58 Emphasis added.

59 Thus the findings in the landmark case of *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761. At para 37, the Court states: "It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'" (footnotes omitted).

60 Sections 39(1)(b), 231, 232 and 233.

Firstly, in terms of section 39(1)(b) of the Constitution, when interpreting the Bill of Rights a court, tribunal or forum *must* consider international law. That much was also confirmed by the highest court in the land, the Constitutional Court, in *Glenister v President of the Republic of South Africa and Others*:[61]

> [T]he courts' obligation to consider international law when interpreting the Bill of Rights is of pivotal importance. Section 39(1)(b) states that when interpreting the Bill of Rights a court 'must consider international law'. The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law.[62]

International law in terms of section 39(1)(b) also covers international law not binding on South Africa.[63]

Secondly, sections 231, 232, and 233 of the Constitution need to be taken into account. These provisions regulate when international law binds the Republic and when it will form part of municipal law. Customary international law automatically forms part of South African law, unless contrary to the Constitution or an Act of Parliament (section 232). International agreements, upon ratification by Parliament, bind South Africa (section 231(2)). They will, however, form part of the law only once specifically incorporated into South African law by way of legislation (Section 231(4)). This is subject to the proviso that self-executing treaty provisions (that is, provisions that are sufficiently precise) will automatically form part of South African law (and can thus be directly enforced by a court) on ratification, again unless contrary to the Constitution or an Act of Parliament (Section 231(4)). It may well be asked if Article 13(2)(b) and (c) of the ICESCR and their requirement of the "progressive introduction of free education" are self-executing provisions in this sense. At least the negative prohibition of deliberately retrogressive measures could be considered sufficiently clear as to have a direct effect. Section 233 finally creates a rebuttable presumption in favour of an interpretation of legislation in accordance with (rather than contrary to) international law.

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61 2011 (3) SA 374 (CC).
62 Para 192.
63 *S v Makwanyane and another* [1995] ZACC 3; 1995 (6) BCLR 665 para 35 (*Makwanyane*).

By ratifying the Covenant in 2015, South Africa has become internationally bound to give effect to Article 13(2)(b) and (c) of the Covenant. In accordance with what has been stated above, there may thus well be an international obligation imposed on the South African government by the Covenant to progressively introduce free higher education in terms of Article 13(2)(c). Two burning questions are whether immediate judicial relief for the implementation of the right as provided for in Article 13(2)(c) could be claimed (that is, whether Article 13(2)(c) is self-executing), and what progressive realisation of the right entails. These are question that this thesis will address in later chapters.

1.9 The reality of study fees in higher education in South Africa

Higher education institutions in South Africa rely mainly on four sources of income/funding, namely government grants, tuition fees, donations and income from other sources such as investments.[64] It is no secret that higher education institutions depend mostly on government grants and tuition fees for income. It is recorded that, in the year 2015, of the total amount of R63 billion received by higher education institution as income, 43% was from government, 34% from tuition fees, 6% from donations, and the remaining 17% from other sources such as investments.[65]

Tuition fees play a pivotal role in financing higher education institutions in South Africa, with R21,5 billion of the total income, in 2015, coming from tuition fees.[66] To illustrate the increasingly important role of tuition fees in higher education institutions in South Africa one needs to consider the following:

> In 2006, 27% of total income was received in the form of tuition fees. By 2015, this had grown to 34%. This shows that HEIs depend on tuition fees more than ever before. The contribution of government grants climbed marginally over the same period, with a drop in the importance of donations and other income.[67]

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64 Statistics South Africa 2017 http://www.statssa.gov.za/publications/Report-92-01-05/HigherEducationandSkillsSouthAfrica2017.

65 Statistics South Africa 2017 http://www.statssa.gov.za/publications/Report-92-01-05/HigherEducationandSkillsSouthAfrica2017.

66 Statistics South Africa 2017 http://www.statssa.gov.za/publications/Report-92-01-05/HigherEducationandSkillsSouthAfrica2017.

67 Statistics South Africa 2017 http://www.statssa.gov.za/publications/Report-92-01-05/HigherEducationandSkillsSouthAfrica2017.

The figures above appear to indicate that the government's current approach relating to the funding of higher education institutions is not in harmony with its international obligation to make higher education progressively free. What is further evident from the above figures is that tuition fees have indeed increased at higher education institutions, strengthening the argument that higher education institutions rely more and more on tuition fees as a source of income than ever before.

It is worrisome that the state's funding of universities has declined, there being a simultaneous increasing reliance on tuition fees. According to a newspaper article of 2016:

> The proportion of University income coming from the Department of Higher Education and Training's budget vote declined in real terms from R15.93 billion (which constituted 49% of the total university income) in 2009 to R22.9 billion (40.9%) in 2014. Universities raised student fees to offset the decline in state funding. The contribution of student fees to university income rose from R7.8 billion in 2000 to R19.6 billion in 2014.[68]

Moreover, South Africa's spending on universities is comparatively low by world standards. It is recorded that South Africa's budget for universities for the 2015/2016 fiscal year was 0.72% of the Gross Domestic Product (GDP), which is significantly lower than the 2011 figures of African countries of 0.78%, the Organisation for Economic Cooperation and Development Countries' 1.21%, and the rest of the world's 0.86%.[69]

A Ministerial Committee for the Review of the Funding of Universities (hereinafter referred to as "the Ministerial Committee")[70] in 2013 found that state funding of higher education institutions had been declining over the years. The Ministerial Committee stated that:

> Between 2000 and 2010, state funding per full-time equivalent (FTE) enrolled student fell by 1.1% annually, in real terms. During the same period, perhaps as a response to declining state funding, tuition fees per FTE student increased by 2.5% annually, in real

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68 Nxasana 2016 https://www.businesslive.co.za/bd/opinion/2016-03-24-sa-has-the-means-to-make-higher-education-more-accessible.

69 Nxasana 2016 https://www.businesslive.co.za/bd/opinion/2016-03-24-sa-has-the-means-to-make-higher-education-more-accessible.

70 The Ministerial Committee was appointed by then Minster of Higher Education, Dr Blade Nzimande. The primary objective of the Ministerial Committee was to review the experiences of the partial and full implementation of the current funding framework for universities.

> terms. South Africa's funding of higher education, even though significant, does not compare favourably to other countries.[71]

For poor learners with aspirations to one day enrol at a South African university the figures quoted above are disempowering. Accessing university will for many of them remain a distant dream. In terms of section 7(2) of the Constitution, the South African government is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights. In other words, there is a constitutional duty on the South African government to respect, protect, promote and fulfil the right to education, which includes the right to further education.[72] The government is obliged to remove, and not create, barriers to further education, including higher education.

Decreasing its funding for universities could be construed as an omission by the government to fulfil its international obligation, and, by extension, its constitutional obligation under Section 29(1)(b) to progressively make further education available and accessible — especially so if this should be held to cover the obligation to progressively introduce free higher education. Having regard to the report of the Commission of Enquiry into Higher Education (hereinafter referred to as "the Commission"),[73] which report further outlines the challenges faced by higher education institutions, there seems to be consensus amongst the stakeholders as to the major obstacles in respect of fees in further education. These obstacles are:

> First, the issue of a decline (per capita) in state funding was highlighted as a major problem, which has left not only higher education institution struggling, but also students, as institutions have raised tuition fees in an attempt to cover costs without compromising the provision of quality higher education academic and programmes [sic]. Related to this, many stakeholders discussed funding of higher education as a percentage of the GDP,

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71 Report of the Ministerial Committee for the Review of the Funding of Universities, October 2013, 7.

72 Section 29 read with Section 7(2) of the Constitution.

73 The Commission of Enquiry into Higher Education and Training was appointed by then President Jacob Zuma on 14 January 2016 with the mandate to enquire into, make findings, report on and make recommendations on the following:
"The feasibility of making higher education and training (higher education) fee-free in South Africa, having regard to:
1.1) the Constitution of the Republic of South Africa, all relevant higher and basic education legislation, all findings and recommendations of the various presidential and ministerial task teams as well as all relevant educational policies, reports and guidelines;
1.2) the multiple facets of financial sustainability, analysing and assessing the role of government together with its agencies, students, institutions, business sector and employers in funding higher education and training; and
1.3) the institutional independence and autonomy which should occur vis-à-vis the financial funding model."

> and compared this to funding in other countries to highlight the need for greater state funding. Second, there was general agreement that NSFAS [National Student Financial Aid Scheme] is underfunded, and that this had led to some of the problems experienced by students. There was not always agreement in identifying what the problems with NSFAS are – with some rejecting NSFAS completely and others suggesting reform of the existing financial aid policies. Finally, there was agreement that, given South Africa's inequality and socio-economic situation, financial support needs to be provided for academically deserving but financially needy students. It was agreed that students should not be excluded from higher education for financial reasons. The form and extent of support was a topic of much debate in the context of the economic climate and the competing priorities outlined in the National Development Plan.[74]

The major problem thus appears to be the underfunding of higher education, which results in higher education institutions' having to increase their fees in order to compensate for the deficit caused by their underfunding, as well as the underfunding of the National Student Financial Aid Scheme (NSFAS) – on NSFAS see under the next heading – which results in academically deserving but needy students not successfully pursuing higher education.

As a result of the aforesaid, students are burdened with high tuition fees, which are in most instances, especially for the poor, unaffordable — and the problem, it seems, is also not really solved by the NSFAS scheme. Barriers to access further education are created by increased fees. As pointed out, a valid argument could be made to the effect that underfunding both of higher education institutions and of the NSFAS by the government is impermissible, viewed in the light of government's obligation in terms of both Article 13(2)(c) of the ICESCR and section 29(1)(b) of the Constitution. However, it is important to understand that such an argument could be made only if government was actually failing in its international or constitutional obligations. The exact nature and scope of these obligations need to be ascertained.

1.10 Study loans (NSFAS) and compliance by the South African government with its international and constitutional obligations

It would be both inaccurate and insincere to suggest that the South African government has made no effort to make further or higher education progressively

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74 2017 Report of the Commission of Enquiry into Higher Education and Training to the President of the Republic of South Africa at para 191.

available and accessible for all, based on capacity. This is also stated in the light of the fact that, ignoring obligations under international law for the moment, currently there exists no explicit authority in South African law for the proposition that further or higher education must be made progressively free. According to Woolman and Bishop,[75] the argument should rather be that further or higher education should be affordable for all those who wish to pursue it.

The authors further caution that the full realisation of the right may not be immediately possible and that the state must take reasonable measures to ensure that, over time, further or higher education becomes available and accessible.[76] With this argument in mind, the state has made TVET colleges and universities accessible to thousands of poor students through the National Student Financial Aid Scheme (NSFAS),[77] created under the National Student Financial Aid Scheme Act 56 of 1999. The primary objective of the NSFAS is to give effect to government's commitment to redress the inequalities of the past and tackle the growing student debt problem in higher education institutions.[78] The NSFAS potentially constitutes a fellowship system under Article 13(2)(e) of the ICESCR.

In its current form the NSFAS offers students entering university interest free loans. Interest is charged only one year after the student has completed his/her studies, and, importantly, at a rate below the commercial lending rate.[79] Moreover, 60% of the loan is converted into a bursary for students completing their degrees in the prescribed time.[80] In a situation where a student never graduates, earns below a certain salary threshold, and/or never finds productive employment, such a student will inevitably never pay back the loan, resulting in his/her entire university education being free.[81] It is free for as long as the student is not in a financial position to pay

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75 Woolman and Bishop "Education" 57-41.

76 Woolman and Bishop "Education" 57-42.

77 Nxasana 2016 https://www.businesslive.co.za/bd/opinion/2016-03-24-sa-has-the-means-to-make-higher-education-more-accessible (attesting to this fact).

78 The National Student Financial Aid Scheme is "funded primarily by government and the repayment of previous loans," see Preamble of the National Student Financial Aid Scheme Act 56 of 1996.

79 Report of the Commission of Enquiry para 194.

80 This means that a student who completes his or her degree in the regulated/prescribed period is liable for repayment of 40% of the total amount awarded to the student towards university fees.

81 Report of the Commission of Enquiry para 14.

back the amount owed to the NSFAS. This will change if the student's financial position changes for the better; then the amount is due.[82]

Since the promulgation of the National Student Financial Aid Scheme Act in 1991 the state has made an enormous effort to make higher education accessible, especially to the poor. It awarded 50.5 billion Rand to about 1.5 million students in the form of loans and bursaries between 1991 and 2014.[83] Although the state has made this great effort to make higher education accessible, according to Nxasana universities have become less affordable to students coming from poor and middle-class families.[84] This is so because higher education fees are generally unaffordable for the poor and the middle class – even more so when fees increase — despite a loan system having been installed. This is the case because there are arguments to the effect that the fear of debt deters some students from entering higher education.[85] Based on data derived from a survey conducted in other countries, there are clear indications that those from "low social classes are more debt averse than those from other social classes."[86]

Hence, it cannot be denied that the state has made an effort to make further or higher education available and accessible. The question, however, is: Is it enough for the state to make further education more accessible through study loans and bursaries. Is there not also an obligation to enhance accessibility by making further education progressively free? Judging from the #FeesMustFall campaign, it appears that South African students who align themselves with that protest movement are not of the view that the state has done enough or utilised its maximum resources, available both nationally and internationally through assistance and co-operation to enhance accessibility. In particular, they are of the view that the state should introduce progressively free further or higher education. This then boils down to the question, which essentially forms the research question of this thesis: In the light of international law, and constitutional law interpreted in the light of international law,

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82 Report of the Commission of Enquiry para 14.

83 Nxasana 2016 https://www.businesslive.co.za/bd/opinion/2016-03-24-sa-has-the-means-to-make-higher-education-more-accessible.

84 Nxasana 2016 https://www.businesslive.co.za/bd/opinion/2016-03-24-sa-has-the-means-to-make-higher-education-more-accessible.

85 Callender and Jackson 2005 *JSP* 509-540.

86 Callender and Jackson 2005 *JSP* 509.

to what extent must South African law and state action recognise and implement the right to progressively free higher education?

1.11 Problem statement

The South African courts, in the landmark cases of *Glenister*,[87] *Fick,*[88] and *Democratic Alliance* (the International Criminal Court (ICC) Withdrawal case),[89] have confirmed that treaties (international agreements) are binding upon the Republic of South Africa at the international level once they have been approved by Parliament. In 2015 South Africa ratified the ICESCR. South Africa is therefore bound under international law to comply with the provisions of the Covenant.

Article 13(2)(c) is thus legally binding on South Africa. This means that in terms of international law South Africa has an obligation to make higher education "equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education." Moreover, Section 39(1)(b) of the Constitution requires every court, tribunal or forum to consider international law when interpreting the Bill of Rights, thus also Article 13(2)(c).

In the light of the above one inevitable question arises, which also constitutes the research question: In the light of international law, and constitutional law interpreted in the light of international law, to what extent must South African law and state action recognise and implement the right to progressively free higher education?

A proper interpretation of Article 13(2)(c) of the ICESCR will go a long way in addressing the research question. Understanding South Africa's international legal obligation in relation to higher education requires a critical appreciation of the purport of Article 13(2)(c). A plain reading of the provision suggests that the progressive introduction of free education is part and parcel of the right to higher education. In other words, the progressive introduction of free education does not seem to be a mere option in the quest for accessible higher education.

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87 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) (*Glenister*).

88 *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

89 *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP).

One must concede that free higher education will probably lead to enhanced accessibility, especially for the poor. Article 13(2)(c) allows for an interpretation which renders the progressive introduction of free education mandatory. Article 13(2)(c) strongly suggests that it envisages higher education's being made gradually free, the ultimate goal being free higher education.

Educational rights must be viewed in a holistic context, and that context comprises all the different levels of education. Higher education must be viewed and understood in the broader scheme of educational rights and not in isolation. Educational rights are inter-related. The right to primary education is related to the right to secondary education, and ultimately to the right to higher education. Albeit these rights are worded slightly differently, they form part of a broader scheme of educational rights in which the right to free and compulsory primary education constitutes the minimum core of educational rights. Article 13(2)(b) and (c) envisages free secondary and higher education, but realising the size of the tasks requires only the progressive introduction of free education. Further, for as long as education at these levels is not yet free, Article 13(2)(e) requires states parties to maintain a fellowship system.

This interpretation is important to the interpretation of section 29(1)(b) of the Constitution. South Africa ratified the Covenant in 2015 but has not yet incorporated it into South African law (at any rate, not in its entirety) in accordance with section 231(4) of the Constitution. This means that the Covenant is binding on South Africa on the international plane but is not domestically binding. This does not mean that the provisions of the Covenant can be ignored. Ultimately, non-incorporation into national law will lead to non-compliance with international law. The Constitution further requires of South African courts that they consider international law in interpreting the Bill of Rights, whenever such law is applicable and relevant.

In this regard, the Covenant is applicable and relevant for the proper interpretation of section 29 of the Constitution. Article 13 of the Covenant is of immense importance to the interpretive exercise, especially Article 13(2)(c). This provision is important in that it can be both a self-executing and non-self-executing provision. As a positive provision, Article 13(2)(c) is not a self-executing provision; for it to be law in South Africa, it will have to be incorporated into the law. However, as a

negative provision Article 13(2)(c) is a self-executing provision, in that the prohibition on retrogressive measures is clear enough to be immediately applicable. Hence, while the (positive) progressive realisation of free higher education – once legally incorporated – would ordinarily be subject to the Constitutional Court's reasonableness criterion, retrogression could be adjudged as (negative) interference with a Constitutional right – even without legislative incorporation.

A complex question which needs to be answered is whether the requirement of progressively free higher education in any way forms an element that should be read into section 29(1)(b) of the Constitution. Section 29(1)(b) of the Constitution does not make any reference to making higher education progressively free. The primary objective of section 29(1)(b) is that further education must be made progressively available and accessible by the state. This might well be held to require that higher education should be made free, as free education could be considered an instrument eminently suited to enhance accessibility. The Higher Education Act is also silent on this crucial aspect of Article 13(2)(c) of the Covenant. The Higher Education Act is the legislation adopted by parliament to comprehensively regulate the sphere of higher education in South Africa. It also regulates the funding of public higher education institutions.[90]

However, three provisions of the Constitution make the consideration of Article 13(2)(c) of the ICESCR imperative when interpreting section 29(1)(b) — these are sections 39(1)(c) and (2), and 233. Section 39(1)(c) makes it mandatory for courts to consider international law when interpreting the Bill of Rights. This means that section 29(1)(b) must be interpreted in a manner which accommodates Article 13(2)(c), unless the latter is glaringly inconsistent with the Constitution. Section 39(2) obliges courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. The Higher Education Act is such legislation which must be interpreted to promote the spirit, purport and objects of the Bill of Rights. The spirit, purport and objects of the Bill of Rights naturally include respect for

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[90] Higher Education Act 101 of 1997. The Preamble to the Higher Education Act states that this act was enacted by the legislature to: "regulate higher education; to provide for the establishment, composition and functions of a Council on Higher Education; to provide for the establishment, governance and funding of public higher education institutions; to provide for the appointment and functions of an independent assessor; to provide for the registration of private higher education institutions; to provide for quality assurance and quality promotion in higher education."

international law as this is alluded to in Section 39(1)(c), and international law, in the language used, prescribes progressively free higher education. Finally, Section 233 requires that, when interpreting legislation, a court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. This provision in its purport likewise requires relevant provisions of the Higher Education Act to be interpreted so as to be in consonance with the requirement of progressively free higher education of international law. Altogether, therefore, when interpreting both the Constitution and the Higher Education Act, an approach should be adopted which takes adequate cognisance of the reference to progressively free higher education in Article 13(2)(c) of the ICESCR.

Like any other right, the right to education, including that to higher education, is not absolute and is subject to limitation. On the international level, the right to higher education is subject to limitations imposed under Article 4 of the ICESCR. South Africa's Constitution has a similar provision, section 36 of the Constitution. To the extent that higher education is held to entail a requirement of progressively free education, any restriction of this principle would require justification under a limitation provision. This means that the restriction could especially if deliberately planned and implemented be required to be provided for in terms of law, and be required to further an acceptable welfare purpose in a proportionate manner. Limitations must not affect the essence of a right. For the right to higher education, this essence includes access to higher education free from discrimination on the ground of economic situation. Beyond the express limitation provisions, restrictions could, of course, also be sought to be justified under Article 2(1) of the ICESCR, embodying the notion of (only) progressive realisation, at the international level. Article 2(1) finds its domestic correspondence in the Constitutional Court's reasonableness requirement for assessing the constitutionality of measures related to funding higher education. Also, scrutiny under reasonableness considerations ultimately entails an examination of acceptable grounds for restrictions and the proportionality of the means chosen.

Turning to South Africa, firstly, the South African Constitution neither expressly refers to higher education nor the progressive introduction of free higher education.

Secondly, the only obligation imposed on the government in relation to further education is to make further education progressively available and accessible through reasonable measures. The Constitution is silent on a crucial aspect of the right to higher education as enshrined in the ICESCR — the progressive introduction of free higher education. Moreover, the increment in university fees in South Africa seems at odds with the government's obligation under international law to progressively introduce free higher education, by taking steps, individually and through international assistance and co-operation, to the maximum of its available resources with a view to achieving progressively the full realisation of the right to higher education by all appropriate means. In particular, the international prohibition on retrogressive measures seems to have been violated.

1.12 Research Methodology

The primary objective of this study is to determine whether a legal argument exists in both international and national law for progressively free higher education. In pursuing the study, various sources will be used to determine whether such an argument can indeed be made. International instruments such as the Vienna Convention on the Law of Treaties (1969), the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966) and the General Comments and Concluding Observations of the Committee on Economic, Social and Cultural Rights, supervising implementation of the Covenant will be analysed for a thorough comprehension of the international position regarding the right to education generally and the right to higher education in particular. While the soft-law General Comments provide a systematic interpretation of Covenant provisions, the Concluding Observations are critical Committee statements adopted following its review of reports submitted by state parties, in which the latter elaborate on the measures they have taken to implement the Covenant.

The General Comments of the Committee will be used for the purposes of interpreting the ICESCR. Textbooks, academic journals and case law will be studied in an attempt to find answers to the research question posed. Reliance will be placed on South African case law to determine the constitutional position with regard to socio-economic rights in South Africa.

Much reliance will also be placed on South African legislation and policies with regard to higher education to determine what the government has done so far to enhance the accessibility of higher education, and also to establish what the government's vision is for higher education in South Africa. Internet sources referring to notable current affairs will be used to assess the current state of access to higher education by the poor and whether the South African government has done enough to make further education progressively accessible through reasonable legislative and other measures.

1.13 Objective of the thesis

The primary objective of this study is to determine to what extent – in the light of international law, and constitutional law interpreted in the light of international law – South African law and state action must recognise and implement the right to progressively free higher education.

1.14 Hypothesis

South African law has not finally been developed and interpreted on the topic of free higher education but may well — and should — be developed and interpreted to recognise a right to progressively free higher education. Such a conclusion would seem imperative in the light of international law. The international law notions to the effect that the progressive realisation of the right to higher education may not entail deliberately retrogressive measures and that any limitation of the right to higher education must not affect its essence, this including access to higher education free from discrimination on the ground of economic situation, could assist South Africa in realising the right to progressively free higher education.

1.15 Limitations of study

This thesis primarily focuses on the interpretation of the ICESCR, the Constitution, related legislation and relevant case law. The thesis will not engage in an in-depth analysis of other international law instruments, such as the CRC, CDE, Banjul Charter or ACRWC. Furthermore, the thesis's focus is on the legal argument in relation to free and/or progressively free higher education as opposed to a political argument (although it is not always possible to neatly separate between the two).

1.16 Significance of study

Deserving prospective students with financial challenges are effectively denied access to higher education due to increasing tuition fees, resulting from a decrease in state funding. The significance of this study in the light of the aforesaid is the following: If a legal argument can be made to the effect that the state, under international human rights law and potentially under the Constitution, is obliged to make higher education progressively free, then unreasonable increases in study fees and a general failure of the state to move towards free higher education conflict with international and national human rights obligations. This would provide very strong support for the enhanced accessibility of higher education, with concomitant beneficial effects for the realisation of other social and economic rights and the overall development of the country.

1.17 Overview the of thesis

Chapter 1: Free higher education as an international and a Constitutional obligation: An overview

This chapter explains the background of and provides an introduction to, the thesis, highlighting the various topics which the thesis focusses on. It formulates the research problem identified, which the thesis endeavours to resolve through a desktop study of relevant literature.

Chapter 2: International law and the right to progressively free higher education

Chapter 2 specifically focusses on the international law position regarding the right to progressively free higher education. It explores the right to education in general, addressing primary and secondary education, and focussing on higher education specifically. Because South Africa is a state party to the Covenant and is internationally legally bound to comply with its provisions, and because the Constitution requires that international law be considered when the Bill of Rights is interpreted, this chapter is crucial to the thesis. The chapter analyses the genesis of the right to progressively free higher education in Article 13(2)(c), and further, whether the progressive introduction of free higher education is optional or

mandatory in terms of Article 13(2)(c) of the Covenant. The chapter further analyses the nature and scope of the obligations generally imposed by the Covenant on state parties and how such obligations are to be complied with.

Chapter 3: The relevance of international law to South African law and jurisprudence

This chapter analyses the relevance of international law to South African law and jurisprudence. It examines the different roles played by international law in South African law under sections 39(1)(b), 231, 232 and 233 of the Constitution. It further examines an important case, *Glenister v President of the Republic of South Africa*, of the Constitutional Court in respect of the role of international law in South African law. The chapter focusses on how international law has been utilised in South African jurisprudence thus far, where the shortfalls lie, and how international law ought to be used in South African law.

Chapter 4: The right to progressively free higher education under the South African Constitution

Chapter 4 focusses on the general right to education in South Africa and specifically the right to further/higher education. This chapter examines the right to further education in Section 29(1)(b) of the Constitution, specifically whether this right encompasses the right to the progressive introduction of free higher education. It further examines relevant legislation in the sphere of higher education, namely, the Higher Education Act 101 of 1997 and the National Student Financial Aid Scheme Act 56 of 1999, to ascertain whether the progressive introduction of free higher education is implicit in section 29(1)(b) of the Constitution. The chapter further identifies the challenges and insufficiencies of the current legislative framework in so far as it relates to the progressive introduction of free higher education.

Chapter 5: The adjudication of socio-economic rights and the doctrine of the separation of powers

Chapter 5 focusses on the ground-breaking cases of the Constitutional Court dealing with socio-economic rights: *Grootboom*,[91] *Treatment Action Campaign* (TAC) No. 2[92] and *Mazibuko*.[93] These cases laid the foundation for the adjudication of socio-economic rights in South Africa. Because the right to further education can also be categorised as a socio-economic right, a discussion of these cases is warranted for guidance on the likely interpretation of section 29(1)(b) of the Constitution by the Court. Furthermore, an analysis of the impact of the doctrine of the separation of powers on the adjudication of socio-economic rights is undertaken. The analysis of the doctrine of the separation of powers is critical so as to put forward a feasible approach for the courts to adopt in the adjudication of socio-economic rights.

Chapter 6: The funding of higher education in South Africa: Study fees, loans, and compliance with international and constitutional obligations

Chapter 6 is a central chapter in this thesis as it examines the funding of higher education in South Africa. The chapter examines different funding models, income streams, the purpose of the National Student Financial Aid Scheme and its challenges and shortcomings. The chapter further explores the role of the private sector in the funding of higher education and whether the current legislative framework allows for the private sector funding of higher education. Furthermore, the role that the specific political agenda followed by government will play in the progressive introduction of free higher education (or the refusal to pursue such an introduction of free higher education) is also examined. The chapter also explores the nature of the challenges faced by students in accessing higher education because of high tuition fees. An argument is made for supplementary aid from the private sector in assisting students to access higher education institutions.

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91 *Government of RSA and others v Grootboom and others* 2001 (1) SA 46 (CC).

92 *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) (*TAC*).

93 *Lindiwe Mazibuko and others v City of Johannesburg and others* 2010 (2) SA 1 (CC) (*Mazibuko*).

Chapter 7: Achieving compliance with international and constitutional obligations: Conclusions and recommendations

This chapter affirmatively finds that both international and South African law should be read to require the progressive introduction of free higher education. A number of recommendations to guide future state action in relation to the financial accessibility of higher education are made here.

CHAPTER 2: INTERNATIONAL LAW AND THE RIGHT TO PROGRESSIVELY FREE HIGHER EDUCATION

2.1 Treaty interpretation in terms of the Vienna Convention on the Law of Treaties

We live in an era of treaties, so the argument goes. It is argued that for political reasons, "states are decreasingly less willing to rely upon customary international law for the regulation of legal matters."[94] More and more states are capable of drafting and concluding treaties,[95] consequently resulting in a situation which triggers the question of how treaties should be interpreted. According to Linderfalk the interpretation of treaties requires the time and skills of many different authorities.[96] By no means is the interpretation of treaties an easy exercise. Quite the opposite is true, it a difficult and contradictory issue.[97] Linderfalk is in agreement with this proposition and offers the following argument to substantiate the proposition:

> Surprisingly often, when an international court or arbitration tribunal is requested to settle a dispute between two or more states concerning the application of a treaty, it is precisely because these states have different opinions about the meaning conveyed by that instrument. Similarly, it is precisely because judges and arbitrators so often disagree on matters of interpretation, that dissenting and separate opinions are so common in international judicature.[98]

Linderfalk's argument illustrates the enormous and difficult task of treaty interpretation because of the subjective nature of the interpretation exercise. However, since 1969 the exercise of treaty interpretation has been guided and guarded by the Vienna Convention on the Law of Treaties (1969) ("the Vienna Convention"),[99] in order to limit the scope of subjective interpretation of treaties.

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94 Linderfalk *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* 1.

95 Linderfalk *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* 1.

96 These authorities include: national courts, police, immigration authorities, civil servants, military officials, diplomatic personnel, international courts and arbitration tribunals, international organisations etc.

97 Mehrish says that "the interpretation of treaties is among the most confused and controversial subjects in international law." Mehrish 1971 *Indian Journal of International Law* 39.

98 Linderfalk *On the Interpretation of Treaties: The Morden International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* 2.

99 Deutsch *An International Rule of Law* 146: "At its opening session in 1949, the International Law Commission of the United Nations agreed that one of its first studies should concern itself with an effort

Articles 31-33 of the Vienna Convention should be considered the point of departure in the exercise of treaty interpretation. These provisions of the Vienna Convention should be seen as evidence, "not only of the rules of interpretation that apply according to the convention between parties, but also of the rules that apply according to customary international law between states in general."[100] These provisions prescribe how to determine the correct meaning of any treaty provision to be interpreted from an international law perspective.

As has been pointed out above, the principal source of states parties' obligations in relation to ESCR and specifically the right to higher education, for the purposes of this thesis, is the ICESCR. The Covenant is a treaty which gives rise to formal rights and duties once a state has ratified or acceded to it. Being a treaty, the Covenant – and of importance here, its Article 13(2)(c) on higher education, equal access, and progressively free education – must be interpreted in accordance with the rules of international law pertaining to treaty interpretation, as embodied in Articles 31, 32 and 33 of the Vienna Convention.[101] Article 31 is of specific importance here. It provides as follows:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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to codify the law of treaties. In eighteen sessions over a period of seventeen years, the Commission held some three hundred meetings at which this subject was the principal topic of discussion. Finally, in 1966, the Commission adopted seventy-five draft articles on the law of treaties and recommended that the General Assembly of the United Nations convene an international conference of plenipotentiaries to study the draft articles and to endeavour to conclude a convention on the subject. The General Assembly, by its Resolution 2166 (XXI), decided that such a conference should be convened, and in the following year (1967), decided that the first session should meet in Vienna in March 1968. At the first session of the conference in the spring of 1968, delegations from 103 countries attended. The second and final session met again in Vienna in April and May of 1969, with representatives of 110 nations participating. The Convention, as ultimately worked out, was finally adopted on May 23, 1969, by seventy votes for, one (France) against, and nineteen abstentions, which included all the Communist countries except Yugoslavia."

100 Linderfalk *On the Interpretation of Treaties: The Morden International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* 7.

101 Eberhard "International Rule of Law" 146.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 31 makes it clear that, in interpreting a treaty, the following must play a role: the ordinary meaning of the words used, the context, the object and purpose of the treaty, and, generally, good faith in interpretation. The "context" referred to above includes – and this is relevant in the framework of this study – "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31(3)(b)). This could be interpreted as including the Committee on Economic, Social and Cultural Rights' General Comments and Concluding Observations.

The Preamble to the Vienna Convention states that "the principles of free consent and of good faith and *pacta sunt servanda* are universally accepted". Article 26 of the Vienna Convention explicitly codifies the rule of customary international law that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The principle of good faith, being closely related to the obligation of upholding the object and purpose of a treaty, also finds its expression in the article dealing with the interpretation of a treaty, namely article 31 of the Vienna Convention.[102] The International Court of Justice ("the ICJ") has applied the doctrine of *pacta sunt servanda* as a fundamental and universally-recognised principle by virtue of customary international law.[103]

The ICJ has had the opportunity to deal with cases related to treaty interpretation, including where the states to the dispute were not party to the Vienna Convention. For instance, in 1994, in the Territorial Dispute case, the ICJ held that:

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102 The obligation to uphold the object and purpose of a treaty is found in Articles 16, 19 and 20 of the Vienna Convention, for example.

103 Greenwood 2008 *UNALIL* 2-3; *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51 at para 38.

> The Court would recall that, in accordance with customary international law … a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[104]

In 1996, in the *Oil Platforms* case, the ICJ reiterated the customary status of good faith interpretation in the light of text, context, and object and repeated:

> The Court recalls that, according to customary international law … a treaty must be interpreted in *good faith* in accordance with the ordinary meaning to be given to its terms in their context and *in the light of its object and purpose*.[105]

The ICJ applied the good faith principle and the interpretative method set out in Article 31 of the Vienna Convention in a dispute concerning a bilateral treaty between Botswana and Namibia, even though neither state was a party to the Vienna Convention. The Court noted:

> [N]either Botswana nor Namibia are parties to the Vienna Convention on the Law of Treaties of 23 May 1968, but … both of them consider that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law. The Court itself has already had occasion in the past to hold that customary international law found expression in article 31 of the Vienna Convention.[106]

From the jurisprudence of the ICJ it is evident that some provisions of the Vienna Convention constitute customary international law. These include the provisions on the good faith performance and interpretation of treaties in Articles 26 and 31, respectively. Also, Article 32, which allows recourse notably to the *travaux préparatoires* of a treaty in certain circumstances, constitutes customary law.[107] Article 32 states as follows:

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104 Case concerning the Territorial Dispute (*Libya Arab Jamahiriya v Chad*), Judgment of 3 February 1994, ICJ Reports 1994 para 41.

105 Case Concerning the Oil Platforms (*Islamic Republic of Iran v. United States of America*), Preliminary Objection, Judgment of 12 December 1996, ICJ Reports 1996 para 23.

106 Case Concerning the Kasikili/Sedudu Island (*Botswana v Namibia*), Judgment of 13 December 1999, ICJ Reports 1999 para 18.

107 ICJ Arbitral Award (*Guinea Bissau v Senegal*) Rep 53, para 48; ICJ Territorial Dispute (*Libya v Chad*) [1994] ICJ Rep 6, para 41; Kasikili/Sedudu Island [1999] ICJ Rep 1045, para 18; Avena Case [2004] ICJ Rep 12, para 83; Construction of a Wall [2004] ICJ Rep 136, para 94; Genocide Case [2007] ICJ Rep 43, para 160; Dispute Regarding Navigational and Related Rights [2009] ICJ Rep 213, para 47; Pulp Mills [2010] ICJ Rep 14, para 65; Maritime Dispute (*Peru v Chile*) [2014] ICJ Rep 3, para 57; Delimitation of the Continental Shelf between Nicaragua and Colombia (Preliminary Objections) [2016] ICJ Rep 100, para 33; Maritime Delimitation in the Indian Ocean (*Somalia v Kenya*) (Preliminary Objections), 2 February 2017, para 63.

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

The fact that these rules of the interpretation of treaties form part of customary international law is of some significance for South Africa. South Africa has neither signed, ratified, nor acceded to the Vienna Convention on the Law of Treaties.[108]

In terms of the Constitution, customary international law is law in South Africa unless it is inconsistent with the Constitution.[109] This means that the contents of Articles 26, 31 and 32 are law in South Africa. Nothing in the wording of the above provisions seems to indicate that these provisions are inconsistent with the Constitution. Importantly, some of but not the entire Vienna Convention constitutes customary international law. This is so because some provisions have explicitly been codified with a view to the progressive development of the law.[110]

The ICESCR as the primary international source of ESCR, including the right to higher education, must, therefore, be interpreted in accordance with the rules of treaty interpretation referred to above. Important for this thesis is Article 13(2)(c) of the ICESCR. This requires that higher education "shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education." This must be read in the light of Article 2(1) of the Covenant, generally describing the nature of positive obligations under the Covenant. In other words, in the light of the stated rules of interpretation, relevant questions to be addressed are:

1. What is the ordinary textual meaning of "ma[king] … accessible to all, *by every appropriate means*, and *in particular by* the progressive introduction of free education." Does "in particular" mean that the progressive introduction of free

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108 On the status of ratification, see the website of the United Nations Treaty Collection at https://treaties.un.org/Pages/showDetails.aspx?objid=080000028003902f&clang=_en.

109 Section 232 of the Constitution states that: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

110 *Harksen v President of the Republic of South Africa and Others* [2000] ZACC 29; 2000 (2) SA 825 (CC), the Court here relying on various authoritative works addressing treaty interpretation.

education is only one of several appropriate means that may be chosen? Or is it mandatory? (**textual interpretation**);

2. Do the formulations of Article 13(2)(a) and (b) on primary and secondary education shed light on how Article 13(2)(c) should be understood? Ultimately, there is a hierarchy of urgency in implementation noticeable in the way these provisions are formulated, and all three provisions refer to “some form of” free education (**contextual interpretation**);
3. What is the relevance of Article 13(2)(e) to Article 13(2)(c)? It has been stated that this expects of states that they set up a fellowship system (bursaries, loans, etc.). Does the existence of a fellowship system relieve a state of the obligation of implementing free higher education? In other words, is a fellowship system a legitimate alternative to free higher education? (**contextual interpretation**);
4. What is the implication of the description of the general nature of positive state obligations under Article 2(1) for the meaning of Article 13(2)(c)? What is required at a minimum level from states parties? What is the discretion available to them? To what extent does the notion of “progressiveness” afford protection against potentially excessive demands on resources? Are deliberately retrogressive measures excluded? Is Article 13(2)(c) justiciable? (**contextual interpretation**);
5. How does the limitation clause in Article 4 apply to the obligation to make higher education progressively free? Which grounds for introducing or increasing study fees in higher education could be considered to “promot[e] the general welfare in a democratic society” and would be “compatible with the nature” of the right of *equal access* to higher education? (**contextual interpretation**);
6. Do the Committee on Economic, Social and Cultural Rights’ General Comments and Concluding Observations facilitate an understanding of Article 13(2)(c)? (**contextual interpretation**);
7. What is the object and purpose of Article 13(2)(c)? Is it that higher education must be accessible, leaving the choice of means to states, or is it that accessibility must be established through essentially free higher education because this is the most adequate way to achieve access? Would free higher

education ensure access to poorer students? Are there perhaps other factors keeping students from studying, so that the object and purpose, namely access, could actually be better achieved through other means? (**object and purpose**);

8. How must the ICESCR and the right to higher education be interpreted to make the protection of ESCR effective? (**good faith interpretation**).

These questions will be addressed below, focussing on the last one first. The discussion will not strictly follow the enumeration of aspects indicated above, but the substance of each point will be dealt with in this chapter.

2.2 Interpreting the ICESCR in good faith: Making the protection of ESCR effective

ESCR and the major instrument protecting them, the ICESCR, are often deliberately distorted. On the one hand, it is said by some that the obligation to fully implement ESCR places an unrealistic monetary burden on states. On the other hand, others say that ESCR are not proper human rights but rather a programme of action not creating legal obligations for states and leaving states a discretion in deciding how to achieve socio-economic welfare. Either view is incorrect. Either view stands in the way of giving effect to ESCR as human rights, in giving effect to the ICESCR as a treaty creating legal obligations. Both views are also encountered when remarking that Article 13(2)(c) of the Covenant creates an obligation to enhance access to higher education by making such education progressively free. Hence, it is of importance that the right in Article 13(2)(c as protected in the ICESCR is taken seriously by those states party to the Covenant by not seeing it as creating unrealistic claims on state resources, but also not as something that does not create a concrete obligation to act.

Like the concept of human rights, the concept of ESCR has captured and occupied the minds of philosophers since it originated as a distinct category.[111] According to Beiter, since the end of World War II "the protection of individuals through subjective rights has become a central concern of public international law."[112] The author

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111 Alston and Quinn 1987 *HRQ* 158.

112 Beiter *The Protection of the Right to Education by International Law* 505.

argues that although it was recognised that there is a need to protect individual rights, the approach seemed to be slightly different when it came to economic, social and cultural rights. According to Beiter:

> Traditionally, a distinction is made between two categories of rights: civil and political rights on the one hand and economic, social and cultural rights on the other hand. While both categories of rights are recognised in principle, considerable differences result from the widespread belief that economic, social and cultural rights lack justiciability and therefore cannot be enforced by the judiciary.[113]

The International Commission of Jurists[114] was amongst the international bodies that publicly and consistently advocated the recognition of ESCR. The argument of the International Commission of Jurists was that "economic, social and cultural rights should be taken as seriously as civil and political rights."[115]

It is argued by some authors that the adoption of the Universal Declaration of Human Rights in 1948, although the Declaration is not binding, was "a cornerstone for the promotion and protection of human dignity in the history of human rights".[116] The UDHR captured both civil and political rights as well as ESCR, without dividing these into two isolated groups. The "artificial" distinction between these two groups of human rights occurred after the 1950s as a result of the Cold War. This was a period of geopolitical tension between the Soviet Union with its satellite states and the United States with its allies after World War II, in which the ideology of each side was reflected in the specific view of the respective importance of each category of human rights. The East argued that ESCR were more important than CPR. The West argued that CPR were more important than ESCR. In consequence, the blocs could not agree on a uniform system of enforcement, let alone that both categories of human rights should be protected in a single document. Because of the United

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113 Beiter *The Protection of the Right to Education by International Law* 505.

114 The International Commission of Jurists is an international non-governmental human rights organization. The Commission itself is a standing group of 60 eminent jurists dedicated to ensuring respect for international human rights standards through the law.

115 International Commission of Jurists 2008 Courts and the Legal Enforcement of Economic, Social and Cultural Rights 1.

116 Baye "Rethinking Justiciability and Enforcement of Socio-Economic Rights in Ethiopia: International Context and Comparative Perspective" 111.

States' views, no individual complaints procedure was eventually installed for ESCR in the ICESCR.[117]

With the beginning of the Cold War there was disagreement among the members of the United Nations Commission on Human Rights, as it then was, in relation to a binding human rights instrument.[118] Baye comments on the disagreement among members was as follows:

> The Commission was split on the question of whether there should be one or two covenants. The question was turned over to the General Assembly, which, in a resolution (General Assembly Resolution 421 (V) of 4 December 1950) adopted in 1950, emphasized the interdependence of all categories of human rights and called on the Commission to adopt a single convention. The next year, however, the western states were able to reverse the decision, asking the Commission to divide the rights contained in the UDHR into two separate international covenants, one on civil and political rights (CCPR) and the other on economic, social and cultural rights (CESCR) (General Assembly Resolution 543 (VI) of 5 February 1952.[119]

Since the adoption of the resolution by the General Assembly on 5 February 1952 the International Bill of Rights was considered to have to consist of two distinct parts, one for civil and political rights and another for economic, social and cultural rights. In the end, two separate United Nations Covenants, namely, the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, were adopted in 1966.[120]

From a legal point of view, the controversy caused by ESCR should have been put to rest by the "adoption of the Covenant, its entry into force in 1976, and the formal acceptance of the ensuing treaty obligations by 87 states (as of 1 August 1986)".[121] Yet, the legitimacy of ESCR continued to be questioned by some states.[122] Unlike CPR, the international community struggled to formally recognise ESCR as rights

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117 Arambulo "Improving supervision of the International Covenant on Economic, Social and Cultural Rights" 19-23.

118 Baye "Rethinking Justiciability and Enforcement of Socio-Economic Rights in Ethiopia: International Context and Comparative Perspective" 112.

119 Baye "Rethinking Justiciability and Enforcement of Socio-Economic Rights in Ethiopia: International Context and Comparative Perspective" 112.

120 Trispiotis 2010 *Opticon1826* 1.

121 Trispiotis 2010 *Opticon1826* 1.

122 Alston and Quinn 1987 *HRQ* 156-229. The authors argued that the debate regarding the legitimacy of economic, social and cultural rights remained as polarised as it was in the days when the international community had yet to recognise formally the legitimacy of economic, social and cultural rights.

of the same standing as CPR. For example, since 1981 the United States government has advocated that economic, social and cultural rights belong in a "qualitatively different category" compared to other rights, in essence arguing that ESCR should not be seen as rights but rather as "goals of economic and social policy".[123] The concern the United States government had harboured was that these rights "are too easily abused by repressive governments as justifications for violations of civil and political rights".[124] In this climate, it was difficult for courts of law and other adjudicating bodies to effectively adjudicate on ESCR, given their rejection by many states in the international community. The task of courts and other adjudicating bodies has been enormous considering the environment in which they had to conduct their work.

The ICCPR creates the Human Rights Committee to monitor compliance with the ICCPR. This is an independent expert committee competent to review reports submitted by states parties, in which they comment on their implementation of Covenant rights, and it can receive individual and state complaints, alleging that Covenant rights have been violated. The individual complaints procedure is created under a separate Protocol to the Covenant. In 1985 the United Nations Economic and Social Council (ECOSOC), set up the United Nations Committee on Economic, Social and Cultural Rights (the Committee) to monitor compliance with the ICESCR. Like the Human Rights Committee, this is an independent expert committee. For many years, the Committee could only review state reports. It was only with the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008[125] that the Committee also acquired the competence to receive individual or group and state complaints alleging violation of a Covenant right.[126]

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123 Alston and Quinn 1987 *HRQ* 158.

124 From the argument of Alston and Quinn it is unclear why the United States harboured such a view. One is left to speculate that it was probably simply based on their practical experience in dealing with such states.

125 The General Assembly adopted resolution A/RES/63/117 on 10 December 2008. The Optional Protocol entered into force on 6 May 2013.

126 On the ICESCR and its implementation mechanism, see Ssenyonjo *Economic, Social and Cultural Rights in International Law* 25-48.

An important comment on the side South Africa, it should be noted, has to date neither signed nor ratified the Protocol. This means that the Committee would not be able to entertain a claim alleging that South Africa did not comply with Article 13(2)(c), for example, by not progressively introducing free higher education, or by increasing existing study fees in higher education.

The decision by ECOSOC to set up an independent expert committee to monitor compliance with the Covenant – such a body not being explicitly envisaged by the Covenant – seems to have been informed by the understanding that ESCR are rights as important as CPR. Likewise, the creation of complaints procedures, the large number of states that have meanwhile signed and ratified the Covenant, along with the fact that more and more states around the world are introducing ESCR in their constitutions and variously granting their courts competence to adjudicate on these, confirms that ESCR have since enjoyed an enhancement in standing.[127]

This now reverts to the notions of good faith and *pacta sunt servanda*. The ICESCR – and thus also its provisions on higher education, equal access, and progressively free education – should be interpreted and applied in a manner that gives due consideration to the principle of good faith as stipulated in Articles 26 and 31 of the Vienna Convention. In other words, interpretation and subsequent application must be directed at making these provisions *effective*, at making ESCR "worth the paper they are written on." Hence, there is a need to identify actual and clear obligations implied by the words "free education," yet these must be sufficiently realistic to be implementable and not to lead to treating the reference to these words as mere idealism.

2.3 The right to education under international law: Legal instruments, "respect, protect, fulfil", and the 4-A scheme

Education is usually regarded "as the formal process by which society conveys its accumulated knowledge, skills, customs and values from one generation to

[127] International Commission of Jurists, Economic, Social and Cultural Rights, https://www.icj.org/themes/economic-social-and-cultural-rights. To date, 170 states have ratified the ICESCR and are therefore obliged to respect, protect and fulfil these rights.

another."[128] In modern times, education, specifically elementary education, has come to be recognised as a human right.[129] It is difficult to think of a country which does not recognise fundamental educational rights or acknowledge the importance and value of education. The right to education may be stated to have attained the status of a universal right, and many countries do recognise the right to education as a fundamental human right.[130]

Various global and regional international instruments, notably the following, recognise the right to education as a fundamental human right: the Universal Declaration of Human Rights (UDHR) (1948) in Article 26, the UNESCO Convention against Discrimination in Education (CDE) (1960) in Articles 1 to 5, the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) in Articles 13 and 14 (Article 14 providing for plans of action and a time-frame for the implementation of primary education), the Convention on the Rights of the Child (CRC) (1989) in Articles 28 and 29, the Convention on the Rights of Persons with Disabilities (2006) in Article 24, the African Charter on Human and Peoples' Rights (Banjul Charter) (1981) in Article 17(1), the African Charter on the Rights and Welfare of the Child (ACRWC) (1990) in Article 11, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) in Article 13, Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952) in Article 2, and the Revised European Social Charter (1996) in Article 17. The recognition of education as a core human right by the UDHR in 1948 commenced the process of the development of educational rights globally. It was the UDHR that first recognised education as a human right in Article 26 of the Declaration. The focus here is on the ICESCR, of course. Where relevant, the UDHR and the CRC are relied on for comparative purposes.

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128 Chürr 2015 *PELJ* 2405.

129 Chürr 2015 *PELJ* 2405.

130 The fact that to date 170 countries have ratified the Covenant attests to the fact that the rights enshrined in the Covenant, including the right to education, are recognised as fundamental rights, and the states parties are obliged to respect, protect and fulfil these rights. See also https://www.icj.org/themes/economic-social-and-cultural-rights.

The provisions of Article 13 of the ICESCR have been cited above.[131] Looking at the social aspect of the right to education as specifically protected in Article 13(2), the following may be noted: albeit the wording of Article 13(2)(a), (b), and (c) on primary, second, and higher education, respectively, is not identical, these levels of education have somethings in common.

Firstly, there are obligations to respect, protect and fulfil the right to education at each of these different levels. These obligations have generally been described for ESCR as follows:

> At the primary level the states are under duty to "respect", to "protect" at the secondary level, and to fulfil at the tertiary level. These levels give rise to both "negative" and "positive" obligations. The duty to respect entails a negative obligation not to interfere with resources owned by the individual, his or her freedom to find a job and the freedom to take necessary action and use the resources to satisfy his or her needs. This means that the state should refrain from any interferences that obstruct the enjoyment of the rights. At the secondary level the state has to protect the freedom of action and use of resources against more assertive or powerful economic interests. The tertiary level obliges the state to "promote" and "fulfil" the rights. This is a more positive obligation compared to the previous two because it requires the state to take positive steps to ensure that the rights are enjoyed. This may include for instance establishment of schools and hospitals to realise the right to education and health respectively.[132]

Secondly, the so-called 4-A scheme, developed by a former United Nations Special Rapporteur on the Right to Education, Katarina Tomaševski, and subsequently affirmed by the Committee on Economic, Social and Cultural Rights in its authoritative interpretation of the right to education, as protected in Article 13 of the ICESCR, in General Comment No. 13 of 1999, is applicable to education at each of its levels. This means that education at its different levels must be available,[133] accessible,[134] acceptable[135] and adaptable.[136] The "4-A's" are interrelated and essential features of education and contribute to the full enjoyment of the right to

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131 Chapter 1 above.

132 Mbazira "The enforcement of socio-economic rights in the African human rights system: Drawing inspiration from the International Covenant on Economic, Social and Cultural Rights and South Africa's evolving jurisprudence" 15.

133 General Comment No. 13 para 6(a).

134 General Comment No. 13 para 6(b).

135 General Comment No. 13 para 6(c).

136 General Comment No. 13 para 6(d).

education.[137] They are essential features of education that ought to be realised at each of the different levels of education. Based on the definitions of General Comment No. 13, Chürr describes each of these features. Regarding the "availability" of education, she states:

> The state has the duty to provide education and make it available to all children. In other words, the state has the duty to make educational institutions and programmes available in sufficient quality in order to meet the needs of children. The availability obligation can be fulfilled through a public education system and by allowing non-state actors to establish non-public schools. The state will then have a combination of both public schools and non-public (private) schools.[138]

Regarding the "accessibility" criterion, she states:

> The state has the duty to make educational institutions and programmes accessible to everyone, without discrimination. … In order to meet the accessibility criteria, schools must be physically and economically accessible and affordable.[139]

Regarding the "acceptability" criterion, she states:

> The state has the duty to ensure that the form and substance of education, as well as the curricula and teaching methods, are acceptable, relevant, culturally appropriate and of high quality to children. In order to meet the acceptability obligation, the state must ensure that the education provided is stable, reliable and consistent with the rights of children set out in human rights instruments such as the ICESCR and the Convention on the Rights of the Child.[140]

Finally, regarding the "adaptability" criterion, she states:

> The education system has to be flexible and expandable in order to adapt to the needs of changing societies and communities and respond to the needs and requirements of learners and students within their social and cultural circumstances. Thus there is a necessity for curriculum flexibility, litheness, and adaptation to meet the needs of children.[141]

Despite the use of the word "children" in the above definitions, it is important to appreciate that the 4-A scheme is as applicable to higher education as it is to primary

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137 General Comment No. 13 para 6.
138 Chürr 2015 *PELJ* 2414.
139 Chürr 2015 *PELJ* 2414.
140 Chürr 2015 *PELJ* 2414. Emphases omitted.
141 Chürr 2015 *PELJ* 2414.

education. In other words, higher education must be available, accessible, acceptable and adaptable. As the Committee says,

> Higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms at all levels.[142]

Having regard once more to the wording of the Covenant in relation to primary, secondary, and higher education in Article 13(2)(a), (b), and (c): primary education "shall *be*" "compulsory" and available "free" "to all." In terms of international law, the right to compulsory and free primary education for all constitutes the minimum core of the right to education.[143] Secondary education in its different forms "shall *be made*" "generally available" and "accessible to all." Accessibility is to be achieved "by every appropriate means, and in particular by the progressive introduction of free education." Higher education "shall *be made*" "*equally* accessible to all, *on the basis of capacity*". Accessibility is to be achieved, and here the exact wording used in relation to secondary education is repeated, "by every appropriate means, and in particular by the progressive introduction of free education." It may thus be seen that these definitions refer in varying degrees – explicitly or implicitly – to the elements of availability and accessibility. The elements of acceptability and adaptability are essentially read into Article 13(2), primarily on the basis of the aims of education mentioned in Article 13(1). These notably include the full development of the human personality and the ability to participate effectively in a free society.

A careful analysis of the 4-A scheme read in conjunction with Article 13(2) reveals the varying degree to which the 4-A scheme applies to primary, secondary and higher education. The wording used in Article 13(2)(a) is mandatory: "primary education shall be compulsory and *free*". From this wording it is possible to understanding that free primary education is evidently not subject to progressive realisation, rendering its availability and accessibility immediate. As for both secondary and higher education the "free" component of the right is subject to progressive realisation. This is evident from the wording used in both sub-Article 13(2)(b) and (c), by the use of the phrase "and in particular by the progressive

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142 General Comment No. 13 para 17.
143 General Comment No. 13 para 57.

introduction of free education." This means that the availability and accessibility of both secondary and higher education is subject to progressive realisation, which is not applicable to primary education. Free higher education essentially relates to two dimensions of accessibility as identified in General Comment No. 13:

> [i] Non-discrimination — education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds [this would include economic disadvantage];
>
> [iii] Economic accessibility — education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education.[144]

Both non-discrimination and economic accessibility are implicated by free higher education. This is so because progressively free higher education makes higher education accessible for those who qualify, especially for people from poor socio-economic backgrounds. Progressively free higher education prevents the manifestation of indirect discrimination on the basis of socio-economic status, where students from poor socio-economic backgrounds are barred from accessing higher education due to their lack of finances.

Importantly, free higher education also relates to availability (the costs of higher education also have to do with the intake capacity of universities, that is, availability); the fact that higher education is free must not impact on quality (acceptability); costs of education may be reduced by online offers (adaptability, higher education adapting to the needs of society), etc. Of the different levels of education, the one that most often remains beyond the economic capability of citizens is higher education because of the fees involved. There is no doubt that the costs of higher education in some countries are unaffordable for a majority of the citizens.[145]

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144 General Comment No. 13 para 6(i) and (iii).

145 See Educause, Affordability, https://library.educause.edu/topics/information-technology-management-and-leadership/affordability: "Policymakers and the public view higher education achievement as central to the economic viability of both individuals and the nation. This belief further heightens their concerns about the affordability of higher education, which has seen growth in its cost to students and families outstrip the rate of inflation for decades."

2.4 Primary and secondary education under international law and the 4-A scheme

2.4.1 Meaning of primary and secondary education, "free" education

Education is critical to the overall development of human beings.[146] Education is important for people for different reasons at different stages of their lives.[147] This view of the importance of education was echoed by the Constitutional Court, where the Court per Khampepe J stated that:

> There are few things as important for the flourishing of a society and its people as education. Through education, doors are opened to opportunities that were only before ever dreamt of. I am not exaggerating when I say that education changes lives. It enriches and develops our children so that they may reach the height of their potential. And, as our citizens are empowered through education to improve their future and achieve their dreams, our nation will undoubtedly prosper too.[148]

For instance, education is essential to adults to enable their effective participation in a free society, and it "promotes understanding, tolerance and friendship among all persons."[149] Education is of special importance to children. The U.N. Convention on the Rights of the Child (CRC) principally defines a child as a person below the age of 18 years.[150] In international law, persons below the age of 18 are the main beneficiaries of primary and secondary education, as laid down in Article 13(2)(a) and (b) of the ICESCR, or in Article 28(1)(a) and (b) of the CRC.

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146 Beiter *The Protection of the Right to Education by International Law* 18-21. See also Committee on the Rights of the Child, General Comment No. 1: The aims of education, UN Doc CRC/GC/2001/1 (17 April 2001) para 1.

147 The various reports of U.N. Special Rapporteurs on the Right to Education attest to this. Hence, see, e.g., the reports of Katarina Tomaševski and Vernor Muñoz Villalobos just by way of example: K Tomaševski, Right to Education: Preliminary Report, UN Doc E/CN.4/1999/49 (13 January 1999); Progress Report, UN Doc E/CN.4/2000/6 (1 February 2000); Report on the Mission to the United Kingdom of Great Britain and Northern Ireland (England), UN Doc E/CN.4/2000/6/Add.2 (9 December 1999); Annual Report, UN Doc E/CN.4/2001/52 (11 January 2001); Annual Report, UN Doc E/CN.4/2002/60 (7 January 2002); Report on the Mission to the United States of America, UN Doc E/CN.4/2002/60/Add.1 (17 January 2002); Annual Report, UN Doc E/CN.4/2003/9 (21 January 2003); Annual Report, UN Doc E/CN.4/2004/45 (15 January 2004); V Muñoz Villalobos, The Right to Education, UN Doc E/CN.4/2005/50 (17 December 2004); Girls Right to Education, UN Doc E/CN.4/2006/45 (8 February 2006); The Right to Education of Persons with Disabilities, UN Doc A/HRC/4/29 (19 February 2007); Mission to Germany, UN Doc A/HRC/4/29/Add.3 (9 March 2007); Right to Education in Emergency Situations, UN Doc A/HRC/8/10 (20 May 2008).

148 *Moko* at para 1.

149 Jayasankar and Jawale 2017 *IJL* 210.

150 CRC Article 1.

In terms of the UNESCO's International Standard Classification of Education: ISCED 2011, primary education means the first six years of schooling, and secondary education the 7th to the 12th years of schooling.[151] Secondary education is divided into lower and upper secondary education.[152] Lower secondary education broadly covers the first three years of secondary education up to the age of 15, and upper secondary education the subsequent three years of secondary education from 15 to 18 years of age.[153] In terms of the UNESCO's International Standard Classification of Education: ISCED 2011, primary education is designed to provide students with fundamental skills in reading, writing and mathematics.[154] Therefore, primary education is designed for the purposes of "establishing a solid foundation for learning and understanding core areas of knowledge, personal and social development, in preparation for secondary education."[155] Lower secondary education on the other hand primarily focusses on laying the foundation for lifelong learning and human development.[156] This foundation is laid to enable education systems to expand further educational opportunities. Ultimately, lower secondary education lays the foundation for upper secondary education. Upper secondary education in turn is designed to complete secondary education in preparation for tertiary education or to provide skills relevant to both employment and tertiary education.[157] Evidently, the different levels of education are interfaced, each level depending on the preceding for effectiveness. Put differently, the different levels/stages of education go hand in hand.

Importantly, "primary" and "basic" education are not one and the same thing.[158] At the international level, only the African Charter on the Rights and Welfare of the Child (ACRWC) of 1990 uses the term "basic" education in Article 11(3)(a). Here it is used as the equivalent of primary education. Ordinarily, however, basic education as used in the Jomtien Declaration on Education for All of 1990, or as used in section 29 of the South African Constitution, refers rather to certain educational content and

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151 UNESCO's International Standard of Classification of Education: ISCED 2011 (2012) paras 120-123.
152 UNESCO's International Standard Classification of Education: ISCED 2011 (2012) paras 139-165.
153 UNESCO's International Standard Classification of Education: ISCED 2011 (2012) paras 162-165.
154 UNESCO's International Standard Classification of Education: ISCED 2011 (2012) para 120.
155 UNESCO's International Standard Classification of Education: ISCED 2011 (2012) para 120.
156 UNESCO's International Standard Classification of Education: ISCED 2011 (2012) para 139.
157 UNESCO's International Standard Classification of Education: ISCED 2011 (2012) para 162.
158 General Comment No. 13 para 9.

skills. The term "basic" education has been explained as follows in the South African context:

> Basic education is that whole range of educational activities in different settings that aim to meet basic learning needs. It comprises both formal schooling (primary and sometimes lower secondary) and a variety of non-formal, informal, public and private educational activities offered to meet the defined basic learning needs of people of all ages.[159]

The objective of basic education is the basic learning needs of children and adults lacking basic education.[160]

It is since the adoption of the UDHR that in international law the elements "free" and "compulsory" have been attributed to the right to primary education.[161] Subsequent international law instruments acknowledge that primary education shall be compulsory and free.[162] These features are usually uniquely mentioned in relation to primary education. Beiter argues, however, that a holistic reading of Article 13(2)(a) and (b) of the ICESCR in the light of other relevant international legal norms (particularly those of the International Labour Organisation's (ILO) Convention Concerning the Minimum Age for Admission to Employment of 1973, requiring in Article 2(3) that the minimum age of employment be no less than 15 years) also requires lower secondary education (the seventh to ninth year of schooling, that is, schooling up to the age of 15 years) to be compulsory and available free to all without extensive delay.[163] The highest standard in respect of free education is that set out in the Council of Europe's Revised European Social Charter (1966), obliging state parties to provide "free primary and secondary education" (Article 17(2)).

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159 Nelson Mandela Foundation *Emerging Voices: A Report on Education in South African Rural Communities* 141.

160 While primary education is not synonymous with basic education, there is a close connection between the two in that primary education is an important component of basic education.

161 Arendse 2011 *PELJ* 98.

162 The right to compulsory and free primary education is recognised in the Universal Declaration of Human Rights (UDHR) (1948) in Article 26(1), UNESCO Convention against Discrimination in Education (CDE) (1960) in Article 4(a), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) in Articles 13(2)(a) and 14 (Article 14 providing for plans of action and a time-frame for the implementation of primary education), the Convention on the Rights of the Child (CRC) (1989) in Article 28(1)(a), the Convention on the Rights and Welfare of the Child (ARCRWC) (1990) in Article 11(3)(a), the Additional Protocol to the American Convention on Human Rights in the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) in Article 13(3)(a), and the Revised European Social Charter (1996) in Article 17 (only free education).

163 Beiter *The Protection of the Right to Education by International Law* 303, 309, 519.

It is important to determine the meaning of "free". When is primary or secondary education free? The CESCR provides an answer to this question in its General Comment No. 11. This focusses on the national plans of action for compulsory and free primary education required of those states parties that have not yet implemented compulsory and free primary education (Article 14 of the ICESCR). Although the Committee's answer here relates specifically to primary education here, the relevant provision of General Comment No. 11 should be quoted in full, seeing that the Committee, in its General Comment No. 13 on the right to education, goes on to state that the definition of "free" in General Comment No 11 is applicable to primary, secondary, and higher education respectively.[164] Hence, "free of charge" means:

> The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis.[165]

The international legal texts do not in a manner comparable to primary education state that secondary education must be "free" or "compulsory". Very often, the requirement is that secondary education must be "generally available" and "accessible to all."[166] Some texts refer to progressively free secondary education.[167]

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164 General Comment No. 13 paras 10, 14, 20.

165 General Comment No. 11, Plans of action for primary education (Article 14 of the ICESCR) UN Doc E/C.12/1999/4 (10 May 1999) para 7 (General Comment No. 11).

166 Similar requirements are found in the Universal Declaration of Human Rights (UDHR) (1948) in Article 26(1), the UNESCO Convention against Discrimination in Education (CDE) (1960) in Article 4(a), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) in Article 13(2)(b), the Convention on the Rights of the Child (CRC) (1989) in Article 28(1)(b), the Convention on the Rights of Persons with Disabilities (2006) in Article 24(2)(a), the African Charter on the Rights and Welfare of the Child (ACRWC) (1990) in Article 11(3)(b), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) in Article 13(3)(b).

167 (Indirectly) the Universal Declaration of Human Rights (UDHR) (1948) in Article 26(1), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) in Article 13(2)(b), the Convention on the Rights of the Child (CRC) (1989) in Article 28(1)(b), the African Charter on the Rights and Welfare of the Child (ACRWC) (1990) in Article 11(3)(b), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) in Article 13(3)(b).

Hence, Article 13(2)(a) of the ICESCR requires that "primary education shall be compulsory and available free to all" and Article 13(2)(b) that "secondary education …shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education."[168] Therefore, applying the 4-A scheme developed in relation to the right to education as referred to above, primary and secondary education thus cover not only the elements of "availability" and "accessibility", however, also those of "acceptability" and "adaptability".[169]

2.4.2 Availability

The "availability" of education is an important feature in the realisation of the right to primary and secondary education.[170] This entails proper infrastructure and facilities with adequate books and materials for learners.[171] Evidently, having a building that is not conducive for learning purposes would not meet the standard of availability. Buildings of learning institutions must meet both "safety and sanitation standards".[172] This means that the buildings should have clean and running drinking water, electricity and other necessities required for the purposes of teaching. Availability includes the availability of qualified staff at each school. Primary and secondary education must be generally available. This means that there must be intake capacity in primary and secondary education for all persons in the age group of children of primary and secondary education age.[173]

2.4.3 Accessibility

It is imperative that learning institutions be accessible to all potential learners on a non-discriminatory basis. Learning institutions should be equally accessible

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168 Article 13(2)(b) of the ICESCR.

169 Reports to the then UN Commission on Human Rights of the Special Rapporteur on the Right to Education, Tomaševski, Preliminary Report, UN Doc E/CN.4/1999/49 (13 January 1999), para 50; Progress report, UN Doc E/CN.4/2000/5 (1 February 2000), paras 32-65; Annual Report, UN Doc E/CN.4/2001/52 (9 January 2001); Annual Report, UN Doc E/CN.4/2002/60 (7 January 2002), paras 22-45; and Tomaševski, *Human Rights Obligations in Education*.

170 General Comment No. 13 para 6.

171 Jayasankar and Jawale 2017 *IJL* 210.

172 Jayasankar and Jawale 2017 *IJL* 210.

173 Beiter *The Protection of the Right to Education by International Law* 96-97.

irrespective of gender, race, religion, economic status, disability, etc.[174] This feature imposes an obligation on state parties to ensure the inclusion of "marginalised groups including children of refugees, the homeless or those with disabilities."[175] The obligation of inclusion exists also at the level of higher education, although its degree of urgency of realisation will not be the same as for primary and secondary education. As the CESCR points out in its General Comment No. 13, "States parties are obliged to prioritize the introduction of compulsory, free primary education."[176]

According to Jayasankar and Jawale, accessibility:

> includes ensuring that proper laws are in place against any child labour or exploitation to prevent children from obtaining primary or secondary education. Schools must be within a reasonable distance for children within the community, otherwise transportation should be provided to students, particularly those that might live in rural areas, to ensure ways to school are safe and convenient.[177]

Accessibility in relation to primary and secondary education requires that education should be affordable to all, "with textbooks, supplies and uniforms provided to students at no additional costs."[178] Primary and secondary education must be accessible to all. This means that every child must not only be nominally catered for in the sense that schools could accommodate such a child, but there must also not be discrimination, geographical or economic reasons, or a lack of equity obstructing access to education.[179]

2.4.4 Acceptability

The education provided to learners should be acceptable both to parents and to children.[180] This means that the education should be non-discriminatory in nature, culturally appropriate to all learners, and relevant to their learning needs.[181] Acceptability attempts, for example, to prevent a situation where learners are

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174 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387. See also General Comment No. 13 para 6.
175 Beiter *The Protection of the Right to Education by International Law* 96-97.
176 General Comment No. 13 para 51.
177 Jayasankar and Jawale 2017 *IJL* 210.
178 Jayasankar and Jawale 2017 *IJL* 210.
179 Beiter *The Protection of the Right to Education by International Law* 96-97.
180 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387. See also Preliminary Report of the Special Rapporteur on the Right to Education, UN Doc. E/CN.4/1999/49 para 62.
181 Jayasankar and Jawale 2017 *IJL* 210.

expected to conform to certain religious or ideological views. Learners should be able to form whatever view they wish to form, based on learning material that is non-discriminatory, relevant and culturally appropriate. The primary objective of acceptability at primary and secondary education level is to ensure that educational material reflects a wide range of ideas and beliefs.[182] Any conduct that might potentially be incompatible with the acceptability of primary or secondary education, for instance corporal punishment, must be addressed expeditiously.

2.4.5 Adaptability

Change is the only variable that is consistent, and that rule applies to education as well. The methods of teaching of today are different from those of a century ago. Educational methods have to acknowledge and embrace change which, means that educational programmes should not be inflexible.[183] Educational programmes should be able to adjust according to "societal changes and the needs of the community". The world is ever changing, and that should be acknowledged by educational programmes.

2.5 Higher education under international law and the 4-A scheme

2.5.1 Meaning of higher education; state obligations, justiciability; "free" education

Like the rights to primary and secondary education, the right to higher education is protected by international human rights law treaties.[184] Universities play a crucial role in the post-schooling system. Universities are the apex institutions of education, training and innovation. The important role played by universities in any society is beneficial to both the private and the public sectors.[185]

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182 Jayasankar and Jawale 2017 *IJL* 210.

183 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387. See also General Comment No. 13 para 6(d).

184 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 384. The human rights treaties which protect the right to higher education include the UNESCO Convention against Discrimination in Education (CDE) (1960) in Article 4(a), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) in Article 13(2)(c), the Convention on the Rights of the Child (CRC) (1989) in Article 28(1)(c), the African Charter on the Rights and Welfare of the Child (ACRWC) (1990) in Article 11(3)(c), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) in Article 13(3)(c).

185 Higher education is beneficial to the public sector in that education in general is an investment in a country's people. "It is through education that other rights are exercised effectively by the citizenry of a

The UDHR, in Article 26(1), states that "[e]ducation shall be free, at least in the elementary and fundamental stages … [and that] higher education shall be equally accessible to all on the basis of merit."[186] The UDHR is not a binding legal instrument. Article 13(2)(c) of the ICESCR is binding on states parties to the ICESCR. It requires of states parties that higher education "shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education."[187]

The difficulty with the term "higher education" is that on the international law level there is no guidance as to what is meant by "higher education". In other words, the human rights treaties dealing with "higher education" do not explicitly define the term. But, the term "higher education" has been readily accepted and understood to include "education provided by post-secondary institutions such as universities, polytechnics, colleges, and other providers of higher education."[188] In terms of UNESCO's International Standard Classification of Education: ISCED 2011, higher – or tertiary – education means the provision of learning activities in specialised fields of education.[189] Its primary aim: is learning at a high level of complexity and specialisation.[190]

Article 13(2)(c) of the ICESCR does not readily provide for a justiciable right to free higher education, in the sense that one could institute a claim for higher education to be provided free of charge where its provision is not (yet) free. Article 13(2)(c) formulates an obligation on states parties to progressively introduce free higher education. The obligation rests on the legislature and the executive. Article 13(2)(c) acknowledges that immediate and full realisation of free higher education will often not be possible.[191] It follows that a litigant arguing in terms of article 13(2)(c) for the immediate provision of free higher education would likely not be successful. This

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country. Education has intrinsic and instrumental value in creating societies that are better able to respond to the challenges of the 21st century." See Report of the Commission of Enquiry into Higher Education and Training para 59.

186 Article 26(1) of the UDHR.

187 Article 13(2)(c).

188 Taylor and Miroiu, *Policy-Making, Strategic Planning, and Management of Higher Education* 19. See also Ssenyonjo *Economic, Social and Cultural Rights in International Law* 384.

189 UNESCO's International Standard Classification of Education: ISCED 2011 para 200.

190 UNESCO's International Standard Classification of Education: ISCED 2011 para 200.

191 General Comment No. 3: The nature of States parties' obligations UN Doc E/1991/23 para 9 (General Comment No. 3).

does not mean, however, that free higher education, to the extent that this has already been implemented, cannot be judicially enforced. Similarly, deliberately retrogressive measures in the form of introducing or increasing fees in higher education may be judicially contested as they entail steps away from a standard that has already been achieved.[192] Such measures could prevail only if the government could justify them under Article 2(1) or 4 of the Covenant.[193]

Article 13(2)(c) requires the introduction of free higher education on a progressive basis. It is this article which gives strength to the argument for progressively free higher education. It is to this norm that scholars and lawyers turn, to locate the source of a legal argument for progressively free higher education. Importantly, Article 13(2)(c) must be interpreted with Articles 2(1) and 4 of the Covenant in mind as well as the relevant provisions of the Vienna Convention, namely Articles 26, 31 and 32. Article 26 of the Vienna Convention requires treaties such as the Covenant to be performed in good faith.[194] Articles 31 and 32 require treaties to be interpreted in good faith and in the light of treaties' words, context, object and purpose. The preparatory works are also to play an important role in the interpretative exercise of a treaty. Naturally, all of this applies to Article 13(2)(c) as well.

The CESCR, which is responsible for interpreting the Covenant is of the view that the right to higher education includes the elements of availability, accessibility, acceptability and adaptability, which are common to education in all its forms and on all levels.[195] These elements are the corner stone of the right to higher education. What distinguishes higher education from primary and secondary education is that higher education is not to be "accessible to all", but only "equally accessible to all, on the basis of capacity."[196] The "capacity" referred to here is the individual's intellectual capacity to follow and benefit from higher education. In other words, whereas all individuals qualify for primary and secondary education, not all qualify automatically for the right to higher education – only those "with capacity".[197].

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192 General Comment No. 3 para 9.
193 Beiter *The Protection of the Right to Education by International Law* 398-401.
194 Article 31 of the Vienna Convention on the Law of Treaties.
195 General Comment No. 3 para 17.
196 General Comment No. 3 para 17.
197 General Comment No. 3 para 17.

However, all those with the necessary capacity must have equal opportunities to pursue higher education.[198]

Today the right to higher education is protected in a number of international legal instruments.[199] While many require its "accessibility" to be enhanced, the ICESCR and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1998), in Article 13(2)(c) (for instance) expressly require the introduction of free higher education. Also, here the question arises as to what "free" means. In this regard, reference should be made to the discussion above,[200] which explains that the CESCR's definition of "free of charge" in respect of primary education also applies to higher education. Following the logic of the Committee's statement in General Comment No. 11,[201] free higher education entails an absence of all fees levied for studies by the government, a local authority, or the university. It covers all direct charges, payment of which is made a requirement for the enjoyment of any benefit in higher education. Indirect charges would include the cost of textbooks or transport, for example. However, what about living costs, which are a major obstacle to students being able to enrol for higher education. Strictly speaking, they are not covered by the introduction of free higher education, yet, they need to be addressed under the obligation to make higher education equally accessible on the basis of capacity. This is also where a fellowship system will have to play a significant role.

The right to higher education does not operate in isolation and there are various provisions of the Covenant which need to be taken into account when considering the right. These provisions are Articles 2(1), 4 and 13(2)(e), in addition to the right

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198 Beiter *The Protection of the Right to Education by International Law* 404. See also General Comment No. 1 para 3; Muterahejuru, UN Doc. E/C.12/1987/SR.5 para 4; Texier, UN Doc. E/C.12/1988/SR.14 para 40; Alston, UN Doc. E/C.12/1988/SR.17, 8 para 48 and Rattay, UN Doc. E/C.12/1990/SR.31 para 13, as cited by Beiter.

199 These include the following: the Universal Declaration of Human Rights (UDHR) (1948) in Article26(1), the UNESCO Convention against Discrimination in Education (CDE) (1960) in Article 4(a), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) in Article 13(2)(c), the Convention on the Rights of the Child (CRC) (1989) in Article 28(1)(c), the Convention on the Rights of Persons with Disabilities (2006) in Article 24(5), the African Charter on the Rights and Welfare of the Child (ACRWC) (1990) in Article 11(3)(c), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) in Article 13(3)(c).

200 See above para 2.5.1.

201 General Comment No. 11 para. 7.

to institutional autonomy of higher education institutions implicit in Article 13 of the ICESCR.[202]

Important to appreciate at the outset is the fact that higher education in terms of Article 13(2)(c), unlike primary and secondary education, is a right to be exercised based on capacity.

This serves as an internal qualification of the right, and the difference in wording between Article 13(2)(b) and (c) attests to this.[203] Because the realisation of primary education should be prioritised, followed by that of secondary education, the Covenant does not state that higher education must be "generally available", as it does for secondary education. In fact, the Covenant does not expressly refer to the element of availability in Article 13(2)(c) at all. This does not mean that availability may legitimately be more restricted, in that places in universities are limited to those that have the necessary capacity to follow higher education.[204] The strong reliance on state resources should not be viewed as a disability to the realisation of the right. Because states parties have a continuing obligation to progressively realise the rights codified in the Covenant, reliance on a lack of resources does not exonerate a state party from its obligations in terms of the Covenant.

Though not as prescriptive as Article 13(2)(a), Article 13(2)(c) is prescriptive in its own right. That is evident from a plain reading of the provision which regards/treats the progressive introduction of free education (higher education) as part and parcel of the right to higher education. The progressive introduction of free education in terms of Article 13(2)(c) is indicative of a prescription by the provision rather than an option to consider.[205] This argument is informed by the use of the words "in particular". These words indicate that, while states parties may choose the means to enhance the accessibility of higher education, one of the means, the progressive introduction of free education, enjoys a special status by being singled out as a means that must be employed. This interpretation honestly favours the concrete accessibility of higher education by students with financial constraints. Conversely,

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202 General Comment No. 13 para 38.
203 General Comment No. 13 para 19.
204 Beiter *The Protection of the Right to Education by International Law* 97.
205 Beiter *The Protection of the Right to Education by International Law* 117.

an interpretation which renders “progressive introduction of free education” as an option would most likely achieve the opposite result.

An argument that could be raised is that Article 13(2)(c) should be interpreted in a fashion which is harmonious with its envisaged goal, namely, higher education that is equally accessible. This would leave it to states parties to choose which measures they use to achieve that goal. In this author’s view, however, the specific way Article 13(2)(c) refers to the progressive introduction of free higher education accords with the notion that this is not an option but a prescription of the provision. Ultimately, higher education should be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education. Realising the right to higher education is an enormous task. Hence the specific addition of the state obligation to provide for a fellowship system in Article 13(2) (e). This is a recognition of the reality that free higher education might be too burdensome for a state party to realise within a brief period of time. For as long higher education is not free, bursaries and loans are to be made available to students in need.

The 4-Ascheme is as applicable to higher education as it is to primary and secondary education. However, the exact nature and scope of the state's obligations differ to a large extent because of the different nature of the rights at issue.

2.5.2 Availability

The first essential feature of higher education is that of availability. Availability relates to the availability of functioning educational institutions within a state’s jurisdiction.[206] The emphasis in this regard is on “functioning” institutions, meaning that a state cannot rely on the mere fact that there is a certain quantity of institutions when the majority of these are dysfunctional.[207] According to the Committee:

> What they require to function depends upon numerous factors, including the developmental context within which they operate, for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities

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206 General Comment No. 13 paras 6(a) and 17.

207 For guidance on the interpretation of availability in general, see also General Comment No. 4, The right to adequate housing, UN Doc. E/1992/23, 13 December 1991, para 8(b); General Comment No. 15, The right to water, UN Doc. E/C.12/2002/11, 20 January 2003, para 12.

> for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on, while some will also require facilities such as a library, computer facilities and information technology;[208]

There are no universal criteria according to which availability can be measured. However, what is important is the fact that the educational institutions should be available according to the standard of development of each state.[209] Hence, the Committee would set a higher standard of availability for highly developed states than for developing states experiencing a lack of financial and other resource. A state's economic development and its available resources will play a central role in the determination of what constitutes adequate availability. It would be inequitable to use the same criteria for both developed and developing countries.

2.5.3 Accessibility

Whilst it is important to have educational institutions available for those who qualify, it is as important that the educational institutions are accessible to them.[210] The Cambridge online dictionary defines accessibility as being "able to be reached."[211] In the context of higher education it would mean that all those who qualify based on their capacity should have a right to use the available educational institutions. The requirement of the capacity of the student is forward-looking and stresses the student's future potential rather than past achievements.[212] Educational institutions should be accessible to all those who qualify without discrimination.[213] It is said that accessibility has three overlapping dimensions, namely, non-discrimination, physical accessibility and economic accessibility.[214] All three dimensions of accessibility represent a different element of accessibility.

With regard to *non-discrimination*, higher education should be accessible to all who qualify for it, especially the most vulnerable in society, without discrimination on any

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208 General Comment No. 13 para 6.
209 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387.
210 General Comment No. 13 para 6(b). See also Ssenyonjo *Economic, Social and Cultural Rights* 387. For a general interpretation of accessibility, see also General Comment No. 4 para 8(c).
211 See https://dictionary.cambridge.org/dictionary/english/accessibility.
212 Beiter *The Protection of the Right to Education by International Law* 97.
213 General Comment No. 13 paras 6(a) and 17.
214 General Comment No. 13 para 6.

of the prohibited grounds.[215] The (negative) prohibition against discrimination in terms of Article 2(2) of the Covenant is neither subject to progressive realisation nor to the availability of resources. This means that it applies fully and immediately to all aspects of education, including higher education.[216] Positive measures to achieve substantive (that is, not mere formal) equality in access to higher education, however, are subject to the ordinary standard of progressiveness. Importantly, special temporary measures introduced to address inequalities between men and women and broadly speaking to advance equal access to disadvantaged groups, do not violate the right to non-discrimination in higher education, as long as such measures do not lead to the revival or maintenance of unequal standards for different groups.[217] Essentially, the temporary measures should not go beyond their intended objectives. Once the objectives have been reached the implementation thereof should cease.[218]

Sharp disparities in spending policies which inevitably result in different qualities of education for some living in certain *geographic locations* may constitute discrimination under the Covenant.[219] With regard to physical accessibility the Committee interprets this to mean that education has to be within a safe physical reach.[220] This means that it must be within reach either by attendance at a reasonably convenient geographical location or via access to a distance learning programme e.g. through technology. It follows that locating educational institutions at an inconvenient geographical location unreasonably out of reach of those who are qualified to make a claim to the right to higher education would not amount to facilitating access to higher education but instead to creating a stumbling block to access to higher education.

Lastly, economic accessibility forms part and parcel of the broader context of the accessibility of higher education. In the context of higher education economic accessibility means that higher education has to be accessible to all based on

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215 The prohibited grounds of discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 2(2) of the Covenant.
216 General Comment No. 13 para 31.
217 General Comment No. 13 para 32.
218 General Comment No. 13 para 32.
219 General Comment No. 13 para 35.
220 General Comment No. 13 para 6.

capacity, that it should not be out of reach for financial reasons. This dimension of accessibility goes to the heart of tuition fees, which in some countries are unaffordable for some students who do qualify for higher education based on capacity.[221] Economic accessibility addresses the issue of tuition fees which students protested against in South Africa in 2015. Student movements argued strongly that tuition fees are too high, and, as a result, create a barrier to access to higher education for some deserving students.

Unlike primary education, which in terms of the Covenant should be free to all, it has been accepted that higher education generally cannot be free for all immediately — hence the inclusion of the obligation pertaining to progressive realisation. Not all those who qualify for higher education can necessarily afford higher education. Then it should also be remembered that tuition fees, in many cases, are more than mainly reflective of the actual costs of higher education. It has been stated:

> Tuition fees are not just a matter of the amount of money charged for teaching. They are one of the important key concepts that have a defining influence upon the qualitative and quantitative development of the higher education system. The way in which tuition fees are set and paid is symbolic of a range of attitudes towards higher education. Fees may be different for different programmes of study, or for different institutions, indicating differences in status, or in public utility, of various routes through the higher education system. Tuition fees may be an approximation to the actual costs of tuition, or be no more than a symbolic contribution.[222]

What is worrisome about the determination of tuition fees is the fact that there seems to be little consideration of the financial position of the users of higher education, namely, students who qualify for higher education on the basis of their capacity.

In reading economic accessibility as determining tuition fees, the financial position of users should play a central part, otherwise such tuition fees are divorced from the real world challenges faced by students from poor backgrounds, resulting in a situation where the users of higher education are barred from accessing higher education based on financial constraints. The argument is essentially that the

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221 Some countries in which tuition fees are "astronomically high" are Britain, Chile, Estonia, Hungary, Japan, Lithuania, Malaysia, Ukraine, Romania, Singapore and the United States of America. See also Brinded 2015 http://uk.businessinsider.com/expert-market-11-countries-where-parents-spend-the-most-money-on-university-tuition-fees-2015-10?IR=T/1.

222 Turner, Baba and Shimada 2000 *JFHE* 397.

determining factors of tuition fees structures seem to give inappropriate consideration to the realities of some of the users of higher education.

Economic accessibility means: the progressive introduction of free higher education and, for as long as it is not free, the provision of adequate student financing. High tuition fees seem to be in direct contrast with the provision of the progressive introduction of free education. In accordance with economic accessibility, higher education must be affordable to all who qualify for it, whether by means of a government grant or personal finances.

2.5.4 Acceptability

Acceptability deals with the form and substance of education, which includes curricula and methods of teaching.[223]. The form and substance of education should be relevant, culturally appropriate and of good quality.[224] Relevance means that higher education must be directed at meeting students' needs. Higher education should *inter alia* prepare students for the labour market and enable them to find work and earn a livelihood.[225] Cultural appropriateness pertains, for example, to the availability of higher education in relevant local languages. Quality includes aspects such as that teaching and learning should be based on the latest scholarship of teaching and learning. Importantly, the form and substance of education should adhere to the educational objectives of Article 13(1) and such minimum educational standards as may be approved by the state in terms of Article 13(3) and (4). Regarding educational objectives, higher education should thus be directed at furthering the full development of personality. Higher education should, in terms of its content and overall environment, be "human rights" education. Regarding minimum standards, private universities must comply with minimum regulatory standards prescribed by the government. Hence, curricula must meet certain quality standards before they lead to recognised degrees.

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223 General Comment No. 13 para 6.
224 General Comment No. 13 para 6(c).
225 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387.

2.5.5 Adaptability

Education must also be adaptable. This means that education has to be flexible in order to be able to adapt to the needs of changing societies and communities.[226] It must be able to "respond to the needs of students within their diverse social and cultural settings."[227] Possible examples of adaptability in higher education might be adaption to the needs of the knowledge society, or adaption to the needs of disadvantaged students (a fellowship system).

2.5.6 The best interest of the student

According to the CESCR, the standard set for the consideration of the interrelated and essential features of education is "the best interest of the student".[228] It is not easy to comprehend the full extent of what constitutes "the best interest of the student" when consideration is given to high tuition fees. In other words, the quantification of tuition fees, especially at higher education level, should reflect the best interest of students. The Committee unfortunately does not define the term best interest of the student, but logic dictates that it is something that is not disadvantageous to students. In other words, the best interest of students is that students with capacity should be able to satisfy their learning needs, not to be prevented from doing so merely because they are not able to afford university. An increase in fees has the effect of preventing students from satisfying their learning needs. From this perspective, an increase in fees is not in the best interest of the students.

2.6 Interpreting Article 13(2)(c) on higher education in the light of Article 31 of the Vienna Convention on the Law of Treaties: Ordinary meaning, context, and purpose and object

Determining the correct meaning of a treaty provision is an exercise which requires attention to various factors. These factors are to be found in the Vienna Convention on the Law of Treaties, which lays down the rules for the interpretation of treaty

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226 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 387.
227 General Comment No. 13 para 6(c).
228 General Comment No. 13 para 7.

provisions. Firstly, treaties are binding on states party to them, and they must be performed by the states parties in good faith.[229] Good faith requires states parties to a treaty to deal with one another in an honest and fair manner. *Secondly*, Article 31, the most important provision in respect of treaty interpretation, stipulates that a treaty should be interpreted with the following elements of interpretation in mind: good faith, the ordinary meaning, the context, and purpose and the object of the treaty. Thirdly, supplementary means (notably the preparatory works) may be used to confirm the meaning resulting from the application of Article 31.[230] In what follows, Article 13(2)(c) will be interpreted in the light of the ordinary meaning of the wording of the provision, the context of Article 13(2)(c), and the purpose and object of that provision. The preparatory works will not really be objects of focus. Human rights treaties are very dynamic instruments and need to keep pace with more current interpretations.

2.6.1 Ordinary meaning: Interpreting the phrase "by every appropriate means" in Article 13(2)(c)

Article 31 of the Vienna Convention requires that, when interpreting treaty provisions, regard must be given to the ordinary meaning of the words.[231]. The ordinary meaning of the term "every appropriate means" used in Article 13(2)(c) is not difficult to determine — it means exactly what is says, namely, that all means which are appropriate must be taken. The qualifying adjective in the phrase is "appropriate". In terms of Article 13(2)(c), the state is obliged to use all appropriate means in respect of realising the accessibility of higher education. Evidently, inappropriate means may not be used. Inappropriate means would be means that do not promote accessibility, such as, retrogressive measures.

Appropriate means include legislative and administrative measures, and judicial remedies, etc.[232] The CESCR in its General Comment No. 3, also emphasises the importance of giving the phrase "every appropriate means", as used in Article 2(1)

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229 Article 26 of the Vienna Convention.
230 Article 33 of the Vienna Convention.
231 Article 31 of the Vienna Convention.
232 General Comment No. 3 para 5.

of the Covenant, its full and natural meaning.[233] Importantly, although generally the state is left to decide on the appropriate means to be used, Article 13(2)(c) mentions a particular means which must to be used by a state in relation to the accessibility of higher education, namely, the progressive introduction of free education. Article 13(2)(c) is *sui generis* in this regard in that it prescribes one of the necessary and inextricable links between accessibility and progressively free higher education.

In the context of the right to access to higher education it is clear that "every appropriate means" means all those means which contribute towards the accessibility of higher education. These means include the progressive introduction of free higher education, which is prescribed, and further specifically financial assistance by way of bursaries or loans (a fellowship system). The appropriateness of a means is inextricably linked to the right at hand. For instance, what is an appropriate measure for the right to secondary education is not necessarily and appropriate measure for the right of access to higher education.

2.6.2 Ordinary meaning: Interpreting the words "in particular" in Article 13(2)(c)

The words "in particular" should be given their everyday meaning. The words "in particular" are synonymous with the word "especially", which is often used to show that something applies to "this and not any other" person or thing.[234]

It is also important to realise the link between the phrase "every appropriate means" and the words "in particular". The former identifies the obligations of the state and the latter directs which measure applies more than any other for the purposes of access to higher education. Among the appropriate measures that *may* be chosen, the words "in particular" introduce the measure that must be chosen to enhance the accessibility of higher education, namely, the progressive introduction of free education. This interpretation is also consistent with the purpose and object of Article 13(2)(c), which is to enhance equal access to higher education. The words "in particular" were intentionally used to indicate that of all the appropriate measures/steps the state could take, the "progressive introduction of free education"

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233 General Comment No. 3 para 4.

234 See https://dictionary.cambridge.org/dictionary/english/particular?q=in+particular.

is the measure the state must take in its full realisation of the right to access to higher education.

Essentially, the words “in particular” in their ordinary everyday meaning are prescriptive. A contrary interpretation suggesting that the “progressive introduction of free education” is but one of the measures a state may take is inconsistent with the ordinary meaning of the words “in particular”.

2.6.3 Context: Comparing Article 13(2)(c) on higher education with Article 13(2)(b) on secondary education

Article 13(2)(b) on secondary education uses the same words as Article 13(2)(c) on higher education. It also requires accessibility to be enhanced “by every appropriate means, and in particular by the progressive introduction of free education”. Most countries interpret this to mean that secondary education must be made progressively free. Ultimately, in many or most countries, secondary education is free. It may also be noted that the (Revised) European Social Charter, in Article 17(2) creates a right to *free* primary *and secondary* education. Consistency would thus dictate that Article 13(2)(c) be interpreted in the same way as Article 13(2)(b). In other words, higher education should also be made progressively free.

2.6.4 Context: The relationship between Article 13(2)(c) on higher education and Article 13(2)(e) on (inter alia) an adequate fellowship system

Under Article 13(2)(e) of the ICESCR, the right to education requires of states parties that:

> [t]he development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

The establishment of an adequate fellowship system plays a central role in the achievement of access to education. However, Article 13(2)(e) does not expressly provide a definition for “fellowship”. According to Beiter,[235] the term “fellowship” must be defined by reference to its meaning in national education systems. Accordingly,

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235 Beiter *The Protection of the Right to Education by International Law* 532.

fellowship is financial assistance granted to individual students with the intention of helping to cover the direct and indirect costs of education.[236] Importantly, there is no prescribed form for the financial assistance. It can be in the form of a bursary (which may be wholly or partially refundable, or non-refundable) and/or a low-interest loan.[237] Evidently, the establishment of an adequate fellowship system is squarely directed at enhancing the accessibility of education by eradicating all forms of discrimination against vulnerable groups in society.[238] A fellowship system is, especially, important for secondary and higher education, as these two stages/levels of education must be made accessible "by every appropriate means". It could be argued that the establishment of a fellowship system constitutes an "appropriate means".[239] Beiter argues that the requirements of (progressively) free education and a fellowship system are complementary. According to the author, as long as secondary and higher education are not free, "the existence of a fellowship system constitutes an 'appropriate means'."[240]

2.6.5 The purpose and object of Article 13(2)(c): Conclusions for "free" higher education

Often legal documents such as legislation, international instruments and even contracts contain a section dealing with the purpose and object of that particular legal document. In the event that such a legal document does not have a section dealing with the purpose and object of the document, like the Covenant in this regard, the Preamble to such a document is often a good guide in determining the purpose and object as the Preamble often sets out what the legal document seeks to achieve or its primary objective. However, the application of the term "purpose and object" has presented scholars and courts with some challenges in respect of its precise definition and/or meaning:

> [O]bject and purpose is a term of art without a workable definition. Broadly speaking, it refers to a treaty's essential goals, as if a treaty's text could be boiled down to a concentrated broth—the essence of a treaty. Beyond this general idea, scholars have failed

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236 Beiter *The Protection of the Right to Education by International Law* 532.
237 Beiter *The Protection of the Right to Education by International Law* 532.
238 General Comment No. 13 para 26.
239 Beiter *The Protection of the Right to Education by International Law* 533.
240 Beiter *The Protection of the Right to Education by International Law* 533.

> to create a definition with adequate clarity and detail to serve lawyers who must apply the term in practice.[241] (footnotes omitted)

Evidently, defining the term purpose and object presents its own challenges, which this thesis will not attempt to resolve. For the purposes of this thesis, the term purpose and object will be accepted to be a "unitary concept referring to the goals that the drafters of the treaty hoped to achieve."[242] To this end, it is important to have regard to the Preamble to the ICESCR. From the Preamble to the ICESCR one gets the impression that the primary purpose and object of the ICESCR is to create an international platform and/or conditions whereby every person is effectively enjoys his or her economic, social and cultural rights (as well as his or her civil and political rights).

This objective should be borne in mind whenever a provision of the ICESCR is interpreted. Essentially, the ICESCR advocates an enjoyment of economic, social and cultural rights that is real (rather than nominal) in the lives of actual individual persons (rather than statistical sectors of the population). This means that the treaty is in favour of an interpretation of its provisions which is aligned to its object of the enjoyment of economic, social and cultural rights as human rights.

For instance, regarding Article 13(2)(a) on the right to primary education, an interpretation which guarantees free and compulsory primary education is more aligned with the purpose and object of the ICESCR than an interpretation which renders the elements of "free" and "compulsory" optional. A similar argument can be made for the right to higher education in terms of Article 13(2)(c). The primary objective of this provision is twofold: firstly, to make higher education more accessible to all those who qualify for it – that is, to gradually *remove impediments to access*, and, secondly, to make it equally accessible – that is, to ensure that among those who qualify, no discrimination in access occurs. The latter implies that discrimination may also not occur on the ground of economic status. As impediments to access are removed, conditions of access must at all times treat all applicants equally. Nobody may be in a less beneficial situation at any point in time

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241 Jonas and Saunders 2010 *VJTL* 567.

242 Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the1969 Vienna Convention on the Law of Treaties* 7.

– even if not all impediments to access have yet been removed – just because of his or her financial situation. From the perspective of equal access, the question is whether this can be achieved only through (progressively) free education or whether an adequate fellowship system could not achieve the same aim. If the former is the case, then the installation of (progressively) free education would have to be regarded as compulsory. If, however, the latter is the case, then, from the point of view of Article 13(2)(c)'s purpose and object, (progressively) free education could be regarded as an option, that is, as a conceivable, but not necessary measure states parties have to take. It is submitted that it is not easy to answer this question. Either view could perhaps be held. There is some evidence, however, to support the view that financial schemes, inevitably involving forms of student debt, have a disproportionately high deterrent effect on those from low-income families.[243] Incurring debt discourages those from low-income families to register for university studies. It seldom affects the decision of those from middle or high-income families to register for studies.[244] Taking into account these psychological factors, therefore, (progressively) free education should rather be understood as a mandatory solution.

2.7 The right to access to higher education under Article 13(2)(c) and state obligations in terms of Article 2(1) of the ICESCR

Article 2(1) of the Covenant is central to the understating of state obligations with regard to ESC rights. Article 2(1) embodies the Covenant's general legal obligation provision.[245] It obliges states parties to take steps to the maximum of their available resources, with a view to achieving progressively the full realisation of the rights codified in the Covenant, by all appropriate means, including particularly the adoption of legislative measures.[246] It rests upon each state party to decide which means are the most appropriate under the circumstances with respect to each right.

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243 Callender and Jackson 2005 *JSP* 509-540.

244 Callender and Jackson 2005 *JSP* 509-540.

245 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 50.

246 Article 2(1) states that: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particular the adoption of legislative measures."

In other words, there is no one-size-fits-all approach when it comes to socio-economic rights.

Appropriate means can be legislative, administrative, financial, educational or social etc. measures[247]. This illustrates that appropriate means are not limited to certain measures. A state party can be innovative in its endeavours to fully realise the rights in the Covenant. What is important is that the measures achieve the result envisaged by the Covenant. An important aspect to keep in mind in relation to compliance with the obligations imposed by Article 2(1), as stressed by the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural rights, is that states parties are accountable to both "the international community and their own people."[248]

Realising economic, social and cultural rights and compliance with the obligations imposed by Article 2(1) requires a collective effort. This much is expressed in the Limburg Principles:

> A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.[249]

The full realisation of economic, social and cultural rights depends on such collective efforts.

Article 2(1) requires all states parties to begin immediately to "take steps" towards the full realisation of the rights enshrined in the Covenant.[250] This is an indirect acknowledgment that full realisation cannot be achieved immediately. The measures that state parties are obliged to take immediately include legislative, administrative, judicial, economic, social and education measures. A state party cannot indefinitely postpone the adoption of these measures. Some of the measures

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247 "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" UN Doc. E/CN.4/1987/17 at para 17 (Limburg Principles).

248 Limburg Principles para 10.

249 Limburg Principles para 11.

250 On a plain reading of the phrase "undertakes to take steps" one gets the impression of an obligation which is imposed to take steps once an undertaking has been given, inclining one to conclude that inaction or not taking steps is prohibited or is an act inconsistent with the phrase.

must be taken immediately. Some measures are not subject to "progressive realisation". This includes obligations not to discriminate, minimum core obligations and the obligation to take steps.[251] Importantly, legislative measures alone are by no means sufficient to fulfil the obligations imposed by the Covenant: more is required.[252] For instance, judicial remedies must be provided in order to render the rights effective.

States parties are further obliged to move as expeditiously as possible towards the realisation of the rights enshrined in the Covenant.[253] This is confirmed by a 2009 Report of the High Commissioner for Human Rights on the implementation of economic, social and cultural rights (Report of the High Commissioner):

> The notion of progressive realization requires progress, that is, improvement over time. States need to undertake deliberate, concrete and targeted measures, making the most efficient use of available resources, to move as expeditiously and effectively as possible towards the full realization of the rights enshrined in the Covenant.[254]

The Limburg Principle are clear on the aspect that progressive realisation should never be construed as "implying for States the right to defer indefinitely efforts to ensure full realization."[255] Moreover there is an obligation on states parties not only to make available maximum resources in the course of the progressive realisation in order to fully realise the rights enshrined in the Covenant, but also to use resources effectively.

The obligation to utilise the maximum available resources and, by extension, the notion of progressive realisation prohibit the deliberate adoption of retrogressive measures. In other words, it is prohibited for states parties to "adopt measures

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251 "Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights" UN Doc. E/2009/90 para 12: "An important feature that makes monitoring essential for economic, social and cultural rights is the notion of progressive realization. Not all of the obligations regarding economic, social and cultural rights, however, are qualified by the notion of progressive realization. Some obligations, such as the obligation to take steps towards realization, the prohibition of discrimination and the satisfaction of minimum core obligations, are of immediate effect. For example, the right to housing entails an immediate obligation to protect from forced eviction."

252 Ssenyonjo *Economic, Social and Cultural Rights in International Law* 56.

253 Beiter *The Protection of the Right to Education by International Law* 505.

254 Report at para 14. See also Committee on Economic, Social and Cultural Rights General Comment No. 3 para 2.

255 Limburg Principles at para 21.

aimed at reducing the level of protection that some rights have already gained."[256] Retrogressive measures are a *prima facie* violation of the Covenant unless a state party can positively demonstrate that a limitation was indeed justified.[257] Deliberately retrogressive measures "would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[258] This constitutes a justification under Article 2(1). One may potentially argue, however, that deliberately retrogressive measures need to be justified under Article 4 of the Covenant. The requirements of Article 4 are perhaps stricter than those of Article 2(1). In other words, a state party would have to demonstrate that the limitation is by way of law compatible with the nature of the right and is imposed solely for the purpose of promoting the general welfare in a democratic society.

This proposition is widely accepted:

> With regard to the government's budget, this means that the government generally should not cut budgets affecting ESC rights-related areas. While the true measure of progressive achievement is what happens to the people's actual enjoyment of rights, normally a cut in a budget leads to a cut in goods and services, which in turn affects people's enjoyment of their rights. However, a cut in the budget would not amount to a "retrogressive measure" if the government were to introduce compensatory measures or efficiencies in spending that have the effect of neutralizing any negative impact from cuts. That said, a substantial budget cut to programs essential for the enjoyment of ESC rights would be cause for concern. The government should explain the factors that prompted the cut and monitor its impact of the realization of related rights. It should also thoroughly investigate the impact of the cuts on different populations, to ensure that such cuts are not discriminatory.[259]

Budget constraints can be seen as a limiting factor in the actual enjoyment of ESC rights. Albeit the limitations of rights in the Covenant are permitted in terms of Article 4 of the Covenant, that in itself does not provide a licence to states parties not to comply with their obligation of the progressive realisation of ESC rights. For rights such as those provided in terms of Article 13, it is imperative when assessing whether actual enjoyment of the rights is achieved to analyse whether school

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256 Trispiotis 2010 *Opticon1826* 1.
257 Committee on Economic, Social and Cultural Rights General Comment No. 3 para 9.
258 General Comment No. 3 para 9.
259 Blyberg and Hofbauer Article 2 & Governments' Budgets.

enrolment is growing, enrolment at institutions of higher learning is increasing, and so on.

It is accepted that a government's budget plays a fundamental role in relation to the realisation of the rights provided in the Covenant. However, there is no direct correlation between an increase in a government's budget and an increase in citizens' enjoyment of their rights. That is the case because a sufficient budget may be poorly targeted or wastefully spent, whilst in some instances an insufficient budget may be utilised more efficiently, resulting in more people enjoying the rights provided in the Covenant.[260] This proposition strengthens the argument that, albeit a government's budget plays a central role in relation to the realisation of the rights enshrined in the Covenant, it is not determinative. It is an important factor to be taken into account, but its status does not go beyond that of an important indicator which ought to be taken into account.

Under Article 2(1), states parties are obliged to realise ESC rights individually and through international assistance and co-operation.[261] The purpose of international cooperation and assistance is to establish a social and international order in which the rights and freedoms codified in the Covenant can be fully realised.[262] In essence this obligation obliges States Parties to "take steps by international means to assist and co-operate in the realization of the rights recognized by the Covenant."[263]

Theoretically Article 2(1) seems to be uncontroversial. However, practice paints a different picture. A federal administrative court in Germany had the opportunity to deal with the relationship between Articles 2(1) and 13 of the Covenant. The court examined whether the levying of tuition fees for higher education violated international law. The facts briefly: the respondent, a German university, issued a statute which required every student to pay tuition fees of € 500 per semester. This

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260 Ramkumar *Our Money, Our Responsibility: A Citizens' Guide to Monitoring Government Expenditures* 9-10.

261 General Comment No. 13 para 13. International assistance and co-operation is recognised by the Committee. It notes: "[T]he phrase 'to the maximum of its available resources' was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23."

262 Limburg Principles para 30.

263 Limburg Principles para 32.

statute was based on a law of the *Bundesland* Nordrhein-Westfalen, which authorised its public universities to introduce tuition fees. This law included an entitlement for every student to receive a loan from a federal bank to cover the fees, which would have to be repaid two years after graduation.

Moreover, the possibility of tuition exemption in hardship cases was included in the law.

The applicant based his argument in particular on Article 13(2)(c) of the Covenant, arguing that, due to its self-executing character, the relevant law would infringe upon this provision in such a manner that he could demand repayment of the tuition fees. The court was not convinced by the argument of the applicant.[264] The court examined the self-executing character of Article 13(2)(c) and found that it was possible that the provision is indeed a self-executing provision but found further that the provision does not prohibit the levying of tuition fees "in the specific arrangement of the applicable law".[265]

The court rejected the argument that the levying of fees constituted a retrogressive measure in terms of Article 2(1). This argument was rejected on the basis that the state in this case had the possibility of "guaranteeing equal access through compensatory measures" (e.g., the entitlement of every student to receive a loan from a federal bank to cover the fees, which would have to be repaid two years after graduation).[266] The court was satisfied that there was no general interdiction on the levying of tuition fees.

The court's assessment of Article 13(2)(c) seems to be problematic in that both article 13(2)(c) and 2(1) prohibits any retrogressive measure, specifically if it might affect equal access to higher education, which as pointed out above,[267] reflects the object and purpose of Article 13(2)(c). Negatively deferring the payment of tuition fees to a later date does not enhance access. Increments in tuition fees have exactly

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264 Seidler and Seifert 2009 *German Yearbook of International Law* 704-708.

265 Federal Administrative Court (Bundesverwaltungsgericht [BVerwG]), Judgment of 29 April 2009, 6 C 16/08, reprinted in: Neue Zeitschrift für Verwaltungsrecht 28 (2009), 1562 at para 46.

266 Federal Administrative Court (Bundesverwaltungsgericht [BVerwG]), Judgment of 29 April 2009, 6 C 16/08, reprinted in: Neue Zeitschrift für Verwaltungsrecht 28 (2009), 1562 at para 57.

267 See chapter 2 discussion under topic 2.7 'The right of access to higher education under Article 13(2)(c) and state obligations in terms of Article 2(1) of the ICESCR.'

the effect on the right to higher education that the poor are barred access based on financial barriers. This reasoning is supported by the CESCR, which, in its Concluding Observations on the report of Canada observes that:

> while scholarships, bursaries, loans and other types of support are provided to disadvantaged and marginalized individuals and groups, [it remained] concerned about the discriminatory impact of tuition fee increases on low-income persons in many provinces and territories since 1998.[268]

While these observations were made in relation to Canada they are as relevant to all the other states parties to the Covenant when it comes to fee increases at institutions of higher education. It is difficult to harmonise fee increases, even if accompanied by bursaries or loans, with the spirit and purport of Article 13(2)(c) read together with Article 2(1). Justification would be difficult as fee increases by their nature tend to affect equal access. Equal access is part of the core or nature of the right to (higher) education, which, in terms of the limitation clause of Article 4, must always remain intact.

The CESCR has variously made it clear in its Concluding Observations that there is a definite obligation to move towards reducing and eventually abolishing fees. In Concluding Observations on Germany, the Committee according held:

> The Committee is concerned that several *Länder* have abandoned the principle of free higher education by requiring the payment of fees, which in some cases are allocated to cover administrative costs of the *Länder*, and not university expenditure. … The Committee recommends that the German Federal Government introduce a reduction of tuition fees in the national framework legislation regulating higher education, with a view to abolishing them.[269]

The Committee considers increasing fees a retrogressive measure that negatively affects vulnerable groups in society. In Concluding Observations on Spain, the Committee stated:

> The Committee is concerned at the regressive measures adopted by the State party that increase university tuition fees, thus jeopardizing access to university education for disadvantaged and marginalized individuals and groups (art. 13). … The Committee recommends that the State party review the regressive measures that have been taken with regard to university tuition fees in the light

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268 Concluding Observations, Canada, UN Doc E/C.12/CAN/CO/4 para 31.
269 Concluding Observations, Germany UN Doc. E/2002/22 paras 671 and 689.

> of article 13, paragraph 2 (c), of the Covenant, and that it guarantee equal access to higher education for all individuals on the basis of ability.[270]

2.8 Limitation of rights in terms of Article 4 of the ICESCR and the practical implications for the right of access to higher education

Covenant rights are subject to potential limitation in terms of article 4, which serves as a general limitation clause. Article 4 permits states parties to limit rights in clearly defined circumstances only, namely, when limitations are "determined by law", when they are "compatible with the nature of these rights" and when they are "solely for the purpose of promoting the general welfare in a democratic society".[271] Hence, limitations can be determined only by law. In other words, a right in the Covenant cannot be limited by way of pure policy. Article 4 naturally is applicable also with regard to Article 13(2)(c). Quite generally, there are three conditions for a legitimate limitation of rights provided for in United Nations human rights treaties, namely — the limitation must be provided by law, the limitation must serve a legitimate aim and there must be proportionality between means and ends.[272] Article 4 also requires that the limitation must be compatible with the nature of the right.

Firstly, there must be a clear legal basis for the limitation of a right in the Covenant. Therefore, the law providing for such limitation of a right must be i) publicly accessible, ii) sufficiently precise to enable people to regulate their behaviour, and iii) it must not confer unfettered discretion on the state to prevent the risk of abuse and the arbitrary exercise of discretion.[273] The legitimate aim refers to an acceptable aim that the state intends to achieve with the limitation of the right or the rights of others. There must be a legitimate aim that the state intends to achieve with the limitation of the right. The legitimate aim Article 4 mentions is general welfare in a democratic society. With regard to measures delaying or halting free higher education or increasing higher education fees, a state's aim might relate to preserving public finances, dealing with economic recession, or endeavouring to increase the availability and quality of higher education. It is submitted that the

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270 Concluding Observations, Spain, UN Doc. E/C.12/ESP/CO/5 para 28.
271 Article 4 of the Covenant.
272 Maja 2018 *UZLJ* 118-119.
273 UN Human Rights Committee General Comment No. 34 Freedoms of opinion and expression para 25.

legitimacy of each such aim would have to be assessed in the light of the particular circumstances of each case to determine its sincerity.

Proportionality plays an important role in relation to the limitation of rights. It demands that

> the means used by a state to limit a right must be proportional to the aim sought. Note 4, paragraph 35 of the UNHRC General Comment No. 34 states that "*[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."* There are a number of considerations that need to be taken into account to justify that the means used by a state to limit a right is proportional to the aim sought. In a nutshell, proportionality includes aspects of suitability, subsidiarity and proportionality in the narrow sense. Suitability requires that the limitation should in principle lead to the legitimate aim which is sought after. Proportionality in the narrow sense requires a reasonable relationship between the infringement and the legitimate aim. The subsidiarity test reviews whether there are other alternatives less restrictive means to reach the legitimate aim.[274]

All ESCR may in principle be restricted through legitimate limitations in terms of Article 4. That includes the rights to primary, secondary and higher education. Importantly, a limitation of a right should be done as a last resort after pursuing less restrictive means (regulating a right). The limitation of rights is a well-known phenomenon practised in various jurisdictions, including South Africa.

South Africa has made use of a limitation of rights clause ever since the interim Constitution entered into force in 1994 (section 33 of the interim Constitution of 1993; section 36 of the Constitution of 1996).[275] The inclusion of the limitation clause in the Constitution essentially means that constitutional rights may be limited provided this limitation is reasonable and justifiable in an "open and democratic society based on human dignity, equality and freedom …"[276]

It is evident that both constitutional rights and human rights by extension are not absolute. These rights can in circumscribed circumstances be legitimately limited by

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274 Maja 2018 *UZLJ* 119-120.
275 Section 36 of the Constitution.
276 Section 36(1) of the Constitution.

law that is fair, reasonable, necessary and justifiable. This is of significance for the further discussion in this thesis. Also, the right to higher education provided in terms of Article 13(2)(c) of the ICESCR is not an absolute right and may in certain cases be limited by law.

2.9 Conclusion

From an international law perspective educational rights are comprehensively catered for and recognised as fundamental human rights. International law recognises and protects three levels of educational rights, namely, rights to (and in) primary education, rights to (and in)) secondary education and rights to (and in) higher education. The right to higher education is provide in terms of Article 13(2)(c) of the ICESCR. Article 13(2)(c) is the most important source on the right to higher education in international law. Article 13(2)(c) imposes international obligations on states parties to make higher education equally accessible to all those who qualify for it by reason of their capacity, *in particular by the progressive introduction of free education*. Determining the nature and scope of the obligations flowing from such a provision requires a principled approach to treaty interpretation.

In determining the correct meaning of a provision of a treaty the Vienna Convention on the Law of Treaties is instrumental in that it lays down the rules of treaty interpretation. Article 31 requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Apart from good faith, three things are thus important for treaty interpretation: (i) the ordinary meaning of terms; (ii) their context, and (iii) the purpose and object of a treaty and its provisions. These are the essentials for determining the correct meaning of a treaty provision.

These rules of interpretation were utilised in this chapter in order to determine the correct meaning of Article 13(2)(c) of the Covenant, specifically as regards the progressive introduction of free education. It is apparent from the above discussion that the progressive introduction of free education is a necessary measure to be taken by the state in making higher education equally accessible. The progressive introduction of free education, from the language, context, object and purpose of Article 13(2)(c), is not an optional, but a mandatory measure. All measures or steps

that a state party takes must be directed at making higher education equally accessible. The progressive introduction of free education is one of the most, if not the most, appropriate measure to make higher education equally accessible.

By introducing progressively free higher education more students from poorer backgrounds are given an opportunity to access higher education, whereas in the absence of this necessary measure their access to higher education is limited. Importantly, the state is not limited to the progressive introduction of free higher education to achieve access to higher education. Legislative measures must be adopted in order to make higher education equally accessible. Legislative measures need to be supplemented by adequate administrative measures and financial, human, and informational resources. Other means of enhancing access include increasing the opportunities for distance education or establishing loan and bursary schemes benefiting needy students. However, a fellowship system can constitute only a supplementary (and in many ways interim) measure of relief in relation to the progressive introduction of free higher education. The reality is that increases in tuition fees and decreases in government funding pose a serious threat to equal access to higher education for students from poor backgrounds. It is acknowledged that the progressive introduction of free education is inextricably linked to the state's resources. Therefore, a sound approach to Article 13(2)(c) would be one harmonious with Article 2(1) of the Covenant. Article 2 imposes various obligations on states parties in relation to the realisation of ESC rights. It imposes an obligation on states parties to move as expeditiously as possible to fully realise the rights enshrined in the Covenant.

It further prohibits both retrogressive measures and indefinite postponement of the full realisation of the rights enshrined in the Covenant. Article 2(1) does recognise the resource intensity of ESC rights but cautions that resource constraints cannot exonerate a state party from its obligations. It requires international assistance and cooperation in relation to the full realisation of the rights in the Covenant. It requires of states parties not only to rely on their own resources but also to forge international networks with other states in order to acquire assistance for the benefit of realising the rights in the Covenant. However, Article 4 of the Covenant is equally important. Article 4 is the limitation clause. It provides that all the rights in the Covenant are not

absolute and may legitimately be limited by law in circumscribed circumstances. All Covenant rights are subject to Article 4. Article 13 can be limited by law only in so far as this may be compatible with the nature of this right and solely for the purpose of promoting the general welfare in a democratic society. A limitation of Article 13 of the Covenant inconsistent with Article 4 is a violation of the provision. Increases in tuition fees easily affect access by poorer students and, therefore, affect equal access to higher education. Equal access may be said to be part of the nature or core of the right to education. Increases in study fees as limitations of Article 13(2)(c) accordingly readily fail this aspect of the limitation clause.

Altogether, this chapter has established that, from an international law perspective, there appears to be a strong argument for the proposition that there is an obligation on states parties to the Covenant to progressively introduce free higher education.

CHAPTER 3: THE RELEVANCE OF AND THE ROLE PLAYED BY INTERNATIONAL LAW IN SOUTH AFRICAN LAW

3.1 Overview: The role played by international law in South African law

International law was for many years regarded by some scholars as "a marginal speciality, well-meaning but naïve and mostly irrelevant".[277] That view goes a long way in explaining the attitude of some states, including the "old" South Africa, towards international law. The fact that international law operates as a system without a centralised government, unlike domestic legal systems, draws most critique.[278] At this point in time, there appears to be consensus, however, that international law might be weaker and less perfect than some domestic legal systems, but that one cannot ignore the development and influence of international law through the years.[279]

The role of international law in relation to South African law has changed with the coming into operation of the interim and the final Constitution. This is so in as far as the previous constitutions of South Africa did not expressly make provision for the role of international law in the South African legal system. The minimal role international law played was made possible by the common law. This chapter will focus on the relevance of international law in South African law. The focus will be on the role international law played under previous Constitutional dispensations and the role it plays now under the final Constitution of 1996. The discussion is necessary because this study examines the question as to the role that the international human right to progressively free higher education plays, or should play, as part of municipal South African law. In other words, to what extent, if any, does or should municipal South African law recognise this right? A discussion of the role of international law in relation to South African law is, therefore, imperative for this thesis. The Chapter first addresses the relevant theory in respect of the role of international law in South African law, then in section 3 draws relevant conclusions

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277 Henderson *Understanding International Law* 4.

278 Henderson *Understanding International Law* 4: "Yet it is the workability of international law in anarchy, that is, in a system without a centralised government, which makes this subject so fascinating."

279 Henderson *Understanding International Law* 5.

from this for the role of Article 13(2)(c) of the ICESCR on the right to progressively free higher education in municipal South African law.

3.2 The role of international law and soft law under the South African Constitution

3.2.1 Overview: The relationship between international law and South African law, where it started and the current position

The present Constitution gives prominence to the role of international law in South African law. The previous constitutions of South Africa, excluding the interim Constitution, were less explicit and/or did not recognise the precise role of international law in South African law. However, the role of international law in the South African legal order has evolved. Particularly, the interim Constitution accorded, and the final Constitution accords international law a prominent role in respect of the interpretation of fundamental rights[280] and legislation.[281] The evolution of the role of international law in South African law also illustrates South Africa's emancipation from a culture which disregarded human rights to a culture which is based on democratic values, social justice and fundamental human rights. The discussion on the relevance of international law is important to the right to education, because the right to education is recognised and protected by both national and international law. Hence, what is the relevance of the international legal instruments to the domestic South African law pertaining to the right to education? To what degree must international legal instruments be taken into consideration? Does this cover both binding and non-binding instruments? Must they just be "considered" or are they binding in their effects? What is their status or rank vis-à-vis domestic norms? This Chapter will address these questions. A proper comprehension of the far-reaching importance of international law under the present Constitution also requires a look at the situation as it prevailed under previous Constitutional dispensations.

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280 Section 39(1)(b) of the Constitution.
281 Section 233 of the Constitution.

For many years prior to the coming into force of the interim Constitution in 1994, the status of international law in South Africa remained unclear.[282] Prior to the interim Constitution, South Africa's written constitutions ignored or did not formally recognise public international law as law in South Africa.[283] According to Slade, international law did not play an influential role in South African law. That is so, the author argues, because prior to the interim Constitution's coming into force, South Africa had not been party to any human rights conventions except for those concerning the suppression of slavery.[284] The question accordingly was not of special practical relevance in as far the application of the law by the courts was concerned.[285]

The period of apartheid brought endless debates as to the status of international law in South Africa's domestic law.[286] This period was a period which was associated with the violation of international law.[287] Slade summarises the role of international law in the apartheid period as follows:

> During the apartheid era, before the text of the 1993 Constitution and the constitutional principles were agreed to, international law was approached differently. Before the 1993 Constitution was enacted, international law played a secondary role in South African jurisprudence, since South African courts failed, … "to use the limited opportunities available to them to apply international human right norms". With the enactment of the Constitution, the exclusion of any reference to international law in any previous constitution was rectified by including provisions that call for an inclusive approach towards international law.[288]

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282 Dugard *International Law A South African Perspective* 46. Dugard makes the argument that "for over a hundred years, South African courts simply assumed that the rules and principles of customary international law might be applied by municipal courts as if they were in some way part of South African law. Consequently, they did not require international law to be proven as foreign legal system."

283 For a general discussion on the role of international law in South Africa prior to 1994, see Dugard *International law: A South Africa Perspective* (as published in 1994).

284 Slade *International Law in the Interpretation of Section 25 and 26 of the Constitution* 20. Slade makes the argument that, prior to the adoption of the 1993 Constitution, international law in South Africa was generally regarded as law existing between states and not enforceable by individuals. As a result, the author argues further, "it proved to be difficult to effectively enforce international human rights law in the South African domestic legal system before the 1993 Constitution was adopted".

285 Slade *International Law in the Interpretation of Section 25 and 26 of the Constitution* 20.

286 Slade *International Law in the Interpretation of Section 25 and 26 of the Constitution* 20.

287 Olivier 2003 *PELJ* 26.

288 Slade *International law in the Interpretation of Sections 25 and 26 of the Constitution* 21.

At this juncture, it should be pointed out that international law includes both international agreements (treaties) and customary international law. A treaty may be defined as:

> [a] written agreement between states or between states and international organizations which is governed by international law. Some treaties are bilateral, creating relations between two states only; others are multilateral, creating relations between many states. Treaties go by many names. The most commonly used names other than treaty are convention, declaration, charter, covenant, pact, protocol, and exchange of notes.[289]

Unlike a treaty, customary international law is "unwritten" international law. It may be defined as follows:

> Customary international law is the "common law" of public international law. Courts have identified two main requirements for the existence of customary rule: settled practice (usus) and the acceptance of an obligation to be bound (opinion juris).[290]

The above distinction is important for the purposes of this thesis as reference is made to both concepts. The right to education is protected by both treaties and international customary law. Free and compulsory primary education as well as the principle of non-discrimination constitute a part of customary international law.[291] Levying fees in higher education may, of course, amount to discrimination on the ground of economic status and, consequently, may violate customary international law. The distinction between treaty and customary law is typically reflected in a different type of treatment for each form of source by domestic law. What did this look like in the period prior to the adoption of the interim and final Constitutions?

According to Stemmet, the "relationship between international law and South African municipal law was traditionally determined by common law", which originated from English law.[292] There was no explicit constitutional provision that dealt with the relationship between international law and South African municipal law. This approach was consistent with the popular view back then that "municipal law

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289 Dugard "Public International Law" 1.
290 Dugard "Public International Law" 1.
291 Beiter *The Protection of the Right to Education by International Law* 532.
292 Stemmet 1999 *The International Lawyer* 47.

prevails over international law."[293] South African courts had difficulty in determining whether international law formed part of the municipal law of South Africa or not.[294]

International law was not completely ignored in South Africa. Schaffer refers to various court cases dating as far back as 1881 to illustrate that international law was always recognised and applied by South African courts in "politically neutral matters".[295] According to Schaffer, the courts applied customary international law as part of South African law in a number of cases. This was so despite the fact that there was no express constitutional provision outlining the role of international law in South African law.[296]

From 1914 some courts did apply international law as they were of the view that international law did play a certain role in the South African legal order,[297] but in 1971 in the matter of *South Atlantic Islands Development Corporation Ltd v Buchan*,[298] the court favoured the approach of the incorporation of customary international law into municipal law (the dualist approach). This means that customary international law was not automatically accepted by the court as being

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293 Stemmet 1999 *The International Lawyer* 47. The author argues further that "[t]his situation stems from the fact that states jealously guard their sovereignty."

294 Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* 22. The author argues that "in the preceding period, international law had not played a prominent role in South African courts. There are various reasons for the courts' behaviour in this regard. Dugard maintains that South African courts were unfamiliar with international law; they were unaware of the importance of international legal norms; and they were antipathetic towards international law as a result of South Africa's isolation from the international community. This means that South African law was isolated from developments that took place with regard to international human rights. Consequently, international law was seldom raised in court cases, and limited attention was paid to it in the event that it was raised" (footnotes omitted).

295 Schaffer 1983 *ICLQ* 278. The cases referred to by the author are the following; *Ncumata v Matwa* (1881-2) 2 E.D.C. 272; *Lemkuhl v Kock* 1903 T.S. 450; *Van Deventer v Hancke and Mossop* 1903 T.S. 401; *Olivier v Wessels* 1904 T.S. 235; *Mshwakezele v Guduza* (1901) 18 S.C. 167; *Alexander v Pfau* 1902 T.S. 155; *Achterborg v Glinister* 1903 T.S. 326; *Du Toit v Kruger* (1905) 22 S.C. 234; *Marburger v The Minister of Finance* 1918 C.P.D. 183; *R v Holm, R v Pienaar* 1948 (1) S.A. 925 (AD); *R v Newmann* 1949 (3) S.A. 1238 (T); *R v Lionda* 1944 A.D. 348; *Crooks and Company v Agricultural Co-operative Union Ltd* 1922 A.D. 423; *S v Devoy* 1971 (1) S.A 359 (N); *S v Penrose* 1966 (1) S.A. 5 (N); *Kaffraria Property Co. (Pty) Ltd. v Government of the Republic of Zambia 1980* (2) S.A. 709.

296 Schaffer *ICLQ* 301.

297 See notably *Ex parte Belli* 1914 CPD 742 at 745; *Marburger v The Minister of Finance* 1918 CDP 183 at 187; *Crooks and Company v Agricultural Co-operative Union Ltd* 1922 AD 423; *R v Lionda* 1944 AD 348 at 352; *Ex parte Sulman* 1942 CPD 407; *S v Penrose* 1966 (1) SA 5 (N) at 10.

298 1971 (1) SA 234 (c) at 238B. In this case the court refused to admit an affidavit from an expert on international law on the ground that international law was not foreign law and therefore could not be proved by affidavit, see Dugard *International Law A South African Perspective* 46.

law in South Africa. It had to be incorporated by way of legislation. Overall, the position as regards customary international law, however, was as follows:

> South African courts have been following the British example of taking judicial notice of customary international law, in contrast to foreign law, which has to be proved by means of expert evidence. This rule of evidence is based on the assumption that international law forms part of South African municipal law. International law was applied by South African courts in a series of cases dating to the previous century. However, it was only in a number of recent judgements that the court stated explicitly that customary international law forms part of South African law. This has been confirmed by the Court of Appeals in *Nduli and Another v Minister of Justice*, holding that "it is obvious that international law is to be regarded as part of our law".[299] (footnotes omitted)

International law, especially customary international law, was not completely ignored by South African courts. Courts utilised the limited avenues they had to introduce customary international law into the South African legal system by consulting the common law as applied by various international adjudicating bodies. The position was different with regard to treaties in that South Africa's position was that the signing, ratification, and other stages of treaty-making formed part of the sole mandate of the executive.[300] The incorporation of treaties into municipal law required legislative intervention.[301] This position changed with the adoption of the interim and final Constitution to the extent that the national executive and Parliament share the responsibility of treaty-making.[302] The participation of Parliament means that treaty-making has been democratised. Parliament can in this way restrain the powers of the executive to make a treaty that the legislative considers undesirable, or which is in conflict with Constitutional values. To summarise the relationship between international and municipal law prior to the adoption of the interim and final Constitution, one may quote Dugard. According to Dugard, international law was "relegated to an inferior position in South African law when the United Nations condemned apartheid":[303]

> [F]rom 1948 to 1990, South Africa was in conflict with both the international community and international law. Apartheid, premised

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299 Stemmet 1999 *The International Lawyer* 48.

300 Dugard *International Law: A South African Perspective* 1. The author explains that "[u]nder South African Constitutions before 1993 the treaty-making power was vested completely in the national executive."

301 Stemmet 1999 *The International Lawyer* 50.

302 Dugard "Public International Law" 1.

303 Dugard "Public International Law" 1.

> on race discrimination and the denial of human rights, was contrary both to the law of the UN Charter and the norms of human rights, non-discrimination and self-determination generated by the post-World War II order. Although South Africa's foreign policy during this period was highly legalistic, it was the old law of state sovereignty and absolute respect for domestic jurisdiction that guided and shaped it. So it was that South Africa became a pariah state within the international community; a delinquent state in the context of the 'new' international law of human rights. Domestically, international law fared little better. Although treaties were incorporated into municipal law, in accordance with the common law dualist approach, and customary international law was treated as part of municipal law, unless inconsistent with legislation, the hostility of successive apartheid governments to the United Nations and international human rights conventions undoubtedly influenced the attitudes of legislators, judges and lawyers. While international law was applied by the courts in politically neutral matters, such as sovereign immunity and diplomatic privileges, it was generally viewed as an alien and hostile legal order.[304]

3.2.2 The role of international law under the interim Constitution of South Africa, 1993

3.2.2.1 Overall implications of the interim Constitution for the role of international law

The interim Constitution was approved by Parliament on 22 December 1993, and it came into force on 27 April 1994.[305] Section 4(1)[306] of the interim Constitution for the first time in the history of South Africa recognised the Constitution as the supreme law of the Republic of South Africa. The interim Constitution further made history by being the first Constitution of South Africa to explicitly incorporate international law into South African law by means of clear provisions.[307]

Both the interim and the final Constitution give international law a central place in the South African legal system.[308] The interim Constitution put to rest an endless debate as to the status of international law in South Africa. According to Stemmet, "the implementation of the [i]nterim Constitution opened a new chapter in the political and legal history of South Africa".[309] This resembled a clear "break-away"

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304 Dugard 1997 *EJIL* 76.
305 Stemmet 1999 *The International Lawyer* 51.
306 Section 4(1) states: "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication of this Constitution, be of no force and effect to the extent of the inconsistency."
307 Stemmet 1999 *The International Lawyer* 52.
308 Dugard "Public International Law" 2.
309 Stemmet 1999 *The International Lawyer* 51.

from the principle of Parliamentary sovereignty.[310] When taking into account the international human rights instruments consulted by the drafters of the interim Constitution it seems inevitable that international law would have been accorded recognition in the interim Constitution and later on in the final Constitution.[311] This proposition finds favour with De Wet, who argues that:

> The strong emphasis on international human rights law is due to the fact that both the interim and final Constitution contain a Bill of Rights that guarantees rights also protected by international human rights treaties. Whereas the interim Constitution was confined largely to civil and political rights, the final Constitution extends its protection to encompass not only civil and political rights but also economic and social rights. In both instances, great care was taken to ensure that the Bill of Rights complied with international norms, in particular the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Although the rights are formulated in simpler language than that found in most human rights conventions, they are broadly modelled on their international human rights standards when interpreting the Bill of Rights.[312]

Both the ICCPR and the ICESCR played a prominent role in the shaping of the South African Bill of Rights. One could argue that the above covenants are the foundation of the South African Bill of Rights.

Section 35(1) of the interim Constitution constitutionally obliged South African courts to consider international law whenever adjudicating a matter where international law was relevant. Section 231 of the interim Constitution regulated the role of international agreements and customary law in the new Constitutional dispensation (organs of government involved in bringing about international obligations, the status of international norms vis-à-vis other (municipal) legal norms, and the incorporation of international norms into municipal law). Other sections of the interim Constitution which dealt with international law were sections 116(2) and 227(2)(d).

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310 Stemmet 1999 *The International Lawyer* 51. According to Stemmet, "the supremacy of the Constitution is in direct contrast to the previous system of administration, which was based on the British Westminster system of government in terms of which Parliament was sovereign and above the law."

311 Slade *International Law in the Interpretation of Section 25 and 26 of the Constitution* 25: "In drafting the bill of rights, the African National Congress relied strongly on the UDHR, the ICESCR, the ICCPR, the European Convention and the African Charter on Human Rights and Peoples' Rights. Therefore, international law and its interpretation will have to play a prominent role in the development of South Africa's human rights jurisprudence. This might be one of the reasons why reference to international law is made in the 1993 Constitution and retained in the 1996 Constitution. A further reason for the inclusion of these provisions in the constitutions is the idea of achieving harmony between international law and South African law."

312 De Wet 2005 *FILJ* 1531.

The former provided that if the independent Human Rights Commission was of the opinion that "any proposed legislation might be contrary … to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature."[313] The latter provided that the National Defence Force "shall not breach international customary law binding on the Republic relating to aggression."[314]

After the interim Constitution entered into force, international law started to play a more prominent role in the South African legal order in general, and in South African jurisprudence in particular.[315] Most of the provisions contained in the interim Constitution were retained in the final Constitution with certain amendments.[316] The enactment of the interim Constitution brought about many fundamental changes to the constitutional regulation of international law in South African law.[317]

The interim Constitution did indeed introduce novel concepts to the South African legal system in as far as the regulation of the relationship between international and municipal law was concerned.[318] The provisions relating to international law provided for in the interim Constitution were summarised as follow by Olivier:

> The 1993 Constitution dealt with the conclusion of international agreements (sections 82(1)(i) and 231(2)), the status of international law in South African law (section 231(3) and (4) and the role of international law in interpreting the chapter on fundamental rights (section 35(1)).[319]

These provisions set out precisely the role of international law in the South African legal order. The most crucial impact the interim Constitution had on the relationship between international and South African law was to accord international law clear constitutional recognition. The next two headings will comment on Sections 35(1) and 231 of the interim Constitution. This will help understand the corresponding

313 Section 116(2).
314 Section 227(2)(d).
315 Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* 25.
316 De Wet 2005 *FILJ* 1531.
317 Oliver 2003 *PELJ* 26.
318 Olivier 2003 *PELJ* 26.
319 Olivier 2003 *PELJ* 26.

provisions of the final Constitution that also determine the relevance of international human rights law on the right to education in the South African legal order.

3.2.2.2 Section 35(1) of the Interim Constitution and the obligation to consider international law

Section 35(1) obliged courts, when interpreting the Bill of Rights, where applicable, to have regard to public international law applicable to the protection of the rights entrenched in the Bill of Rights.[320] Section 35(1) further provided courts with a discretion to have regard to comparable foreign law. This is inferred from the use of the word "*may"* as opposed to a "mandatory" word like "*shall*" *or* "*must*". Chaskalson resorted to section 35(1) in the *Makwanyane* case.[321] An important point which Chaskalson made when having regard to section 35(1) of the interim Constitution is that South African courts are not bound to slavishly follow international law. The courts must ultimately "[c]onstrue the South African Constitution and not an international instrument. International agreements and international customary law were to provide a framework within which the [Bill of Rights could] be evaluated and understood."[322]

Chaskalson was not advocating that international law be ignored by a court, but rather that the Constitution should not be subjected or relegated to a status inferior to international law. Put differently, international law provided a framework within which to interpret constitutional provisions. It did not enjoy a status superior to the interim Constitution. It is in this context that Chaskalson in *Makwanyane* described the role of international law as follows:

> Public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the

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320 Section 35(1) of the interim Constitution states: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equity and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable case law."

321 Olivier 2003 *PELJ* 27.

322 1995 6 BCLR 665 (CC) at para 39.

> European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisations, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].[323]

Olivier has analysed the correctness of Chaskalson's understanding of the difference between binding and non-binding international law. According to the author, Chaskalson described binding law as international law binding on South Africa in terms of section 231 of the interim Constitution.

This includes rules of customary international law binding on South Africa and international agreements to which South Africa is a party. Non-binding international law would refer to international law not binding on South Africa. Chaskalson limited non-binding international law to the traditional sources of international law as listed by article 38(1) of the Statute of the International Court of Justice (ICJ).[324] These are binding international agreements to which South Africa is not a party, customary international law not binding on South Africa and sources mentioned in article 38(c) (general principles) and (d) (judicial decisions and teachings).[325]

Chaskalson's approach in relation to binding and non-binding international law has been criticised by Olivier. The first point of criticism is that Chaskalson's approach was in contrast with the intention of the drafters of the interim Constitution, who intended that international agreements to which South Africa is a party and binding custom, should form part of the law of South Africa provided they were not in conflict with the interim Constitution.[326] Secondly, a theoretical distinction should be made between binding and non-binding international law for the purposes of the interpretation of the Bill of Rights. It is this distinction which Chaskalson failed to make. Had Chaskalson made this distinction it would have been clear that binding

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323 Para 35.

324 Article 38 states:
"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply:
a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. International custom, as evidence of general practice accepted as law;
c. The general principles of law recognized by civilized nations;
d. Subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of various nations, as subsidiary means for determination of rules of law."

325 Olivier 2003 *PELJ* 30.

326 Olivier 2003 *PELJ* 30.

law is binding, and non-binding law is not binding but may be used for other purposes, such as an interpretive aid.[327] In essence the author argues that Chaskalson failed to appreciate that section 35 should refer only to non-binding international law and that binding international law should be treated in terms of the provisions of section 231 of the interim Constitution.

Whatever the merits of Olivier's criticism, lower courts are bound by the decisions of the Constitutional Court. But that does not mean that the Constitutional Court itself should slavishly follow its own jurisprudence in instances where there was a lack of care or an oversight from its side. This much was acknowledged by one of the Justices of the Constitutional Court, Justice Froneman. Froneman J stated that:

> courts sometimes make decisions *per incuriam*, or in more brutal translation, 'through lack of care'. The Latin phrase sounds more impressive than its English translation, but, embarrassing as it may turn out to be, one must examine whether the decision suffers from a lack of care.[328]

Ever since the Constitution came into force the jurisprudence of the Constitutional Court seems to have shifted slightly from the approach followed in *Makwanyane*. Subsequent cases of the Constitutional Court but also of other courts suggest that the courts have quietly moved beyond the approach that international law is a mere interpretive tool.[329] The distinction between roles played by international law in terms of sections 35 and 231, respectively, as argued by Olivier, appears to be well received.[330]

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327 Olivier 2003 *PELJ* 30.

328 *Jacobs and Others v S* [2018] ZACC 4 at para 97.

329 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W); *De Gree and Another v Webb and Others (Centre for Child Law as* Amicus Curiae*)* 2007 (5) SA 184 (SCA); *Tantoush v Refugee Appeal Board and others* 2008 (1) SA 232 (T); *Harksen v President of the Republic of South Africa and others* 2000 (2) SA 825 (CC); *Earthlife Africa and Another v Minister of Energy and Others* 2017 (5) SA 277 (WCC); *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325; *President of South Africa v Quagliani; President of the Republic of South Africa v Van Rooyen; Goodwin v Director General, Department of Justice and Constitutional Development* 2009 (2) SA 466; *Law Society of South Africa and Others v President of the Republic of South Africa* [2018] ZACC 51.

330 Tladi 2018 *SALJ* 708. Tladi makes the argument that the identification of international law is such an important task for courts when dealing with international law. The distinction between binding and non-binding international law by implication becomes central to the inquiry of identification of international law.

3.2.2.3 Section 231 of the interim Constitution and the status of international law under the interim Constitution

Section 231 of the interim Constitution regulated the legal situation as regards international law in relation to South African law.[331] Unlike section 231 of the final Constitution, section 231 of the interim Constitution has not been judicially considered by the South African courts. Section 231 of the interim Constitution did not deal with all its treaty-making process provisions under section 231 as section 231 of the final Constitution does. For instance, in terms of section 82(1)(i) of the interim Constitution, the President was entrusted with the task of the negotiating and signing of international agreements under the powers and functions of the President. In terms the final Constitution, the negotiating and signing of international agreements are dealt with under section 231(1).

On a more substantive level, the major difference between section 231 of the interim Constitution and section 231 of the final Constitution lies in the change of wording in the extra step of the incorporation of international agreements into law. In terms of section 231(4) of the final Constitution, an international law agreement becomes law in the Republic when it is enacted by national legislation. Section 231 of the interim Constitution was worded differently, stating that an international agreement "shall form part of the law of the Republic, provided Parliament expressly so provides". This may have meant one of two things: (i) in terms of section 231 of the interim Constitution, international law became law in the Republic subsequent to the "mere" ratification of or accession to an international agreement under section

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[331] Section 231 states:
"(1) All rights and obligations under international agreements which immediately before commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.
(2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1)(i).
(3) Where Parliament agrees to ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.
(4) The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic."

231(2);[332] or (ii), as Devine argued, "a resolution followed by ratification of a treaty is not, however, enough to make a treaty binding on South Africa internationally".[333] According to Devine, the use of the word "provides" in section 231(3) indicates that a legislative act (an Act of Parliament) was required before the treaty bound South Africa.[334] Assuming the view that no separate act of incorporation was required (beyond a resolution of Parliament) was, in fact, correct, it would have been preferable to keep that solution also under the final Constitution. This would have ensured a much quicker absorption of international law into domestic law and also would have been a move towards monism in respect of treaties. The advantage thereof is that changes in the life of international norms (the way they are interpreted) immediately apply in national law as well. The theory of incorporation would strictly require an interpretation of the international agreement as understood at the moment of incorporation.

The formal procedure for the conclusion of international agreements as outlined by the interim Constitution was as follow: (i) the international agreement must be negotiated by the President; (ii) the international agreement must be signed by the President; and (iii) Parliament should agree to the ratification of or accession to the agreement.[335] In terms of the interim Constitution, Parliament had the final word in the treating making process. Importantly, even if Parliament enacted a treaty by way of legislation, such a treaty would not be binding unless provided it was consistent with the interim Constitution. Put differently, an international agreement bound the Republic only if, or to the extent that, it was consistent with the interim Constitution.

Section 231(4) of the interim Constitution embraced the supremacy of the Constitution by unambiguously stating that customary international law forms part of South African law unless it is inconsistent with the interim Constitution.[336] This provision elevated the status of customary international law in the South African legal system. The recognition of international law by the interim Constitution brought

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332 This view was supported by Dugard, who argued that, though the procedure was not clear, a resolution approved by both Houses of Parliament was sufficient. In other words, "express provision" did not require that an Act of Parliament be enacted. See Dugard *International Law: A South African Perspective* 343.

333 Devine 1995 *ICLQ* 8.

334 Devine 1995 *ICLQ* 8.

335 Devine 1995 *ICLQ* 8.

336 Section 231(4) of the interim Constitution.

an end to the debate on the status of international law in South African municipal law.[337] According to Olivier:

> This step was a symbolic break from the apartheid legal system, which was closely associated with the violation of international law and indicated to the international community that South Africa was willing to abide by internationally accepted rules. More important, however, for South African lawyers are the fundamental changes the constitutional regulation of international law introduced to South African law.[338]

The essence of section 231(4) of the interim Constitution was retained in the final Constitution, evidently indicating the important role to be played by international law in the South African legal system.

3.2.3 The role of international law under the (final) Constitution, 1996

3.2.3.1 Overall implications of the (final) Constitution for the Role of international law

The primary objective of the interim Constitution, even if not so expressed, was to facilitate the transition from parliamentary sovereignty to constitutional democracy. That it should only fulfil a transitional role is understandable because the interim Constitution was not the product of a "democratically elected body" like the 1996 Constitution.[339] South Africa became a constitutional democracy in 1994. A Constitutional Assembly was entrusted with the task of drafting a final Constitutional text which marked South Africa's constitutional revolution.[340] The Constitution was signed by then President Nelson Mandela on 10 December 1996 and was enacted

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337 Olivier 2003 *PELJ* 26.

338 Olivier 2003 *PELJ* 26.

339 Currie and De Waal *The Bill of Rights Handbook* 6. Dugard agrees with the views expressed regarding the unelected body that drafted the interim Constitution. The author argues: "In 1993, 26 political groups assembled at Kempton Park to draft a constitution to bring an end to the apartheid legal order. As these groups were in most instances unelected, and simply reflected the political realities of the time, it was considered inappropriate to confer on them the power to draft a final constitution. Instead, the constitution which they fashioned in negotiations lasting some six months was to serve as an 'interim constitution', pending the drafting of a constitution by a democratically elected constitutional assembly. As the Interim Constitution represented a political compromise between rival groups, notably the National Party (which had ruled South Africa since 1948) and the African National Congress (outlawed from 1960 to 1990), it was agreed at Kempton Park that the 'final' constitution would comply with 34 constitutional principles contained in a schedule to the Interim Constitution and that the Constitutional Court created by the 1993 Interim Constitution would be empowered to pronounce on the issue of compliance". See Dugard *International Law A South African Perspective* 49.

340 Currie and De Waal *The Bill of Rights Handbook* 6.

into law on 4 February 1997.[341] In adopting this Constitution, South Africa made a clear break from its previous system of parliamentary sovereignty.

The Constitution puts it beyond any doubt that it is the supreme law of the land,[342] meaning that —

> whenever and insofar as a legal norm or rule of decision laid down by the Final Constitution (as construed) comes into practical collision with a legal norm or rule of decision laid down by any sort of non-constitutional law (as construed) – be it parliamentary legislation, subordinate legislation, common law, or customary law – the Final Constitution's norm is to be given precedence by any whose project is to carry out the law of South Africa.[343]

The Constitution is regarded internationally as an "international law" friendly constitution.[344] Except for the 1993 Constitution previous constitutions of South Africa, as already pointed out, made no mention of the role of international law in the South African legal order.[345] According to Tladi:

> The South African Constitution is reputed to be one of the most international law-friendly constitutions in the world. It provides, for example, that the interpretation of the Bill of Rights must take into consideration international law, that when interpreting any legislation, any reasonable interpretation consistent with international law must be preferred over any other interpretation that is inconsistent with international law; and that customary international law is law in the Republic except where it is in conflict with the Constitution or an Act of Parliament.[346]

There are a number of provisions in the Constitution which deal with the relationship between the international legal system and the South African legal system. These are Sections 39(1)(b), 198(c), 199(5), 200(2), 201(2)(c), 231, 232, and 233.[347] In broader terms, the Constitution envisages the following relationship between

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341 Dugard *International Law: A South African Perspective* 50.

342 Section 2 of the Constitution. "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

343 Michelman "The rule of law, legality and the supremacy of the Constitution" 11-34 – 11-35.

344 Tladi 2016 *AHRLJ* 310.

345 Dugard *International Law: A South Africa Perspective* 50.

346 Tladi 2016 *AHRLJ* 311.

347 Section 198(c) ("National security must be pursued in compliance with the law, including international law."); Section 199(5) ("The security services must act … in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."); Section 200(2) ("The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force."); Section 201(2)(c) ("Only the President, as head of the national executive, may authorise the employment of the defence force [*inter alia*] in fulfilment of an international obligation.").

international law and South African law. Firstly, the Constitution compels South African courts, tribunals and other forums to consider international law when interpreting the Bill of Rights.[348] Secondly, legislation must be interpreted to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[349] Thirdly, customary international law is law in South Africa provided it is not inconsistent with the Constitution.[350] Fourthly, international agreements ratified by Parliament are binding on South Africa on the international plane and South Africa is prohibited from violating their provisions. They are part of the law if so, incorporated by an Act of Parliament.[351]

3.2.3.2 Section 39(1)(b) of the (final) Constitution and the obligation to consider international law

The Bill of Rights was drafted under the influence of international legal standards and "other constitutions which were themselves drafted on the basis of international legal standards."[352] Some authors even argue that there is no section of the Bill of Rights for which corresponding norms of international law do not exist.[353] According to O'Shea international law will almost always form part of the inquiry when interpreting of the Bill of Rights.[354]

Section 39(1)(b) of the Constitution creates a constitutional obligation for courts, tribunals and forums to consider international law. Section 39(1)(b) should be understood in the wider context of Section 39(2) and Section 233. The provisions provide as follows:

> *Section 39(1) and (2)*
> 1. When interpreting the Bill of Rights, a court, tribunal or forum -
>   a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>   b. must consider international law; and

348 Section 39(1)(b) of the Constitution.
349 Section 233 of the Constitution.
350 Section 232 of the Constitution.
351 Section 231 of the Constitution.
352 O'Shea "International law and the bill of rights" 7A-6.
353 O'Shea "International law and the bill of rights" 7A-6.
354 O'Shea "International law and the bill of rights" 7A-6.

c. may consider foreign law.[355]

2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Section 233

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The obligation imposed by Section 39(1)(b) of the Constitution is unambiguous and mandatory. Section 39(1)(c), by contrast, affords courts, tribunals and forums a discretionary power to consider foreign law. Section 39(1)(b) clearly prohibits a situation where international law is ignored, where the facts or circumstances require it to be considered.[356] Unlike the interim Constitution, which only referred to "courts", the final Constitution obliges courts, tribunals and forums to consider international law when adjudicating matters which implicate international law.[357] The wording of Section 39(1)(b) also differs from that of section 35(1) of the interim Constitution in that the latter required a court "where applicable" to have regard to international law. The obligation now is definitely to consider international law.[358]

In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*,[359] in the written submission of the first to fourth *amici curiae*, the first *amicus curiae* being John Dugard, the argument was made that there exist three key constitutional obligations of varying strengths in the

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355 Section 39(1) of the Constitution.

356 See the written submissions of the *amici curiae* in the case of *National Commissioner of South African Police Service v Southern African Human Rights Litigation Centre and Another* to support the argument that the South African Constitution seeks to ensure that domestic law and international law are aligned wherever that is possible: "international law can significantly influence the content of domestic law indirectly through various interpretive obligations imposed on the courts to interpret and develop domestic law compatibly with South Africa's international legal obligations. The constitution seeks to align domestic law with international law wherever possible." See *National Commissioner of The South African Police Services v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, written submissions of first to forth *amici curiae* para 11.

357 This duty imposed on courts, tribunals, and forums can be said to extend beyond the forums mentioned. It can be said to implicate lawyers and advocates as well. This is so because the ethical duties of litigants require that they cite all relevant law. This is to ensure that a court is aware of any provisions of international law that are relevant. See O'Shea "International law and the bill of rights" 7A-6.

358 O'Shea "International law and the bill of rights" 7A-6: "The change in the wording serves to emphasise that it is not merely sufficient to look at the provisions of international law but to genuinely consider the extent of their application to the Bill of Rights."

359 2015 (1) SA 315 (CC), written submissions of first to forth *amici curiae* at para 11.

South African Constitution which require domestic law to be interpreted compatibly with international law.[360] These were explained as follow:

> First, s 233 imposes the strongest interpretive obligation on domestic courts, mandating that when interpreting any legislation, a court must adopt an interpretation of legislation that is consistent with international law over any inconsistent interpretation, as long as the interpretation is a "reasonable" one. Secondly, courts are subject to a weaker obligation that they must "consider" international law when interpreting the Bill of Rights. Finally, s 39(2) of the Constitution requires courts to promote the "spirit, purport, and object" of the Bill of Rights when interpreting any legislation or developing the common law. Though this does not mention international law expressly, it has been held that determining the "spirit" of the Bill of Rights will often require consideration of international law, as many of the rights in the Bill were intentionally drawn from various international human rights instruments. These interpretive obligations have been used extensively by South African courts to give effect in domestic law even to provisions of international law that are not binding on South Africa and to untransformed treaty obligations.[361]

In line with this, Chief Justice Ngcobo, as he then was, in his minority judgement in *Glenister* held that:

> Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law…These provisions of our Constitution demonstrate that international law has a special place which is carefully defined by the Constitution.[362]

International law is a valuable guide to courts, tribunals and forums when interpreting domestic law. Therefore, an interpretation of the Bill of Rights without any reference to or consideration of international law where international law is applicable/relevant renders such an interpretation inadequate/incomplete.[363]

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360 Written submissions of the first to the fourth *amici curiae* at para 14.

361 Written submissions of the first to the fourth *amici curiae* at paras 15, 16 and 17.

362 Ngcobo in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 97 (*Glenister*).

363 At para 201, the minority judgment makes the following point: "It is possible to determine the content of the obligation section 7(2) imposes on the State without taking international law into account. But section 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision…to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact."

While Section 39(1)(b) deals with the interpretation of the Bill of Rights, Section 233 deals with the interpretation of legislation in line with international law.[364] There is an evident distinction between legislation and the Bill of Rights. Section 39(1)(b) is applicable in relation to the interpretation of the Bill of Rights and section 233 in relation to the interpretation of legislation. Legislation in South Africa is presumed to be constitutional and is declared unconstitutional in the event that it is inconsistent with the Constitution.[365] Section 233 must be understood in the context of the presupposed constitutional compliance of the legislation. This means that constitutionally compliant legislation must be interpreted in a manner that is consistent with international law.

It is important to point out what section 233 does not mean. It does not mean that legislation must be interpreted to be consistent with international law to the exclusion of the Constitution. In South Africa, legislation is interpreted "with the Constitution in sight." Section 233 serves the purposes of ensuring that international law is also taken into account in the interpretative endeavour. In the South African context, international law is thus taken into account on both the constitutional and the legislative level, a position which did not exist prior to the constitutional democracy.

Both sections 39(1)(b) and 233, but more specifically section 39(1)(b), require that the following sources of international law be taken into account when interpreting the Bill of Rights and legislation:

> (a) international law conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> (b) international customs, as evidence of general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;

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364 The difference in function between sections 39(1)(b) and 233 is noticed by Tladi who argues that: "While at first blush it may seem surprising to make a distinction between 'international law' in the context of s 233 of the Constitution, the distinction is justified. International law in s 39(1)(b) is only 'to be considered', while the implication of s 233 'is far more insidious and far reaching' and implies 'the application of the 'international interpretation' in the interpretation of all South African legislation'. This might necessitate a more narrow reading of the phrase 'international law' since international law, in the context of s 233, has more far-reaching implications." See Tladi 2018 *SALJ* 725.

365 That is made evident by two provisions of the Constitution, namely sections 2 and 172. Section 2 states that all legislation must be consistent with the Constitution. In the event that it is not, it must be declared unconstitutional to the extent of the unconstitutionality (section 172).

> (d) judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law.[366]

Notionally, it should not be determinative whether international norms are binding or not because judges and other decision makers should seek guidance from international law.[367] According to O'Shea:

> This applies especially to those principles which are of almost universal application, in other words widely adopted general principles of law and widely ratified multinational conventions. This also follows from the nature of the Bill of Rights, the wording of which has derived much influence from provisions of international human rights instruments.[368]

O'Shea is arguing for a more inclusive and receptive approach to international law. The determinative issue is that section 39(1)(b) enjoins courts, tribunals and forums to consider international law when interpreting the Bill of Rights. On its face, section 39(1)(b) does not make a clear distinction between binding and non-binding international law. On a plain reading of section 39(1)(b), all international instruments relevant to a particular provision of the Bill of Rights should be taken into account when interpreting that particular provision. The distinction between binding and non-binding international law in the South African context was first made in the *Makwanyan*e judgment. This was, however, decided under a differently worded section 35(1) of the interim Constitution.

Though one accepts that, in the strict legal sense, there is a distinction between binding and non-binding international instruments, that should not be the determining factor as to whether or not a court, tribunal or forum takes international instruments into account. At the interpretational level, it matters less whether an international instrument is binding or not; it is the weight that each instrument carries that is determinative. Perhaps the binding instrument will enjoy more weight than a non-binding instrument. The argument is not that the distinction between binding and non-binding instruments does not exist – of course it does:

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366 Article 38 of the Statutes of the International Court of Justice.

367 O'Shea persuasively argues that, being a young constitutional democracy, South Africa should consider not only international instruments binding on South Africa, but the whole framework of international human rights law, which includes international law not binding on South Africa.

368 O'Shea "International law and the bill of rights" 7A-11.

> [L]egal bindingness reflects a state of mind — most importantly of officials who apply and interpret the law (judges, executive branch officials, and so forth), but also to some degree of the larger community that the law purports to govern. It depends on what the British philosopher HLA Hart referred to as their "internal point of view", a sense that rule constitutes a legal obligation and that compliance is therefore required rather than merely optional.[369]

The point being made here is that the "bindingness" of an international instrument should not impede the proper application of section 39(1)(b). This section on its face does not concern itself with the status of international instruments. In the South African context, the "bindingness" of an international instrument is relevant under section 231 of the Constitution.

3.2.3.3 Section 231 of the (final) Constitution and the status of international agreements under the (final) Constitution

Section 231 outlines South Africa's internal procedure for concluding international agreements, becoming bound by these, and incorporating them into domestic law. Section 231 states that:

> (1) The negotiation and signing of international agreements is the responsibility of the national executive.
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
> (3) An international agreement of technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

The above internal procedure is but one procedure a state can utilise to ratify international agreements and incorporate them into national law. South Africa has opted for the dualist system, meaning that there are two separate actions for making

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369 Bodansky "Legally binding versus non-legally binding instruments" 156.

an international agreement law in South Africa. *Firstly*, the agreement must be ratified (approved by resolution in this instance), making that agreement binding on the international plane but not nationally. *Secondly*, the agreement must be incorporated into national law by an Act of Parliament. This makes the international agreement part of national law and, as such, binding on all organs of government.

However, Section 231(4) creates an important exception. In terms of Section 231(4), a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. A provision may be stated to be self-executing if it is sufficiently precise to be directly applied as law, that is, if no intervention of the legislature is required to concretise the provision. This is of significance in as far as Article 13(2)(c) of the ICESCR is concerned. At any rate in its negative dimension, in terms of which states parties may not take deliberately retrogressive measures, that is, not introduce or increase costs in higher education, Article 13(2)(c) is probably self-executing and thus directly applicable law – without the legislature having incorporated this provision into domestic law by means of legislation.[370]

In any event, even if an international agreement has not been incorporated into law by an Act of Parliament, such an agreement still has some national implications. A state is prohibited from acting contrary to the provisions of a ratified, but unincorporated international agreement.[371]

3.2.3.4 The *Glenister* case, the role of international law, and the binding nature of international agreements

The differing roles of international law in South African law are codified in various provisions of the Constitution. As seen above, Section 39(1)(b) outlines the interpretational role of international law, section 231 deals with international agreements, section 232 relates to customary international law, and finally section 233 deals with the application of international law. These provisions were dealt with by the Constitutional Court in the *Glenister* judgement in an endeavour to clarify and

370 Beiter *The Protection of the Right to Education by International Law* 80.
371 Tladi 2018 *SALJ* 711.

outline the precise role played by international law in the South African constitutional adjudication.

The case concerned an application for leave to appeal against a decision of the Western Cape High Court, Cape Town (High Court) and an application for direct access to the Constitutional Court. At the heart of the applications was the constitutional validity of the National Prosecuting Authority Amendment Act (NPAA) and the South African Police Service Amendment Act (SAPSA). The crux of the complaint relates to the disbanding of the Directorate of Special Operations (DSO), a specialised crime fighting unit that was located in the National Prosecuting Authority (NPA), and its replacement by the Directorate of Priority Crime Investigations (DCPI), which is located in the South African Police Service (SAPS).

The abovementioned impugned laws brought this about. The DSO was established in 2001 under section 7(1) of the National Prosecuting Authority Act (NPA Act). Its purpose was to supplement the powers of existing law enforcement agencies in addressing organised crime. The DSO was vested with powers to investigate and institute criminal proceedings relating to organised crime or other specified offences. On 27 January 2009, the President signed into law the impugned laws. The combined effect of the impugned law was to disband the DSO and establish the DPCI. It is this effect of the impugned laws which was at the centre of the constitutional challenge. The applicant, Mr Glenister, a businessman, challenged the impugned laws in the High Court on various grounds.[372]

The Constitutional Court was called upon to adjudicate the following issues:

> - Whether the ratification and domestic incorporation of an international agreement in terms of the Constitution of South Africa created domestic statutory or constitutional rights and obligations.
> - Whether the positive obligation of South Africa to respect, protect, promote and fulfil the rights in the Bill of Rights imposed by the Constitution created constitutional rights and obligations as informed by the state's obligations under the United Nations Convention against Corruption.
> - Whether the Constitution, and by implication international law, imposed an obligation on South Africa to establish and maintain an independent body to combat corruption and organised crime.

372 *Glenister* paras 1-2.

- Whether national legislation that established such specialised force was constitutionally valid in light of South Africa's obligations under the United Nations Convention against Corruption and other international obligations.[373]

In dealing with these issues, the Constitutional Court, relating specifically to the place of international law in the South African legal order, initiated its analysis by unpacking section 231 of the Constitution. In respect of the crucial questions involved in this regard, let us first address the minority judgement. Chief Justice Ngcobo, as he then was, in his minority judgment, from the outset of the analysis pointed out that section 231 of the Constitution is "deeply rooted in the separation of powers".[374] This observation is correct, given the fact that section 231 of the Constitution does indeed make provision for the different tiers of the state to play distinct roles in respect of the ratification of and/or accession to an international agreement.

Chief Justice Ngcobo's analysis referred to the different steps required in terms of section 231 of the Constitution for an international agreement to become binding on the Republic. Firstly, section 231 of the Constitution empowers the national executive to negotiate and sign international agreements. Secondly, an agreement signed by the national executive does not automatically bind the Republic, except in those exceptional circumstances outlined in section 231(3) and (4). Lastly, the international agreements which do not fall under the "exceptional circumstance" require the approval by resolution of Parliament.[375]

Chief Justice Ngcobo then turned to deal extensively with the application of section 231(2) of the Constitution. He held that:

> The approval of an international agreement, under section 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign state, to be bound at the international level by the provisions of the agreement. As the Vienna Convention on the Law of Treaties provides, the act of approving a convention is an "international act…whereby a State establishes on the international plane its consent to be bound by a treaty". The approval of an international agreement under section 231(2), therefore, constitutes an undertaking at the international level, as between South Africa

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373 Lubbe 2012 *ILDC* 1712.

374 *Glenister* para 89. Ngcobo CJ held the view that section 7(2) of the Constitution does not impose an obligation on the state to establish an independent corruption fighting unit. The majority was of the view that section 7(2) does impose such an obligation on the state.

375 *Glenister* para 89.

> and other states, to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law or taking other steps to bring our laws in line with the agreement to the extent they do not already comply.[376]

In essence, the argument is that an international agreement that has been ratified by South Africa is binding on the Republic on the international level, having the effect that failure to observe the provisions of the international agreement may result in South Africa's incurring responsibility towards other signatory states. The judgment further holds that an international agreement is not law in South Africa "until and unless it is incorporated into our law by national legislation."[377] For such an agreement to become part of South African law it must be incorporated into South African law by national legislation. Chief Justice Ngcobo further stated:

> [I]n our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiation and signing an international agreement do not result in a binding agreement. *Legislative action is required before an international agreement can bind the Republic.*[378]

Turning to section 231(4) of the Constitution, Ngcobo's judgement noted the following:

> The consequence of incorporation of an international agreement into our domestic law under section 231(4) is that the agreement "becomes law in the Republic". It is implicit, if not explicit, from the scheme of section 231, that *an international agreement that becomes law in our country enjoys the same status as any other legislation*. This is so because it is enacted into law by national legislation, and can only be elevated to a status superior to that of other national legislation if Parliament expressly indicates its intent that the enacting legislation should have such status. On certain occasions, Parliament has done this by providing that, in the event of a conflict between the international convention that has been incorporated and ordinary law, the international agreement would prevail.[379]

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376 *Glenister* para 91.
377 *Glenister* para 92.
378 *Glenister* para 95. Own emphasis.
379 *Glenister* para 100. Own emphasis.

Clearly, the understanding in Chief Justice Ngcobo's minority judgement is that an international agreement becomes part of South African law or enjoys the status of law in South Africa only once such an international agreement has been enacted into law by national legislation. Its status then is that of ordinary legislation.

Chief Justice Ngcobo's judgment also considered the consequences of the incorporation of an international agreement into South African law. On this score, Chief Justice Ngcobo reasoned as follow:

> Once it is accepted, as it must be, that incorporation of an international agreement under section 231(4) gives the international agreement the status of ordinary legislation, two consequences flow from this. Firstly, insofar as provisions in the international agreement give rise to rights and obligations under domestic law, *these rights and obligations* flow from, and *are limited by, the extent to which the domestic legislation incorporating the agreement includes those provisions*. Secondly, it can hardly be contended that the incorporation of an international agreement gives rise to constitutional rights and obligations. The incorporation of an international agreement does not transform the rights and obligations embodied in the international agreement into constitutional rights and obligations. It only *transforms* them *into statutory rights and obligations* that are enforceable in our law under the national legislation incorporating the agreement.[380]

The caution raised by Chief Justice Ngcobo is that one should guard against elevating the status of an incorporated international agreement to the same level as that of the Constitution. An incorporated international agreement, according to Chief Justice Ngcobo, does not give rise to constitutional rights and obligations as it does not enjoy the same status as the Constitution.

The majority judgment penned by Deputy Chief Justice Dikgang Moseneke (as he then was) and Justice Edwin Cameron agreed partially with some of the reasoning of Chief Justice Ngcobo. Important for the purposes of this thesis are the parts of the judgments where there is agreement on the role of international agreements and their binding nature. Also, the majority judgment stated:

> The negotiating and signing of all international agreements "is the responsibility of the national executive." An agreement that the executive has concluded does not without more bind the Republic. For that to happen, the agreement must be approved by resolution in both the National Assembly and the National Council of Provinces (NCOP). However, agreements "of a technical, administrative or

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380 *Glenister* para 102. Own emphasis.

> executive nature, or an agreement which does not require either ratification or accession" need not be so approved. They bind the Republic once the national executive has properly entered into them, but must be tabled in the National Assembly and the NCOP within a reasonable time.[381]

Likewise, it agreed:

> [t]he main force of section 231(2) is directed at the Republic's legal obligations under international law, rather than transforming the rights and obligations contained in the international agreement into home-grown constitutional rights and obligations. Even though the section provides that the agreement "binds the Republic" and Parliament exercises the Republic's legislative power, which it must do in accordance with and within the limits of the Constitution, the provision must be read in conjunction with the other provisions within section 231. Here, section 231(4) is of particular significance. It provides that an international agreement "becomes law in the Republic when it is enacted into law by national legislation". The fact that section 231(4) expressly creates a path for the domestication of international agreements may be an indication that section 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them. It follows that *the incorporation of an international agreement creates ordinary domestic statutory obligations*. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.[382]

Evidently, both judgements acknowledge that international agreements which have been incorporated do not give rise to constitutional rights and obligations. Furthermore, incorporated international agreements enjoy the status of ordinary domestic legislation. Importantly, an international agreement which has been ratified but not yet incorporated should not be construed to have no effect. By ratifying an international agreement in terms of the applicable constitutional provisions, South Africa becomes a "state party" to the applicable international agreement. Such and act obliges it under international law to observe the rights enshrined in the international agreement. A state party is prohibited from acting in a manner that is inconsistent with the provisions of the international agreement. Although the domestic courts in such a case would not be able to hold the government to account,

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381 *Glenister* para 180.

382 Para 181. Own emphasis. This interpretation of section 231 is supported by Tuovinen who argues: "Section 231 of the Constitution expressly provides for the process in which international conventions are incorporated into domestic law. Section 231(2) provides that an international agreement 'binds the Republic only when it has been approved by a resolution in the National Assembly and the National Council of Provinces'. This section does, however, refer only to obligations on the international plane and that international obligations only create domestic obligations once they have been enacted into domestic legislation as required by s 231(4)." See Tuovinen 2013 *SALJ* 663.

a relevant international tribunal might be able to do so. State responsibility in terms of the rules of public international law ensues.

3.2.3.5 Criticism levelled against the *Glenister* judgment

Although the *Glenister* judgment plays a prominent role in understanding the relationship between South African law and international law, it has not been immune from criticism. Tuovinen in particular criticised the judgement for not utilising the opportunity to outline "once and for all" the different roles played by international law in relation to the Bill of Rights.[383] The author argues that the Constitutional Court omitted to distinguish between the two most important roles played by international law in terms of the South African Constitution. According to Tuovinen:

> The Constitution envisages in a number of sections, including ss 39(1)(b), 231 and 233, two kinds of relationships between international law and the domestic legal system that are relevant for our purpose. The first is a relationship of authority, where international law is binding within the Republic. The second is one of persuasiveness, where international law is not binding but may aid in the interpretation of formally binding, domestic norms.[384]

To substantiate the argument, the author relied mainly on two judgments of the Constitutional Court, namely, *S v Makwanyane*[385] and *AZAPO v President of the Republic of South Africa*.[386] Firstly, with regard to *Makwanyane*, the author relies on the statements where the Court held that international agreements provide a framework within which the Bill of Rights can be evaluated and understood.[387] Secondly, the author relied on the judgement in *AZAPO v President of RSA*,[388] where the Court held that:

> The issue which falls to be determined in this Court is whether [a particular section of an Act] is inconsistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be party at any particular time are, in my view, relevant

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383 Tuovinen 2013 SALJ 662. The author is of the view that the judgement focusses *inter alia* on "the role played in constitutional adjudication by section 39(1)(b) of the Constitution of the Republic of South Africa, 1996, and the meaning of the obligation in that section to 'consider international law' when interpreting the Bill of Rights."

384 Tuovinen 2013 *SALJ* 663.

385 1995 (3) SA 391 (CC) (*Makwanyane*).

386 1996 (4) SA 672 (CC) (*AZAPO*).

387 Tuovinen 2013 *SALJ* 664; see also *Makwanyane* para 35.

388 Tuovinen 2013 *SALJ* 664.

> only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law.[389]

The author appears to be arguing that there is a disproportionate emphasis on the role of international law on the level of section 39(1)(b). For this reason courts conflate the role of international law on the levels of sections 39(1)(b) and 231. According to the author, these are two distinct regimes of applying international law, though they may often overflow. For instance, a court *must* consider an international rule that is binding on South Africa. In this case it is evident that both sections 39(1)(b) and section 231 are applicable.

A sequence must be followed when a court deals with international law. Once a court has identified that international law is applicable to a particular case, it must determine whether international law in that particular case is formally binding (authoritative) or persuasive. Based on factors which will be outlined below, the court can either adopt or reject international law.[390] In so doing, the court must proffer sufficient and legally sound arguments as to why it chooses not to follow international law.

The distinction between international law as authoritative and persuasive is imperative for the proper application of international law. In its persuasive form:

> [i]nternational law may thus give guidance or provide a framework for interpretation of constitutional norms, and it may even persuade courts to decide one way or another. However international law in its interpretive function, cannot create binding obligations.[391]

Tuovinen's primary concern with both the majority and minority judgements in the *Glenister* case is that both judgements fail to recognise the difference between the formal (authoritative) and persuasive roles of international law within the Constitution.[392] The author argues that the appropriate way to deal with international law in the constitutional framework is as follows. Firstly, a court must determine whether it is dealing with international law in its authoritative or persuasive form.

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389 *AZAPO* para 26.
390 Tuovinen 2013 *SALJ* 669.
391 Tuovinen 2013 *SALJ* 664.
392 Tuovinen 2013 *SALJ* 669.

Secondly, upon determining the role of international law in that case, it must provide reasons for either agreeing or disagreeing with international law.[393]

Tuovinen is not alone in his criticism. Tladi thus emphasises that there are two provisions in the South African Constitution which provide for the interpretive role of international law, namely, sections 39(1)(b) and 233. According to Tladi South African courts have fallen short when confronted with the interpretive role of international law.[394] Tladi argues that South African courts have failed and still continue to fail to substantively explain their methodological identification of international law. Before a court can successfully rely on international law it is of immense importance that international law itself be identified and interpreted.

The true meaning of international law can be ascertained only through an application of the methodological rules of international law.[395] A court cannot simply rely on a single treaty without taking into account the international framework, including the methodological rules of international law. Tladi criticises South African courts for not adopting a principled approach when seized with the interpretative role of international law. From the various judgments dealing with international law in South Africa it is unclear how international law itself is to be interpreted. The courts fail to show in a principled and methodological way how they interpret international law — and thereafter how they apply it to the Constitution or any other national legislation.

According to Tladi, South African courts including the Constitutional Court, must acknowledge their failures in not adopting a principled approach based on a methodology to interpret international law rules —

> it is one thing to identify the international-law sources that may be used in the interpretation of the Bill of Rights; it is quite another to interpret those international-law sources. In relation to treaties in particular, the court does not explain its approach to treaty interpretation, including whether it will apply the Vienna rules of interpretation. It is not clear whether the court will use all, or some, of the elements of the Vienna rules of interpretation. Thus, while the court provides an elaborate explanation of the role of international

393 Tuovinen 2013 *SALJ* 669.
394 The author uses the following cases to illustrate his point; *Makwanyane*; *Mohamed*; *Glenister*; *AZAPO*; and *Kaunda*.
395 Tladi 2018 *SALJ* 713.

> law in the interpretation of the Bill of Rights, the interpretation of international law itself receives scant attention.[396]

Tuovinen argues that, once international law has been identified and interpreted, it is in a court's discretion to follow international law in a specific case or not. However, the court will always have to substantiate its approach. He states:

> An example of the manner in which to give reasons regarding the use of international law, may be drawn from the court's decision in *Government of the Republic of South Africa & others v Grootboom* 2001 (1) SA 46 (CC). One of the questions before the court was whether the right to access to adequate housing contained in s 26 of the Constitution contained a so-called minimum core; that is a baseline which must, in the very least, be satisfied. Article 11.1 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") imposes a duty on the state parties to the ICECR to an "adequate standard of living". The United Nations Committee on the Economic, Social and Cultural Rights ("UN Committee") considered that this would entail a minimum core standard beneath which the state may not fall. The UN Committee, however, did not specify what that minimum core ought to be. The Constitutional Court rejected the invitation to follow the approach of the UN Committee because it felt that it did not have sufficient information to determine an appropriate minimum standard, and that it was not certain whether it is appropriate for a court to determine such a standard in any event (*Grootboom* (supra) paras 26-33).[397]

It is submitted that Tuovinen's argument illustrates the correct approach which should be adopted by courts when dealing with international law as an interpretative source. According to the author, the court's discretion is based on a proper reading of section 39(1)(b) of the Constitution as well as the *Makwanyane* judgement, where it was held that international law *assists* courts to interpret the Constitution. This means that not all international norms should be applied in the same manner. For instance, where a norm is considered universal and a court intends to deviate from that international norm, the court would have to give substantive reasons for not following the international norm. Moreover, where an international instrument has been ratified by Parliament but not incorporated, a court ought to follow that legal instrument in order to achieve harmony between the state's internal and external legal obligations.[398] Importantly, the discretionary power does not concern the question whether a court ought to consider international law binding on the Republic

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396 Tladi 2018 *SALJ* 717.
397 Tuovinen 2013 *SALJ* 669.
398 Tuovinen 2013 *SALJ* 669.

and incorporated into domestic law or not. That is mandatory.[399] The discretion is triggered subsequent to considering international law, in the exercise of the decision to either adopt or reject a solution proposed by international law.

Tuovinen does not engage with section 231(4) of the Constitution, leaving it to a logical conclusion that, once an international agreement has been enacted into law by national legislation, it bears the status of ordinary domestic law, hence moving it beyond the ambit of the persuasive regime of international law prescribed in section 39(1)(b) of the Constitution. The author states:

> International law instruments cannot attain formal validity in terms of s 39(1)(b) of the Constitution. This is so even if the text of the domestic provision matches that of international law, if Parliament has ratified the convention, or if the norms found in a treaty are universal. These are crucial factors that should influence a court's reasoning. However, international law instruments cannot be relied upon without considering their substance, and courts must give a reason for accepting or rejecting them. From this point of view, international law, whether followed or not, will bolster a court's reasoning and will ultimately make its judgements stronger.[400]

Tuovinen's criticism of the *Glenister* judgement is well-reasoned, constructive and meaningful in that it clarifies the role of international law in the South African context.

3.3 The different roles of the ICESCR, and Article 13 thereof, in terms of section 39(1)(b) and 231 of the Constitution

The role of international law in South Africa has evolved considerably under both the interim and final constitutions. Section 1 of the Constitution states that "our" sovereign democratic state is founded *inter alia* on the supremacy of the Constitution and the rule of law.[401] This represents a clear break from parliamentary sovereignty that prevailed under the apartheid regime, which regime had a hostile attitude towards the human rights of particularly black South Africans. This hostile attitude was extended to international law. The present-day South Africa is a Constitutional democracy founded on the concept of the rule of law of which Justice Kriegler said the following:

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399 Section 39(1)(b) of the Constitution.
400 Tuovinen 2013 *SALJ* 672.
401 Kroon 2018 *SAJEJ* 81.

> In principle, I believe it means that all persons and authorities within the state, whether public or private, are bound by and entitled to the benefits of laws that have been publicly and prospectively promulgated and that are publicly administered by courts of law. In particular, every wielder of public power is constrained by the law to function strictly within the limits of the empowering instruments.[402]

Under South Africa's constitutional democracy, the judiciary, in particular the High Courts, Supreme Court of Appeal and the Constitutional Court, are given considerable power. For instance, in terms of section 172(1), upon declaring that any law or conduct is inconsistent with the Constitution, the court may make any order that is just and equitable. Furthermore, in terms of section 173 of the Constitution, the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa "each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice." The Constitution's friendliness towards international law can be seen in the prominence of its international law provisions. Sections 39(1)(b), 231, 232 and 233 play a crucial role, and the courts are now empowered to give effect to international law.

South Africa has ratified various international agreements (binding international law in terms of section 231). These also play an interpretative role in terms of section 39(1)(b) of the Constitution. The table below indicates the various international treaties relevant for the purposes of this thesis and their ratification status:[403]

Treaty	**Signature**	**Ratification date, Accession, Succession date**
ICESCR – International Covenant on Economic, Social and Cultural Rights (1966) right to education – Article 13 right to higher education – Article 13(2)(c)	3 October 1994	12 January 2015

402 Kriegler "The rule of law in postcolonial Africa: A British legacy?" (Keynote address delivered at the second Annual Bar Council International Rule of Law Lecture, 3 December 2008), quoted in Kroon 2018 *SAJEJ* 82.

403 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx (Office of the UN High Commissioner for Human Rights).

UNESCO Convention against Discrimination in Education (1960) right to education – Article 4 right to higher education – Article 4(a)		9 March 2000
CRC – Convention on the Rights of the Child (1989) right to education – Article 28 right to higher education – Article 28(1)(c)	29 January 1993	16 June 1995
ICESCR – OP – Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008) *(individual complaints procedure to the Committee on Economic, Social and Cultural Rights)*	-	-
CRC – OP – Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2014) *(individual complaints procedure to the Committee on the Rights of the Child)*	-	-
African Charter on Human and Peoples' Rights (1981) (Banjul Charter) right to education – Article 17	9 July 1996	9 July 1996
African Charter on the Rights and Welfare of the Child (1990) right to education – Article 11 right to higher education – Article 11(3)(c)	10 October 1997	7 January 2000
African Youth Charter (2006) right to education – Article 13 right to higher education – Article 13(3)(f)	7 May 2009	28 May 2009

From the table above it is evident that South Africa has ratified various treaties providing for the right to education in general and for the right to higher education in

particular. The ICESCR, the CRC, the UNESCO Convention, the Banjul Charter, the African Charter on the Rights and Welfare of the Child, and the African Youth Charter, having been ratified by South Africa, are binding on the Republic under international law. Their provisions on accessible or progressively free higher education would further be binding on the executive and the judiciary, and generally all organs of state, to the extent that they are either self-executing *or* have been incorporated into national law by an act of parliament. Via section 39(1)(c), these treaties and their provisions must further guide the interpretation of section 29 of the Constitution on the right to education by any court.

Treaties that have not yet been or cannot be, ratified by South Africa likewise serve as interpretative guides in the latter sense. Hence, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988), Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952), and the Revised European Social Charter (1996) fall into this category. They all contain provisions on the right to education. Article 13(3)(c) of the Additional Protocol to the American Convention, for example, like Article 13(2)(c) of the ICESCR, provides that "[higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education."[404] This strengthens the statement under the ICESCR. International declarations or recommendations that constitute soft law also constitute interpretative guides in terms of section 39(1)(c). For instance, Paragraph 71(e) of the non-binding Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Banjul Charter, as adopted by the African Commission on Human and Peoples' Rights in 2011, repeats that African states are effectively obliged, under Article 17(1) of the Banjul Charter, "[t]o ensure that higher education is made generally available and accessible to all, on the basis of capacity, by all appropriate means, and in particular by the progressive introduction of free education."[405] Again, this confirms the statement under the ICESCR.

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404 Article 13(2)(c) of the ICESCR.
405 Article 17 of the Banjul Charter.

Accordingly, the focus now shifts to the determination of the precise role of the ICESCR in South African law. South Africa is a state party to the ICESCR. The Covenant was signed by then President Nelson Mandela in 1994 but it was ratified by the government of South Africa only on 18 January 2015, this becoming effective on 12 April 2015.[406] In ratifying the ICESCR, that action of the government of South Africa placed the ICESCR within the ambit of section 231(2) of the Constitution, in other words conferring on it the status of binding international law. If South Africa does not give effect to Article 13(2)(c) on accessible and progressively free higher education, the country therefore violates international law.

This means that South Africa must comply with Article 13(2)(c), and "to comply with" means "giving effect to". Giving effect to Article 13(2)(c) includes, *inter alia*, the adoption of legislative, financial, administrative and other relevant measures.[407] It also includes making available remedies, including judicial remedies, in as far as justiciable aspects of Covenant rights are concerned.[408] Rights should be concretised by legislation to such a degree that judicial claims become possible. In the sphere of Article 13(2)(c) this means that legislation should spell out what "free" higher education means. That is, which entitlements this concretely covers.

In as far as Article 13(2)(e) on the establishment of a fellowship system is concerned, legislation should likewise state what may be claimed in which circumstances, so as to make judicial claims possible. Where a state party to the ICESCR does not comply with its international obligations, for example, by failing to take any steps directed at enhancing the accessibility of higher education, by not developing a national policy envisioning a reduction of costs in higher education, by implementing provisions that in access to higher education discriminate against

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406 ESCR-Net 2015 https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr. On its website, the International Network for Economic, Social and Cultural Rights published the following statement in reaction to the ratification of the ICESCR: "The Socio-Economic Rights Institute (SERI), the Legal Resources Centre (LRC), the Community Law Centre (CLC), Section 27 and other Members welcome South Africa's ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on January 18, which will enter into force on 12 April 2015. The South African government signed the Covenant twenty years ago. Ratifying the Covenant represents an important step forward, giving the Covenant greater force. The final ratification of the covenant was a fitting tribute to former president Nelson Mandela who initially signed the Covenant in 1994 on his first visit to the UN in New York."

407 Veriava and Coomans "The right to education" 58.

408 Veriava and Coomans "The right to education" 58.

poorer students, by not developing an adequate fellowship system, or where individuals cannot access higher education in any concrete situation because it is too expensive, this constitutes a *prima facie* infringement of Article 13(2)(2) or (e), potentially read with Articles 2(1), (2), or 4 of the Covenant. In these circumstances, the Committee on Economic, Social and Cultural Rights can ordinarily be approached for a finding that a state party has violated Covenant rights. Local remedies will have to be exhausted first, however. The complaints procedure is provided for by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.[409] South Africa has so far neither signed nor ratified the Protocol.

For now, therefore, South Africans, or other states parties, cannot submit claims to the Committee against the government of South Africa. However, South Africa is obliged to periodically report on its successes and failures in implementing the Covenant.[410] It must thus also state what is has done to accomplish accessible or progressively free higher education. The Committee considers the reports of states parties and responds to these by adopting Concluding Observations. In 2018, therefore, the Committee in its Concluding Observations on the initial report of South Africa noted as follows:

> The Committee welcomes in particular the significant progress the State party has made in enhancing access to education. This includes the nearly universal access to primary and secondary education; the improved access to early childhood education benefiting 88 per cent of children aged 5 and 6 years (although access remains very limited among children from the poorest families); and the free higher education and training currently made available to first-year students from low-income families. It also welcomes the announcement of fully subsidized higher education and training for students from low-income families over a five-year period.[411]

The ICESCR does not stipulate the specific means by which it is to be implemented in the national legal order. Put differently, there is no provision obliging its comprehensive incorporation or requiring it to be accorded any specific type of status in national law.[412] Therefore, each state party is at liberty to choose the

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409 Article 2 of the Optional Protocol to the International Covenant on Economic Social and Cultural Rights.
410 Article 16 of the ICESCR.
411 Concluding Observations, South Africa, UN Doc. E/C.12/ZAF/CO/1 para 70.
412 Ramsden 2012 *HKLJ* 839.

precise method by which ICESCR rights are to be given effect in national law.[413] Article 13(2)(c) of the ICESCR has two sides to it. On the one hand, there is the positive obligation to enhance the accessibility of higher education, to make it progressively free. On the other, there is a negative obligation not to introduce or increase study fees. The latter obligation is related to the obligation not to take deliberately retrogressive steps in realising Covenant rights. A report of the High Commissioner on Human Rights provides in this regard that:

> [t]he obligation to progressively realize economic, social and cultural rights also entails a related prohibition of deliberate retrogression. This means that it is prohibited to adopt measures aimed at reducing the level of protection that some rights have already gained. The restriction or limitation of rights that have already been provided for (such as access to free primary health-care services for children) or the abrogation of legislation necessary to exercise a right, are examples of deliberate retrogressive measures, which are considered by the Committee on Economic, Social and Cultural Rights a prima facie violation of the Covenant unless the State can show that it is fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[414]

Although the ICESCR has been ratified by, and is binding on, South Africa on the international level, it has not yet been incorporated into South African law by an Act of Parliament as referred to in section 231(4) of the Constitution. It may therefore be asked, what is the nature of the legal obligation flowing from Article 13(2)(c) in the case of South Africa? Where international provisions have been incorporated into national South African law, they give rise to ordinary legislative duties. Hence, they would rank on a par with any other legislation. They do not give rise to constitutional obligations. In other words, the Constitution will always rank supreme. It is hard to argue that Article 13(2)(c) has been incorporated into national law. For example, neither the Higher Education Act of 1997 nor the National Student Financial Aid Scheme Act of 1999 refers explicitly or implicitly to the ICESCR more generally, or the obligation under Article 13(2)(c) to the effect that the accessibility of higher education be enhanced, notably by making it progressively free, specifically. In any event, both acts were adopted prior to the ratification of the ICESCR. Consequently, there flows no legislative duty from Article 13(2)(c). The duty that flows from Article

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413 General Comment No. 9 paras 5 and 7.

414 "Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights" UN Doc. E/2009/90 para 15.

13(2)(c) remains a “purely” international one. At any rate, this is the case for the positive obligation under Article 13(2)(c), the obligation to enhance the accessibility of higher education, notably by making it progressively free.

However, what is the situation in as far as the *negative* obligation not to undertake deliberately retrogressive measures is concerned, specifically the obligation not to introduce or increase study fees? This obligation is implicit in Article 13(2)(c). Section 231(4) of the Constitution states in part that “a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.” Is Article 13(2)(c), in its negative dimension, perhaps a self-executing provision and for that reason automatically part of the law in the Republic? In other words, must the negative duty not to introduce or increase study fees be considered a legislative duty in South Africa also without an act of parliament incorporating Article 13(2)(c) having been adopted?

Human rights provisions in international agreements have been stated to be self-executing, and thus also justiciable by any court of law, if they satisfy the following requirements: (a) they must impose on the state party a clearly defined duty; (b) compliance therewith must be possible without it being necessary for the state party to take further legislative measures; (c) they must not leave to the state party a “choice of policy” in the implementation of the international obligation.[415]

The stated negative duty under Article 13(2)(c) satisfies all three criteria. The duty, being a negative one, one of restraint, is very clear – it is the duty not to introduce or increase fees. It can be complied with, without legislation being necessary to detail how compliance should occur. No policy choices – that would better be left to parliament or the executive – need to be taken, as there is only one method of compliance, namely that not to act. Consequently, there is a legislative duty binding on the executive and the judiciary, and generally all organs of state. Reverting to the language of section 231(4) of the Constitution, this duty is also not “inconsistent with the Constitution or an Act of Parliament,” and must, therefore, prevail.

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415 Coomans and Jansen 1991 *NJCM-Bulletin* 189.

What has been stated above applies *mutatis mutandis* to the comparable provisions of the UNESCO Convention against Discrimination in Education, the CRC, the African Charter on the Rights and Welfare of the Child, and the African Youth Charter. The provisions on higher education of all of these instruments, in their positive dimension, cannot clearly be identified as having been incorporated into South African municipal law by national legislation and seem not to be part of South African municipal law in an overt manner. In their negative dimension, however, forbidding deliberately retrogressive measures, they can be considered part of municipal law. *Ex abundanti cautela*: All provisions on higher education, in their positive and negative dimension, must yet play a role in the interpretation of section 29 of the Constitution on the right to education. This follows from section 39(1)(c) of the Constitution.

Reference has been made to Article 13(2)(e) of the ICESCR, which envisages the establishment of an adequate fellowship system.[416] From the ICESCR it is unclear what precisely constitutes “an adequate” fellowship system. However, a purposive and contextual interpretation of Article 13(2)(e) favours an interpretation in support of a bursary or loan system that is effective enough to address poor student's need for financial resources to access education in general, in particular higher education, for as long as higher education is not yet free.[417] Perhaps the National Student Financial Aid Scheme Act of 1999 can be considered an incorporation of Article 13(2)(e) into South African municipal law under section 231(4) of the Constitution. There is no express reference to the Covenant, though.

The ICESCR imposes various obligations which are of immediate effect (and which, to this extent, should also be viewed as “self-executing” within the meaning of Section 231(4) of the Constitution). One of these is imposed by Article 2(2), as read with the various substantive Covenant provisions. This requires states parties to guarantee that relevant rights will be exercised without discrimination of any kind as to “race, colour, sex, language, religion, political or other opinion, national or social

416 Article 13(2)(e) of the ICESCR.
417 Beiter *The Protection of the Right to Education by International Law* 532-533.

origin, property, birth or other status."[418] In the mentioned report of the High Commissioner of Human Rights it is thus stated:

> An important feature that makes monitoring essential for economic, social and cultural rights is the notion of progressive realization. Not all of the obligations regarding economic, social and cultural rights, however, are qualified by the notion of progressive realization. Some obligations, such as the obligation to take steps toward realization, the prohibition of discrimination and the satisfaction of the minimum core obligations, are of immediate effect. All rights may also include immediately enforceable aspects. For example, the right to adequate housing entails an immediate obligation to protect from forced eviction.[419]

The Commissioner then goes on to state that:

> An important obligation enshrined in all core international human rights treaties is the prohibition of discrimination in relation to all human rights. According to article 2, paragraph 2, of the Covenant, States parties "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Similar provisions are included in other relevant human rights instruments enshrining economic, social and cultural rights. This list of "forbidden grounds of discrimination", is, however, not exhaustive — as the use of the expression "other status" suggests. There could be other relevant grounds to consider. The Committee on Economic, Social and Cultural Rights has mentioned, for example, disability, geographical residence, health status and sexual orientation as grounds that would also require a strict scrutiny if employed to make distinctions with the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of rights set forth by the Covenant.[420]

This is important in the context of an adequate fellowship system as unaffordable higher education fees can be discriminatory against eligible poor students. An adequate fellowship system, therefore, ought to strive to address this. The Committee has stated that "an adequate fellowship system" should be read with the ICESCR's non-discriminatory and equality provisions.[421] In other words, the fellowship system should enhance equality of educational access for individuals from disadvantaged groups. The absence of a fellowship system, or its inadequate conception could be seen as an infringement of Article 13(2)(c) and (e) read with

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418 Article 2 of the ICESCR.

419 "Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights" UN Doc. E/2009/90 para 12.

420 "Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights" UN Doc. E/2009/90 para 17.

421 General Comment No. 13 para 26.

the non-discrimination provision of Article 2(2). Reference being to a "self-executing" aspect of the Covenant here, courts should moreover be able to adjudicate without express legislative incorporation.

Generally, one can argue that all negative obligations of non-discrimination in relation to access to higher education in international agreements, and potentially very urgent positive obligations to eliminate clear forms of discrimination in this context (for instance, to correct aspects of legislation that discriminate against poorer students in access to higher education), are self-executing provisions that automatically form part of municipal South African law and are also justiciable. Hence, these obligations may also be enforced before any court of law. Positive obligations to take measures aimed at addressing static or systemic discrimination in access to higher education are progressive in nature, directed at the legislator. They would need to be clearly incorporated into national law before they would bind the courts or the state administration.

Section 232 of the Constitution deals exclusively with customary international law, which is formed by a "general state practice accepted as law".[422] This section states that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".[423] The effect of this constitutional provision is that customary international law must be followed in South Africa in all material aspects unless it is found to be inconsistent with the Constitution or an Act of Parliament. In some instances customary international law can fulfil the role of international agreements not yet ratified or incorporated.[424] The apex Court of South Africa has to date not had the opportunity to judicially consider the scope of the operation of section 232. This can be attributed to various factors, including a "lack of aptitude and expertise in international law among the ranks of the legal profession."[425] One has to concede that determining the customary status of a human right is not an easy exercise; it requires some expertise. This might explain

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422 The Statute of the International Court of Justice Article 38(1)(b).

423 Section 232 of the Constitution.

424 O'Shea notes that "as long as South Africa has not ratified the major international human rights agreements and incorporated the provisions into domestic law, customary international law will play an important role in human rights analysis in South African courts." O'Shea "International law and the bill of rights" 7A-16.

425 O'Shea "International law and the bill of rights" 7A-16.

the lack of jurisprudence on this specific section of the Constitution. Importantly, customary international law is directly enforceable in domestic law without the prerequisite of transformation by an Act of Parliament.[426]

In the light of the above, a valid argument could be made that the duty not to discriminate constitutes customary international law. This would mean that it is law and binding in South African unless inconsistent with either the Constitution or primary legislation. Evidently, the prohibition of discrimination is by no means inconsistent with the Constitution and any such legislation in South Africa. Therefore, the provisions of the ICESCR relating to non-discrimination – even if operative in the sphere of economic, social, and cultural rights – are law and binding in South Africa. High university fees often have a discriminatory effect on poor students in that these may be denied effective access to higher education due to their socio-economic status their lack of financial resources.[427] This is patently inconsistent with customary international law. which is law in South Africa. Such an argument is not far-fetched. In his treatise on the right to education under international law, relying on other credible secondary literature, Beiter argues that if there is an aspect of the right to education that has acquired the force of customary law (apart from compulsory and free primary education, which is available to all), then this is access to education without discrimination.[428] In that sense again, one could argue that Article 13(2)(c), in its anti-discriminatory function, forms part of South African law as customary law.

Consequently, eliminating discrimination in access to higher education, the duty to make higher education progressively free – and, for as long as it is not yet free, to make available study loans or bursaries – and also the duty further not to introduce or increase fees in higher education, are significant obligations under international law. What is South Africa's attitude towards fees in education? Judging in terms of the reservation the Republic has made to Article 13(2)(a) of the ICESCR, its commitment in this respect seems rather weak. Article 13(2)(a) requires primary

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426 *President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases* 2009 (2) SA 466 (CC).

427 Brooks 2016 *GLJ* 230. The author argues: "As costs continue to rise, higher education will become increasingly unaffordable to those at the lower end of the income distribution, even though as a matter of justice and economic policy, higher education ought to be available to all."

428 Beiter *The Protection of the Right to Education by International Law* 44.

education to be compulsory, free, and available to all immediately. South Africa however reserves the right to realise this right only progressively. Apart from the fact that this reservation seems not to be in compliance with Article 19(c) of the Vienna Convention on the Law of Treaties,[429] which requires that reservations must not be incompatible with the object and purpose of a treaty (this covering primary education as this is a so-called minimum core obligation), the reservation, by implication, also seems to reflect that the government's perception is that free *higher* education is not "important." If the government does not even consider there to be an obligation to make primary education free in all earnest, the question of free higher education perhaps seems totally beyond consideration as at serious obligations for the South African government.

3.4 Conclusion

Under the constitutions of South Africa preceding the interim Constitution the protection of human rights by courts of law was virtually impossible.[430] Due to the regime of parliamentary sovereignty that was in place then, courts of law could not declare an act of parliament to be invalid for reasons relating to the violation of human rights.[431] The status of the constitutions of South Africa preceding the interim Constitution can be equated to that of ordinary acts of parliament. During this period, constitutional supremacy was a distant dream.

Unlike the interim Constitution and the later (final) Constitution, none of the other constitutions of South Africa contained a Bill of Rights for the purposes of recognising and protecting individual and collective human rights. The hostility towards human rights also sheds some light on why the constitutions of South Africa preceding the interim Constitution treated international law with a hostile attitude. During this period, when international law was recognised it was relegated to a status subordinate to parliamentary legislation and common law.[432] That was the case because human rights form a significant part of international law. It is hard to imagine international law without reference to human rights. The apartheid regime

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429 Article 19(c) of the Vienna Convention.
430 Currie and De Waal *The Bill of Rights Handbook* 2.
431 Currie and De Waal *The Bill of Rights Handbook* 3.
432 Dugard *International Law: A South African Perspective* 50.

was conceptually and in all practical senses in direct conflict with the concept of human rights. This was confirmed by the resolution of the General Assembly of the United Nations adopting the International Convention on the Suppression and Punishment of the Crime of Apartheid, which declared apartheid to be a crime against humanity.[433]

Although apartheid was declared a crime against humanity in the 1970s, it remained a mammoth task for South African courts to fully embrace human rights and by extension international law. With the limited legal avenues at their disposal, the courts tirelessly attempted to "introduce" international law, specifically customary international law, into South African law. In limited circumstances, the courts would consult customary international law for guidance in adjudicating upon disputes brought before them by aggrieved litigants. Unlike post 1994, cases or disputes were not brought before courts of law to determine whether a statute was consistent with either the constitution or international law, or both. Viewed with this background in mind, it is clear that great efforts have been made for the recognition of international law in South African law since 1994.

The interim Constitution was the first Constitution of South Africa to formally give recognition to the constructive role of international law in South African law. It compelled courts to consider international law when adjudicating upon matters where international law was relevant and applicable. Furthermore, it subjected international law only to the supremacy of the interim Constitution[434] – an evident break from the previous regime of parliamentary sovereignty, where international law was subordinate to parliamentary legislation and common law. The *Makwanyane* case, which was adjudicated under the interim Constitution, outlined the role of international law in South Africa as being a tool of interpretation for courts of law when interpreting the Bill of Rights.[435]

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433 International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the UN General Assembly on 30 November 1973, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force on 18 July 1976.

434 Section 231 of the interim Constitution.

435 *Makwanyane* para 35.

What is significant about this judgement is the fact that it held that both binding and non-binding international law should be utilised to interpret the Bill of Rights. As imperfect as the judgment is in the opinion of some scholars and lawyers, it has crafted a clear role for international law in South African jurisprudence. Moreover, the interim Constitution changed the treaty-making process to respect the doctrine of the separation of powers in that it introduced both houses of parliament to the process.[436] In so doing, the interim Constitution ensured that the treaty-making process is transparent and not the sole responsibility of the national executive. The process has thus become democratised. The interim Constitution initiated the evolution of the role of international law in South Africa law. It is also this Constitution that for the first time obliged courts to prefer an interpretation, when interpreting any legislation, which is consistent with international law.

The (final) Constitution of South Africa of 1996 completed the project commenced by the interim Constitution in respect of the formal recognition of international law in South African law. Most constitutional provisions relating to international law in the interim Constitution were retained in the (final) Constitution, although the (final) Constitution regrettably fell back on the dualist position in as far as international agreements are concerned, requiring their specific incorporation into domestic law in most cases. The monist position with regard to treaties, which had been introduced in the interim Constitution for the first time in South African history, made international agreements part of domestic law by virtue of a mere resolution of parliament. Retaining this position would have been preferable as most international human rights treaties would in this way quickly have become part of South African law, binding on all organs of government, including the courts. Under the (final) Constitution, the *Glenister* case dealt comprehensively with the role of international law in South African law. The case focussed primarily on sections 7, 39 and 231 of the Constitution. It was in the *Glenister* case that the Constitutional Court reiterated that courts of law in South Africa are obliged to consider international law where it is applicable and relevant as a tool for use in the interpretation of the Bill of Rights.

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436 Section 231 of the interim Constitution.

The Constitutional Court went one step further to clarify that international law does not enjoy the same status as the Constitution and its rules do not create constitutional rights and obligations. The Constitution remains supreme, as stated in section 2 of the Constitution.[437] International law does have a prominent role in South African law even so – that much is evident from the Constitution itself, which subjects international law solely to the supremacy of the Constitution. International law must be respected by the South African government and its obligations must be complied with. The role of international law in South Africa has evolved greatly since 1994 and it is evident that it is still evolving, given the global space within which states function these days.

South Africa must give effect to its international obligations in a manner that is adequate and effective – including its obligation under Article 13(2)(c) of the ICESCR, to make higher education "equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education." South Africa is accountable for its compliance with this obligation to states parties to the Covenant, notably through its obligation to report on successes and failures in implementing accessible and progressively free higher education to the Committee on Economic, Social and Cultural Rights.

With regard to the progressive realisation of the right to education, General Comment No. 13 provides that "[s]tates parties have a specific and continuing obligation 'to move as expeditiously and effectively as possible' towards the full realisation of Article 13."[438] This also applies in as far as accessible higher education is concerned. Access needs to be progressively enhanced, inter alia, by making higher education free over time. Article 13(2)(c) envisages improved access to higher education through legislative, financial, administrative and other relevant measures. Notably, judicial remedies in terms of which relevant aspects of "free" higher education can be adjudicated will be useful in making the right effective. For as long as higher education is not yet free, there must, in accordance with Article 13(2)(e), be set up an adequate fellowship system, entailing bursaries and/or loans benefitting economically disadvantaged students. While South Africa seems not to

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437 *Glenister* para 81.
438 General Comment No. 13 para 44.

have given legislative form to Article 13(2)(c) in as far as progressively free higher education is concerned, the National Student Financial Aid Scheme Act of 1999 gives legislative contours to Article 13(2)(e).

Apart from these progressive positive obligations, there are immediate negative obligations which, as part of the relevant containing treaties, can be seen as "self-executing" and thus as immediately forming part of South African law. There is an immediate negative obligation not to undertake deliberately retrogressive measures in the form of introducing or increasing study fees in higher education. This is also an obligation easily justiciable by a court of law. Any introduction or increase in fees would have to be justified under strict limitation or "reasonableness" considerations (Article 2(1) or Article 4 of the ICESCR). There is also an immediate negative obligation not to discriminate, this flowing from Article 13(2)(c) and (e) read with the non-discrimination provision of the Covenant in Article 2(2). Any study fee system or fellowship system in place may thus not, in its intents and effects, discriminate against economically disadvantaged students. Also this obligation is justiciable without further ado by a court of law. In view of the importance of the non-discrimination obligation, there may also be stated to exist immediate positive obligations under international law in as far as free higher education is concerned. Notably the failure to set up even a rudimentary fellowship system right away could be seen as violating such a positive obligation. The importance of the non-discrimination obligation in the sphere of higher education is underlined by the fact that this forms part of customary international law. As such, it immediately forms part of South African law.

Finally, binding and non-binding international instruments protecting the right to accessible higher education must be utilised to the extent necessary to give meaning to section 29(1)(b) of the Constitution on further education, this covering higher education. This is a constitutional requirement enshrined in section 39(1)(b) of the Constitution.

CHAPTER 4: THE RIGHT TO PROGRESSIVELY FREE HIGHER EDUCATION UNDER THE SOUTH AFRICAN CONSTITUTION

4.1 Overview: Education, higher education fees, NSFAS and the right to progressively free higher education under the Constitution

> Education empowers people to define their identity, take control of their lives, raise healthy families, take part confidently in developing a just society, and play an effective role in the politics and governance of their communities.[439]

The quote above embodies the immeasurable value of education in any society. Without education societies would not be able to effectively solve their problems, develop competitively and eliminate poverty.[440] Education is not only important for the formal labour market but also for "good citizenship and enriching and diversifying life."[441] Education enables citizens to make informed choices and valuable contributions to the development of their countries.[442] Conversely, an uninformed and uneducated citizenry is unable to both effectively contribute to the development of their country and to exercise their human rights effectively. Nelson Mandela held the view that education is the "great engine of personal development."[443] It is in accordance with this notion that education is today accorded the status of a human right and is protected in many national constitutions.[444] From a South African perspective, the right to education is protected by the supreme law, the Constitution.[445]

Under the apartheid regime the right to education was not available to all South Africans. Black South Africans did not receive the same level of education as white South Africans.[446] The type of education an individual received primarily depended

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439 National Planning Commission: National Development Plan 2030 "Improving Education, Training and Innovation" 261.

440 National Planning Commission: National Development Plan 2030 "Improving Education, Training and Innovation" 261.

441 National Planning Commission: National Development Plan 2030 "Improving Education, Training and Innovation" 262.

442 Beiter *The Protection of the Right to Education by International Law* 18-19.

443 Quotation by Nelson Mandela, in Beiter *The Protection of the Right to Education by International Law* 1.

444 Beiter *The Protection of the Right to Education by International Law* 1.

445 Section 29 of the Constitution deals with educational rights and defines the state's obligations in this respect.

446 *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 45 (Ermelo).

on race. The democratically elected government of South Africa post 1994 inherited an education system which was burdened with inequalities, a disproportionate distribution of resources along racial lines, and a lack of qualified educators for the majority of learners, which happened to be African, particularly black.[447] Higher education was back then restricted to "relatively well-off families", by design of the system of apartheid, who happened to be white South Africans.[448] This was done to the exclusion of the majority of students, which were black South Africans.[449]

Importantly, this should not be comprehended to mean that black people did not attend higher education institutions Some of them did. The focus is on the skewed resource allocation to the different higher education institutions, with white universities (previously advantaged institutions) receiving far more resources than black universities (previously disadvantaged institutions). The legacy of apartheid for the socio-economic conditions of South Africa, especially education, was described by the Constitutional Court in its *Ermelo* judgment. Moseneke DCJ, writing for the majority of the Court stated that:

> Apartheid has left us with many scars. The worst of these must be the vast discrepancies in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequality are still with us.[450]

This sentiment was expressed by the Constitutional Court in 2009, fifteen years after the end of apartheid. This indicates the long-lasting effect of apartheid on the country and its citizens. The educational system of South Africa is negatively affected by the long-lasting effects of apartheid. Like other sectors of the South

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447 Para 46.

448 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 1. The author states that: "[d]uring apartheid the vast majority of students at Higher Education Institutions (HEIs) in South Africa were white. In 1980, for example, they constituted 74.8 per cent of students, compared to the 12.5 per cent that were black. A decade later in 1990 black students still represented only 37.7 per cent of all the students. This disproportionate relationship between demographic share and representation at tertiary institutions was a reflection of the broader injustice of the previous political dispensation. It had to change."

449 Para 46, the sentiments expressed by the Court were not limited only to basic education but applied with equal force to higher education.

450 Para 45.

African economy, higher education too has been greatly affected by the apartheid regime. A large majority of the black population was unable to access higher education for various reasons, including lack of financial resources, oppressive legislation, a lack of resources, inadequate schools, and so on.

The large-scale inequalities caused by the apartheid system are still very much a reality in the higher education system of today.[451] The first democratically elected government of South Africa inherited a fragmented, structurally racialised and unequal higher education system which was not receptive of all the citizens of South Africa.[452] Upon assuming office, the post-apartheid government embarked on a transformation agenda for the education system in South Africa. The previous chapter demonstrated that a deliberate decision was made to transform South Africa, moving from a system of parliamentary sovereignty that had facilitated the introduction of apartheid laws to one of constitutional democracy, where the constitution reigns supreme.

The South African Constitution is hailed as a "transformative" constitution.[453] It serves as a bridge between South Africa's unjust past and the new democratic South Africa based on human dignity, equality, and human rights and freedoms.[454] The transformative role of the Constitution is expressly referred to in the Preamble to the Constitution. The Preamble states that the Constitution is being adopted as the supreme law of South Africa to facilitate the healing of the divisions of the past, and to establish a democratic and open society based on respect for human rights.[455] Pursuant to this commitment, the drafters of the Constitution proceeded to lay down various human rights in the Constitution, in chapter 2 containing the Bill of Rights, to help materialise a democratic and open society based on the respect for human rights, dignity and freedoms.

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451 Wangenge-Ouma 2012 *Higher Education* 832.

452 The Ministerial Oversight Committee on Transformation in South African Public Universities, September 2015 "The Transformation of South African Higher Education" para 1(iii).

453 Langa P 2006 *SLR* 1; Pieterse 2005 *SAPL* 158.

454 Section 1(a) of the Constitution; Currie and De Waal *The Bill of Rights Handbook* 2; Ackermann 2004 *NZLR* 63.

455 Preamble to the Constitution.

The Bill of Rights is the cornerstone of the constitutional democracy of South Africa.[456] It sets out the fundamental constitutional rights of every person (including every juristic person, to the extent applicable) in South Africa,[457] including the right to education. Education is a fundamental human right in South Africa[458] and can be limited only in terms of section 36 (the limitation clause) of the Constitution. Section 29 of the Constitution expressly and implicitly imposes various governmental obligations, which are both positive and negative in nature. Section 29(1)(b) is to the effect that "[e]veryone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible."[459] Hence, there is a positive obligation on the state to make further education available and accessible, and a negative obligation not to interfere with the exercise of the right to further education. Educational rights in South Africa, being constitutional rights, are justiciable.[460] This means that the government can be challenged in a court if it does not comply with its constitutional obligations on education.

Despite the great efforts made to address the injustices of the past, accessing education in its different stages remains a challenge, especially higher education. Surveys from Statistics South Africa indicate that 51% of South African youth aged 18-24 claim they do not have the funds to pay for their higher education tuition.[461] From a financial perspective, this figure suggests that higher education is out of reach for most South African students and their parents.

Learners from poor socio-economic backgrounds are limited by high tuition fees from accessing higher education, in that high tuition fees create a barrier to adequate access to higher education. Although the focus here is on tuition fees at higher education institutions, it should not be understood that tuition fees are the sole factor impeding access to higher education in South Africa. There are various other factors impeding access to higher education, including a disempowering and alienating institutional culture, a poor understanding by government of the many

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456 Section 7(1) of the Constitution.
457 Section 8 of the Constitution on the application of the Bill of Rights.
458 Chürr 2015 *PELJ* 2405.
459 Section 29(1)(b) of the Constitution.
460 Chürr 2015 *PELJ* 2406.
461 Statistics South Africa 2017 http://www.statssa.gov.za/publications/Report-92-01-05/HigherEducationandSkillsSouthAfrica2017.

challenges faced by students and staff, a pervasive culture of passive resistance to transformation on the part of universities and their staff, continuing inequalities in provision, language barriers, lack of infrastructure, lack of capacity to accommodate students, and a lack of co-operation between the government and the private sector.[462]

The post-apartheid government embarked on a transformation agenda for the higher education system in South Africa in the second half of the 1990s. Avenues were explored and found to fund higher education. The National Student Financial Aid Scheme (NSFAS) was established in terms of the National Student Financial Aid Scheme Act, 56 of 1999 (NSFAS Act).[463] Though the NSFAS has been and still is of great assistance to students from poor backgrounds, South African students have remained resolute that they demand free higher education, suggesting that the NSFAS was or is insufficient and/or ineffective to comprehensively address the issue of access to higher education. The NSFAS has contributed to expanded access to higher education by previously disadvantaged groups/communities. It is primarily reliant on government funding, which plays a crucial role in it effective functioning. This means that without, or with decreased government funding its operation would be rendered ineffective. Furthermore, government funding also plays a crucial role in the funding of higher education institutions themselves. Through this relationship, it is evident that funding and access to higher education are interrelated. Proper funding plays a central role in expanding or enhancing access to higher education, especially in a country like South Africa with its high levels of inequality as a result of past injustices.

What makes the funding of higher education institutions by the South African government even more important is the constitutional commitment to social justice. The commitment is to improve the "quality of life of all citizens and free the potential of each person", including by addressing the inequalities and injustices of the past.[464] Despite this important constitutional commitment, there has been a

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462 The Ministerial Oversight Committee on Transformation in South African Public Universities, September 2015 "The Transformation of South African Higher Education" para 2.

463 Section 3 of the NSFAS Act.

464 Preamble of the Constitution.

decrease in state funding of public higher education institutions in South Africa.[465] The total earmarked funding for higher education (institutions) as a percentage of the total state funding of universities and Technikons decreased from 15.6% in 1996 to 10% in 1997.[466] Moreover, in 2003 it declined to 10.3%. The argument is made that funding for capital expenses has forced many higher education institutions to fund capital development from their budget or take loans. Consequently, this has implications for tuition fees.[467] One of the major concerns arising from the diminution of state funding for higher education institutions was identified by the Higher Education of South Africa Task Team (HESA Task Team):[468]

> Considering that government is the main funder of higher education, budgetary reduction or limited budgetary enhancement often causes institutional vulnerability. In turn, vulnerability threatens the attainment of these institutions' mandates. To continue to prosecute their mandates effectively, even with diminishing state financial support, universities have to generate own income through *inter alia*, tuition and other fees, research, private gifts and grants, and investments.[469]

The immediate consequence of the diminution of state funding is an increase in the cost of higher education to the students, which takes the form of raising the tuition fees. The state is obliged by both the Constitution and international law to fund higher education institutions as part of its obligation to make further (this including higher) education available and accessible through the adoption of reasonable measures, with the specific exclusion of unjustified retrogressive measures. The impermissibility of retrogressive measures flows from the obligation to realise socio-economic rights progressively.

4.2 The purpose of further education, especially university education

Higher education is one of the sectors which forms part of the post-apartheid government's transformation agenda as envisaged by the Education White Paper

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465 HESA Task Team Tuition Fees: Higher Education Institutions in South Africa 9.
466 HESA Task Team Tuition Fees: Higher Education Institutions in South Africa 18.
467 HESA Task Team Tuition Fees: Higher Education Institutions in South Africa 19.
468 Pursuant to the concerns of the Minister of Education regarding the levels of tuition fees charged by higher education institution, the Minister mandated the task team to investigate the funding of higher education in South Africa with specific reference to tuition fees.
469 HESA Task Team Tuition Fees: Higher Education Institutions in South Africa 9.

3: A Programme for the Transformation of Higher Education of July 1997.[470] Alive to the impact of apartheid on the higher education system, the White Paper attempts to address the following challenges: redress past inequalities, transform the higher education system in order to bring it in line with a new social order, and respond to new realities and opportunities.[471] Higher education in South Africa seems to serve a purpose beyond mere academic aims. That is, there appears to be a strong element of social justice that is to be achieved through higher education. For some, higher education represents an agent of change. It is this understanding of the purpose of higher education which evidences an inextricable link to social justice.

The commitment to social justice is also found in the foreword by the then Minister of Education, Professor SME Bengu, to White Paper 3, which reads:

> The transformation of the higher education system to reflect the changes that are taking place in our society and to strengthen the values and practices of our new democracy is, as I have stated in many previous occasions, not negotiable. The higher education system must be transformed to redress part inequalities, to serve a new social order, to meet pressing national needs and to respond to new realities and opportunities. The White paper outlines the framework for change, that is, the higher education system must be planned, governed and funded as a single national co-ordinated system. This will enable us to overcome the fragmentation, inequality and inefficiency which are the legacy of the past, and create a learning society which releases the creative and intellectual energies of all our people towards meeting the goals of reconstruction and development. I have no doubt that the journey is not likely to be easy. However, I am confident that if we collectively commit ourselves to completing it in a spirit of consensus that has already been achieved, we will reach our destination, that is, a higher education system that contributes to the building of a better life for all.[472]

In South Africa, higher education plays a central role in the government's transformative vision of building a better life for all. This is crucial given South Africa's history of exclusion on the basis of race. From a South African perspective, higher education is not primarily focussed on the skills that higher education should equip students with, but it goes beyond that. It is about the societal impact of higher education. It is this understanding of the purpose and role of higher education that

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470 Education White Paper 3: A Programme for the Transformation of Higher Education, July 1997, Preamble.

471 White Paper 3 Preamble.

472 White Paper 3 Foreword by Professor S M E Bengu.

must inform how higher education should be funded. It is the understanding of the role and purpose of higher education that informs whether it is a public or a private good.

The term "public good" is a term used mostly in the discipline of economics. In that context, a public good must be "non-excludable" and "non-rivalrous".[473] These terms are explained as follows:

> A [non-excludable] good is one which the provider cannot charge consumers for, such as public sidewalks. A [non-rivalrous] good can be enjoyed by many consumers at once, with an additional consumer's entry not affecting the degree to which other consumers can enjoy the good (think software or music downloads).[474]

From the strict and narrow economic definition of public good it is evident that higher education is not a public good because universities do regularly charge students tuition fees for receiving higher education. However, for the purposes of this thesis, the term "public good" will be used loosely, acknowledging the expert debates on the classification of higher education as a public good.[475] It will be acknowledged that higher education certainly has positive externalities and, in this sense, is at least a societal good benefitting not only graduates but wider society as well.[476]

If higher education is understood to be a societal good, it follows that government will have a greater role to play in relation to its funding.[477] This does not suggest that government should necessarily be the sole bearer of all funding obligations vis-à-vis higher education. Higher education being a societal good implicates the private sector as a beneficiary of higher education through its employment of graduates. Considering this factor, a compelling argument could be made for shared

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473 Cooper 2017 https://www.forbes.com/sites/prestoncooper2/2017/08/18/if-higher-education-were-a-public-good/#19f4cc493dc6. See further Kaul et al "Defining global public goods" 2-19.

474 Cooper 2017 https://www.forbes.com/sites/prestoncooper2/2017/08/18/if-higher-education-were-a-public-good/#19f4cc493dc6.

475 Cooper 2017 https://www.forbes.com/sites/prestoncooper2/2017/08/18/if-higher-education-were-a-public-good/#19f4cc493dc6.

476 Cooper 2017 https://www.forbes.com/sites/prestoncooper2/2017/08/18/if-higher-education-were-a-public-good/#19f4cc493dc6.

477 Cooper 2017 https://www.forbes.com/sites/prestoncooper2/2017/08/18/if-higher-education-were-a-public-good/#19f4cc493dc6. Cooper explains his understanding of the cause of confusion in respect of higher education being classified as a public good as follow: "What many of these individuals likely mean when they call higher education a public good is that higher education has positive externalities. A positive externality occurs when a good benefits society at large in addition to the good's consumer. As the argument runs, people who earn college degrees increase their own earnings, but earning those degrees also has beneficial impacts on other people."

responsibility between the government and the private sector vis-à-vis the funding of higher education institutions.

In its submission to the Commission of Inquiry into Higher Education established by former President Jacob Zuma in the wake of the "Fees must Fall" protests of 2015 to examine the feasibility of free higher education (the Commission), the University of Mpumalanga stated that:

> The role of higher education is numerous and varied. Higher education will contribute to the creation of high-level human resources and knowledge for the economy and for the national social-economic project. Higher education will also promote the achievement of some of the goals of the Constitution including the achievement of equality and the advancement of human rights and freedoms. However, higher education must reach far beyond the creation of skilled human resources for the economy and will include the promotion of socially conscious, critically thinking graduates who will find innovative answers to old and new questions.[478]

This understanding of the purpose of higher education resonates with the transformation agenda as envisaged in White Paper 3. A strong social justice element is evident in the purpose of higher education there as well. The Council on Higher Education (CHE), an independent statutory body created under the Higher Education Act of 1997, with public advisory, information, quality assurance, and promotion of higher education access functions, submitted the following statement to the Commission in relation to the purpose of higher education:

> The first consideration is the need to have a shared understanding of the purpose or purposes of higher education. Cognisant of the fact that higher education leads individuals to greater opportunities and that it also contributes to overall national socio-economic development, the CHE views higher education as both a public good and a private good, and not exclusively one or the other. This has a bearing on how it is constituted and how it is funded. The basic questions to ask are who should benefit from higher education, and who should fund it? These have become acutely difficult questions at this political conjuncture; twenty or more years after the beginning of the democratic dispensation, inequality is still widely evident in terms of access to higher education and in the share of benefits that it brings. These are profoundly moral questions, and the answer depends on our vision for the future and what we want to achieve in terms of higher education.[479]

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478 As quoted in Report of Commission of Enquiry into Higher Education para 44.
479 As quoted in Report of Commission of Enquiry into Higher Education para 45.

The CHE raised two points. Firstly, it submitted that higher education is both a public good *and* a private good. Secondly, in light of the hybrid nature of higher education, it raises the question as to who should fund higher education. As a matter of law, the answer to that question is to be found in section 29(1)(b) of the Constitution, read together with the relevant international law instruments. Carefully considered, section 29(1)(b) imposes an obligation on the state to make higher education available and accessible. This is to be achieved progressively by the state. The precise steps to be taken are left for the state to decide, considering reasonable measures. Increased funding of higher education (a financial measure) is but one measure the state could take to make higher education available and accessible. Regulated funding by the private sector is equally a measure the state could take to make higher education available and accessible. The socio-economic rights jurisprudence of the Constitutional Court is particularly helpful in understating exactly what constitutes reasonable measures as referred to in section 29(1)(b).

4.3 The right to education under the interim Constitution, 1993

4.3.1 Overview: Education, including higher education, under the interim Constitution

On face value, the text of the interim Constitution and the (final) Constitution appear to be very much the same. However, on closer analysis of these two Constitutions, there is a subtle difference in approach. A case in point is the right to education in terms of section 32 of the interim Constitution and section 29 of the (final) Constitution. Because it resorts in a transitional constitution, the text of section 32 of the interim Constitution is less comprehensive than the text of section 29 of the (final) Constitution. The drafters of the (final) Constitution added in section 29 thereof the right to “further” education, which had not been provided for in section 32 of the interim Constitution.

The inclusion of the right to further education might appear to be insignificant, but the inclusion is significant to the purposes of this thesis. It is significant because it evidences the importance of all the stages of education as part of a fundamental human right. An analysis of the related provisions of the interim Constitution and (final) Constitution follows below.

4.3.2 The right to (basic) education as contained in the interim Constitution: Section 32

As important as all the levels of education are (primary, secondary and higher), the drafters of the interim Constitution opted not to include the right to "further" education as it is now contained in section 29(1)(b) of the (final) Constitution. Section 32 of the interim Constitution read:

> Every person shall have the right
> (a) To a basic education and to equal access to educational institutions;
> (b) To instruction in the language of his or her choice where this is reasonably practicable; and
> (c) To establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

This section concerned the (positive) provisions of basic education, (negative) equal access to educational institutions at all levels, the choice of the language of instruction and the freedom of private actors to establish educational institutions based on a common culture, language or religion.

Though the section did not explicitly provide for adult basic education, it was accepted that this was encompassed by basic education.[480] Substantively, basic education under the interim Constitution and (final) Constitution was provided for in the same way. Under the interim Constitution, it was understood that basic education should provide a learner with the essential learning skills of literacy and numeracy.[481] It was further understood that a basic education plays a central role in the enjoyment of "basic civil and political rights" such as freedom of speech, conscience, association and to make informed political choices. This function of basic education has not fundamentally changed under the (final) Constitution. Under the interim Constitution basic education was and under the (final) Constitution it continues to be treated as a core fundamental human right.[482]

Basic education received preferential treatment under the interim Constitution. The same treatment was not afforded to what is now known as further education under

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480 Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 295.
481 Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 295.
482 Chürr 2015 *PELJ* 2406.

the (final) Constitution. One is left to speculate as to why the drafters of the interim Constitution thought it best not to include the right to further education in the interim Constitution.

Perhaps the drafters knew that the interim Constitution was transitional in nature. This explains, perhaps, why there was no objection to the inclusion of further education under section 29 of the (final) Constitution. The majority of the objections to the current section 29 of the (final) Constitution related to section 29(2)(a) to (c), the right to receive education in an official language of choice.[483] The final text of section 29 of the (final) Constitution evidences a paradigm shift towards the appreciation of the importance of all the stages of education.

4.4 The right to (basic and further) education under the (final) Constitution, 1996

4.4.1 Overview: Education, including higher education, under the (final) Constitution

Education is enshrined as a fundamental human right in Section 29 of Chapter 2 of the Constitution of the Republic of South Africa, 1996, the Bill of Rights.[484] The state is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.[485] This instruction, contained in section 7(2) of the Constitution, is also applicable to the right to education on its different levels, namely, basic, including adult basic education, and further education, which includes higher/tertiary education.[486] Importantly, section 7(3) states that: "the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."[487] This provision illustrates that no right in the Bill of Rights is absolute. The right to education must, on the one hand, be interpreted with due consideration to international law as required by section 39(1)(b) of the Constitution. On the other hand, where an international agreement protecting the right to education is binding

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483 *Certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 (CC) paras 79-81.
484 Chürr 2015 *PELJ* 2406.
485 Section 7(2) of the Constitution.
486 Section 8(1) of the Constitution states that: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."
487 Section 7(3) of the Constitution.

on the Republic in terms of section 231 of the Constitution and forms part of municipal law in one form or another, this should be applied and implemented co-jointly with section 29, if not clearly conflicting with section 29. Section 29 of the Constitution embodies the rights of both citizens and non-citizens in the Republic to all levels of education. This can be inferred from the use of the word "everyone".[488] With this understanding in mind, the discussion proceeds to consider section 29 of the Constitution.

4.4.2 The right to education as a constitutional right in terms of section 29(1) of the Constitution

Section 29(1) of the South African Constitution embodies every person's right to education. It states that:

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

In terms of the Constitution education is divided into three categories/stages, namely, basic education, adult basic education and further education. The state's obligations differ for each of the stages of education. Although the focus of the thesis

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488 *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) (*Khosa*).

is on higher education, the nature and scope of the state's obligations with regard to further education become clearer when compared to its obligations in respect of basic education.

The fundamental human rights as enshrined in the Bill of Rights apply to everyone in the Republic of South Africa. Put differently, citizens and non-citizens alike are the bearers of the fundamental rights enshrined in the Bill of Rights. In the case of *Khosa*, the Constitutional Court held that "everyone" includes permanent residents for the purposes of social security.[489] The wording of section 29(1) does not expressly distinguish between South African citizens and non-citizens. In accordance with *Khosa*, this suggests that the provision is applicable to everyone in South Africa, irrespective of nationality, who is in the country as a permanent resident.

One may ask to what extent Section 29 is also applicable to illegal immigrants. In the case of *Centre for Child Law, the School Governing Body of Phakamisa High School & 37 Children v Minister of Basic Education & 4 others* (*37 children case*), the High Court found that the state had acted unconstitutionally in not permitting children to receive education in public schools purely by reason of the fact that they lack immigration documentation.[490] While that case concerned "basic" education, it is not clear whether the same reasoning would apply in so far as "further" education is concerned.

It should be noted that Article 22(2) of the Convention Relating to the Status of Refugees of 1951 – also ratified by South Africa – states that, with respect to education other than elementary education, contracting states are expected to accord to refugees "treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances."[491] Article 30 of the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990 grants to the children of migrant workers, both those in a regular as well as those in an irregular situation, the right to access

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489 Paras 81-82.

490 *Centre for Child Law, The School Governing Body of Phakamisa High School & 37 Children v Minister of Basic Education & 4 others* [2019] ZAECGHC 131.

491 Article 22(2) of the Convention Relating to the Status of Refugees, 1951.

to education on an equal basis with nationals, it seems also in as far as education beyond elementary education is concerned. Children here might potentially include children for as long as they are dependent on their parents, hence also in respect of higher education. South Africa has neither signed nor ratified the Convention. It must, however, play a role when interpreting Section 29 (Section 39(1)(b)).

Moreover, section 29(1)(a) is a universal right to basic education subject to neither progressive realisation nor the capacity of a learner. Though applicable to everyone, section 29(1)(b) is not a universal right. In accordance with Article 13(2)(c) of the ICESCR, section 29(1)(b) – in as far as it pertains to higher education – is a right that is to be realised progressively and which grants access to higher education "on the basis of capacity." Capacity here refers to intellectual or related aptitude.[492] If higher education, as under the ICESCR, need be accessible only on the basis of intellectual capacity, the state need also not make it generally available in the same way as primary and secondary education. However, the state would have to ensure equal access. Ultimately, Article 13(2)(c) of the ICESCR refers to "equal access" "on the basis of capacity". The same follows locally not least from Section 9 of the Constitution on equality. In as far as Section 9, in accordance with Section 7(2) is also to be positively "fulfilled", equal access to higher education in Section 29(1)(b) needs to be realised through positive measures, including funding and, as argued here, reducing and eliminating fees.

Section 29(1) differs from the other socio-economic rights in sections 26 and 27 of the Constitution in that some of its provisions have inbuilt qualifications and some not. For instance, section 29(1)(a), the right to basic education including adult basic education, has no internal qualification. It simply states that everyone has a right to basic education, including adult basic education. However, section 29(1)(b) is worded differently. It states that everyone has the right to "a further education, which the state, through reasonable measures, must make progressively available and accessible."[493] Section 29(1)(b) evidently has its own internal qualifications, which directly affects the state's obligations in respect of further education. In sum, basic

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492 See the discussion in Chapter 2 above dealing with the interpretation of Article 13(2)(c) of the ICESCR.
493 Section 29(1)(b) of the Constitution.

education is immediately realisable while further education is subject to progressive realisation.

Irrespective of the difference in wording between section 29(1)(a) and (b), the state's foundational negative and positive obligations remain the same. That is to say that the state must refrain from interfering with both rights (basic education and further education) (a negative obligation), and it must promote and fulfil both rights (a positive obligation), although to differing degrees. The real difference lies in the realisation of the rights. Section 29(1)(b) is, by and large, subject to the state's budget (progressive realisation), whereas section 29(1)(a) must be realised immediately (the role of the state's budget is not as central as in section 29(1)(b)).

4.4.3 The right to basic education in terms of section 29(1)(a) of the Constitution

As already alluded to elsewhere in this thesis, the right to a basic education is immediately realisable. It may be limited only in terms of section 36(1) of the Constitution, in accordance with a law of general application. Any limitation must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."[494] The Constitutional Court and subsequently the Supreme Court of Appeal have confirmed this overall scheme.[495] Hence, "progressive realisation" and the notion of reasonableness, as applied by the Constitutional Court in respect of other socio-economic rights such as sections 26 and 27, do not apply in relation to section 29(1)(a). Section 29(1)(a) is different from section 29(1)(b): Basic education must be compulsory. Section 3(1) of the South African Schools Act, 84 of 1996 (SASA) states that:

> [E]very parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such a learner reaches the age of seven years until the last school day of the year in which such a learner reaches the age of fifteen years or the ninth grade, whichever occurs first.[496]

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494 Section 36(1) of the Constitution.

495 See *Juma Musjid* para 37, as subsequently confirmed in *Minister of Basic Education and others v Basic Education for all and others* 2016 (4) SA 63 (SCA) at para 36. In the latter case, the Supreme Court of Appeal thus found that the state was required to concretely provide textbooks to every learner in each subject before the commencement of the academic year.

496 Section 3(1) of the South African Schools Act 84 of 1996.

Further, no learner should be prevented from exercising his or her right because of lack of finances. Section 3(3) of SASA obliges the Member of the Executive Council (MEC) to ensure that there are sufficient schools so as to ensure that every child who lives in his/her province attends schools as required by the Act.[497] The MEC is further obliged to provide public schools and to ensure that funds are appropriated for this purpose by the provincial legislature.[498]

Education on all its levels, excluding tertiary/university education, in terms of Schedule 4 of the Constitution is a functional area of concurrent national and provincial legislative competence. This means that both the national and the provincial legislatures have legislative competence in respect of education. Section 146 of the Constitution regulates the situation where national and provincial legislation conflicts. Notably, in as far as there is a need for nationally uniform norms and standards, frameworks, or policies, national legislation will prevail.[499] Higher education, however, is a national legislative competence.

Reversing the effects of apartheid on the schooling system required the establishment of a new legal framework for schooling in South Africa. The SASA and the National Educational Policy Act, both of 1996, were enacted to establish a new legal framework for schooling in South Africa. The objectives of the new legal framework for schooling are to: desegregate schools, make schooling compulsory for nine years, to establish a new funding system for all schools, and to democratise the governance of schools by the introduction of school governing bodies representing the actual school community concerned.[500] Aspects of the legal framework are not without any criticism. It may primarily be criticised for its permitting public schools to charge fees.

A look at the relevant provisions of the Schools Act dealing with school fees reflects the dilemma. While it was appreciated that schools should actually be free, it was at

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497 Section 3(3) of SASA.

498 Section 12 of SASA reads:

(1) The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.

(2) The provision of public schools referred to in subsection (1) may include the provision of hostels for residential accommodation of learners.

499 146(2)(b).

500 Veriava 2007 *SAJHR* 181.

the same time (illegitimately) perceived that financial exigencies meant that without such fees, there would be insufficient funding.[501]

While well-intended, the problem is that international law is strict in this respect. International law requires that "primary education shall be compulsory and available free to all."[502] Secondary education is to be made progressively free.[503] International law explicitly makes provision for free primary education. Neither the Constitution nor the SASA make such explicit provision for free basic education. A former U.N. Special Rapporteur on the Rights to Education, Katarina Tomaševski, has made it clear that exemption schemes in primary education can never adequately live up to the requirement of free education.[504] Locally, Veriava argues that a system that

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501 Sections of the Schools Act:

Section 5

(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 section39.

Section 36

(1) A governing body of a public school must *take all reasonable measures* within its means to *supplement the resources supplied by the State* in order to improve the quality of education provided by the school to all learners at the school. (Own emphasis)

Section 39

(1) Subject to this Act, *school fees may be determined and charged* at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting referred to in section 38(2) [a meeting to approve the school budget]. (Own emphasis)
(2) A resolution contemplated in subsection (1) must provide for
  (a) the amount of school fees to be charged;
  (b) equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees;

Section 41

(7) A learner *may not be deprived of his or her right to participate in all aspects of the programme* of a public school *despite the non-payment of school fees* by his or her parent and may not be victimised in any manner, including but not limited to the following conduct:
  (a) Suspension from classes;
  (b) verbal or non-verbal abuse;
  (c) denial of access to
    (i) cultural, sporting or social activities of the school; or
    (ii) the nutrition programme of the school for those learners who qualify in terms of the applicable policy; or
  (d) denial of a school report or transfer certificate.

502 Article 13(2)(a) of the ICESCR.

503 Article 13(2)(b) of the ICESCR states that secondary education is to be "made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education."

504 Preliminary Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, UN Doc. E/CN.4/1999/49 (13 January 1999) para 35.

permits schools to charge school fees fails to effectively facilitate adequate access to a basic education, especially for poor learners, even if exemptions are nominally provided for.[505]

Certain attempts were made to address the critical aspect of free basic education. In June 2003 the Department of Education published a "Plan of Action: Improving Access to Free and Quality Basic Education" (Plan of Action).[506] This may also be seen as an attempt to better comply with international law in respect of compulsory and free primary education. It was also a reaction to the fact that the exemption scheme in practice remained unknown to parents or led to discrimination against those applying for exemptions.

The Plan of Action essentially introduced a distinction between "fee-paying" schools and "no-fee" schools. South Africa opted for a dual system, retaining the element of fees in basic education. It is envisaged that in the "no-fee" schools school fees will not be charged. These are the poorest schools that receive "adequate school allocations from the government."[507] In determining a school's "poorness", the Minister relies on what is called a school's poverty ranking. To determine a school's poverty ranking, the Minister looks at the poverty of the community surrounding the school.[508] On that basis the Minister will declare whether a school is a "no-fee" school or a "fee-paying" school. Veriava criticises this system because it perpetuates "fee-charging" as a default position. In other words, if a school fails to obtain "no-fee" school status it will fall back to being entitled to charge fees. This is the case despite the fact that South Africa is a state party to the ICESCR, which provides for compulsory and free primary education.

While this thesis does not, of course, focus on basic but on higher education, the above analysis is important as it demonstrates an important point: the general failure and reluctance of the South African government to properly understand its international obligations in the sphere of addressing private costs in education, whether at basic or at further education level. A misconception of "free" at the basic

505 Veriava 2007 *SAJHR* 180.
506 Veriava 2007 *SAJHR* 180.
507 Veriava 2007 *SAJHR* 187.
508 Veriava 2007 *SAJHR* 187.

level of education does not bode well for students' and their parents' wallets in higher education either.

Over and above this, neither the Constitution nor the SASA defines the term "basic" education. Before attempting to discern the definition of "basic" education, it is important to first comprehend its importance. The Constitutional Court per Nkabinde J in *Juma Musjid* remarked that:

> Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school — an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution — is a necessary condition for the achievement of this right.
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> The importance of the right to basic education is also foreshadowed by the fact that any failure by a parent to cause a child to attend school renders that parent guilty of an offence and liable, on conviction, to a fine or imprisonment for a period not exceeding six months. Furthermore, "[a]ny other person who, without just cause, prevents a learner who is subject to compulsory attendance from attending school is also guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.[509]

It is not only the term "basic education" that is not defined in the Constitution. The content and quality of the education the state must provide has not yet been considered by the Constitutional Court or any other courts.[510]

This gives rise to various interpretations of section 29(1)(a) of the Constitution. According to Chürr, free and compulsory education do not expressly form part of the right to a basic education. However, the author does point out that section 3(3) of SASA makes provision for compulsory education.[511] This raises the question whether the right to a basic education, as protected in section 29(1)(a) encompasses free and compulsory education. The right to a basic education has been described as:

> …an unqualified right requiring the priority attention of the State, also in respect of budgetary allocations. This requires the State to

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509 *Juma Musjid* at paras 43-44.
510 Arendse 2011 *PELJ* 98.
511 Chürr 2015 *PELJ* 2409.

> provide sufficient schools, educators and support, and other incidental services in order to ensure reasonable access to basic education for everybody. The right refers to education up to the level of functional literacy, in other words, reading, writing, arithmetic, and an elementary knowledge or awareness of economics, culture and politics.[512]

The description exposes the difficulty of attempting to determine the precise content of the right to a basic education. This is so because basic education is a "flexible concept which must be defined so as to meet the learning needs appropriate to the age and experience of the learner."[513] This means that the concept of basic education is hardly capable of a precise definition.

Section 29 is a complex provision as it encompasses (i) an unqualified right to basic education; (ii) a qualified right to further education; (iii) a right to receive education in an official language of one's choice in public schools where reasonably practicable; and (iv) the right to establish and maintain independent educational institutions.[514] Points (iii) and (iv) relate to some extent to the categories of education set out in section 29(1)(a) and (b).

For instance, on the one hand section 29(1)(a) and (b) can be read in conjunction with section 29(2) relating to the language of instruction at a particular public educational institution. On the other hand, section 29(2) and (3) relating to the establishment of independent educational institutions cannot be read as easily together as in the previous example. These examples illustrate the complexity of section 29 of the Constitution. Section 29 reflects a "hybrid" right, meaning that it is a provision containing both state and private citizens' rights and responsibilities in the sphere of education. Neither section 26 on the right to access to adequate housing nor section 27 on the right to access to health care, food, water and social security is structured in a similar fashion.

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512 Taiwo *The Implementation of the Right to Education in South Africa and Nigeria* 116.

513 The White Paper on Education and Training published on 15 March 1995 (Gen N 196 in GG 16312 of 15 March 1995) chapter 7, para 14. "Basic education programmes should therefore be flexible, developmental, and targeted at the specific requirements of particular learning audiences or groups and should provide access to a nationally recognised qualification or qualifications." Chapter 7, para 14.

514 Liebenberg 2016 *PELJ* 2.

To go back to section 29(1)(a), Chürr correctly notes that the Constitution is silent on whether basic education must be free and compulsory.[515] Section 3(3) of SASA, which is the legislation constitutionally mandated to give effect to section 29(1)(a) of the Constitution, is the crucial provision entrenching the compulsory nature of basic education.

However, section 3(3) is silent on whether basic education must be free. As already indicated, on the international plane South Africa has an obligation to make primary education compulsory and free and secondary education progressively free, to all by virtue of its being a state party to the ICESCR (and also the CRC and the ACRWC). South Africa is therefore prohibited from adopting or taking measures that violate these obligations of the ICESCR and the CRC.

From a constitutional law perspective, taking into account South Africa's international obligations, basic education can be interpreted to encompass free and compulsory basic education.[516] The government regards basic education as "the cornerstone of any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults."[517] It has therefore committed to "the provision of education that is compulsory for all children of school-going age, that is of good quality and in which financial capacity is not a barrier to any child."[518] As in the case of the other rights in the Bill of Rights, the state must respect, protect, promote and fulfil the right to basic education.[519] In terms of this typology of obligations of the Constitution, the state is obliged to: (i) refrain from impairing the right to a basic education; (ii) take steps to protect access to a basic education against private parties (e.g., parents, private education providers, etc.), and (iii) take positive steps to ensure access for all to the enjoyment of basic education. The right to a basic education is prioritised above the other stages of education. This is what Arendse calls "the first degree of realisation in the process of ultimately fulfilling all forms of education."[520]

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515 Chürr 2015 *PELJ* 2409.
516 This is an interpretation in terms of Sections 39(1)(b), 231 and 233 of the Constitution.
517 Plan of Action: Improving access to free and quality basic education for all (14 June 2003) para 5.
518 Plan of Action: Improving access to free and quality basic education for all (14 June 2003) para 6.
519 Section 7(2) of the Constitution.
520 Arendse 2011 *PELJ* 104.

This understanding of the importance of the right to a basic education has budgetary implications. The state must ensure that resources are directed to realising the right to basic education immediately. The right to basic education triggers both the negative and positive obligations of the state. As a positive obligation the state must ensure that basic education is provided to everyone. And, as a negative obligation no one should be obstructed from pursuing basic education.[521] Importantly, the right to a basic education is "neither formulated as a right of access nor subject to the same internal qualifiers as section 29(1)(b)."[522]

The Constitutional Court has not yet grappled with the difficult question of what exactly the (unqualified) right to basic education entails. The High Court has on a case-by-case basis attempted to give substantive meaning to the right to a basic education. For instance, the Eastern Cape High Court has held that the provision of school furniture forms part and parcel of the right to a basic education and that the non-provision of same violates the right to a basic education.[523] In another case from the Easter Cape High Court, the Court went further to hold that the provision of transport to learners to and from school, at state expense, is part and parcel of the right to a basic/education.[524] In 2016, the Supreme Court of Appeal found that the right to basic education included a right of each learner to be provided with the textbooks prescribed for each subject before the commencement of the academic year.[525] It is evident from the developing jurisprudence that South African courts are attempting on a case-by-case basis to give substantive content to the right to basic education.

Textually, the right to basic education does not permissibly differentiate between different persons, meaning that:

> [L]earners in South Africa may come from different socio-economic backgrounds but as learners in the same public school domain and

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521 *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill* of 1995 1996 3 SA 165 (CC) at para 9.

522 Arendse 2011 *PELJ* 116.

523 *Madzodzo and others v Minister of Basic Education and others* 2014 (3) SA 441 (ECM).

524 *Tripartite Steering Committee and another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG).

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

> as equal bearers of their constitutional right to basic education all of them are entitled to the same type of education.[526]

Moreover, South Africa has an international obligation to provide free primary education and to make secondary education progressively free. This must influence the interpretation of Section 29(1)(a). No child should be turned away from a school due to his or her parents' inability to pay school fees.

4.4.4 Free education in global international instruments

Before proceeding with an analysis of Section 29(1)(b) of the Constitution protecting the right to "further" education, an overview of the provisions in international instruments, in as far as they address the element of "free" education, will prove instructive. This will be relevant in assisting the interpretation of Section 29(1)(a) and (b) in accordance with Section 39(1)(b) and also as an aid to ascertaining which of the related obligations binds South Africa. The overview points out differences in the "intensity" of state action required on lower and higher levels of education in the education system to make education free.

The "free" element of education can be traced back to the UDHR. This states that "everyone has the right to education" and that "education shall be free, at least in the elementary and fundamental stages."[527] This indicates a special emphasis on free education at the lower levels of education but it must also be read as containing an instruction to attend to the "freeness" of education on subsequent levels of education. Following the UDHR, three global international agreements entrenched the notion of free education, namely Article 4 of the Convention against Discrimination in Education (CDE) of 1960, Article 13(2) of the ICESCR of 1966, and Article 28(1) of the CRC of 1989.[528] All three require primary education to be free.[529]

The ICESCR and the CRC refer to (progressively) free secondary education. The ICESCR requires secondary education to be made "accessible to all by every

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526 *Basic Education for All* para 119.
527 Article 26(1) of the UDHR.
528 The ICESCR and CRC were adopted by the UN General Assembly, in 1966 and 1989, respectively. The CDE was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation on 14 December 1960.
529 Article 4(a) CDE, Art. 13(2)(a) ICESCR, Art. 28(1)(a) CRC, respectively.

appropriate means, and in particular by the progressive introduction of free education."[530] The CRC uses a weaker formulation, stating that states parties are to "take appropriate measures such as the introduction of free education."[531] Only the ICESCR refers to (progressively) free higher education, using the same formulation as for secondary education. Higher education is to be made "accessible to all by every appropriate means, and in particular by the progressive introduction of free education."[532] South Africa is a state party to all three of these instruments. It has already been pointed out that South Africa has (in a contestable way) reserved its right to implement Article 13(2)(a) of the ICESCR progressively.

4.4.5 Free education in regional international instruments

A good starting point on the regional level is the Banjul Charter.[533] It aims at institutionalising the protection of human rights on the African continent. Article 17(1) of the Charter merely states that every child shall have the right to education. Unlike the ICESCR, the Charter is silent on the "free" element of education in general. Furthermore, the Charter does not refer to either basic/primary education or secondary or higher education. Nevertheless, the African Commission on Human and Peoples' Rights, in its soft law *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, adopted in 2011, interprets Article 17(1) of the Banjul Charter as entailing the obligation of states parties to "ensure that all children enjoy their right to free and compulsory primary education."[534] This is described as a minimum core obligation. It goes on to point out, applying the ICESCR's language, that each of secondary and higher education must be made accessible "by all appropriate means, and in particular by the progressive introduction of free education."[535] South Africa is a state party to the Banjul Charter.

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530 Article 13(2)(b) ICESCR.
531 Article 28(1)(b) CRC.
532 Article 13(2)(c) ICESCR.
533 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986).
534 Para 71(a) of the Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights of 2011.
535 Para 71(d) and (e), respectively.

The Banjul Charter is not the only regional African instrument dealing with education. The African Charter on the Rights and Welfare of the Child[536] (ACRWC) also addresses the topic of educational rights. The ACRWC's primary objective is the protection of the rights of children on the African continent. It can be compared to the CRC in that both instruments seek to achieve the same objective, which is to define principles and norms protecting the rights of children. The ACRWC explicitly refers to basic (primary), secondary and higher education, also addressing free education in the context of basic (primary) and secondary education, omitting it, however, for higher education: Article 11(3) of the ACRWC states in part that:

> State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
>
> (a) provide free and compulsory basic education:
>
> (b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all;
>
> (c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;
>
> (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.[537]

The ACRWC uses the term "basic" education as the equivalent of "primary" education rather than in the South African sense of education of a foundational nature that may also extend beyond primary education. This is evident from its providing for secondary and higher education as the levels of education following "basic" education. Probably in an attempt to avoid excessive strain on state resources, the drafters omitted any reference to free education in the context of higher education. It should be noted, however, that the reference in Article 11(3)(e) to "special measures" "to ensure equal access to education" for "disadvantaged children" may be interpreted as a reference to some form of fellowship system in the sense of Article 13(2)(e) of the ICESCR. South Africa is a state party to the ACRWC.

Finally, there is the African Youth Charter of 2006. Article 13(4) thereof provides in part:

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536 Adopted by the Organisation of African Unity (OAU) in 1990 (in 2001, the OAU legally became the African Union) and entered into force in 1999.

537 Article 11(3) of the ACRWC.

> States Parties shall take all appropriate measures with a view to achieving full realisation of this right and shall, in particular:
>
> a) Provide free and compulsory basic education and take steps to minimise the indirect costs of education;
>
> b) Make all forms of secondary education more readily available and accessible by all possible means including progressively free;
>
> f) Make higher education equally accessible to all including establishing distance learning centres of excellence;
>
> I) Introduce scholarship and bursary programmes to encourage entry into post-primary school education and into higher education for outstanding youth from disadvantaged communities, especially young girls;[538]

Also, the African Youth Charter thus refers to free primary education and progressively free secondary education, again omitting any reference to "free" education in the context of higher education. But there is an explicit reference to "scholarship and bursary programmes to encourage entry into post-primary school education and into higher education for outstanding youth from disadvantaged communities, especially young girls." South Africa is a state party to the Youth Charter.

Finally, though these provisions cannot be binding on South Africa, Article 13(3)(a), (b), and (c) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 virtually replicate the provisions of Article 13(2)(a), (b), and (c) of the ICESCR in as far as "free" education is concerned for the American continent. This is relevant from the perspective of Section 39(1)(b) of the Constitution – and a strong argument in support of progressively free higher education under Section 29(1)(b) of the Constitution.

4.4.6 The right to further education in terms of Section 29(1)(b) of the Constitution

As early as in 1994, Dlamini reported that the right to education had been included in the constitutions of at least fifty nine countries, indicating the importance of the right globally.[539] South Africa is one such country which codified the right to education in both its interim and final Constitutions.[540]

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538 Article 13(4) of the African Youth Charter.
539 Dlamini "Culture, education, and religion" 580.
540 Section 32 of the interim Constitution and section 29 of the final Constitution.

There is a clear difference in the nature and degree of the obligations imposed on the state in terms of section 29(1)(a) and (b) of the final Constitution, dealing with "basic" and "further" education respectively. The Interim Constitution did not make provision for the right to further education as recognised by section 29(1)(b) of the final Constitution. Section 29(1)(b) of the final Constitution makes provision for everyone's right to "further" education, which the state, "through reasonable measures, must make progressively available and accessible."[541]

The right to further education is not immediately realisable, it is subject to progressive realisation. Section 29(1)(b) obliges the state to progressively enhance the accessibility and availability of further education.[542] State action (or inaction) in the sphere of further education is susceptible to constitutional challenge in the light of section 29(1)(b), where the state fails to meet its constitutional obligations, that is, does not adequately enhance the accessibility and availability of further education. Reasonableness is then the standard used in the adjudication of the right to further education as a "qualified" socio-economic right. This standard was endorsed and applied by the Constitutional Court in cases such as *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46; 2000 (11) (CC) (*Grootboom*)*, Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721; 2002 (10) (CC) (*TAC*) and *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (*Mazibuko*).

Section 29(1)(b) is worded different than article 13(2)(c) of the ICESCR on higher education. Unlike article 13(2)(c), section 29(1)(b) does not explicitly refer to "higher" education and also does not expressly require the "progressive introduction of free education". On a proper reading of the Constitution and the Covenant, it is evident that the Covenant is more substantive than the Constitution in its regulation of the right to higher education. A question that comes to mind is whether the two provisions can be read together in a harmonious manner without straining their language and intentions?

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541 Section 29(1)(b) of the Constitution.
542 Veriava and Coomans "The right to education" 58.

At face value, it appears that the provisions are capable of being read together. On the national/domestic level, the state has no explicit obligation to progressively introduce free higher education. However, being a state party to the ICESCR, South Africa has an obligation under international law to progressively introduce free higher education, subject to its available resources. Section 39(1)(b) of the Constitution requires international law to be taken into account in interpreting Constitutional rights. Furthermore, section 233(4) of the Constitution stipulates that "a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." As a negative obligation *not to introduce or increase fees* in higher education, Article 13(2)(c), as has been explained earlier on,[543] is a self-executing provision. Hence, as it does not in any way conflict with section 29(1)(b) of the Constitution, it forms part of South African municipal law to that extent – and, as such may in turn impact on the understanding of section 29(1)(b) itself. As a positive obligation to make higher education progressively free, Article 13(2)(c) admittedly has not yet been incorporated into South African municipal law. Yet, via section 233 of the Constitution it must as "international law", play a role in the interpretation of "any legislation", thus also in the Constitution, where this promotes conformity with international law. In the light of all of the above, it could possibly be argued that section 29(1)(b) encompasses an obligation on the state to progressively introduce free higher education. The binding nature of the ICESCR on South Africa further buttresses this argument.

4.4.7 The interpretation of section 29(1)(b) of the Constitution considering international law by the President's Commission of Enquiry into Higher Education and Training

In assessing the government's obligation in terms of section 29(1)(b) of the Constitution, it is wise to state up front what such an obligation does not entail. It does not entail the government's going beyond its available resources to realise a socio-economic right.[544] There is a correlation between the scope of the state's obligation and its available resources. The state is obliged to make higher education

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543 See the discussion of the state's negative obligation in Chapters 4 and 5.

544 *Grootboom* at para 46, *TAC* at para 32 and *Mazibuko* at para 50.

available and accessible progressively, through reasonable measures taken within the bounds of its available resources. Ultimately, the question to be answered is whether the measures taken by the government are reasonable. Before one can answer this intriguing question, one needs to properly understand the nature of the reasonableness test as applied by the Constitutional Court when adjudicating on "qualified" socio-economic rights, rights that are to be realised progressively in the light of available resources. An analysis of its leading cases in relation to socio-economic rights, namely *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (*Soobramoney*), *Grootboom*, *TAC* and *Mazibuko*, will prove imperative in this regard. However, before embarking on an analysis of these cases in Chapter 5, the remainder of this Chapter will focus on the nature and scope of Section 29(1)(b) more specifically.

An important distinction needs to be drawn between the right to higher education and the right to progressively free higher education. This distinction is important because it ultimately informs the argument on the obligations imposed on the state. This distinction consumed the Commission of Enquiry into Higher Education and Training, appointed by the President of South Africa on 14 January 2016. The essential mandate of the Commission was to make recommendations regarding the feasibility of free higher education in South Africa.[545] The Commission's Chairperson expressed the opinion that there is no legal obligation on the state to provide free higher education. This view will be analysed together with the slightly different views

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545 "The Commission of Enquiry into Higher Education and Training was to make findings, report and make recommendations on the following:
The feasibility of making higher education and training (higher education) fee-free in South Africa, having regard to:
1.1 the Constitution of the Republic of South Africa, all relevant higher and basic education legislation, all findings and recommendations of the various presidential and ministerial task teams as well as all relevant educational policies, reports and guidelines;
1.2 the multiple facets of financial sustainability, analysing and assessing the role of government together with its agencies, students, institutions, business sector and employers in funding higher education and training; and
1.3 the institutional independence and autonomy which should occur vis-à-vis the financial funding model."
The Commission was chaired by Honourable Justice Jonathan Arthur Heher, assisted by Adv Gregory Ally and Ms Leah Khumalo.
Report of Commission of Enquiry into Higher Education para 33.

of the two Commissioners who found that there is indeed a legal obligation on the state to progressively provide free higher education.[546]

The Chairperson made the point that, in the case of further education, "the right is an access right, which obliges the state to take reasonable measures to make further education progressively available and accessible."[547] Accordingly, the Chairperson concluded that there is no explicit right to free further education, but "there is the expectation of progressive steps towards increased access and availability."[548] The argument is premised on the understanding that the Constitution unambiguously states that further education must be made progressively available and accessible, but does not refer to free education. This argument places much reliance on the consideration that the Constitution does not *explicitly* make reference to the progressive realisation of free further education.[549] According to the Chairperson:

> The focus is not on the policy used (such as the preferred financial aid intervention) to ensure the right, but on the right itself. Therefore, if increased access and availability would be ensured through a different or changed funding model, this would be progressive in meeting the Constitutional requirements. As such, policy changes away from free education could be introduced should these meet the Constitutional demand for higher education to be 'progressively [made] available and accessible'. It must, however, be borne in mind that higher education and training must be accessible to individuals from all financial backgrounds.[550]

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546 Report of Commission of Enquiry into Higher Education para 152. "The Commissioners hold differing views as to the scope of the state's obligation to provide higher education. In the view of the Chairperson the state has no legal obligation to provide such education free of charge. Commissioners Ally and Khumalo interpret the United Nations International Covenant on Economic, Social and Cultural Rights as requiring the state to progressively provide free higher education according to the capacity of the state."

547 Report of Commission of Enquiry into Higher Education para 154.

548 The view of the Chairperson is premised on the following reasoning: "In discussing their interpretation of the Constitutional obligation, the Minister of HET explained that 'The Department, and Government generally, read the constitution to clearly articulate that basic education, including basic adult education, is a fundamental/basic right that must be provided to all who need it; while further education (HE) (also referred to as university education) and Technical and Vocational Education and Training (TVET), are secondary rights that must be made progressively available and accessible to those who merit it (meet the academic requirements). Within the remit of the Department of Higher Education and Training (DHET), the provision of Community Education and Training (CET) gives effect to section 29(1)(a), namely that everyone has the right to adult basic education, while the provision of TVET and HE responds to section 29(1)(b). To make further education available is interpreted to mean that the system must grow to provide sufficient spaces (opportunities) for study. To make it accessible means it should be affordable, and individuals should not be denied access based on financial need, on the basis of a disability or other form of discrimination.'" Report of Commission of Enquiry into Higher Education para 155.

549 Report of Commission of Enquiry into Higher Education para 160.

550 Report of Commission of Enquiry into Higher Education para 160.

In terms of the Chairperson's argument, the focus should be on the realisation of the goals of the right – the availability and accessibility of higher education – rather than the specific means (free education) to achieve this. In his view, there is no right to free higher education at the national level and the state is under no legal obligation to provide free higher education as such. According to the Chairperson:

> [T]he end to be achieved is equal accessibility to all, on the basis of capacity: the means to achieve that end are "every appropriate means, and in particular by the progressive introduction of fee-free education". The end of universal accessibility is peremptory but means to be adopted are discretionary and determined by the signatory. It is this context that the progressive introduction of free higher education must be understood. In so far as article 13(2)(c) is concerned that sub-article must be read in the light of the principles enunciated in general comment number 13. Particularly relevant to the present context is the "dimension" of "economic accessibility". It is in relation to that dimension that "State parties are required to progressively introduce free [secondary and] higher education". This is simply a restatement of the progressive role of free higher education as set out in article 13(2)(c) but drawing attention to its dependence on economic affordability.[551]

The Chairperson's interpretation of section 29(1)(b) of the Constitution in the light of article 13(2)(c) of the Covenant is purely purposive and does not give due consideration to the langue of Article 13(2)(c). The interpretation favoured by the Chairperson proceeds on the basis that section 29(1)(b) of the Constitution is an access right rather than a self-standing right to further/higher education. This interpretation of section 29(1)(b) seems incorrect because section 29(1)(b) states that everyone does have "a right to further education". Accessibility and availability come into play only in respect of the obligation(s) of the state. The Chairperson's interpretation conflates the right to further education and the obligation(s) of the state in relation to further education. It is accepted that section 29(1)(b), as it stands, does not make any reference to free higher education or to a duty to progressively introduce free higher education. But that does not mean that this section cannot be interpreted in a manner that is consistent with such a duty. Article 13(2)(c) requires, "in particular", the progressive introduction of free higher education in making higher education accessible; the language is unambiguous. The progressive introduction of free higher education is not merely discretionary because of the use of the words "in particular" in article 13(2)(c). The words in their proper English meaning are used

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551 Report of Commission of Enquiry into Higher Education para 179.

to show that something applies to “this and not any other” person or thing.[552] This indicates that, while various options to make higher education accessible do exist and should all be considered, one of them, the progressive introduction of free higher education, is a means that cannot simply be ignored.

The interpretation of any statute, whether a constitution or an international instrument, is no easy exercise and should permit an approach to interpretation that is “open to various texts, rather than relying on restrictive and literal interpretation.”[553] A contextualised and progressive interpretation of a statute, it is argued, brings justice.[554] This is so particularly in South Africa with its history of oppression and injustice, which led to high levels of inequality. The Chairperson’s interpretation appears to lose sight of the historic context of section 29(1)(b), which if taken into account calls for a generous interpretation of the provision. In *S v Makwanyane*, the Constitutional Court stressed the importance of context of not interpreting constitutional provisions in isolation.[555]

The approach favoured by the Chairperson reflects a purposive approach. The Chairperson determines the purport of article 13(2)(c) in the light of the purpose of that provision, which is to enable access to higher education to all those with intellectual capacity, irrespective of students’ financial background. So far, the approach cannot be criticised. It is, however, problematic in two respects: firstly, it ignores the language of article 13(2)(c) altogether. This prescribes the introduction of free higher education as one of the means to achieve that end. Secondly, though purposive in one sense, the Chairperson’s approach does not sustain purposiveness to its full conclusion. His approach does not reflect adequate consideration firstly of the role that free (higher) education plays in ensuring access to (higher) education and secondly of the specific historical or social context when interpreting article 13(2)(c). Regarding the first point, the drafters of the Covenant included the obligation of providing progressively free higher education because they were fully aware of the fact that no other approach to enhancing accessibility could be as successful as making education free. All other schemes (bursaries,

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552 See https://dictionary.cambridge.org/dictionary/english/particular?q=in+particular.
553 Louw and Pienaar 2012 *Speculum Juris* 88.
554 Louw and Pienaar 2012 *Speculum Juris* 89.
555 1995 3 SA 391 (CC) 403G-H.

scholarships, etc.) entail bureaucratic administration and potential student debt that deters students especially form lower income groups from contemplating pursuing higher education. Regarding the second point of the specific historical or social context when interpreting article 13(2)(c), the degree of poverty in a country and the inability to pay due to reasons of historically grown, systemic inequality must, it is submitted, influence the interpretation of which means are to be considered "prescribed" to make higher education accessible. Then, free higher education does constitute an eminently suitable method of enhancing access in a country such as South Africa, where higher education is so clearly beyond the financial ability of most students. Hence, the scope of article 13(2)(c) must also be construed in the specific domestic context. The latter approach gives full effect to Article 31(1) of the Vienna Convention on the Law of Treaties, where this states that a treaty "shall be interpreted … in the light of its object and purpose."[556] While article 13(2)(c) is, as the Chairperson correctly says, essentially about access rather than about any specific means to make higher education accessible, it is not that easy to dispel the means enumerated as merely discretionary.

Turning to the (other) Commissioners' argument: The Commissioners argued slightly differently form the Chairperson. According to their argument, the Constitution is capable of being interpreted in a manner that imposes an obligation on the state to provide public institutions with "teaching staff and all ancillary measures necessary to offer higher education to citizens and residents of South Africa."[557] The Commissioners argued *with regard to the Constitution itself* that:

> Because the ideal of universal access was recognised as not immediately obtainable the state was obligated to take reasonable measures (this being a fact-based value question upon which the state exercises a wide measure of discretion according to its balancing of available means and priorities) to increase the breath of its provision of education and its accessibility to aspirant higher education students. The section says nothing about cost of or payment of tuition fees and there is in our view no implication to be read into the state obligation in that regard. It may be that in ensuring access to education such access will remain barred to those who cannot afford it. It is then the duty of the state to ensure that such bar is removed. Fee-free education may then become a necessary means to achieve the primary goal of universal access. The removal of the bar may however take various forms, for

556 Article 31(1) of the Vienna Convention on the Law of Treaties.
557 Report of Commission of Enquiry into Higher Education para 170.

> example, the provision of scholarships, loans, incentives, grants, tuition fee write-offs, or simply an exemption from paying tuition fees. Tuition free higher education is thus, within the context of the constitution, merely one means of achieving the constitutional right to universal access.[558]

The Commissioners went on to argue that, by virtue of international law, a broader approach becomes applicable. Their argument is premised on universal access to higher education, which includes the removal of barriers to higher education. This argument places much reliance on international law in other words, on the treaties to which South Africa is a member state.[559] The Commissioners accepted that section 29(1)(b) of the Constitution does not create a right to free further education, yet, they argued that the ICESR broadens the constitutional obligation so as to impose an obligation to make higher education progressively free.

The argument seems to have found its genesis in various provisions of the Constitution as well as the Constitutional Court's jurisprudence to the effect that international agreements to which South Africa is a party are binding on South Africa on the international level. Further to this, South African courts must consider international law when interpreting the Bill of Rights. Section 29(1)(b) of the Constitution cannot be interpreted in a vacuum or in isolation. It must be interpreted in conjunction with international law. International law in this instance appears to favour an interpretation of section 29(1)(b) of the Constitution which encompasses an obligation to progressively introduce free higher education.

The Chairperson disagreed with this interpretation of section 29(1)(b) of the Constitution read together with article 13(2)(c) of the Covenant. The Chairperson contended that the ratification of the Covenant did not expand South Africa's constitutional obligations and contended that it simply affirms the "existing" obligations in relation to the provision of higher education. This argument by the Chairperson is unconvincing for the following reasons. Firstly, the Constitution does not explicitly impose an obligation on the state to progressively introduce free higher education. Secondly, neither the Constitution nor the Higher Education Act

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558 Report of Commission of Enquiry into Higher Education para 170.

559 "Evidence leaders, however, argued that the constitutional obligation of the State must be understood by the extension of that obligation involved in South Africa's ratification of the United Nations International Covenant on Economic, Social and Cultural Rights." Report of Commission of Enquiry into Higher Education para 171.

expressly makes provision for free higher education and/or the progressive introduction of free higher education.

Hence, the argument by the Chairperson to the effect that the ICESCR simply affirms existing obligations in relation to higher education is unconvincing and unsupported. A contextual and purposive interpretation favours the interpretation of the Commissioners (e.g., that Article 13(2)(c) broadens the state's obligations under section 29(1)(b) of the Constitution). The Bill of Rights must be interpreted with binding and non-binding international instruments firmly in mind and with due consideration being given to these. This is not always done, however. For instance, in the case discussed below, the court interpreted section 29(1)(b) without resorting to international law. Perhaps not all cases require a consideration of international law, however. This particular case could be resolved by the court without resorting to international law. Yet, the case significantly demonstrates that section 29(1)(b) of the Constitution firmly protects the right to higher education.

4.4.8 Relevant case law dealing with section 29(1)(b) of the Constitution — Thukwane v Minister of Correctional Services and Others *2003 (1) SA 51 (T)*

South Africa has limited jurisprudence in respect of the right to further education as contemplated by section 29(1)(b) of the Constitution. *Thukwane v Minister of Correctional Services and Others* (*Thukwane*) is the first (and only) case dealing specifically with the right to further education. This case is particularly important for this thesis as it indicates how South African courts in future are likely to deal with a case involving the interpretation of section 29(1)(b) of the Constitution.

Facts

This matter concerned a prisoner who had been convicted of murder and was serving a ten-year prison term. The prisoner brought an application in his own name and in the interest of a group and/or class of prisoners. On 6 February 2002, Mr Thukwane (applicant) registered as a final year LLB student at the University of South Africa (UNISA). In his notice of motion the applicant sought the following orders from the court: (i) that the provisions of Chapter V of the Treatment

Programmes for Prisoners be declared invalid in as far as they limit the applicant's right to further education, as provided for by section 29(1) of the Constitution, in an unreasonable and unjustified manner, because they make choices on behalf of the applicant on which courses to follow and at which institutions courses can be taken; (ii) the court reverse a decision made of refusing the applicant temporary leave or any other alternative as provided for by section 44(1)(b) and (d) of the Correctional Services Act 111 of 1998, in order for the applicant to attend a 40 hour practical tutorial session; and (iii) an interdict be issued calling upon the respondents to respect, protect, promote and fulfil the applicant's right to further education.[560]

Legal question

The court was required to determine whether the applicant's right to further education, as contemplated by section 29(1)(b), was unjustifiably limited by the provisions of Chapter V of the Treatment Programmes for Prisoners.

Judgment

In dealing with the inevitable question of limitation in this case, the Court drew from the dictum of Corbet AJ in *Goldberg and others v Minister of Prisons and others*,[561] where the learned Judge stated as follows:

> It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties … of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed.[562]

This dictum illustrates the importance of basic human rights to all citizens irrespective of the social status of the bearer. Prisoners retain their basic human rights unless such rights are limited by law, taking into account the circumstances of imprisonment.

In dealing with the right to further education, as contemplated by section 29(1)(b) of the Constitution, the Court emphasised that it is important to bear in mind that the

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560 *Thukwane v Minister of Correctional Services and Others* 2003 (1) SA 51 (T) at paras 1 to 6.
561 1979 (1) SA 14.
562 Para 39D.

prisoner cannot study or do specific research in ways he could have before his imprisonment.[563] The prisoner's life is by necessity regulated by prison hours and infrastructure. The Court readily accepted the argument of the respondent that it would be impractical to control the operation of the applicant's personal computer and, if the applicant was to be allowed access to the internet, such access could cause security risks for the prison.[564]

Importantly, the Court held that the provisions of the education programmes which prohibited access to the internet were well-founded, given the circumstances in which the applicant found himself as a prisoner. Although the Court in this matter did not substantively engage in an interpretative exercise as to what the right to further education specifically entails, the Court understood and accepted the right to a further education as a basic human right. This judgment is important for its implicit recognition and acceptance of the importance of further education as a basic human right. This is important because the right plays a crucial role in the contextual and purposive interpretation of the right to higher education. The obligations of the state in relation to higher education must be interpreted from the premise that one is dealing here with a basic human right like any other. In other words, the interpretation of section 29(1)(b) of the Constitution must be through the prism of a basic human right. The fact that higher education is subjected to progressive realisation does not affect its status as basic human right.

Importantly, the Court restated that all the rights in the Bill of Rights are subject to the limitation clause. In the context of this particular case the Court held that the provisions of the education programme which the applicant sought to have declared invalid respected the Constitution. The Court acknowledged the limitation of the applicant's right to freedom and security of the person (section 12(1)(e)); the right to freedom of expression (section 16(1)(d)); the right to freedom of trade, occupation and profession (section 22); and the right to further education (section 29(1)(b)). The Court clearly stated that in the context of the present case the purpose of the limitations was important. What is important to take away from this judgment is that the Court followed the well- established jurisprudence in respect of the limitation of

563 *Ermelo* at para 39.
564 Para 40.

constitutional rights. To limit the right to higher education the purpose of such a limitation must be important considering the importance of the right itself.

4.4.9 Mahapa v Minister of Higher Education and Another *2 All SA 254 (GJ)*

In this matter the Court had the occasion to compare section 29(1)(a) (basic education) with section 29(1)(b) (further/higher education).

Facts

The matter came before Mabesele J in the High Court of South Africa Gauteng Local Division, Johannesburg on an urgent basis for an order directing the Minister of Higher Education (the Minister) to (a) allocate funds to Mr Desmond Mahapa (the applicant) to further his studies, in 2017; and (b) provide written reasons as to why the applicant was not allocated a bursary in 2015 and 2016 respectively; and (c) direct the Minister to protect the applicant's constitutional right to education.

The applicant was studying for a law degree at the University of South Africa (UNISA). He registered for this degree towards the end of 2016. In demonstrating his inability to pay university fees, the applicant annexed to the court documents a copy of an affidavit deposed to by his mother, stating that she is a pensioner and could not afford to educate the applicant. In 2015 the applicant applied for an admission at UNISA, to study for the LLB degree. The application was successful. He subsequently applied for a bursary from the National Student Financial Aid (NSFAS), but he did not receive a response from NSFAS. Consequently, he could not pursue his studies that year. In 2016, the applicant submitted a new application for a bursary for funding for the 2017 academic year. This application was also not responded to by NSFAS, but the applicant managed to secure funds for registration for the 2017 academic year.

In court the applicant argued that he was entitled to education at tertiary level. The applicant contended that since he could not afford university fees, due to his impecunious family background, the Minister acting on behalf of the state was is obliged to secure funds for him to further his education. The applicant relied on section 29(1)(b) of the Constitution for his argument. On the other hand, Counsel for the Minister argued on the strength of section 36(1) of the Constitution. Counsel

submitted that the Minister has no obligation to provide funds to the applicant to further his education.

Legal question

The question that the Court was seized with was whether there was a constitutional obligation on the Minister to fund the applicant's further education.

Judgment

In dealing with the importance of education in general the learned Judge stated the following:

> Education is an instrument for development. It is as important as the air that one breathes. It is a vehicle for the promotion of self-dependence and self-worth. It liberates the mind from self-oppression and promotes positive thinking. Important, it promotes one's dignity.[565]

Relying on the Constitutional Court's judgment in the matter of Governing Body of the *Juma Musjid Primary School and Others v Essay NO and Others*,[566] the Court readily accepted that the right to a basic education is immediately realisable. The Court also stated that section 29(1)(a) is intended to address the imbalances of the past.[567] Turning to the difference between section 29(1)(a) and (b) of the Constitution, the Court pointed out that section 29(1)(b) of the Constitution has internal limitations, which limitations are not present in section 29(1)(a) of the Constitution. In dealing with section 29(1)(b) the Court specifically stated that:

> Unlike section 29(1)(a), this section, in my view, has internal limitation, requiring the state to be obliged, through reasonable measures, to make further education "progressively available and accessible". Regrettably, this right is distinct from the right to basic education, which is immediately realisable, and with no internal limitation requiring "progressively realised" within "available resources" subject to "reasonable legislative measures". In addition, section 29(1)(b), to my understanding, is intended to enhance one's knowledge and equip one with necessary skill for one to become self-dependent and contribute meaningfully to the socio-economic development of the country, whereas section 29(1)(a) is intended to eradicate illiteracy and promote literacy to enable everyone to understand the society in which they live and to fit well in that modern society. Therefore, it should follow that section 29(1)(a)

565 *Mahapa v Minister of Higher Education and Another* 2 All SA 254 (GJ) at para 15 (*Mahapa*).
566 2011 (8) BCLR 761 (CC) at para 37.
567 *Mahapa* para 29.

> must take preference and be protected. Therefore, the applicant's argument cannot stand. It stands to reason, therefore, that the first respondent [the Minister] has no obligation, arising from section 29(1)(b), to protect the applicant's right to further his education, by providing him with funds.[568]

Having reasoned as stated above, the Court proceeded to dismiss the application of the applicant. What is evident from the Court's reasoning is that basic and higher education have distinct purposes. According to the Court higher education is aimed at enhancing one's knowledge for future self-independence, whereas basic education is primarily aimed at eradicating illiteracy. Proceeding on this understanding of section 29 the Court concluded that there is no obligation on the Minister, arising from section 29(1)(b) to protect the applicant's right to further his education, by providing him with funds. Though this judgment is currently authority in South Africa it must be noted that it is a judgment of the High Court. Neither the Supreme Court of Appeal nor the Constitutional Court have had occasion to pronounce substantively on section 29(1)(b) of the Constitution. The likelihood is ever present that these Courts might come to a different conclusion to that of the High Court. The interpretation of constitutional provisions is a constitutional matter. In terms of both the Constitution and the operations of the South African judiciary the adjudication of constitutional matters is the specialist area of the Constitutional Court. That being the case, it is possible that this Court might have reached a different conclusion or reasoned differently to the High Court. This line of argument should not be construed to mean that the High Court reached an incorrect decision. However, there are elements of the case that indicate that a differently constituted court might reason differently. For instance, the applicant in this case was representing himself in the matter. Perhaps if the case was pleaded differently with the assistance of Counsel familiar with constitutional litigation a different conclusion and/or outcome might have been reached. The following discussions focusses on the state's obligation(s) in relation to higher education as envisaged in section 29(1)(b) of the Constitution.

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568 *Mahapa* para 31.

4.4.10 The State's obligation(s) in relation to higher education as contemplated by section 29(1)(b) of the Constitution

Unlike the strong, unqualified, positive right to basic education, section 29(1)(b) provides a qualified positive right to further education. The state's obligation in relation to higher education is set out in section 29(1)(b) of the Constitution. In terms of this section, the state is obliged to ensure that access to further education does not deteriorate and that it is improved gradually and progressively. The state is further obliged to act reasonably. In other words, the measures taken by the state must be reasonable. Reasonable measures include both adequate legislative and non-legislative measures.[569] The mere adoption of legislation is not enough to constitute constitutional compliance with the obligation to take reasonable measures. Assessing the reasonableness of a measure requires a case-by-case analysis. Put differently, the circumstances of a particular case will determine whether the measures taken by the state are reasonable or not. All of many very different measures could be reasonable. The choice as to which of these is to be adopted rests with government.

This approach was endorsed by Yacoob J in *Grootboom*, where the Justice stated that:

> A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether pubic money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[570]

Naturally, the wording of section 29(1)(b) of the Constitution is central to the proper interpretation of the obligations of the state in respect of the right to higher education. However, apart from the obligations specifically embedded in section 29(1)(b), the state is also generally obliged, in terms of section 7(2) of the Constitution, to respect, protect, fulfil and promote socio-economic rights.[571] The section 7(2) obligations

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569 Ngang 2014 *AHRJ* 672.
570 *Grootboom* para 41.
571 Section 7(2) of the Constitution.

influence the understanding and interpretation of the rights in the Bill of Rights. Hence, a proper understanding of section 7(2) is imperative for a proper interpretation of the provisions of the Bill of Rights. Applying the section 7 obligations to the requirement of "access" to higher education, the following duties may be deduced: Firstly, the state is obliged to ensure that existing access to higher education is not disrupted (respect). Secondly, the state is further obliged to deter, stop or impose sanctions on third persons when they are unduly interfering with the enjoyment of a right, in this case the right to higher education (protect). Thirdly, the duties to fulfil and promote in section 7(2) entail obligations to facilitate, provide and promote the enjoyment of rights. "Facilitating" access to higher education means creating a suitable legislative and other enabling environment in which access to higher education can be realised. "Providing" access involves actual hand-outs by the state to make access a reality (e.g., study bursaries or loans). "Promoting" access covers an array of state measures that advance access by securing ongoing political and popular support for the endeavour of enhancing access (e.g., information, campaigns, etc.) (fulfil and promote).[572]

Turning to the wording of section 29(1)(b) of the Constitution, it should be noted that the wording used in section 29(1)(b) of the Constitution differs from that used in both sections 26(2) and 27(2) of the Constitution, sections 26 and 27 being the other two important socio-economic rights provisions of the Constitution, addressing "Housing" and "Health Care, Food Water and Social Security", respectively. The difference in wording between sections 26(2), 27(2) and 29(1)(b) is important because of the presumption in South African law that the legislature would not enact purposeless provisions. In other words, there is a legitimate purpose for the difference in the wording of these provisions. This proposition is supported by the judgment of Trollip JA in *S v Weinberg*:

> [i]f possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it: or putting the same principle negatively … "a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." …The reason is, of course, that

[572] Aoife Nolan and Mira Dutschke state: "In facilitating access, that state must pro-actively engage in activities intended to strengthen people's access and utilization of resources and means to ensure their livelihood. The duty to promote requires States to take a variety of actions necessary to create, maintain and restore access to ESR." Nolan and Dutschke 2010 *EHRLR* 283.

> the lawgiver, it must be supposed will choose its words carefully in order to express its intention correctly, and it will therefore not use any words that are superfluous, meaningless, or otherwise otiose.[573]

Both sections 26(2) and 27(2) use the phrase "reasonable legislative and other measures, within … available resources." The reference to "available resources" is omitted from section 29(1)(b). Section 29(1)(b) simply obliges the state to make further education accessible and available progressively "through reasonable measures." The difference in wording is noticeable and might well have a certain legislative purpose. Woolman and Bishop note that some scholars have argued that the difference in wording in the above provisions should be largely ignored.[574] However, the authors prefer a reading that "gives the difference in the wording a real bite."[575] For this proposition, the authors rely on the arguments made by Veriava and Coomans to the effect that a lack of resources alone will not easily justify a failure to make further education available and accessible. The state must make a special effort to make the necessary funds available, so the argument continues.[576] According to Veriava and Coomans, this entail that:

> where a state policy or programme is challenged in terms of this right, the criteria for assessing the reasonableness of the programme, could, in addition to those set out in Grootboom, also entail an evaluation of the sufficiency of funding available for the policy or programme's implementation.[577]

The above argument by Veriava and Coomans captures the essence of what the difference in wording among sections 26(2), 27(2) and 29(1)(b) is all about. The essence is about the fact that the reasonableness criteria as established in *Grootboom* will have to be amplified to deal specifically with section 29(1)(b). The amplification will entail an evaluation of the sufficiency of the funding made available by the state. Unlike the position pertaining in most of the other socio-economic rights, lack of resources alone will not easily justify a failure to make further education available and accessible. The argument is primarily premised on the omission of the words "within its available resources." This omission proves to have

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573 1979 (3) SA 89 (A) 98D-G.
574 Woolman and Bishop "Education" 57-38.
575 Woolman and Bishop "Education" 57-38.
576 Veriava and Coomans "The right to education" 74.
577 Veriava and Coomans "The right to education" 74.

a legislative propose, and a correct interpretation of section 29(1)(b) must give due consideration to the wording of section 29(1)(b) and the difference in wording when compared to that of sections 26(2) and 27(2).

Another important section in giving substantive meaning to section 29(1)(b) of the Constitution is section 237 of the Constitution. This section which is titled *Diligent performance of constitutional obligations* provides that "[a]ll constitutional obligations must be performed diligently and without delay." Section 237 of the Constitution must be read in conjunction with section 2 of the Constitution, which pertinently states that the obligations imposed by the Constitution must be fulfilled. Section 29(1)(b) imposes on the state the obligation to make higher education available and accessible. Although this obligation is subject to progressive realisation, it must be performed diligently and without delay, as prescribed in section 237 of the Constitution. Even though the courts have not had occasion to judicially consider the content of section 237 of the Constitution, the section is self-explanatory constitutional obligations must be performed diligently and without delay. Therefore, the state's obligation in respect of higher education (to make it available and accessible) must be performed diligently and without delay. The approach for statutory interpretation including the Constitution was eloquently set out by Wallis JA in *Natal Joint Municipal Fund v Endumeni Municipality (Endumeni)*,[578] where the learned judge stated that:

> … Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual

578 2012 (4) SA 593 (SCA).

> context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[579]

In keeping with the approach advocated in *Endumeni*, the term "diligent" is defined by the Cambridge online dictionary as follows: "careful and serious in one's work, or done in a careful and determined way."[580] The state is obliged to conscientiously discharge its obligation to make higher education available and accessible. Having shown conscientiousness, it is further required to move as expeditiously as possible to satisfy its constitutional obligation. From a constitutional perspective, the obligations of the state towards higher education can be gleaned from four important provisions. These provisions are the following section 2 (obligations imposed by the Constitution must be fulfilled); section 7(2) (the state must respect, protect, promote and fulfil the rights in the Bill of Rights); section 29(1)(b) (the state must make higher education available and accessible); and section 237 (all constitutional obligations must be performed diligently and without delay).

4.4.11 Further education, fees, and the limitation of socio-economic rights

As stated throughout this thesis, section 29(1)(b) of the Constitution guarantees the right of everyone to further education. Importantly, section 29(1)(b) also imposes a positive obligation on the state to make further education available and accessible through reasonable measures. Therefore, the standard to judge and/or scrutinise the state's action pertaining to further education is "reasonableness". In other words, one would have to examine the actions taken by the state and ask whether the action(s) taken are reasonable, considering the reasonableness jurisprudence developed by the Constitutional Court in relation to socio-economic rights. On the international level, South Africa has an obligation to progressively introduce free higher education. This obligation must be given effect to by South Africa because it is an obligation which is binding on South Africa. Moreover, in interpreting section 29(1)(b), this obligation becomes an imperative interpretative tool in giving meaning to section 29(1)(b).

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579 Para 18.

580 See https://dictionary.cambridge.org/dictionary/english/diligent.

Essentially, section 29(1)(b) of the Constitution cannot be meaningfully/purposively interpreted without giving consideration to the international obligation imposed on South Africa by Article 13(2)(c) of the ICESCR. An assessment of whether the measure(s)/action(s) are reasonable must consider the international obligation to progressively introduce free higher education. Liebenberg correctly points out that:

> If the socio-economic rights in the Constitution are to amount to more than paper promises, they must serve as useful tools in enabling people to gain access to the basic social services and resources needed to live a life consistent with human dignity.[581]

This is a clear call for a substantive interpretation of socio-economic rights with a view to ensuring that people can gain access to the resources required to live a life consistent with human dignity. The reasonableness of the state's action(s) should be viewed through this prism — enabling people to gain access to the basic social services and resources needed to live a life consistent with human dignity. In line with this sentiment, the U.N. Committee on Economic, Social and Cultural Rights' General Comment No 13 on the Right to Education states that:

> *Education is both a human right in itself and an indispensable means of realizing other human rights.* As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.[582] (Emphasis added)

It is through the right to education that people are empowered to effectively exercise their socio-economic and political rights. It is this understanding of the right to education, especially higher education in our case, which makes its realisation so imperative. The realisation of the right to higher education is subject to progressive realisation to be assessed in the light of "reasonableness". The Constitutional Court's adoption of the reasonableness standard for assessing the state's positive obligations to realise socio-economic rights was first fleshed out in the *Grootboom*

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581 Liebenberg 2002 *LDD* 159.
582 General Comment No 13 para 1.

case. The reasonable test as articulated by the Court has been well summarised by Liebenberg as follows:

> 1. The programme must be a comprehensive and coordinated one, which clearly allocates responsibilities and tasks to the different spheres of government and ensures that "the appropriate financial and human resources are available". Although each sphere of government is responsible for implementing parts of the programme, national government has the overarching responsibility of ensuring that the programme is adequate to meeting the state's constitutional obligations.
> 2. The programme "must be capable of facilitating the realisation of the right," albeit on a progressive basis and within the state's available means.
> 3. Policies and programmes must be reasonable "both in their conception and their implementation".
> 4. The programme must be "balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long-term needs" (sic). A reasonable programme cannot exclude 'a significant segment of society'.
> 5. The programme must include a component that responds to the urgent needs of those in desperate situations, Thus a reasonable programme, even though it is statistically successful in improving access to housing, cannot "leave out of account the degree and extent of the denial of the right they endeavour to realise" … Thus the state must "plan, budget and monitor the fulfilment of immediate needs and the management of crises".[583]

According to some scholars the factors considered in the *Grootboom* case are not exhaustive in relation to access to further education. The argument is that when it comes to access to further education, a further factor requires to be examined, namely the evaluation of the sufficiency of funding available for the implantation of the policy or programme.[584] This argument suggests that in the case of access to further education, sufficiency of funding plays a much more central role. This line of reasoning is supported by Woolman and Bishop, who argue that a lack of resources alone will not easily justify a failure to make further education available and accessible.[585] Put differently, the state cannot simply rely on a "tight" resource situation for its failure to make further education available and accessible. Effectively, there must be other compelling and/or exceptional circumstances (such as perhaps a severe economic recession) justifying the non-compliance with the

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583 Liebenberg 2002 *LDD* 171.
584 Veriava and Coomans "The right to education" 74.
585 Woolman and Bishop "Education" 57-38.

constitutional duty to make further education available and accessible. Government's motivations for limiting socio-economic rights, it should be noted, may be questioned. This approach is in line with the Constitutional Court's judgment in *TAC*, where the Court emphasised that some level of scrutiny of government decision making was "intrinsically necessary as part of judicial review".[586]

> Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.[587]

The *TAC* judgment endorses a substantive approach to the interpretation of socio-economic rights as opposed to an approach that, to some extent, requires undue judicial deference to other arms of the state. The latter approach is premised on an overemphasis on the doctrine of separation of powers. The latter approach was followed by the Constitutional Court in *Mazibuko*, where the Court held that:

> [I]t is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic rights entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.[588]

The unintended consequence of this kind of approach to socio-economic rights adjudication is that courts refrain from giving substantive content to affirmative socio-economic rights.[589] This is not really in accordance with section 165 of the Constitution, which states that the judicial authority of South Africa vests in the courts. In terms of section 172(1), when interpreting constitutional matters, courts

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586 Roithmayr 2010 *CCR* 323.
587 *TAC* para 99.
588 *Mazibuko* para 60.
589 Roithmayr 2010 *CCR* 323.

are empowered to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency with the Constitution.[590]

Socio-economic rights are inherently constitutional matters, and the courts are the ultimate arbiters of what their normative content is. An overly deferential stance, specifically when viewed through the prism of sections 165 and 172 of the Constitution, appears to be incongruent with the constitutional mandate of courts in South Africa. As eloquently put by former Deputy Chief Justice Dikgang Moseneke:

> Judicial interpretation under the Constitution has placed different imperatives upon the adjudicator. Austere legalism suitable for interpretation of statues is not suitable to constitutional interpretation. The intention of the drafter is of little avail in constitutional interpretation. As intimated earlier, the salutary approach to constitutional interpretation is one which provides the most adequate response to the counter majoritarian dilemma by giving effect to the underlying values of the Constitution. It seems to me that our constitutional design of conferring vast powers of judicial review to the courts becomes optimal only if the courts are true to the constitutional mandate. It is argued that, in their work courts should search for substantive justice, which is to be inferred from the foundational values of the constitution. After all that is the injunction of the Constitution – transformation.[591]

The quotation above echoes the approach followed by the Constitutional Court in *TAC*, giving substantive content to socio-economic rights as opposed to exhibiting overly cautious judicial deference. Inevitably, pronouncing on the sufficiency of funding by the state for further education, specifically higher education, is likely to draw criticism from some quarters of government. Some might argue that it is an intrusion into the domain of the other arms of the state. If indeed it were to amount to an intrusion into the domain of the other arms of government, then such an intrusion would have to be held to be permitted by the Constitution, certainly in as far as section 29(1)(b) and the question of resources is concerned.

The constitutional obligation to make further education, including higher education, available and accessible relates in many ways to the issue of funding. When scrutinising the state's action(s) and/or programme(s) in relation to further education, such analysis will inevitably primarily focus on the issue of funding. Here

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590 Section 172(1)(a) of the Constitution.

591 The Fourth Bram Fischer Memorial Lecture "Transformative Adjudication" (delivered by Dikgang Moseneke, at the Nelson Mandela Civic Theatre, Johannesburg, 25 April 2002).

the point made by Veriava and Coomans should be kept in mind, namely that insofar as access to further education is concerned an evaluation of the sufficiency of funding available for the implementation of the policy or programme becomes an additional factor for consideration. As a result, the reasonableness standard must (here) be understood as justifying a stricter assessment of whether adequate resources have been made available to realise available and accessible further, including higher, education.

It is well true that a balance must be struck between the reasonableness of the state's action(s), realisation of the applicable socio-economic right and the resources made available to that end. However, the duty to make further education available and accessible must be read in the light of bold obligations to put into operation programmes aimed at the full realisation of the right and to move progressively toward full realisation.[592] The phrase "progressive realisation" on its own imposes a duty on the state to examine legal, administrative, operational and financial hurdles and/or barriers.[593] The state is to ensure that, over time, these barriers and/or hurdles are, where possible, lowered and eventually removed. Tuition fees constitute such a barrier for poor students to access higher education. The tuition fees of higher education institutions increased substantially, "making affordability a new hurdle in access for the (mainly black) poor."[594] Consequently, the state is constitutionally obliged to lower the fees barrier over time and eventually to remove it. A contextual and purposive interpretation of the duty of the state to make higher education accessible and available encompasses the installation of a financial support system (a fellowship system) like the NSFAS, which is sufficiently funded and properly engineered to address problems of access. This addresses the economic accessibility of higher education. Such a system will have to be in place until such time as higher education is fully free.

To be accessible, higher education must be affordable, and one of the ways to make it accessible, which is expressed in mandatory terms in Article 13(2)(c) of the ICESCR, is to progressively introduce free higher education. South Africa has an

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592 Heads of argument on behalf of the *amici curiae*, 10 September 2002, para 27.
593 Liebenberg 2002 *LDD* 172.
594 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 1.

international law obligation to progressively introduce free higher education. This international law obligation has not yet been supplemented by a similar national obligation, and one should contemplate theoretically why that is so. The law-making process and the state's positive constitutional obligations are inherently political in nature. The funding of the NSFAS to ultimately ensure access to further education involves considerable political debate. Free higher education – especially in South Africa, where neither the Constitution nor legislation expressly provide for free higher education – tends to attract more political than legal attention.

Law and politics are intertwined, especially on the level of socio-economic rights, taking into consideration the nature of the state's positive constitutional obligations implicated by such rights. This explains the relevance of discussing the topic of "political will" in the overall assessment of the progressive introduction of free higher education. In South Africa, the state consists of three spheres of government, the judiciary, the executive and the legislature. The legislative authority of South Africa vests in Parliament (national)[595], the provincial legislatures (provincially),[596] and Municipal Councils (locally).[597] These different legislative authorities assemble politicians, of course, who are responsible for the law-making process. In terms of section 73(2) of the Constitution, at the national level, "only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly…".[598] These provisions evidence the central role politics plays in the law-making process. What is "political will" then? "Political will" is defined as "the firm intention or commitment on the part of a government to carry through a policy, especially one which is not immediately successful or popular."[599] Simply put, "political will" is a commitment to adopt and implement a policy by the responsible politicians. Based on this definition of "political will", the progressive introduction of free higher education requires just one step but an important step for realisation, namely the initiation of a policy-making process that caters for the progressive

595 Section 43(a) of the Constitution.
596 Section 43(b) of the Constitution.
597 Section 43(c) of the Constitution.
598 Section 73(2) of the Constitution.
599 See https://www.lexico.com/definition/political_will.

introduction of free higher education. This process can be initiated only by the responsible politicians. It is not a task within the ambit of the judiciary.

In 2017 President Jacob Zuma announced that government would subsidise free higher education for poor and working-class students. The former President's announcement was followed by an announcement by the former Finance Minister Malusi Gigaba during his maiden budget speech where he announced that an additional R57-billion over the next three years had been allocated to fund free education for students who come from poor or working-class families with a combined income of a maximum of R350 000. This was on top of the R10 billion which had been provisionally allocated in the 2017 budget for the same purpose.[600] The announcements of both the former President and former Minister of Finance were policy-decisions of government, requiring "political will" for their announcement and fulfilment. It is through commitment to policies such as the above that the progressive introduction of free higher education can be realised.

Importantly, constitutional rights and freedoms are not absolute.[601] This means that the rights enshrined in the Constitution have boundaries set by the "rights of others and by important social concerns such as public order, safety, health and democratic values."[602] Furthermore, socio-economic rights, to the extent that they are defined in relation to their progressive implementation, are, of course, limited by resource constraints. It is explained above that the right to further (including higher) education entails a positive obligation on the part of the state to progressively make such education free and further a negative obligation not to take deliberately retrogressive measures in the form of introducing or increasing study fees in higher education.[603] While limitation justification regarding the positive obligation operates within the parameters of the "reasonableness test" as expounded by the Constitutional Court, limitation justification regarding the negative obligation should proceed within the narrower confines of the general limitation clause of section 36. Whereas limitation justification in the former sense has been addressed in the

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600 Tshwane 2018 https://mg.co.za/article/2018-02-21-finally-how-government-plans-to-fund-free-education.

601 Currie and De Waal *The Bill of Rights Handbook* 150.

602 Currie and De Waal *The Bill of Rights Handbook* 150.

603 See the discussion of further, as higher education and fees, generally, in this thesis.

previous paragraphs, let us now look at limitation justification in relation to the negative obligation not to introduce or increase fees under section 36.

Section 36 of the Constitution governs the process for the justification or restrictions of rights in the Bill of Rights. When a right is limited and there is no justification in terms of section 36, Currie and De Waal argue that such limitation will be unconstitutional. The essential point is that, when a right is limited, there must be a clear justification for such a limitation which is consistent with section 36 of the Constitution. The rights in the Bill of Rights cannot be limited for any reason that does not accord with the values of the Bill of Rights. The reasons for limiting a right must be exceptionally strong.[604] Justifying a limitation "is not a question of determining whether the benefits of a limitation to others or to the public interest will outweigh the cost to the right-holder."[605]

Two questions become important in the section 36 analysis: first, whether a right in the Bill of Rights has been infringed; and second, whether the infringement can be justified as a permissible limitation of the right (a two—stage approach).[606] Proper evidence must be placed before a court to determine the reasonableness of a justification. A court cannot determine in the abstract whether the limitation of a right is "reasonable" or "justifiable in an open and democratic society based on human dignity, equality and freedom."[607] Regarding the necessary evidence that must be placed before the court, it was held as follows in *Mosie v Greater Germiston Transitional Local Council*:

> If the government wishes to defend the particular enactment, it then has the opportunity—indeed an obligation—to do so. The obligation includes not only the submission of legal argument but placing before the court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.[608]

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604 Meyerson 1997 *Rights Limited: Freedom of Expression, Religion and the South African Constitution* 36-43.

605 Currie and De Waal *The Bill of Rights Handbook* 151.

606 Currie and De Waal *The Bill of Rights Handbook* 153. See also *Makwanyane* para 102.

607 Section 36 of the Constitution.

608 2001 (4) SA 491 (CC) para 19.

The justification of a limitation entails considerable effort on the part of the respondent, the state. Hence, section 36 makes it clear that a right in the Bill of Rights may be limited only: (a) by a law of general application, that is (b) reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account, *inter alia*, (i) the nature of the right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the limitation; (iv) the relation between the limitation and its purpose; and (v) less restrictive means to achieve the purpose. These are all important considerations in the limitation analysis and due regard must be given to them.

Turning to section 29 of the Constitution, the right to education, including the right to higher education, is both a core human right in itself and an "indispensable means for realising other human rights."[609] The right to education is therefore "a very important right." Taking into account the discussion above, it is evident that the limitation of the right to education, including the right to higher education, requires an exceptionally strong justification.

The right to higher education entails that it should be economically accessible. In other words, higher education must be affordable to all. Hence, there is a duty (explicit on the international level) to progressively introduce free higher education. By implication, it is not permissible to introduce or increase study fees in higher education. This thesis argues that the introduction of or increase of tuition fees in higher education constitutes a deliberately retrogressive measure as referred to in the UN Committee's General Comment No 3. The Committee there says that deliberately retrogressive measures "would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[610] These considerations, it is submitted, should play a decisive role in any limitation justification under section 36. What would be constitutionally acceptable reasons for introducing or increasing study fees in higher education then? Clearly, resource constraints could be a reason, but only if they are, as it were, of a serious nature. Ultimately, the above Committee statement refers to the use of

609 General Comment No. 13 para 1.
610 General Comment No. 3 para 9.

the “maximum” resources available. Hence, the mere fact that resources are “tight” is not as such a reason for making higher education students bear that burden. State discretion under this form of resource constraint justification is far more limited than in terms of the “ordinary” reasonableness test as discussed above, applicable in relation to the positive obligation of the state to progressively make higher education free. Another potentially acceptable reason could be the endeavour to enhance quality in higher education, costing additional money. Ultimately, enhancing quality advances the right to higher education – but it may also impact on access again. In any of the above types of justification, much will depend on the specific form the increase takes. Hence, is its effect softened by providing for bursaries and loans to those in need? Here one may think of the NSFAS scheme, of course. Another important point is this: a deliberate introduction or increase of study fees cannot simply be proclaimed by the government. It needs to be adopted by parliament, as only a parliamentary law would in this instance constitute “a law of general application”. The importance hereof is that any introduction or increase of study fees requires a democratic legitimation. Potentially, a provision in a parliamentary enabling act authorising fee increases by the executive could be acceptable if it spells out in detail the (constitutionally informed) factors that must be taken into account in arriving at any related decision. As alluded to earlier the Higher Education Act was enacted *inter alia* to give effect to section 29(1)(b) of the Constitution. Importantly, the Higher Education Act is silent on the introduction or increase of tuition fees. In other words, the Act does not set out detailed “constitutionally-informed” factors that must be considered in arriving at any decision related to an increase of study fees. That being the case, it is imperative that an Act of Parliament be enacted to deal specifically with the limitation of the right to access to higher education by an increase of tuition fees.

4.4.12 Financial measures taken by the state to make higher education available and accessible

As shown above, the state has certain constitutional and international law obligations in relation to the right to higher education.[611] Assessing compliance with

[611] Chapter 3, the discussion on the relevance of international law.

these obligations is not an easy task and requires ongoing assessment of the state's actions, especially because socio-economic rights are subject to progressive realisation. For the purposes of this thesis, the inquiry into the state's compliance will be limited to the financial and legislative measures taken by the state because these measures are of importance in relation to the research question to be answered ultimately.

On face value, the South African state appears to have embraced the obligations imposed on it by section 29(1)(b). At the hearings of the Commission, both the then Minister of Higher Education and Training and the Minister of the National Treasury acknowledged that the Higher Education and Training sector is an "apex priority" for government.[612] The then Minister of Finance, Mr Gordhan, stated that "education as a whole is an apex priority of government as reflected in both the NDP [National Development Plan] and the MTSF [Medium-Term Strategic Framework]."

The Commission held, and it is warranted to quote this in full, that:

> Historically, education as a whole accounted for the majority of allocations from the State budget. The largest portion of the education allocations is dedicated to basic education.
>
> The 2016 budget was estimated at R1.3 trillion. This represents the resources available for government expenditure on various programmes. Post-school education and training was allocated 5.2 per cent of that budget, amounting to an estimated R64.2 billion. The sector experienced the largest nominal expenditure growth by function between relevant MTEF periods, second only to debt-servicing costs.
>
> The current budget allocation to the sector must be understood in its historical context.
>
> The Department of Higher Education and Training was established in May 2009 and became operational in April 2010. It came about as a result of splitting the higher education, further education and training (TVETS) and Adult Education functions from the erstwhile Department of Education. The TVET and Community Education and Training (CET) functions remained a provincial competence until they were moved in April 2015 to the Department of Higher Education and Training.
>
> The first budget allocation for the newly formed Department of Higher Education and Training was for the financial year 2010/2011. According to the evidence of the Department of Higher Education and Training, this shift in functions has had an adverse impact on the Department's baseline allocation from National Treasury. This has had the result that the Department's allocation reflected an

612 Report of Commission of Enquiry into Higher Education para 359.2.

> annual growth of 7.9 % between the financial years 2012/13 and 2015/16.
>
> It was only during 2016 MTEF that the National Treasury adjusted the Department's baseline allocation with an amount of about R17.4 billion to support the 2016 zero per cent fee increase at universities. The majority of this additional amount, in sum of about R16.2 billion, was directed at resolving the historic NSFAS student debt challenge and to offer financial support to continuing and new NSFAS students.[613] (Footnotes omitted)

From the evidence provided to the Commission the following can be gleaned: (i) the higher education and training sectors budgets have, at least over the past six years, grown faster than the budgets for other functions;[614] and (ii) the NSFAS allocations started to increase prior to the demands from students. That is the case because the evidence suggests that the NSFAS more than tripled in funding per learner from 2005 to 2014.[615] These measures by government represent the financial measures taken. However, financial measures alone are not sufficient to address the obligation of government to make higher education available and accessible. The next heading addresses the legislative measures taken by the government in compliance with its constitutional obligation in terms of section 29(1)(b).

4.4.13 Legislative measures taken by the state to make higher education available and accessible

Mere financial measures are not enough. There are various other measures government can take to comply with its constitutional obligation to make higher education available and accessible. It is inevitable that policy and legislative measures must be taken. The South African state, in its pursuit of complying with the obligations set out in section 29(1)(b), adopted the following legislative measures and policies, namely, the Higher Education Act 101 of 1997 ("the Act"), Education White Paper 3 (DoE 1997), the National Plan for Higher Education (1997) the National Student Financial Aid Scheme (NSFAS) Act 56 of 1999, the Green Paper for Post-School Education (2012), and the White Paper for Post-School Education and Training (2014). The National Development Plan 2030 of 2011,

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613 Report of Commission of Enquiry into Higher Education paras 404-409.
614 Report of Commission of Enquiry into Higher Education para 410.
615 Report of Commission of Enquiry into Higher Education para 417.

aiming to eliminate poverty and reduce inequality by 2030, is to constitute a guide in the legislative process.

The Higher Education Act deals extensively with the funding of higher education. In this respect, the Act outlines the government's intentions with higher education. These include the redress of past discrimination in pursuit of:

> [E]nsuring representativeness and equal access; providing optimal opportunities for learning and creation of knowledge; promoting the values that underpin an open and democratic society based on: dignity, equality; freedom; respect for academic freedom; the pursuit of excellence; the promotion of the potential of every student, and appreciation for diversity.[616]

Hence, equal access is specifically mentioned. The Act stipulates that the Minister of Higher Education, after having had the required consultation with the Council of Higher Education (CHE) and the Minister of Finance, must determine the policy on the funding of public higher education. Yet the Act does not actually comment on tuition fees as such.

On a policy level, both the Education White Paper 3 and the National Development Plan cover the following aspects in relation to higher education:

> Improving access opportunities; increasing participation of disadvantaged students and of women; ensuring that enrolments increase in academic programmes linked to economic development and in postgraduate programmes at masters and doctorate level; improving the quality of teaching and research through enhancing the qualifications of academic staff; increasing the numbers of graduates produced by the university system.[617]

Furthermore, the state established the Ministerial Committee for the Review of the Funding of Universities in 2013 in an attempt to address the funding issues of universities. The Ministerial Committee had a specific mandate to review the funding framework in the light of the transformation requirements set out in the 1997 Education White Paper. Subsequent to its work, the Ministerial Committee made the following recommendations:

> The funding for higher education should be increased to levels of comparable international expenditure. Enrolment planning should

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616 Report of Commission of Enquiry into Higher Education paras 421.1-421.4. See also the Preamble to the Higher Education Act.

617 Report of the Ministerial Committee for the Review of the Funding of Universities 95.

> remain a key steering instrument for determining the size and shape of the higher education sector with negotiated targets linked to the funding of universities. In instances of poor success and throughput rates more attention should be devoted to improvement than growth. Where growth is appropriate it should be aligned with institutional capacity, human resources, fiscal availability, infrastructure and student accommodation. The monitoring and evaluation capacity of the DHET in regard to funding efficiency and effectiveness and the financial health of universities requires enhancement. The Minister of Higher Education should establish a funding committee to oversee annually the funding allocations to universities. The formula-based approach to funding and the system of block grants and earmarked grants should be retained. All universities must offer quality undergraduate education.[618]

Focussing on the NSFAS, where the state is heavily criticised, the Ministerial Committee recommended steep increases in NSFAS funding and greater academic support for NSFAS recipients. The approach and remedies of the Ministerial Committee were somewhat criticised by the Commission:

> The Committee appears to have focused almost entirely on public (state) funding for universities and sought its remedies only in the public sphere. It is the advice of this Commission that a much broader view of social responsibility of the private sector to assist financially and otherwise in the funding and support of students is justified. Such an approach will in the view of the Commission free the state from the primary burden of student funding. Instead such funds as would have been expended for that purpose may be redirected to the fulfilment of funding goals in the wider education sector identified by the Commission in its recommendations.[619]

While the private sector should indeed play a role in the overall funding scheme, it is unrealistic, however, to state that the government should not be the primary funder of higher education.

On a legislative and policy level, the state in South Africa has taken some significant measures to address the funding crisis that has ensued and to comply with both its constitutional and international obligations. Further policy measures were adopted in 2017 to address the topical issue of free higher education. The then President Mr Jacob Zuma announced that government would subsidise free higher education for poor and working-class students.[620] Although this action of the head of the state was taken in the form of, it is strongly relevant when determining whether measures

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618 Report of Commission of Enquiry into Higher Education at para 428.1-428.8.

619 Report of Commission of Enquiry into Higher Education at para 435.

620 News24Wire 2017 https://businesstech.co.za/news/government/216987/zuma-announces-free-higher-education-for-poor-and-working-class-students.

taken by government are reasonable. The then President reiterated that education was an apex priority for government's pro-poor policies, and further committed to increasing subsidies to universities from 0.68% to 1% of the GDP over five years, as had been recommended by the Commission.[621] Furthermore, the former President committed government to convert packages allocated to existing NSFAS students in their further years of study from loans to 100% grants effective immediately.[622]

4.5 Conclusion

Ever since the interim Constitution was adopted in 1994, the right to education has enjoyed the status of a basic human right in South Africa. Unlike the final Constitution, the interim Constitution did not make provision for the different levels of education. The interim Constitution did not make provision for basic adult education and further education. Perhaps the cautious approach taken under the interim Constitution can be explained by the fact that the interim Constitution was a transitional Constitution.

The drafters of the interim Constitution knew that the final Constitution would address more extensively some of the provisions of the interim Constitution. Once adopted, the final Constitution did indeed expand the constitutional provision relating to education. Under the final Constitution, basic adult education and further education were added under section 29(1). In section 29 the role and obligations of the state in respect of education are clearly set out. The state's obligations in respect of basic education under section 29(1)(a) differ from its obligation in respect of further education under section 29(1)(b). Basic education is a basic human right which is immediately realisable and not subject to the availability of the state's resources.

Basic education is a universal right which is available to everyone. Under South African education legislation, basic education is compulsory. A contentious issue is

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621 News24Wire 2017 https://businesstech.co.za/news/government/216987/zuma-announces-free-higher-education-for-poor-and-working-class-students.

622 News24Wire 2017 https://businesstech.co.za/news/government/216987/zuma-announces-free-higher-education-for-poor-and-working-class-students.

whether basic or compulsory education must be free as is required under international law. In South Africa, provision is made for both fee-paying and non-fee-paying schools for the purposes of basic education, (attempting) to exempt poor learners from paying fees. Some scholars strongly argue that paying school fees for basic education undermines the constitutional right to a basic education. In essence, the argument is that basic education is a fundamental human right guaranteed by the Constitution, and therefore should not be paid for. South African courts have on several occasions pronounced on the substance and importance of the right to a basic education.

The courts have held that the right to basic education includes timeous delivery of textbooks to learners, the provision of furniture and the provision to learners of transport from and to school. However, South African courts have not had a similar opportunity to substantively pronounce on section 29(1)(b) of the Constitution, the right to further education. Reliance is placed on the Constitutional Court's socio-economic rights jurisprudence to ascertain a likely interpretation of section 29(1)(b), especially in respect of the state's obligations. Importantly, in respect of socio-economic rights, including the right to education, the state has both national and international obligations.

South Africa is a state party to the ICESCR, which imposes explicit obligations in respect of the provision of education on the primary, secondary and higher levels, in Article 13(2)(a), (b) and (c) of the Covenant, respectively. Unlike primary and secondary education, higher education is not a universal right in that it is available to only those who qualify for it by virtue of their intellectual capacity. The state's obligations in respect of higher education are different from those for primary and secondary education. Being a state party to the ICESCR, South Africa is bound on the international level to respect, protect and fulfil its provisions. Article 13(2)(c) of the ICESCR specifically provides for higher education and the progressive introduction of free higher education. This provision is binding on South Africa on the international level, meaning that South Africa cannot act in a manner inconsistent with this provision.

The South African equivalent of Article 13(2)(c), roughly, is section 29(1)(b) of the Constitution, but, unlike Article 13(2)(c), section 29(1)(b) does not explicitly provide

for the progressive introduction of free higher education. The Higher Education Act of 1997 is also silent on the progressive introduction of free higher education. The nearest South Africa gets to the progressive introduction of free higher education is through the NSFAS, in as far as a percentage of a student's loan is converted into a bursary. However, the ineffectiveness of the NSFAS and the ever-increasing tuition fees negatively affect the efforts made towards the progressive introduction of free higher education in practice.

In terms of both the Constitution and the Constitutional Court's jurisprudence international law must be considered when interpreting the Bill of Rights. Section 29(1)(b) should therefore be interpreted in the light of Article 13(2)(c) of the ICESCR. Importantly, a purposive interpretation does not permit altogether ignoring the clear language used in a particular provision under interpretation.[623] In *S v Zuma*,[624] the Constitutional Court stated that:

> We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.[625]

On a plain reading of section 29(1)(b) of the Constitution, the provision seems not to encompass free higher education. However, interpreting section 29(1)(b) in the light of Article 13(2)(c) (international law), section 29(1)(b) would seem to encompass the obligation of the progressive introduction of free higher education. If it did not, and the progressive introduction of free higher education was inconsistent with section 29(1)(b), the South African government would not have ratified the Covenant or would have limited the application of Article 13(2)(c) to South Africa by noting a reservation. Because that was not done Article 13(2)(c) must be considered whenever section 29(1)(b) of the Constitution is interpreted. The Constitution further, in terms of Section 233, prefers an interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. A preferred interpretation of section 29(1)(b) of the Constitution which is also consistent with international law, is one which

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623 *President of the Republic of South Africa v Democratic Alliance and Others* [2019] ZACC 35 at para 59.
624 [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).
625 Para 18.

encompasses the progressive introduction of free higher education. The silence of section 29(1)(b) on the progressive introduction of free higher education does not automatically mean that this is not envisaged by the provision.

The NSFAS (the fellowship system) and the former President Jacob Zuma's announcement that free higher education would be introduced are in certain respects, indications that South Africa is moving towards the progressive introduction of free higher education. Hence, it would not be too much of a strain on the language of section 29(1)(b) to argue that the provision encompasses the progressive introduction of free higher education. Both the NSFAS and the Higher Education Act in different ways give effect to section 29(1)(b) of the Constitution. It is through these statutes that clarity must be provided in respect of the progressive introduction of higher education. It is these two statutes that must set out or design mechanisms to achieve the progressive introduction of free higher education.

However, it is also important not lose sight of the fact that core constitutional rights, including the right to education, are not absolute. In other words, even core fundamental human rights are subject to possible limitation where this can be justified. What is important in this regard is that such limitation take place in accordance with the criteria set for limitations of constitutional rights. From an international law perspective, the limitation of rights is governed by Article 4 of the ICESCR. This provide that the state may subject fundamental rights to such limitations "as are determined by law only in so far as this may be compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society." South Africa has a similar provision, section 36 of the Constitution, which states that the rights in the Bill of Rights may be limited "only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." Section 36 and Article 4 set out the criteria against which any limitation of rights needs to be justified, in this case that of the right to higher education. The progressive introduction of free higher education is part and parcel of the right to higher education. Deliberate measures taken by the state, for instance the increase in tuition fees, that have retrogressive effects evidently limit the realisation of the right. As already stated, where a right is limited, the applicable criteria for the

limitation of such a right must be complied with. Absent compliance with such criteria, the right is limited unjustifiably. Those affected by such a limitation then have judicial recourse.

CHAPTER 5: THE ADJUDICATION OF SOCIO-ECONOMIC RIGHTS AND THE DOCTRINE OF THE SEPARATION OF POWERS IN SOUTH AFRICA

5.1 Introduction

The right to higher education is part and parcel of the socio-economic rights which the state is (usually) obliged to realise progressively. Inevitably, a discussion on socio-economic rights necessitates a discussion of the doctrine of the separation of powers as the adjudication of socio-economic rights often involves scrutiny of government policies and programmes aimed at advancing socio-economic progress. It is in response to this scrutiny by the courts, if it is not carefully performed that the judiciary is accused of judicial overreach.[626]

The chapter will analyse the exact scope of the doctrine of the separation of powers in the context of the adjudication of socio-economic rights. Furthermore, this chapter will comment on section 29 of the Constitution and elaborate on the extent to which this section obliges the state to make higher education progressively free and to refrain from deliberate increases in fees in a way that may be adjudicated by a court of law.

The internal qualifications contained in section 29(1)(b) of the Constitution, which are similar (though not identical) to those contained in sections 26 and 27 of the Constitution, suggest that section 29(1)(b) should be interpreted much like the access rights found in sections 26 and 27. Sections 26 and 27 protect the rights of access to housing and to health care, food, water and social security, respectively. It is in this interpretive exercise that the doctrine of separation of powers serves as a restraint. The primary objective of the doctrine is to prevent a situation where absolute power is entrusted to a single body or person. The "biggest enemy" of the doctrine of separation of powers is absolutism, as it represents a regime where the

626 Judicial overreach occurs when a court acts beyond its jurisdiction and interferes in areas which fall within the executive's and/or the legislature's mandate. Simply put, it means the court has violated the doctrine of the separation of powers by taking on functions such as law enforcement, policy making, and law making.

making of the law, its execution, and its judicial interpretation rest in the same person or body.[627] That much was argued by Montesquieu in the seventeenth century:

> [There is no] liberty if the power of judging is not separate from legislative power and from executive powers… All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercise these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.[628]

Philosophers such as Montesquieu made a great contribution towards the development of the doctrine of the separation of powers with the harsh but realistic argument that man has a natural propensity to abuse political power entrusted to him/her, and, if no safeguards are in place to guard against this abuse, every government is bound to fail.[629]

It is widely accepted that it is inherently impossible to achieve the absolute separation of powers.[630] Unavoidably, some powers and functions will overlap – this applies to South Africa as well. In terms of the South African model of the separation of powers, the state is divided into three branches, namely, executive, legislature and the judiciary. Each branch or arm of the state has its own functions and responsibilities. The legislature is responsible for making the law, the executive is tasked with proposing policies and legislation and with implementing any legislation adopted by the legislature, and the judiciary is responsible for the interpretation of laws and the adjudication of such laws in the case of disputes.

The judiciary is the guardian of the Constitution and ultimately pronounces on the functions and powers of the other branches of government. This function easily conflicts with the doctrine of the separation of powers, as it not only limits both lawmaker and enforcer, but also tends to prescribe how law-making and enforcement should occur. It is in this guardian function that the judiciary is thus often accused of judicial overreach. The correctness or otherwise of those allegations in all their dimensions is beyond the scope of this thesis. The focus here

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627 Labuschagne 2006 *Politeia* 18.

628 Modern History Sourcebook: Montesquieu: The Spirit of the Laws, 1748 https://sourcebooks.fordham.edu/mod/montesquieu-spirit.asp.

629 Klaasen *The Constitutional Impact of Strategic Litigation in South Africa* 180.

630 Klaasen *The Constitutional Impact of Strategic Litigation in South Africa* 184.

is on the implications of the doctrine of the separation of powers for the adjudication of socio-economic rights in South Africa.

5.2 South African courts and the doctrine of the separation of powers

The doctrine of the separation of powers presents yet another layer of complexity in the adjudication of socio-economic rights. This is the case because courts of law are called upon to adjudicate matters involving policy-making decisions by another branch of government. But the separation of powers is a constitutionally enshrined doctrine which must be observed by South African courts, especially in cases involving the adjudication of socio-economic rights. The interim Constitution was the first Constitution of South Africa to comprehensively introduce the doctrine of the separation of powers.

The first indication of the recognition of a separation of powers in the interim Constitution, although not explicit, is found in section 4(2), where a clear distinction is drawn between the three branches of government.[631] Furthermore, in section 96 of the interim Constitution it was stated unambiguously that the judiciary was to be independent and subject only to the interim Constitution – a constitutional protection from interference which the judiciary did not previously explicitly enjoy.[632] The interim Constitution also recognised various "Constitutional Principles" that were to be foundational to the new Constitution.[633]

Of the negotiated Constitutional Principles, Constitutional Principle VI in particular explicitly recognised the doctrine of separation of powers. Constitutional Principle VI stated that:

> There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

This Principle was silent on which model of the separation of powers would best suit South Africa. This might have triggered some of the objections questioning

631 "This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government."

632 Section 96(1). "The judiciary shall be independent, impartial and subject only to this Constitution and the law."

633 Klaasen *The Constitutional Impact of Strategic Litigation in South Africa* 196. See also Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993.

compliance with the doctrine of the separation of powers raised in the process of certifying the final Constitution by the Constitutional Court, a procedure prescribed under the interim Constitution. An objection raised related to the fact that members of the executive government are also members of the legislature on all three levels of government.[634] The essence of the objection was that members of cabinet by virtue of their positions were able to exercise influence over decisions of the legislature. In substantiating the objection, reliance was placed on the doctrine of the separation of powers applied in the United States of America, France, Germany and the Netherlands. The Constitutional Court rejected this objection on the basis that there is no system of absolute separation of powers. Each country should therefore develop its own system of the separation of powers which would best suit the country concerned.

The doctrine of the separation of powers was not intended to interfere with or obstruct the judiciary in performing its functions as laid down in the Constitution. Under both the interim Constitution and the final Constitution, the judiciary is constitutionally mandated to be the ultimate guardian of the Constitution. The Constitution does not expressly provide for the separation of powers. However, the Constitution is structured in a manner that clearly embodies the doctrine.[635] The separation of powers can be gleaned from the following constitutional provisions: Section 43 vests the legislative authority in the national sphere in Parliament, in the provincial sphere in provincial legislatures, and in the local sphere in the Municipal Councils.[636] Sections 85[637] and 125[638] vest the executive authority in the President, on the national level, and the respective premiers, in the different provinces, respectively. Lastly, section 165 vests the judicial authority in the courts.[639] These provisions are the clearest indication that the doctrine of the separation of powers is recognised and embodied by the Constitution.

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634 *Certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 (CC) para 106.

635 Currie and De Waal *The Bill of Rights Handbook* 18. See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC). In this case, the Constitutional Court held that there "can be no doubt that our Constitution provides for such a separation [of power], and that laws inconsistent with what the Constitution requires in that regard, are invalid", at para 22.

636 Section 43 of the Constitution.

637 Section 85(1) of the Constitution.

638 Section 125(1) of the Constitution.

639 Section 165(1) of the Constitution.

The judiciary's constitutional mandate has brought it into the firing line with some alleging that the judiciary is meddling in the domain of the other branches of government. It was the Constitutional Court, through Ackerman J, that expressed the desire for a distinctively South African model of the separation of powers. According to Ackerman J:

> [O]ver time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.[640]

Ackerman J had in mind a system of the separation of powers which takes cognisance of the socio-economic conditions, the gap between the rich and the poor, inequalities, and the social welfare of South Africans. The South African judiciary seems to have taken the view expressed by the Court seriously – and that is evident in some of its most difficult decisions dealing with sensitive issues such as socio-economic rights, which go to the heart of a separation of powers.[641]

The distinctively South African model of the separation of powers contemplated by Ackerman J seems to entail, firstly, that there is no absolute separation of powers. There will from time to time be an overlap in functions among the three branches of government, which is justifiable as long as the overlap is constitutionally permissible and does not blur the separation of powers. Secondly, the judiciary is the ultimate guardian of the Constitution, and in that function the judiciary is required to see to it that the doctrine of the separation of powers is observed and adhered to whenever there is a dispute relating to the powers or functions of the different branches of government. The powers of the judiciary are not unlimited; courts can go only as far as is constitutionally permissible. Thirdly, all powers and functions are exercised

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640 *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 60.

641 See, e.g., *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC); *Glenister*; and *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC).

subject to the Constitution, which recognises the doctrine of the separation of powers.

5.3 Separation of powers, the adjudication of socio-economic rights and relevance to section 29(1)(b)

It is a well-known fact that under apartheid resource allocation was skewed in favour of the white minority at the expense of the black majority. In their wisdom, the drafters of the Constitution deemed it necessary to address the socio-economic inequality created by the apartheid system. The Preamble to the Constitution commits all stakeholders in the Republic of South Africa to "improve the quality of life of all citizens."[642] Moreover, the improvement of the lives of all citizens requires an element of social justice, which the Preamble explicitly refers to as one of the means to correct the injustices of the past. Social justice involves issues falling in the domain of the other arms of the state, such as policy decisions, laws, the allocation of resources, and so on.

Inevitably, the judicial competence to adjudicate on socio-economic rights draws the judiciary into matters involving the allocation of public resources, a function which was traditionally the exclusive terrain of the legislative and executive branches of government.[643] It is the (apparent) allocation of elements of this function to the courts that has been criticised the most, with some arguing that it is not the role of judges to implement socio-economic rights but that of democratically elected representatives.[644] The argument goes even further to state that judges are not institutionally equipped to deal with such complex policy choices regarding the allocation of public resources.[645] This criticism, though valid and sound in certain respects, has not detracted the South African courts from adjudicating complex socio-economic rights cases, in accordance with the adjudicative competences bestowed on the courts under the Constitution. Such far-reaching competences, it is submitted, are justified by virtue of the huge symbolic role that courts are to play

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642 Preamble of the Constitution.
643 Roux "Democracy" 10-58.
644 Roux "Democracy" 10-58.
645 *National Coalition for Gay and Lesbian Equality v Minister of Home Affair* 2000 (2) SA 1 (CC) at para 66.

in the new South African dispensation in upholding the Constitution and helping social justice to be made a reality.

Three cases decided by the Constitutional Court will be analysed in the following section. *Grootboom*, *TAC (No. 2)*, and *Mazibuko* – as they are often referred to in short – are probably the three most important pronouncements by the highest court on socio-economic rights. The cases define the "reasonableness" approach towards adjudicating socio-economic rights, whether there are stand-alone minimum core entitlements, and, ultimately, what the exact scope of the doctrine of the separation of powers in the new South Africa is considered to be.

5.3.1 Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Summary of the facts of the case

This case concerned eviction proceedings. The respondents, a group of poor residents, had been evicted from their informal homes, which were situated on private land earmarked for formal low-cost housing by the metropolitan council. They argued that the eviction violated their right to access to adequate housing under section 26 and their children's right to shelter under section 28(1)(c).

Section 26(1) states: "[e]veryone has the right to have access to adequate housing."[646] Section 26(2) states: "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."[647] Further, section 28(1)(c) states: "[e]very child has the right to basic nutrition, shelter, basic health care services and social services."[648] There is no internal qualifier in Section 28 comparable with section 26(2).

Prior to occupying the private land earmarked for low-cost housing, the respondents together with their children had lived in an informal squatter camp known as Wallacedene. Half of the population of Wallacedene had been were children. What further worsened the case was that they had had no water, sewage or refuse

646 Section 26(1) of the Constitution.
647 Section 26(2) of the Constitution.
648 Section 28(1)(c) of the Constitution.

removal services and only five per cent of the shacks had had electricity. Many residents had opted to relocate to a new area which happened to be the area earmarked for low-cost housing. The owner of the private property had obtained an eviction order for the eviction of the respondents.

Rendered homeless by the eviction order, the respondents approached the High Court for an order requiring the government to provide them with adequate basic shelter or housing until they were given permanent accommodation. The High Court found in favour of the respondents and ordered the government to provide the children accompanied by their parents with shelter. The order of the High Court was specific in that it specified that tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum. Dissatisfied with the judgement of the High Court, the government challenged the correctness of the judgement in the Constitutional Court.[649]

Legal question

The Constitutional Court was called upon to decide on the nature of the state's obligations under sections 26 and 28(1)(c) of the Constitution.

Judgement of the Court

The Court through Justice Jacoob noted that there is a difference between a right to "access to adequate housing" and a "right to adequate housing". According to the Court, housing entails more than "bricks and mortar", it includes available land and appropriate services such as the provision of water and the removal of sewage.[650] Therefore, for a person to have access to adequate housing all of the aforesaid conditions must be met. In other words, there must be land, services, and a dwelling. Access to land, the Court noted, is part and parcel of the right to access to adequate housing in section 26 of the Constitution. The obligation of the state in terms of section 26 is that it must create the conditions for access to adequate housing for people on all economic levels in the Republic of South Africa.[651]

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649 2001 (1) SA 46 (CC) paras 3-16.
650 Para 35.
651 Para 35.

In outlining the obligations of the state under section 26, the Court stated that it is important to appreciate that the obligation imposed upon the state in terms of section 26 is subject to the state's available resources.[652] The Court highlighted the fact that the state is not obliged to go beyond its available resources to realise the rights concerned.

The nature of the state's obligation in Section 26(1) is qualified by the parameters of Section 26(2), which require the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

Importantly, the state's obligation in terms of section 26(2) is not only financial. The state is further obliged to take legislative and other measures to achieve the progressive realisation of the right. In dealing with the legislative and other measures which the state is obliged to take, the Court held that:

> The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligation.[653]

There must, therefore, be a clear indication that programmes are already in the process of being implemented. Hence, state action rather than inaction is vital for constitutional compliance with section 26(2) of the Constitution.

The phrase "reasonable measures" is crucial in socio-economic rights jurisprudence. Explaining the phrase, the Court held that:

> In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must

652 Para 39.
653 Para 42.

> be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.[654]

Appreciating that most socio-economic rights cannot be realised immediately but rather require progressive implementation, and explaining the exact relationship between section 26(1) and (2), the Court held:

> The extent and content of the obligation consist in what must be achieved, that is, "the progressive realisation of this right." It links subsection (1) and (2) by making it quite clear that the right referred to is the right of access to adequate housing. The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.[655]

The Court consulted the ICESCR and the General Comments of the CESCR in order to correctly interpret the meaning of the term "progressive realisation". The Court emphasised that neither section 26 nor section 28(1)(c) of the Constitution gave any of the respondents the right to claim shelter immediately. In other words, ordinarily, there were no stand-alone positive entitlements.

The Court realised that it would be a constitutional absurdity to order the government to immediately realise the rights of the respondents in terms of section 26 of the Constitution and potentially to expect the government to go beyond its available resources. Section 26 does not expect more of the government than is achievable within its available resources.[656] The Court concluded that the government was not meeting its obligation. The programmes adopted by the government fell short of the requirements of section 26(2) in that the government had no adequate policy in place to deal with the situation of people facing eviction and in need of emergency housing.[657] Yet, actual relief for the respondents was accordingly not forthcoming.

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654 Para 43.
655 Para 45.
656 Para 46.
657 Para 69.

5.3.2 *Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC)*

Summary of the facts of the case

This case concerned the government's lack of a clear and coherent programme to make available antiretroviral medicine to pregnant mothers to prevent the transmission of the HIV virus to their unborn children. Treatment Action Campaign (TAC), a non-governmental organisation active in the area of HIV/AIDS, had approached the High Court to force the government to make nevirapine generally available and to develop a coherent programme in this regard. The High Court had found in favour of TAC, holding that by refusing to make nevirapine available in the public health sector where the attending doctor considered it medically necessary, and by not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV through the administration of nevirapine, the government's programme fell short of the constitutionally mandated standard under the right to access to health. Not satisfied with the order of the High Court, the government approached the Constitutional Court.[658]

Legal question

The Constitutional Court had to determine whether the government's refusal to make nevirapine available to pregnant women could be reconciled with the constitutional requirements of sections 27(1) of the Constitution. The Constitutional Court was called upon to decide on the nature of the state's obligations under sections 27(2) of the Constitution. Section 27(1)(a) states: "Everyone has the right to have access to health care services, including reproductive health care."[659] Section 27(2) states, in a way comparable to Section 26(2): "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

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658 2002 (5) SA 721 (CC) paras 1-20.
659 Section 27(1)(a) of the Constitution.

Judgement of the Court

In dealing with the case the Court examined the question whether socio-economic rights under the Constitution imposed a minimum core obligation to satisfy, as a matter of priority, minimum levels of provision, as the Committee on Economic, Social and Cultural Rights has held rights do under the ICESCR.[660] In its examination, the Court dealt as follows with the minimum core obligation approach:

> It was contended that section 27(1) of the Constitution establishes an individual right vested in everyone. This right, so the contention went, has a "minimum core" to which every person in need is entitled. The concept of minimum core was developed by the United Nations Committee on Economic, Social and Cultural Rights which is charged with monitoring the obligations undertaken by states parties to the International Covenant on Economic, Social and Cultural Rights. According to the Committee "a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a state has discharged its minimum core obligations must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each state party to take the necessary steps to the maximum of its available resources. In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[661]

Subsequent to examining the international position, the Court considered the application of the international position to South Africa and held that:

> Although Yacoob J indicated [in *Grootboom*] that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution *should not be construed as entitling everyone to demand that the minimum core be provided to them*. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1). A purposive reading of section 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a "core" service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-

660 General Comment No. 3 para. 10.
661 Para 26.

> economic rights identified in section 26 and 27 on a progressive basis.[662] (emphasis added)

The court thus recognised that there exists a minimum core obligation to a particular service. However, the Court was convinced that, on a proper reading of the South African Constitution, the minimum core obligation was not a self-standing right, but had to be incorporated into the reasonableness approach applied by the Court in its constitutional assessment of compliance with socio-economic rights.

The Court made the point that it is impossible to give everyone access even to a "core" service immediately, arguing that it would be unrealistic to find that there exists a minimum core of a particular service, given the additional factor of resource scarcity, which courts have to take into account when dealing with socio-economic cases. The Court was of the view that the courts were not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standard called for in a specific instance.[663] Realising the fine balance that the courts have to establish, the Court took the opportunity to pronounce on the role of the courts in a constitutional democracy and the doctrine of the separation of powers:

> The primary duty of courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice". The Constitution requires the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights". Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of the government that a distinction should be drawn between declaratory and mandatory orders against the government. Even simple declaratory orders against government or organs of state can affect its policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect their policy and has to find the resources to do so.[664]

The Court reiterated that in a constitutional democracy the courts had a duty towards the Constitution, and all their powers were derived from the Constitution. Hence,

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662 Paras 34 and 35.
663 Para 37.
664 Para 99.

courts should not hesitate to scrutinise the other two branches of government provided this was constitutionally permitted. It is acknowledged that in some instances, the judiciary might intrude on the terrain of the other branches of government provided that such intrusion is constitutionally sound and permitted.

In full appreciation of these facts, the Court held that the government's policy has failed to meet constitutional standards because it had excluded those who could reasonably be included where such treatment was medically indicated to combat the mother-to-child transmission of HIV. However, although that did not mean that everyone could immediately claim access to such treatment, every effort had to be made to satisfy such claims as soon as was reasonably possible.[665] This case serves as the prime example that courts can make orders obliging government to act in a certain manner, irrespective of the doctrine of the separation of powers and the argument of budgetary constraints. The case was perhaps easier to decide in that the court did not really have to question financial allocations. *In casu*, the government had already made sufficient financial allocations that would be able to provide for access to nevirapine.

5.3.3 Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)

Summary of the facts of the case

This case focussed on two aspects of Operation Gcin'amanzi, a project the City of Johannesburg conducted in Phiri in early 2004 to address the severe problem of water losses and non-payment for water services in Soweto. Operation Gcin'amanzi involved re-laying water pipes to improve water supply and to reduce water losses and installing pre-paid meters to charge consumers for the use of water in excess of the 6 kilolitre per household provided free of charge.

The applicants challenged firstly the City of Johannesburg's Free Basic Water policy in terms of which (only) 6 kilolitre of water are provided monthly for free to all households in Johannesburg and secondly the installation of pre-paid water meters in Phiri, both on the basis that the City's policy and the manner in which it was being

665 Para 135.

implemented were unlawful, unreasonable, unfair and in breach of their constitutional right of access of sufficient water, protected in Section 27(1)(b). The applicants succeeded in the South Gauteng High Court, which held that the installation of pre-paid metres in Phiri was unlawful and unfair, and furthermore that the City should provide 50 litres of free basic water per person daily to the applicants and "similarly placed" residents of Phiri.

On appeal to the Supreme Court of Appeal, the order was varied to read that 42 litres of water per day would be 'sufficient water' within the meaning of the Constitution. The Supreme Court of Appeal also held that the prepaid water meters were unlawful on the ground that the City's by-laws did not make provision for them in these circumstances. Dissatisfied, the applicants approached the Constitutional Court against the judgement of the Supreme Court of Appeal, seeking reinstatement of the order of the South Gauteng High Court.[666]

Legal question

The Constitutional Court was called upon to determine whether the free basic water policy, in terms of which (only) 6 kilolitres of water are provided monthly free of charge to all household in Johannesburg, was consistent with the constitutional right to access to sufficient water in section 27, and whether the City's policy of installing pre-paid water meters was lawful and consistent with the Constitution. Again, the Constitutional Court was called upon to decide on the nature of the state's obligations under sections 27(2) of the Constitution.

Judgement of the Court

The Constitutional Court in this case once again reiterated its already established jurisprudence that the obligation placed on government by section 27 of the Constitution is an obligation to take reasonable legislative and other measures to progressively achieve the realisation of the right. The Court held:

> [I]t is clear that the right [to access to sufficient water] does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realise

666 2010 (4) SA 1 (CC) paras 1-8.

> the achievement of the right of access to sufficient water, within available resources.[667]

The Court once again emphasised that the internal limitations built into socio-economic rights in the Bill of Rights require the state only to take reasonable measures within its available resources. There is no obligation on the government to go beyond its available resources to achieve the progressive realisation of socio-economic rights. The Court accepted that socio-economic rights, by their very nature, are almost impossible to be realised immediately and that it would be unfair and/or unrealistic to expect of government to realise these rights immediately.

Furthermore, the Court confirmed its rejection of the minimum core obligation approach as followed by the UN Committee, arguing that the social and economic rights in the South African Constitution do not create an entitlement to claim a minimum core of services which the state is obliged to provide.[668] As the applicants had required the Court to determine a certain quantity of water that would constitute the content of section 27(1)(b), the Court touched on the subject of the separation of powers, more specifically the lack of institutional competency of the courts to determine a minimum quantity of water. The Court held:

> Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic rights entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and the executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.[669]

Having dealt with all the submissions made and expert evidence produced, the Court concluded that it could not be said that the City's water policy was unreasonable, given that 80% of the households in the City would receive adequate water under it. Furthermore, it was held that the installation of the pre-paid water meters was neither unfair nor discriminatory and that this was authorised by national legislation and the City's own by-laws. This conclusion by the Court is somewhat

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667 Para 50.
668 Para 53.
669 Para 61.

confusing because, to determine that action is constitutional, there must be some quantification as to whether amounts are constitutional or not. Put differently, the question will always be: reasonable against which standard? There must be some quantification one has in mind which renders the current quantification constitutional, and the courts, it is submitted, are obliged to give that substantive content to section 27.

The Constitution of South Africa makes plain that the judicial authority in the Republic vests in the judiciary.[670] The judiciary is the custodian of the Constitution and it is its task to give substantive meaning to the constitutional and other legislative provisions. It is the judiciary that must uphold the Constitution and citizens are entitled to approach the judiciary to protect their rights and to obtain appropriate and effective relief.

The powerful role of the judiciary is to be found in section 172 of the Constitution, which empowers a court deciding a constitutional issue to declare invalid any law or conduct inconsistent with the Constitution. Section 172(1)(a) states: "[w]hen deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."[671] Upon declaring such inconsistent law or conduct invalid, section 172(1)(b) states that the court may make any order that is just and equitable.[672] Section 172(1)(b) provides a very wide discretion to a court, to go along with a very powerful role provided for in section 172(1)(a). The full thrust of section 172(1)(a) and (b) is sparingly used by South African courts. Section 172 is most effective when preceded by a substantive analysis of a constitutional provision. In other words, Section 172 cannot be used in the abstract without a thorough analysis of a constitutional provision. For instance, if a court like the Constitutional Court, is unable to determine the substantive content of the right to access to sufficient water, section 172 is rendered less effective. The courts, especially the Constitutional Court, should be bold and go as far as is constitutionally permissible to give

670 Section 165(2) of the Constitution.
671 Section 172(1)(a) of the Constitution.
672 Section 172(1)(b) of the Constitution.

substance to constitutional provisions, and make *any* order where law or conduct is inconsistent with the Constitution.

5.4 Rejection of minimum core obligations: A lost opportunity

To date, South African courts have not shied away from seeking guidance from both international and foreign law, whenever prudent or necessary. Cases such as *Glenister* and *Makawanyane* are prime examples of how the South African courts embrace international law within South Africa's domestic law. The Covenant, which was ratified by South Africa in 2015, embeds, as seen above, a minimum core obligation that must be fulfilled by all state parties – thus the UN Committee on Economic, Social and Cultural Rights. In South Africa the minimum core as a standalone entitlement, was rejected by the Constitutional Court in two cases, namely, *Grootboom* and *Treatment Action Campaign*.

In the *Grootboom* case the Court specifically referred to and took note of a possible minimum core obligation, but rejected its strict application in South Africa on several grounds. The Constitutional Court reasoned that, on a proper interpretation of the Constitution, the latter does not contain a minimum core obligation as a self-standing right. The Court stated that it was at pains to determine the contents of a minimum core obligation, arguing that: firstly, a court would require sufficient information about the needs and opportunities for enjoying a right to determine what the minimum core should be; secondly, it was difficult to firmly arrive at a precise definition for a minimum core; and lastly, it was unclear whether the minimum core should be defined generally or with regard to a specific group of people.[673] The Court raised these difficulties to illustrate the undesirability, in its view, of defining a minimum core obligation. The Court thus concluded that no minimum core obligation is enshrined in the Constitution.

In the *TAC* case, where the Constitutional Court was also invited to apply the minimum core from international human rights law to the South African Constitution,

673 2001 (1) SA 46 (CC) paras 32 and 33.

the Court did not hesitate to hold that "it is impossible to give everyone access even to 'core' services immediately."[674]

Importantly, what Yacoob J in the *Grootboom* case was rejecting was not the minimum core obligation as contained in the Covenant *per se*, but the minimum core obligation as a self-standing right. In this judgement the Court stated that the minimum core is part and parcel of the reasonableness approach as (allegedly) preferred by both the Constitution and the jurisprudence of the Constitutional Court. In other words, the minimum core should be considered when a court of law assesses whether the steps taken by the state are reasonable.[675]

The Court was rejecting the minimum core obligation as a self-standing right. Put differently, the Court was rejecting an approach where individuals could take the state to court, claiming the minimum core of any of the socio-economic rights immediately. From a South African perspective, it seems that the Constitutional Court partially rejected the minimum core obligation because it reasoned that such an obligation would "essentially create an individual right to demand a social benefit from the government."[676] The minimum core obligation is not necessarily "dead" in South African law; it is one of many factors to be considered when determining the reasonableness of state action.

The minimum core is that core content of a right without which the right loses its significance as a genuine right.[677] The minimum core establishes a level below which standards should not fall. There is no necessary implication of the immediate realisation of, or creation of, an individual right to claim directly for the minimum core.[678] According to Craven:

> The minimum core approach does not require the division of rights according to their priority, rather it requires that each right be realised to the extent that provides for the basic needs of everyone.[679]

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674 *TAC* para 35.
675 *Grootboom* paras 30-37.
676 Kende 2004 *ConJIL* 621.
677 To this effect, see Liebenberg "The interpretation of socio-economic rights" 33-30 – 33-31.
678 Russell "Introduction: Minimum state obligations: International dimensions" 15.
679 Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* 141.

In the literature it has been argued that the minimum core obligation is not a self-standing right but a yardstick for a certain standard of living, which makes it unacceptable for any human being to live without sufficient resources to maintain his or her survival.[680]

The jurisprudence of the Constitutional Court in relation to the minimum core obligation causes confusion. This is so because, on the one hand, the Constitutional Court refuses to define the minimum core obligation on the grounds of institutional incompetence, yet on the other it expects of courts to take the minimum core principle into account when determining the reasonableness of the state's actions. It is this "undefined ambiguous" nature of the minimum core obligation that complicates the reasonableness inquiry and, on a general level, the adjudication of socio-economic rights in South Africa.

As already indicated, the judiciary is responsible for the interpretation of any legislation, including the Constitution. That task inevitably includes providing substantive content to fundamental rights, including socio-economic rights. If the courts during the interpretative process intrude into the domain of another branch of government, such an intrusion could well be warranted – ultimately by the Constitution itself. The argument that the courts are institutionally incapable of defining the minimum core is not entirely correct. Courts *can* interpret and provide their understanding of what the minimum core obligation entails, as does the UN Committee when it deals with the minimum core obligation of various economic, social and cultural rights in its many General Comments. The conclusive interpretation of the Constitution is the task of the courts. The Constitutional Court is eminently suited to interpreting and giving meaning to the provisions of the Constitution. It is notably this Court that is responsible for elaborating on the nature of the obligations imposed by constitutional rights.[681] The Constitutional Court is also exceedingly competent to provide substantive content to the minimum core obligation.

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680 Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* 61.

681 Bilchitz 2002 *SAJL* 487.

Bilchitz considers courts "suitable" to provide substantive content to rights generally. He argues that the function of a court in relation to socio-economic rights is giving content to the rights that are abstractly enshrined in the Constitution. By doing so, the court engages in a process of specifying general principles that define the obligations placed upon the state by the right.[682] The call is not for a precise determination of the minimum core as such, but to set the general standard that must be met for the state to comply with its minimum core obligation.

Hence, the court could hold that every person in South Africa must have access to accommodation (a right to access to adequate housing) that includes access to basic services such as toilets and running water.[683] In achieving this end, the legislature and the executive are given leeway to determine exactly what measures are to be taken to realise the right, and in turn the courts must decide whether the measures taken by government are reasonable in the light of the general obligations that are imposed upon it by the right. According to Bilchitz the minimum core:

> Does not represent any particular means by which a socio-economic right can be realized; rather, it represents the standard of socio-economic provision necessary to meet people's basic needs[684].

The argument above highlights that the Constitutional Court has missed a number of opportunities to provide substantive content to socio-economic rights generally and the minimum core obligation specifically. The author's argument seems to suggest that it is not too late for the Court to correct its current approach:

> South Africa is one of the first countries to entrench directly enforceable socio-economic rights in its Constitution. Its blueprint for a decent society recognizes that political equality alone is not sufficient; there has, at least, to be some measure of economic equality. The notion of a minimum core obligation can help achieve this aim. It involves recognizing the centrality and importance that the provision of certain basic goods has for the equality of people's lives and requires correspondingly urgent action. Reasonableness review, while of significance, does not in and of itself impel a government to prioritize fully such needs. It is to be hoped that in future the Constitutional Court will adopt a more robust approach to the enforcement of socio-economic rights and recognize the existence of minimum core obligations. In this way, the court can show that it has the interests of the most vulnerable at heart, and

682 Bilchitz 2002 *SALJ* 487
683 Bilchitz 2002 *SALJ* 487.
684 Bilchitz 2002 *SALJ* 488.

> that, in their defence, it is prepared to demand that the government fulfil their basic needs.[685]

The Constitutional Court could rectify the position regarding the ambiguous and undefined nature of the minimum core obligation in South Africa. The Court has, in fact applied the minimum core principle, although not explicitly so. It held in *Grootboom* that:

> A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[686]

As pointed out earlier, the Court did not consider there to exist a minimum core as a stand-alone entitlement. It also did not explicitly define what constitutes the minimum core. Yet, it is evident that the Court did take the minimum core into account in its reasoning and evaluation of the national programme of government. What is lacking in the Constitutional Court's approach to the minimum core obligation is giving substantive content to that core. Such substantive content of the minimum core obligation is important in that it could be used as a guide for the state to realise the rights in question as soon as resources become available.[687] Without the substantive content – and the bare minimum – defined, socio-economic rights will remain "rights-in-awaiting" and their full realisation will remain a distant dream.

5.5 The minimum core and negative state obligations

In the context of the discussion of the minimum core, another aspect not considered so far is the following. The above discussion focussed on the justiciability of socio-economic rights as positive rights; that is, as rights that require proactive measures on the part of the state directed at their fulfilment. Also, the core content has been

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685 Bilchitz 2002 *SALJ* 501.
686 *Grootboom* para 44.
687 McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* 72.

considered from that perspective. However, what about socio-economic rights as negative rights, as rights to ward off any state interference with an achieved standard of enjoyment? This perspective is important in any consideration of the right to progressively free higher education. As pointed out, the notion of progressive realisation, *e contrario*, excludes deliberately retrogressive measures in the nature of any introduction or increase of tuition fees in higher education. Any such measure would have to be seen as a *prima facie* infringement, that requires justification in the light of the general limitation clause of section 36 of the Constitution. In this respect, socio-economic rights are at least similar to classic freedom or civil and political rights.

Civil and political rights have a strong component that requires restraint on the part of the state. Although a scarcity of resources necessitating a limitation of rights will more readily impact on socio-economic rights than on freedom rights, thus requiring certain deliberate policy decisions regarding resources, this is, it is submitted, a question of degree rather than of principle. In both instances, courts are institutionally capable of finding that something has been taken away from a current standard of achievement and that this needs to be justified in the light of stricter requirements than apply where standards need as yet to be achieved. In the above sense, that is, as negative rights, socio-economic rights are well justiciable by any court in South Africa. A protection against negative interference will in many instances have to be considered part of the core content of a right, whether civil and political or socio-economic.

An important aspect of the judgment of the Constitutional Court in *Grootboom* which this thesis has not touched upon yet is that the Court makes it clear that any claim based on socio-economic rights necessarily engages the right to dignity.[688] In other words, the right to dignity – protected in section 10 of the Constitution – is inherently linked with socio-economic rights.[689] It is consistent with this line of reasoning that the Constitutional Court has found that there is a negative content to socio-economic rights.[690] Section 7 of the Constitution, entitled *Rights*, in particular section 7(2),

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688 *Grootboom* at para 83.
689 *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 24.
690 *Certification judgment* at para 78; *Grootboom* at para 34; *TAC* at para 46.

states pertinently that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.[691] From a constitutional jurisprudential perspective, this means that the state has a specific and constitutionally enshrined obligation to respect, protect, promote and fulfil the right of everyone to higher education, which the state, through reasonable measures, must make progressively available and accessible. Respect, in the present context, means that the state must ensure that existing access to higher education is not disrupted. It focusses specifically on the state's negative obligation to refrain from disrupting existing rights, in this case access to higher education – but also implicitly the right to dignity. Effectively, the measures adopted and any state action in this regard should not be inconsistent with the right laid down in section 29(1)(b) – however, also not with the right to dignity in section 10. From this perspective, a valid argument could be made that the decrease in state funding of higher education and the increase in tuition fees are conduct that pertinently disrupts or limits the right to further education and automatically also that to dignity, so as to amount to *prima facie* violations of section 29(1)(b) and section 10, when read with section 7(2), thus requiring justification (not under the reasonableness test, but) under the limitation clause of section 36.

In *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) (*Jaftha*), dealing with section 26(1) of the Constitution, the Court held that:

> It is not necessary in this case to delineate all the circumstances in which a measure will constitute a violation of the negative obligations imposed by the Constitution. *However, in light of the conception of adequate housing described above I conclude that, at the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1). Such a measure may, however, be justified under section 36 of the Constitution.*[692] (Emphasis added)

Section 7(2) obliges the state to respect the right to access to higher education. This the state is to do by ensuring that existing access to higher education is not disrupted. The state's obligation to respect existing access to higher education encompasses the duty not to cause financial disruption. To the extent that the disruption amounts to the limitation of such a right to access, section 7(3) of the Constitution makes it clear that "rights in the Bill of Rights are subject to the

691 Section 7(2) of the Constitution.
692 *Jaftha* at para 34.

limitations contained or referred to in section 36, or elsewhere in the Bill."[693] On the international level, although relating to health care, it is said that the obligation to respect entails *inter alia* "immediately enforceable obligations to non-disruption of existing access to health-related goods, services and facilities and the removal of arbitrary barriers to access."[694] The same argument is valid for access to higher education. Similarly, the state has a negative obligation not to disrupt existing access and to increase existing fee levels. Should it have done so, there is a positive obligation to instantly undo any such measures.

Higher education must be accessible to all those who qualify for it, especially the most vulnerable groups (economic accessibility).[695] To be accessible, higher education must be affordable to all those who qualify for it. Affordability seeks to ensure that existing access to higher education is not disrupted by the imposition of high tuition fees, effectively reserving higher education for those with the financial means to enjoy such an important constitutional right. Economic accessibility, also encompassed by section 29(1)(b) of the Constitution, must be understood in its proper context. In other words, economic accessibility must be understood in the legal context envisaged in Article 13(2)(c) of the ICESCR, in terms of which state parties are required to progressively introduce free higher education.[696] The "free" element in section 13(2)(c) is consistent with the notion of accessible and affordable higher education. This approach to access to higher education gives credence and substantive meaning to the right of everyone to higher education as envisaged in section 29(1)(b) of the Constitution.

There is, in fact, another dimension in which the right to progressively free higher education and other socio-economic rights are justiciable without excessive complication. An achieved standard of enjoyment should not easily be taken away. That has been stated. Matters become problematic on another level, however, if any taking away affects different people differently without any justification. Increasing fees in higher education in a way that would affect poorer segments of the

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693 Section 7(3) of the Constitution.
694 General Comment No. 14: The right to the highest attainable standard of health (art. 12 ICESCR) UN Doc. E/C.12/2000/4 paras 33-34; 50; Pieterse 2006 *SAJHR* 494.
695 General Comment No. 13 para 6(b).
696 Article 13(2)(c) of the ICESCR.

community disproportionately may thus be discriminatory. Similarly, also any act of actively granting a socio-economic benefit could be discriminatory in nature. Hence, granting bursaries or loans to cover study fees based on arbitrary criteria (for example, age) will not be acceptable. In both types of cases, one may be dealing with violations of the right to higher education when read in conjunction with the right not to be discriminated against. Understood as rights not to be discriminated against, all socio-economic rights are readily justiciable. Socio-economic rights become such rights by virtue of the equality provisions of the Constitution in section 9.

5.6 Conclusion

South Africa is one of the countries that codified socio-economic rights in their Constitution and also committed themselves to social justice and fighting the injustices of the past through establishing a society based on democratic values, social justice and fundamental human rights.[697] In South Africa, the Constitution is the supreme law of the land and its provisions and the obligations imposed thereby must be fulfilled.[698] Socio-economic rights are among the provisions of the Constitution; therefore, the obligations imposed by socio-economic rights must be fulfilled.

The debate regarding the justiciability of socio-economic rights, in South Africa at least, is an academic one in that the Constitution recognises socio-economic rights as justiciable rights just like civil and political rights. It is with the fulfilment of socio-economic-rights in mind that the drafters of the Constitution obliged all stakeholders in South Africa to "improve the quality of life of all citizens and free the potential of each person."[699] It is difficult to imagine how the quality of life of all citizens could be improved as a matter of law without the inclusion of socio-economic rights in the supreme law of South Africa.

The courts in South Africa, including the Constitutional Court, have on several occasions been confronted with cases involving infringements of socio-economic

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697 Preamble of the Constitution.
698 Section 2 of the Constitution.
699 Preamble of the Constitution.

rights. Through its socio-economic rights' jurisprudence the Constitutional Court has shown that the South African judiciary does not shy away from complex cases such as these. The courts have in some instances declared government action and/or national programmes to be unconstitutional. This serves as an indication that the South African judiciary does apply the law impartially and without fear, favour or prejudice as required by the Constitution.[700]

The accusations levelled against the judiciary of judicial overreach are unwarranted. This is so because the South African judiciary, in its socio-economic rights' jurisprudence, has always shown great institutional respect to the other branches of government. Where the courts were of the view that they lack the requisite institutional competence to make a certain decision, they have deferred to the other two arms of government.

That is an indication of the appreciation by the judiciary of the constitutionally recognised doctrine of the separation of powers. South African courts have played an impressive role in crafting a distinctly South African model of the separation of powers, which takes cognisance of South Africa's history and present social conditions. It is evident through the judgements of the Constitutional Court specifically that South African courts have accepted that there is no absolute separation of powers, but only a partial separation of powers.[701] This is an important point, because the Constitution of South Africa does, in some instances, permit the judiciary to intrude into the terrain of the other branches of government, for example, by holding that the measures taken by the government are inadequate and/or unreasonable and as a result to order government to self-correct measures or simply to declare government's actions to be unconstitutional.

This serves to indicate that, although the doctrine of the separation of powers is constitutionally recognised, it should not be used by the courts or politicians as an argument advancing that there should not be an adjudication of complex

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700 Section 165(2) of the Constitution.

701 *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC); *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC); *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC).

constitutional cases such as those concerning socio-economic rights. The courts should at all times be guided by the Constitution when fulfilling their constitutional functions. The Constitutional Court has shown enthusiasm when it comes to the adjudication of socio-economic rights. In its well-known socio-economic rights cases, namely *Soobramoney*, *Grootboom*, *TAC*, *Mazibuko* and *Khoza*, the Constitutional Court laid the foundation for future socio-economic rights adjudication. It was in these cases that the Court dealt extensively with the complex terminologies of progressive realisation, reasonable measures, available resources and minimum core obligations.

It was in these cases that the Constitutional Court held that, when adjudicating socio-economic rights cases, a court of law should at all times assess whether the measures taken by the state to realise the socio-economic right concerned were "reasonable". It was further established that the obligations imposed upon the state by the various socio-economic rights enshrined in the Constitution do not oblige the state to go beyond its available resources or (in most cases) to realise these rights immediately. Lastly, it was established that, unlike the ICESCR, the South African Constitution does not impose a minimum core obligation. Various reasons, as discussed above, were advanced to substantiate that interpretation.

However, there are those who argue that the Constitutional Court has missed the opportunity to give socio-economic rights substantive content. They argue that the Court has deferred that function to the other two branches of government, which they argue is an incorrect interpretation of the Constitution. The essence of the criticism is that the Constitutional Court is the best suited institution to give socio-economic rights substantive content. It is this Court that is best suited to clarify what is meant by the minimum core obligation, and, in so doing, the Court would assist the other two branches of government to discharge their constitutional mandate as they would have a clear guideline as to what is expected from them in relation to socio-economic rights.

The courts cannot defer their function of the interpretation of the Constitution to the other branches of the government. If this approach continues then, it is submitted, socio-economic rights will remain "rights-in-waiting". It is not too late for the courts to adopt a more robust approach when dealing with socio-economic rights to the

extent that such an approach is constitutionally permissible. The courts can intrude on the terrain of the other branches of government provided this is constitutionally permissible. It is submitted that giving socio-economic rights substantive content is a constitutionally permissible intrusion.

Finally, it has been explained that socio-economic rights are most certainly justiciable in the courts of South Africa in two other ways. In as far as socio-economic rights are negative rights, obliging the government not to act in a certain way, including lowering accomplished standards of realisation, they are justiciable in the same way as any other civil and political rights. Any court would be competent to adjudicate on whether the introduction or increase of tuition fees in higher education is constitutional or not. Similarly, unequal treatment in the sphere of socio-economic rights is easily justiciable in the light of the Constitution's non-discrimination and equality provisions. Discriminatory conduct in increasing or decreasing tuition fees can be declared unconstitutional by the courts without further ado.

CHAPTER 6: FUNDING OF HIGHER EDUCATION INSTITUTIONS IN SOUTH AFRICA

6.1 Overview of the funding of higher education in South Africa

In his book, titled *The Political Economy of Higher Education Finance*, Garritzmann asks the emotionally loaded question as to "why … students in some countries pay tremendously high tuition fees while students in other countries study free of charge."[702] The answer to this question, according to the author, lies in an analysis of the political economy of higher education tuition fees and subsidies. While a comprehensive analysis to this effect is beyond the scope of this thesis, some aspects hereof will be dealt with later on in this chapter. It seems that fees in higher education have more to do with political choices than with actually available resources.

The South African government's National Development Plan (NDP) of 2011,[703] a blueprint for eliminating and reducing inequality by 2030, envisages a transformative future for South Africa in which education plays a central role in bettering the standard of living for all South Africans. The NDP identifies the following elements as elements for a decent standard of living: nutrition, housing, water, sanitation, electricity, transport, education and skills, safety and security, health care, employment, recreation and leisure, and a clean environment.[704] The NDP highlights three key functions higher education fulfils to develop a nation like South Africa, namely: (a) provide people with indispensable high-level skills; (b) produce new knowledge; and (c) provide opportunities for social mobility.[705] Although the NDP is not a binding legal instrument and was drafted exclusively by politicians, it nevertheless sheds some light on how the Constitution could be interpreted to give effect to the various socio-economic rights enshrined in the Bill of Rights. From this

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702 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 1.

703 Government News 2018 https://www.cogta.gov.za/index.php/2018/07/24/national-development-plan-unpacked.

704 National Development Plan 28.

705 National Development Plan 3.

perspective, the NDP gives context to the right to education in general and higher education in particular.

The Department of Higher Education and Training (DHET) is entrusted with post-school education and training. Post-school education/further education in South Africa consists of vocational education,[706] community education,[707] university education,[708] and skills development.[709] Funding of the institutions offering these forms of education plays a central role in making further education accessible and available. The focus in what follows is on the funding, the accessibility and availability, of university education.

In Education White Paper 3 of 1997 the South African state acknowledges the need for a new funding framework to facilitate the transformation of the higher education system.[710] The new funding framework came into effect in the 2004/5 financial year and was fully implemented in the 2007/8 financial year.[711] The identified primary objectives of White Paper 3 include: (i) more equitable student access; (ii) improved quality of teaching and research; (iii) increased student progression and graduation rates, and (iv) greater responsiveness to social and economic needs.[712] The National Plan for Higher Education (NPHE) of 2001[713] devises the implementation framework for "achieving the vision and goals of higher education".[714] The NPHE is

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706 Technical and Vocational Education and Training (TVET) colleges offer vocational education and training programmes. See https://www.dhet.gov.za/SitePages/TVETColleges.aspx.

707 Community Education and Training colleges target post-school youth and adults "who wish to raise the base for further learning, improve their skills for employability and/or progression to opportunities in the TVET colleges and university education." See https://www.dhet.gov.za/SitePages/TVETColleges.aspx.

708 Universities are higher education learning institutions that "provide a wide range of theory-intensive education with emphasis on academic knowledge and research." https://www.dhet.gov.za/SitePages/TVETColleges.aspx.

709 The national skills development programmes are implemented by Sector Education and Training Authorities (SETAs).

710 Government Notice: Ministry of Education, No. 2003, Higher Education Act, 1997 (Act. 101 of 1997) Funding of Public Higher Education (November 2003) para 1.

711 It replaced the South African Post-Secondary Education (SAPSE) funding framework, which was implemented from 1983-2003.

712 Education White Paper 3: A Programme for the Transformation of Higher Education, July 1997, para 4.14.

713 The National Plan is the former Minister of Education, Professor Kader Asmal's response to the advice provided, at his request, by the Council on Higher Education on the restructuring of the higher education system. The National Plan outlines the framework and mechanisms for implementing and realising the policy goals of the Education: White Paper 3: A Programme for the Transformation of Higher Education (1997).

714 Government Notice: Ministry of Education, Funding of Public Higher Education (November 2003) para 2.

a plan by the national government developed to provide the framework and mechanisms for the restructuring of the higher education system to achieve the vision and goals for the transformation of the higher education system outlined in the Education White Paper 3. Central to the NPHE was the development of a funding formula based on the primary objectives identified in White Paper 3. The role of funding has evolved to occupy a central role in the higher education system, as the previous funding framework, which was introduced in 1982, was not suitable to achieving the policy objectives of the state to transform the higher education system. The previous funding framework was based on a "market-driven model," as it "restricted and constrained institutional and student choices and decisions."[715] Under the previous funding framework, the state's role was limited to funding student demand and to correcting any market-related failures.[716] Asmal argued that this funding framework was flawed because

> the higher education system [could] not be left to the vagaries of the market as it was singularly ill-suited to address the legacy of the past and the reconstruction and development challenges of the future.[717]

White Paper 3 was the vehicle selected by the state to address the identified flaws of the previous funding framework. Importantly, White Paper 3 envisages a three steps process in the funding of higher education. These steps are: (i) the Ministry determines national policy goals and objectives; (ii) institutions develop institutional three-year rolling plans indicating how they intend to address the national goals and objectives; (iii) the Ministry and institutions interact, resulting in the approval of institutional plans, which would be the trigger for the release of funds based on the quantum of the funds available.[718] This chapter will elaborate and critically assess the new funding framework.

White Paper 3 embodies the social justice commitment contained in the preamble to the Constitution. It also seeks to align with the obligations of the state in terms of

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715 Government Notice: Ministry of Education, Funding of Public Higher Education (November 2003) para 1.5.

716 Government Notice: Ministry of Education Funding of Public Higher Education (November 2003) para 1.5.

717 Government Notice: Ministry of Education Funding of Public Higher Education (November 2003) para 1.6.

718 Government Notice: Ministry of Education Funding of Public Higher Education (November 2003) para 1.7.

section 29(1)(b) of the Constitution to make higher education accessible and available.

Post 1994 South Africa's racially defined higher education institutions were merged into twenty-three non-racial universities.[719] This merger came with its own challenges in relation to the funding of higher education institutions. The state's resources were no longer disproportionately concentrated in certain institutions at the expense of others. The state had for the first time to make higher education equally accessible and available to all. Its budget allocation for higher education had to indicate its commitment to making higher education accessible and available to all.

Currently, South Africa has three categories of universities, namely: universities, universities of technology[720] and comprehensive universities.[721] South Africa has adopted a three-stream model of funding higher education and training:

> The first stream represents government funding in the form of block and earmarked grants. Historically, government subsidies have represented the largest single component of the total income of institutions and universities in particular.
>
> The second stream consists of tuition fees paid by students (and of NSFAS on behalf of qualifying students), and has been increasing, partly as a result of declining state subsidies.
>
> The third stream represents "own funding", that is funding raised by the institutions from various sources such as donations and research activities. Universities are finding it increasingly difficult to raise these stream funds given the financial situation.[722]

Evidently, the current funding framework is premised on cost sharing among the beneficiaries of higher education (mainly government and students). Notably, the private sector's role in this funding framework is limited to donations and bursaries. The private sector, unlike the government, does not feature as a prominent player in the streams of funding of higher education. That is so even though the private sector also benefits from the graduates produced by South African higher education institutions. This warrants more attention in this chapter.

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719 Pillay "Higher Education Funding Frameworks in SADC" 168.

720 These are the former technikons or technical universities.

721 These merge certain universities and technikons.

722 Report of the Commission of Enquiry into Higher Education and Training paras 375.1-375.3.

It is recorded that in 2016/2017 the total state funding for universities was nearly 30% of GDP.[723] The state placed volumes of evidence before the Commission of Inquiry into the Feasibility of Making Higher Education and Training Fee-free in South Africa indicating the history of the underfunding of higher education institutions. Departmental funding of universities in 2014 accounted for 38% of the total university income compared to 49% in 2000.[724] The Commission heard evidence that there were two main factors which contributed to the decline in the state subsidy, namely: (i) linking the subsidy to the consumer price index,[725] and (ii) failing to make the subsidy keep pace with the growing student enrolments.[726]

The failure of the state's subsidy to keep pace with the growing student enrolment propelled South African universities to increase tuition fees to address the deficit created by the state's failure. This situation is not sustainable. South Africa has an international and potentially a constitutional obligation to progressively introduce free higher education (the positive obligation). Exactly what measures it adopts to achieve its clear obligation to make higher education accessible is for the state to decide. Yet, giving proper attention to the reduction of study fees is, as has been discussed, compulsory. There is also an international and constitutional obligation to respect the right to higher education by ensuring that access to higher education is not disrupted by measures of the state, including by those that increase study fees (the negative obligation). Having said that, nothing in law prohibits the state

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723 Report of the Commission of Enquiry into Higher Education and Training para 377: "GDP represents the total income or value, in the case of South Africa, the Rand value, of all goods and services produced in the country over a specific period of time, normally annually. In simple terms, it represents the size of the economy and is one of the primary indicators to access the health of a country's economy."

724 Report of the Commission of Enquiry into Higher Education and Training para 383.

725 Report of the Commission of Enquiry into Higher Education and Training para 392. "The evidence shows that HEPI [Higher Education Price Index] is applicable to the sector and is on average 2 per cent higher than the CPI [Consumer Price Index]. The result is the erosion of the subsidy through inflation. It has been noted that the current subsidy, including the NSFAS allocation, is growing at CPI. Institutions have indicated that the applicable inflation in the sector is the HEPI, which was 9,2 % (in 2014) when CPI was 6%. On average, the HEPI is, at any given time, 2% higher than CPI. This makes inroads to the subsidy. It has thus been proposed that the budget allocation to higher education institutions should match the HEPI." Report of the Commission of Enquiry into Higher Education and Training paras 393-394.

726 Report of the Commission of Enquiry into Higher Education and Training para 396. Evidence was presented to the Commission indicating that the subsidy of government is not keeping pace with the enrolment figures. It was stated that: "While enrolments have increased (as per enrolments plans determined with the DHET), government allocations have not in turn swelled to meet those numbers, resulting in lower funding per capita. The FFC notes that the State's current MTEF projections only provide for a standstill student enrolment growth."

from partnering with the private sector to address both its international and its constitutional obligations in relation to higher education.

The current model of funding of higher education institutions is silent on the role of the private sector. The private sector benefits from the graduates produced by South African universities. Consequently, the private sector ought to play a more prominent role in the realisation of the right to access to further education. For those who argue that the private sector is already playing a prominent role in higher education through the allocation of bursaries, that argument has some validity, but the number of graduates employed in the private sector justifies an even greater participation by the private sector in the funding of higher education institutions.

This chapter will thus do the following. Firstly, it will examine the current funding framework and the income streams of higher education institutions. The various income streams include government funding, student fees, donations and own entrepreneurial activities. Secondly, the focus will then be on the National Student Financial Aid Scheme (NSFAS). This discussion will analyse the statutory purpose of the NSFAS as envisaged in the applicable legislation, the NSFAS Act. This is followed by a discussion of the shortcomings/challenges faced by the NSFAS, these challenges ranging from decreased funding to allegations of corruption in the NSFAS. Thirdly, consideration will be given to the politics involved in the funding of higher education. This will be done by closely examining the issue of "the political will" to make higher education free of charge in South Africa. Ideology seems to play a bigger role in the financing of higher education than actual resource availability. Fourthly, the focus will be on the role of the private sector in the funding of higher education. This analysis will explore the role currently played by the private sector in the funding of higher education in South Africa and the role it could play in this regard. Consideration will notably be given to the effectiveness of the current role of the private sector. Lastly, this chapter will assess South Africa's legal framework on the funding of higher education, examining student finance in the light of section 29(1)(b) of the Constitution as read considering international law.

6.2 The current funding framework and the income streams of higher education institutions

As indicated, higher education institutions benefit from three streams of income on which they rely to be able to engage in tertiary level teaching and research.[727] A discussion of these streams is necessary because this will shed light on the challenges and enable possible recommendations to better the current funding framework. Each of the streams will be discussed under this heading.

The Higher Education Act is the Act setting out the arrangement of funding of higher education institutions. As it were, one of the many reasons why the Higher Education Act was enacted was to provide for the governance and funding of public higher education.[728] From a policy perspective, the following documents also address the issue of institutional funding: Education White Paper 3, the 2012 Green Paper for Post-School Education and Training, the National Development Plan and the 2013 White Paper for Post-School Education and Training.[729]

6.2.1 Government funding

6.2.1.1 Block grants

Regarding government funding, there are block funds/grants and earmarked funds/grants. Both are paid by the Department of Higher Education and Training (DHET) in the form of subsidies.[730] The block grants are undesignated funds available to each higher education institution. They are meant to cover the expenses relating to institutions' "day-to-day operations".[731] This grant consists of: (i) research funds generated by approved outputs, (ii) teaching funds generated by planned full-time equivalent student enrolments and approved teaching outputs, and (iii) institutional factor funds to address equity.[732] Unlike earmarked funds, the block

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727 Ministry of Education: A New Funding Framework: How Government Grants are Allocated to Public Higher Education Institutions (February 2004).
728 Preamble to the Higher Education Act.
729 Commission Report at para 423.
730 Commission Report at para 437.
731 Commission Report at para 438.
732 Pillay "Higher Education Funding Frameworks in SADC" 169.

funds may be spent at the discretion of the council of each higher education institution.[733]

6.2.1.2 Earmarked grants

These funds may be utilised only for specific purposes designated by the Minister of Higher Education. These grants are "intended to steer the sector in line with policy goals and priority areas, and broadly consist of NSFAS,[734] Teaching Development and Research Development,[735] Foundation Provisioning,[736] the Veterinary Science Grant,[737] Infrastructure and efficiency,[738] the HDI Development Grant and the Clinical Training Grant."[739] Unlike Block funds these funds are not subject to the discretion of the council of each higher education institution. They have specific purposes, and must be accounted for through the provision of progress reports and audit certificates, which are to be provided by the universities on an annual basis.[740]

6.2.2 Student fees

These fees are the fees paid to the university by students or their parents or through the NSAFS for all tuition and accommodation purposes. It is these fees that are central to accessing higher education because, if these fees are unaffordable, access to higher education is negatively affected. In December 2017 South Africa's former President Jacob Zuma announced that South African tertiary education would be free.[741] This was a far-reaching announcement by the then President, given the fact that these fees include tuition and residence fees paid by students to

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733 Commission Report para 439.

734 Commission Report para 443.1: "NSFAS funding provides assistance to students with academic potential who cannot afford university education."

735 Commission Report para 443.5: "Provides financial assistance to universities to develop support programmes that enhance their ability to increase student success and completion rates, as well as to enhance their capacity to produce research outputs."

736 Commission Report para 443.4: "Provides funding for extended programmes aimed at addressing the under-preparedness of students and improving their chances of success at university."

737 Commissioner Report para 443.7: "Provides funding for the clinical training component of veterinary sciences programmes and to support the cost of running an animal hospital at the University of Pretoria."

738 Commission Report para 443.2: "Funding is intended to increase the capacity of the university system to cope with the growth in student numbers, to provide the necessary infrastructure and equipment for improving the quality of teaching and learning and student success and completion rates."

739 Commission Report at para 442.

740 Commission Report at para 443.

741 Businesstech 2019 https://businesstech.co.za/news/finance/293800/university-fees-2019-how-much-it-costs-to-study-in-south-africa.

the universities. This announcement came without any detailed plan as to how or when this change would be made, with the NSFAS still in effect.[742] Student fees are one of the primary sources of income of higher education institutions. In 2019 it was estimated that a student will on average pay R64 200 for the first year of study and this cost is expected to rise to R107 600 by 2025 and as much as R165 600 by 2030.[743]

It is these fees which higher education institutions desperately need, that prevent many students from accessing higher education institutions. South African higher education institutions depend largely on government grants and tuitions fees for income. This reality highlights the far-reaching impact of the announcement made by the former President because, if tuition fees are done away with completely, both the state and higher education institutions will be required to locate another source to finance the vacuum that would be left by the absence of tuition fees. Moreover, the state's subsidy has decreased as a component of the total university income from 49% to 40%, while the contribution from student fees has risen from 24% to 31%.[744] It is precisely this situation that has resulted in student protests demanding free higher education or lower tuition fees or a cap on tuition fees. The dependence of higher education institutions on student fees as a primary source of revenue seems to be unsustainable. This is the case because ever-increasing tuition fees undermine the right to access to higher education. Increasing tuition fees creates a barrier to access to higher education for students from financially deprived backgrounds and it results in higher education being unaffordable to those students.

As a result of the decrease in state funding, higher education institutions are relying more than ever before on tuition fees. Although the Constitution does not explicitly make provision for progressively free higher education, it does make provision for access to higher education, which is undermined by ever-increasing tuition fees. Section 29(1)(b) of the Constitution read together with article 13(2)(c) aligns with an interpretation which fosters access to higher education. Ever-increasing tuition fees

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742 Businesstech 2019 https://businesstech.co.za/news/finance/293800/university-fees-2019-how-much-it-costs-to-study-in-south-africa.

743 Businesstech 2019 https://businesstech.co.za/news/finance/293800/university-fees-2019-how-much-it-costs-to-study-in-south-africa.

744 GroundUp 2015 https://www.groundup.org.za/media/features/studentfees/studentfees_0023.html.

are not consistent with such an interpretation. The increase in tuition fees to levels that are unaffordable also violates the state's obligation to ensure that existing access is not disrupted by the introduction of measures which create barriers to the accessibility of higher education to the poor.

6.2.3 Third-stream income

The third stream of income focusses on what is known as "own funding". These funds consist of funds received from donations, research activities, contracts, private entities and the private sector, rendering services, and private gifts.[745] By their nature these funds are much sought after by higher education institutions, inevitably creating competition between universities.[746] For instance, the Commission of Inquiry into Higher Education (Commission) noted that the University of Venda had established a third stream income generating entity in 2010 in order to "have a practical and sustainable means of generating extra income."[747] The Commission also found that in 2015 the third-stream income as a total of institutional expenditure in institutions of higher education was as follows: (a) University of Cape Town – 41%; (b) University of Stellenbosch – 44%; (c) University of the Witwatersrand – 39%; (d) University of Fort Hare – 15%; (e) University of Venda – 14%; (f) University of Zululand – 17%.[748] These figures clearly indicate that some institutions of higher education invest considerable energy into acquiring the third stream of income. Importantly, these income streams are inter-dependent; a decrease in one inevitably affects the other two. A proper balance must be found between these income streams of higher education institutions. With this in mind, the focus now shifts to the purpose and challenges of the NSFAS as a vehicle of the broader transformative agenda of the government.

6.3 The National Student Financial Aid Scheme (NSFAS)

A discussion of the NSFAS is crucial because establishing NSFAS was a central measure taken by the state to comply with section 29(1)(b) of the Constitution in

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745 Commission Report para 375.3.
746 Commission Report para 462.
747 Commission Report para 463.
748 Commissioner Report paras 464.1-464.6.

making higher education accessible to students. As already indicated, the NSFAS has achieved commendable results in making higher education accessible to eligible students who cannot afford higher education. However, it also faces many challenges.

6.3.1 The purpose and functions of the NSFAS

The establishment of the NSFAS constituted an initiative by the state to make higher education more affordable for the poor and more representative of the country's demographics.[749] According to De Villiers, the provision of additional financial aid to poor students was an effort to create equal opportunities of access to higher education in South Africa.[750] As advocated by the National Commission for Higher Education, the Tertiary Education Fund of South Africa (TERSA) was established in 1991 by the Independent Development Trust (TEFSA).[751] TEFSA was tasked with administering the NSFAS. De Villiers states that:

> The first state allocation for NSFAS was made in 1995. However, the need for financial assistance was so overwhelming that NSFAS was unable to respond to the massive demand. For example, in 1996, 223 000 students applied for loans, but only some 70 000 could be assisted. In 1999 the NSFAS was formally established by an Act of Parliament (Act 56 of 1999). In 2000, TEFSA was reconstituted as the NSFAS – a statutory agency with a board, representing all major stakeholders in HE in South Africa, appointed by the Minister of Education.[752]

The NSFAS is a public entity which reports to the Department of Higher Education and Training in the implementation of the government bursary scheme.[753] As alluded to above, the NSFAS is established in terms of section 3 of the NSFAS Act as a public entity, which "extends financial aid to students at both public universities and TVET colleges."[754] The primary purpose of the NSFAS is to provide financial aid to eligible students who meet the requirements for admission to further education and training programmes or to higher education programmes.[755] Essentially, the NSFAS focusses on providing funding to financially needy, academically qualifying

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749 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 1.
750 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 4.
751 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 4.
752 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 5.
753 National Student Financial Aid Scheme: Annual Report 2018/2019 14.
754 Section 2(1) of the NSFAS Act.
755 Section 2(2) of the NSFAS Act.

students so as to be able to access university education, *inter alia*. The financial aid provided by NSFAS comes in the form of a loan and bursary. As set out in section 4(d) of the NSFAS Act, the loan portion of the financial assistance can be recovered from the student. The functions of the NSFAS are set out in section 4 of the NSFAS Act. These functions include, *inter alia*, to: (a) allocate funds for loans and bursaries to eligible students; (b) develop criteria and conditions for the granting of loans and bursaries to eligible students in consultation with the Minister; (c) raise funds; (d) recover loans; (e) maintain and analyse a database and undertake research for the better utilisation of financial resources, (f) advise the Minister on matters relating to student financial aid; and (g) perform other functions assigned to it by the NSFAS Act or by the Minister.[756] Evidently, the functions of the NSFAS are much broader than merely providing financial assistance to eligible students. They include advising the Minister, who is the political head of tertiary education, on matters relating to student financial aid.

The Minister of Higher Education and Training is intimately involved in the affairs of the NSFAS because the NSFAS is largely funded out of public funds. In terms of section 14 of the NSFAS Act, the funds of the NSFAS consist of the following: (i) money appropriated by Parliament, (ii) donations or contributions, (iii) interest, (iv) money repaid or repayable by borrowers, and (v) any other income received by the NSFAS.[757] When public funds are involved, transparency and accountability are required – hence the importance of the role of the Minister of Higher Education and Training.

In terms of section 4(d), the financial aid provided by the NSFAS is hybrid. In other words, it is both a loan and a bursary.[758] In terms of section 19, the loans or bursaries granted by the Board of the NSFAS may be subject to certain conditions which the eligible student must meet. Section 19 outlines the general conditions of loans and bursaries under the NSFAS. The provision states:

> (1) Loans or bursaries granted by the board may be subject to such conditions as may be determined, either generally or in respect of a particular loan or bursary.

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[756] Section 4(a)-(g) of the NSFAS Act.
[757] Section 14(1)(a)-(e) of the NSFAS Act.
[758] Section 4(d) states that one of the functions of the NSFAS is to recover loans.

(2) A loan or bursary is granted in respect of a particular course of study, which must be specified in the loan or bursary agreement in question and may not be used for any other purpose.

(3) A written agreement must be entered into between the NSFAS and every borrower or bursar

(4) The board must impose a condition in respect of any loan or bursary to the effect that if the borrower or bursar does not perform satisfactorily in his or her studies, the board may terminate the granting of finance in terms of the agreement and that the borrower or bursar must comply with any obligation as a result of the granting of the loan or bursary on or with effect from the date specified by the board.

(5) The amount of the loan or bursary is paid by the NSFAS to the designated higher education institution concerned by way of allocations in respect of amounts payable to the institution by the borrower or bursar.

(6) A right to obtain a loan or bursary from the NSFAS cannot be construed from any provision of this Act.

Moreover, section 22 sets out the obligations towards the NSFAS of the student as a borrower. For as long as a student remains indebted to the NSFAS, s/he must provide the Board of NSFAS with his/her residential address and information on their employment status and any change thereof. Any failure of a student to provide this information renders the loan immediately repayable, irrespective of the student's financial position.[759]

This provision – Section 22(2) – is problematic. It does not (appear to) take into account the personal circumstances of the student prior to rendering a NSFAS loan immediately repayable. This leads to student debt irrespective of the student's employment status. This concern will be addressed more fully under the theme of the identified shortcomings of NSFAS.

The reach of the obligations of an NSFAS agreement is wide in that employers are obliged, upon receipt of a notice that a student is indebted to the NSFAS, to make deductions from the remuneration of the student in order to repay the NSFAS.[760] In terms of section 23(5), failure by an employer to make the necessary deductions constitutes an offence. On conviction, an employer may in addition to a fine be ordered to make such a deduction and payment.

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759 Section 22 of the NSFAS Act.

760 Section 23(1)(a)-(b) of the NSFAS Act.

The NSFAS provides financial assistance to eligible students who meet defined criteria. Only South African citizens qualify for assistance. Applicants' combined household income must not exceed R350 000 per annum. SASSA[761] grant recipients are eligible for assistance. Applicants must be registering for the first time for an undergraduate qualification at a public university or for one of the National Certificate Vocational or Report 191 programmes at a public TVET college. They must thus apply to study at a public university or TVET college. They must have passed Grade 9 and 10 to receive NSFAS funding for studies at a TVET college. They must have passed Grade 12 to receive NSFAS funding for studies at a university.[762] It is through these criteria that the NSFAS endeavours to make higher education accessible to eligible students from poor households.

As part of the endeavour to assist students financially, the NSFAS places no obligation on the student to repay the loan during the course of study. The obligation to repay a loan arises only once at student is employed and earns at least R30 000 per annum.[763] As part of the hybrid nature of financial assistance, the NSFAS converts up to 40% of a loan into a bursary, provided the student passes all the modules registered for in any particular academic year.[764] Importantly, should a student pass all the modules registered for in the final year of study, the final-year loan is converted into a 100% grant.[765] In an attempt to limit students' indebtedness, the loan is made interest-free during the course of study and one year post studies. However, thereafter interest on the loan is levied at 80% of the repo rate (which currently, in January 2021, stands at 3.5%).[766] The NSFAS covers the full costs of study, which include the following: tuition fees, accommodation, meals and learning support materials.[767] All of this is all done in the effort to make higher education accessible for students from poor and working-class families, "who would otherwise not be able to afford to study."[768]

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761 South African Social Security Agency.
762 Nsfas.org.za/content/bursary-scheme.html.
763 Commission Report at para 290.2.
764 Commission Report at para 290.3.
765 Commission Report at para 290.4.
766 Commission Report at para 290.5.
767 Commission Report at para 290.
768 nsfas.org.za/content/mission.html.

6.3.2 Underfunding and other shortcomings of the NSFAS

Having considered the purpose, functions, and achievements of the NSFAS, its shortcomings need to be addressed. The current model of the NSFAS has drawn criticism ranging from underfunding and exclusion of students based on both race and financial status to the eligibility threshold's being too low, excluding the "missing middle."[769] A persistent criticism relates to the unmet demand for NSFAS funding, leading to many students, who qualify for NSFAS funding failing to secure loans from the scheme because of inadequate resources.[770] Higher education institutions faced with this reality are hard pressed to make contributions to the NSFAS for their own poor students.[771] De Villiers presents the following statistics to illustrate the continued underfunding of higher education institutions, which has inevitably affected the NSFAS over the years:

> *In the past two decades, the public financing of higher education decreased in real per capita terms.* State allocations to higher education increased from R1 422 million in 1987 to R10 215 million in 2005 in South Africa (and since then increased to R19 534 million in 2010). *However, this has not kept up with student numbers and real state appropriation per weighted full-time equivalent (FTE) students decreased by 36 per cent for universities between 1987 and 2005 and by 43 per cent for Technikons.* This trend was continued during the period 2000-2009 when real state appropriations decreased by 1.1 per cent per annum per FTE student.[772] (Emphases added)

The table below illustrates the total public expenditure for higher education as a percentage of GDP for 2011-2013, in comparison with other world regions:[773]

769 HESA Task Team Tuition Fees: Higher Education Institutions in South Africa 45.
770 HESA Task Team Tuition Fees: Higher Education Institutions in South Africa 45.
771 HESA Task Team Tuition Fees: Higher Education Institutions in South Africa 45.
772 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 2.
773 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 3.

Continent/Area	Countries	Percentage of total state expenditure (average)	Percentage of state expenditure on education (average)	Percentage of GDP (average)
Africa south of the Sahara	23	2,85	17,20	0,80
South and West Asia	7	2,91	21,79	0,73
North America and Western Europe	22	3,04	23,91	1,41
Latin America and Caribbean Islands	18	2,85	17,20	0,90
East Asia and Pacific region	14	3,61	22,99	1,21
Central and East Europe	21	2,99	19,81	0,91
Arab States	6	2,51	21,33	0,83
South Africa		2,38	12,41	0,74

In comparison with other regions, South Africa's expenditure on higher education is quite low. This is so, even though tuition fees at universities increased in real terms by 49 per cent between 1986 and 2003 and by 85 per cent at Technikons between

1987 and 2003.[774] De Villiers points out that between 2000 and 2010 tuition fees per full-time equivalent student increased by 2,5 per cent per annum in real terms. The author laments that:

> While universities were expected to become more inclusive in terms of attracting a more diverse student profile, these inevitable cost increases became a prohibitive factor for poor students to enter the system. Those who did became saddled with huge debts.[775]

High tuition fees, as pointed out above, have a prohibitive effect on poor students' ability to access higher education. Increased costs are exacerbated by a decrease in state funding for higher education and the ineffectiveness of the NSFAS. Higher education institutions in South Africa had to deal with a growth in the number of student enrolments, but this has not gone hand in hand with an increase in the financial resources available for post matriculation. The table below depicts the annual cost of attending higher education institutions in South Africa during 2015/16:[776]

University	**BA**	**BCom**	**BSC**	**LLB**	**BEng**
University of Cape Town	R43 500 - R59 000	R50 000 - R62 500	R51 000 - R64 500	R46 500 - R52 000	R51 500 - R53 000
University of Witwatersrand	R33 640 - R43 320	R42 010 - R43 320	R41 080 - R58 580	R32 470	R40 170 - R48 150
Stellenbosch University	R32 534	R33 164 - R46 338	R37 880 - R40 749	R39 606	R45 070
University of Kwazulu Natal	R38 160 - R46 700	R39 170	R30 940 - R39 600	R36 500	R39 150 - R40 000
University of Pretoria	R25 710 - R36 270	R34 720 - R39 610	R36 880 - R54 620	R31 800	R34 500 - R42 600

774 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 4.
775 De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 4.
776 Bronkhorst and Michael 2017 *JIBC* 4

Rhodes University	R37 200	R40 700	R38 700 - R40 700	R41 730	N/A
University of Johannesburg	R29 170 - R35 970	R29 140 - R37 000	R30 600 - R50 940	R29 460 - R33 840	R34 500 - R42 600
North West University	R28 140 - R49 200	R38 600 - R41 050	R38 400 - R44 650	R36 500	R43 900

To properly understand the figures above, an analysis of the maximum amounts of NSFAS awards from 1999 to 2015 is warranted. The table below indicates the maximum amounts of NSFAS awards from 1999 to 2015:[777]

Year	**Amount**
1999	R 13 300
2000	R14 600
2001	R16 000
2002	R 17 600
2003	R 20 00
2004	R 25 000
2005	R 30 000
2006	R32 500
2007	R 35 000
2008	R 38 000

[777] De Villiers "The poor and access to higher education in South Africa: The NSFAS contribution" 9.

2009	R 43 000
2010	R 47 000
2011	R 54 000
2012	R 65 400
2013	R 60 000
2014	R64 000
2015	R 71 800

Importantly, the amounts shown in the previous table are strictly costs of higher education. These are merely the fees in respect of each study field. It is evident that the amount that is allocated is not enough to cover all study-related costs. The amount awarded appears to lose sight of other study-related costs such as study material, accommodation, food, and living expenses. Surveys indicate that residence fees at the University of Johannesburg in 2015 ranged from R22 000 to R35 000 per annum.[778] Further surveys indicate that costs for books and stationery could be as high as R3000 per annum, and for food and other living expenses up to R20 000 and R12 000 respectively.[779] For a poor student, who exclusively relies on NSFAS funding, the figures indicate a staggering deficit of financial assistance. The following example illustrates this point: Take a student who registered at the University of Johannesburg in 2015 for an LLB degree and received NSFAS funding for that year. That student's estimated budget for expenses for the academic year of enrolment at UJ would be as follows: Tuition – R 35 000; Accommodation – R 30 000; Books and Stationery – R 3 000; Food – R 20 000; and Living Expenses – R 12 000. Premised on this example, the student would have required R 100 000 for

[778] Drawn from the website of the University of Johannesburg in 2018, https://www.uj.ac.za/studyatUJ/StudentFinance/Documents/2015%20Fees%20Information (website not accessible anymore on 4 December 2021).

[779] Drawn from the website of the University of Johannesburg in 2018, https://www.uj.ac.za/internationalstudents/Pages/Federal%20Student%20Aid/Cost-of-Attendance-and-Disbursements (website not accessible anymore on 4 December 2021).

the academic year but could receive a maximum of only R 71 800. For a poor student, therefore, the maximum amount awarded by the NSFAS is clearly insufficient to cover all the study-related costs of such a student. However, those who (legitimately) criticise the NSFAS on the grounds that its individual allocations are insufficient, should not lose sight of the fact that the NSFAS relies primarily on state funding to fulfil its statutory mandate. The unfortunate fact that the NSFAS allocations are inadequate – and, as indicated earlier, that the NSFAS fails to fund all students in need of funding – cannot solely be the fault of the NSFAS. The state is constitutionally obliged to see to it that higher education is made financially accessible to those students who cannot afford it. The state's underfunding of NSFAS contributes to many of the "secondary" impediments of NSFAS.[780]

A further major criticism levelled against the NSFAS are the high dropout and low graduation rates for the students who receive funding from it. The NSFAS has a very low student graduation rate and very high dropout rate.[781] This is problematic because the NSFAS relies to a large extent on funds collected from previous students who have successfully completed their studies and found employment. The scheme is naively premised on a "recycling" model, meaning that students who have successfully completed their studies and are formally employed will repay their loans to the NSFAS for the scheme to fund other eligible students. With the low graduation and high dropout rates this is not possible. In fact, the NSAFS is losing much-needed funds in the process.

Furthermore, the NSFAS's allocation formula to apportion amounts as between higher education institutions is heavily criticised for being inappropriate. The allocation formula used is based on the Full Cost of Study (FCS) (both the tuition fee and the residential fee) and the demographic profile of the student population at the higher education institution.[782] Regarding the latter, the weighted number of disadvantaged students (WDS) at each higher education institution is thus taken

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780 Mlamla 2021 https://www.iol.co.za/capeargus/news/nsfas-funding-increased-by-billions-over-six-years-4e31fc63-ed58-4db6-8cfb-ddf8f2d62d44.

781 Department: Higher Education and Training, Report of the Ministerial Committee on the Review of the National Student Financial Aid Scheme, 2009, xiv.

782 Report of the Ministerial Committee on the Review of the National Student Financial Aid Scheme xiv.

into account, according a weight per student based on race.[783]The formula is criticised for using race as a proxy for socio-economic need. This presents various difficulties, including assuming that there are no poor white students needing the NSFAS assistance. It should be noted, however, that this does not mean that white students cannot apply for the NSFAS assistance in the same way as other applicants. The use of race as a proxy leads to unintended consequences, for instance, historically disadvantaged institutions with poor black students receive the same NSFAS funding as previously advantaged institutions with black students who do not require financial assistance from the NSFAS.[784] While it is recognised that race should be taken into account in the light of South Africa's racially divided past, it should be ensured that this does not lead to unintended consequences, as described above.

A more neutral approach for access to NSFAS assistance would be one based on socio-economic status with less emphasis on race. Calculating the institutional allocation based on the FCS is flawed as well because the latter is determined by each higher education institution on its own without the involvement of the NSFAS. The costs of study vary from one university to another, resulting in a situation where some institutions receive significantly more assistance than others.[785]

Another aspect of the NSFAS which is criticised is its capped loans. In 2016 the NSFAS cap stood at R71 800. The criticism is that the cap has resulted in the underfunding of students and has added to historical and prevailing student debt, as students have to make up shortfalls from other funding sources.[786] Different universities have responded differently to the NSFAS cap, including:

- by "topslicing" and
- by increasing the costs of study. This has enabled some universities to cross-subsidise its poorer student population who would otherwise be unfunded and excluded from studying; or alternatively;
- admitting fewer "poor" students.[787]

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783 WDS = (FTE enrolled Black students × 3) + (FTE enrolled Coloured students × 2) + (FTE enrolled Indian students × 1). No weight is allocated to white students.

784 Report of the Ministerial Committee on the Review of the National Student Financial Aid Scheme xiv.

785 Report of the Ministerial Committee on the Review of the National Student Financial Aid Scheme xiv.

786 Commission Report para 295.

787 Commission Report paras 296.1, 296.2 and 296.3.

Top-slicing refers to the practice of redistributing NSFAS funds allocated to all qualifying students with the result that students may receive a lower amount than that originally recommended for them by NSFAS through the means test.[788] One of the primary consequences of the top-slicing practice is student debt because students must rely on other funds, such as loans from banks and other institutions, to fill the deficit. Not all universities have adopted the top-slicing practice. Some have decided to allocate the entire the NSFAS grant to NSFAS beneficiaries, with the result that other qualifying students do not receive the limited grant.[789] This means, of course, that deserving students are denied access to higher education due to a lack of finances.

Also, the NSFAS's means test and its application have not been spared criticism as being inappropriate and inequitable.[790] The major concern with the means test is its exclusion of students from families who earn above the stipulated threshold amount per annum but who still cannot afford university fees the so-called “missing-middle”. At this juncture it is important to note that there are two categories of the so-called “missing-middle”. The first category comprises of those students who have a combined gross family income of up to R350 000 per annum who entered higher education in 2018 or thereafter.[791] The second category comprises of those students with a combined household income of R122 000 per annum who entered prior to 2018.[792] These missing-middle students are deserving students who are effectively being barred from accessing higher education, if they do not manage to find other funding.

What boggles the mind is that the NSFAS routinely has funds of up to R50 million a year which are not used.[793] These funds flow from deficiencies in the NSFAS system, such as funds not being utilised at one higher education institution but not being reallocated timeously to another, or funds arriving too late in the year at

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788 Commission Report para 297.
789 Commission report para 300.
790 Report of the Ministerial Committee on the Review of the National Student Financial Aid Scheme xv.
791 Department of Higher Education and Training, Guidelines for the Department of Higher Education and Training, Bursary Scheme for Students at Public Universities, 2021 para 5.3.
792 Department of Higher Education and Training, Guidelines for the Department of Higher Education and Training, Bursary Scheme for Students at Public Universities, 2021 para 5.3.
793 Report of the Ministerial Committee on the Review of the National Student Financial Aid Scheme xv.

institutions of higher education.[794] Unutilised funds suggest quite the opposite of underfunding. The missing-middle students could be comfortably accommodated with the unutilised funds returned by the NSFAS each year. Deserving students ought to have access to the unutilised funds.

6.3.3 NSFAS and maladministration

The NSFAS faces many challenges due to persistent underfunding by the state and the widely reported scale of corruption in its administration. Consequently, during 2020 Parliament resolved to hold an inquiry into the allegations of maladministration and corruption at the NSFAS.[795] The allegations of maladministration and corruption ought to be viewed as extremely serious, because, if true, these "threaten[] the functioning of the higher education sector".[796] The words of Chaskalson in *South African Association of Personal Injury Lawyers v Heath and Others (SA Association of Personal Injury Lawyers)*,[797] are apposite in this context. Dealing with corruption and maladministration the learned Judge stated that:

> Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state….[798]

In *Glenister* addressing the issue of corruption and malfeasance in public office, the Constitutional Court said:

> Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. …

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794 Report of the Ministerial Committee on the Review of the National Student Financial Aid Scheme xv.

795 Phakathi 2020 https://www.businesslive.co.za/bd/national/2020-11-08-parliament-to-hold-inquiry-into-nsfas-corruption-allegations.

796 Phakathi 2020 https://www.businesslive.co.za/bd/national/2020-11-08-parliament-to-hold-inquiry-into-nsfas-corruption-allegations.

797 2001 (1) SA 883 (CC).

798 Para 4.

> Section 7(2) (of the Constitution) casts an especial duty upon the State. It requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy….[799]

The judgments of *SA Association of Personal Injury Lawyers* and *Glenister* properly contextualise the allegations of maladministration and corruption levelled against the NSFAS. Maladministration and corruption in the NSFAS pose a serious threat to the rights of eligible students to access higher education. Furthermore, underfunding of the NSFAS and the corruption mean that eligible students are negatively affected because the funds relied on are insufficient to meet the demand for access to higher education. As was pointed out by the Minister, Dr Blade Ndzimande, in the Report of the Ministerial Committee for the Review of Funding of Universities:

> Historically disadvantaged universities, which are mainly located in poor, rural areas, serve in the main poor students who are poorly prepared for higher education studies. These students are mostly dependent on National Student Financial Aid Scheme (NSFAS) funding to access higher education, and therefore adequate levels of NSAFAS funding are vital to ensure that no student is excluded from higher education on the basis of its affordability.[800]

It is evident from the above that it is the poor students who are affected by the ineffectiveness of the NSFAS.

6.4 The politics involved in the funding of higher education and the political will to make higher education free of charge

Law and politics are intertwined, even more so on the level of socio-economic rights. Some scholars have written on the relationship between law and politics. One such scholar is Dr Miro Cerar who said the following about the relationship between law and politics:

> Law and politics as social phenomena are two emanations of the same entity (a monistic ontological conception), regarding which their separate existence is only a consequence of a human dualistic or pluralistic perception of the world (a dualistic ontological conception). Furthermore, the difference between law and politics is, from a deeper ontological perspective, in fact only illusory, for

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799 *Glenister* paras 176 and 177.

800 Foreword by Dr Blade Ndzimande in the Report of the Ministerial Committee for the Review of the Funding of Universities October 2013.

> reason of which also in the fields of legal and political theory and philosophy there are conclusions regarding the partial or complete overlapping of law and politics, sometimes even equating of the two that raises a crucial question of how both notions are defined. Regardless of such findings, the distinction (i.e., consciously persisting in a distinction) between law and politics at the current level of human development is necessary and indispensable.[801]

In a country like South Africa with its history of colonialism and apartheid political considerations are ever present in the law. For instance, the Constitution of South Africa is the product of well-balanced political negotiations. The Constitution is deeply rooted in the commitment to social justice, a notion that has considerable legal and political meaning. To bring the commitment to social justice to life, the drafters of the Constitution incorporated into the Constitution a Bill of Rights in Chapter 2. Amongst others, its provisions are to address the injustices of the past. Insofar as the inclusion of socio-economic rights is concerned, Heyns and Brand noted the debate on this topic as follows:

> Although there was a large measure of agreement on the eventual approach taken in respect of socio-economic rights in the new Constitution, there had been much disagreement on how to deal with this issue along the way. One side argued for and the other side campaigned against granting a significant role for socio-economic rights in the Constitution, with a range of options in between.
>
> The most persuasive parts of the arguments at both extremes centred around the effect which the inclusion of socio-economic rights could have on the legitimacy of the Constitution. Those who argued in favour of a significant role for these rights pointed out that it makes little sense to tell people that their civil and political rights will be protected, if they continue to be at the mercy of the elements and of social exploitation. Freedom of expression means little to someone who is dying of hunger. If socio-economic rights were not given meaningful protection by the Constitution, it was said, the legitimacy of the Constitution would suffer because people would be bound to say it does not deal with their most fundamental needs. This raised the spectre of angry and disillusioned people holding up the Constitution and asking whether this is what the struggle was all about.
>
> The argument on the other side was that it would be equally erosive to the legitimacy of the Constitution if it promised too much. Rights impose corresponding duties, and the Constitution would lose its credibility if it told people they have rights in respect of which the state cannot deliver, due to a lack of resources. If socio-economic rights were to be portrayed in the Bill of Rights ultimately as rights which do not differ in any way from other rights, the entire Bill of Rights would be discredited when it becomes apparent that the country cannot meet the expectations the Constitution had created. Civil and political rights would go down together with socio-

801 Cerar 2009 *Annual Survey of International and Comparative Law* 23.

> economic rights. The haunting picture of people saying the struggle has been betrayed reappeared.[802]

The ultimate decision to include socio-economic rights in the Constitution as justiciable rights means that poverty alleviation was considered fundamental to the new South Africa. The alleviation of poverty can be said to be a primary objective of the South African Constitution.[803] In relation to socio-economic rights, the Constitution imposes on the state both positive and negative obligations. These obligations must be fulfilled.[804]

In the adjudication of these obligations, the courts routinely interfere with "politically conditioned and interwoven activities of the legislative and executive branches of power."[805] Inevitably, their decisions in this regard draw considerable political attention because of the political nature of socio-economic rights. This is true also insofar as higher education is concerned, as both a socio-economic right and a public good. Especially in South Africa higher education has a larger political and social role. Gains in knowledge improvement in the form of "job skills, education levels, technology levels, innovation and so on contribute to rising living standards."[806] The elements of social justice are clearly visible in the right to higher education. The question of the funding of higher education is inherently a political consideration. Ultimately, there is a deep political notion of bettering the living standards of the citizenry. Higher education produces economic development,[807] and the development of the economy is firmly fixed in political will.

However, the funding of higher education and the introduction of (progressively) free higher education legally require political decisions. Every socio-economic right, including the right to education in general and higher education in particular,

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802 Heyns and Brand 1998 *LDD* 153-154.

803 *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at 770-771 at para 8. Chaskalson CJ stated: "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."

804 Section 2 of the Constitution.

805 Cerar 2009 *Annual Survey of International and Comparative Law* 23.

806 Schalin *State Investment in Universities: Rethinking the Impact on Economic Growth* 5.

807 Schalin *State Investment in Universities: Rethinking the Impact on Economic Growth* 6.

constitutes a legal issue. That being the case, socio-economic rights legally require political decisions (and the political will to take such decisions). Hence, the inclusion of socio-economic rights in the Constitution means that political decisions become legal issues, even if the exact nature of the political decisions cannot be prescribed. For instance, if the state fails to take any political action whatsoever, the Constitutional Court could legally oblige the state to act (the Constitutional Court is constitutionally mandated to do so in terms of its just and equitable remedial powers).[808] The fact that higher education must be made progressively free (which this thesis argues the Constitution obliges the government to do) is thus now a *legal* question first and foremost. Importantly, it requires political will and political decisions. If these are not forthcoming, the Constitutional Court could force the state to take action. This means that the state cannot simply raise an argument of political expedience, namely that progressively free higher education is not really possible, although it will have the leeway to in decide how exactly and over which period of time to realise this goal.

Garritzmann poses complex questions in respect of the funding of higher education. The author asks: (a) why do students in some countries pay tremendous tuition fees while others study free of charge?; (b) why do students in some countries receive generous financial student aid while students in other countries remain empty-handed?[809] These are complex questions with no easy answers. However, there are some indications of what the cause of these differences could possibly be. Exploring the literature on possible explanations for the existence of tuition fees, Garritzmann finds that explanations for tuition fees can be grouped into two categories. The author explains that the first group of structural economic explanations seeks to explain tuition fees in the light of underlying economic factors.[810] The second group of explanations of political economy takes political factors into account. With regard to the first group, the predominant argument is that tuition fees are a necessary corollary of fiscal austerity.[811] This argument is

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808 Section 172 of the Constitution.

809 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 8.

810 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 7.

811 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 8.

premised on the presence of the following factors: (a) a growing public demand for higher education; (b) mounting per-student costs; (c) a shift towards the knowledge economy; and (d) intensified globalisation-induced economic competition.[812] These factors necessitate introducing or raising tuition fees in an effort to obtain additional revenues. Interestingly, this group of explanations does not take into consideration political factors that might be at play.

The second group (i.e., political economy) moves from the premise that there exists a crucial relationship between political and economic factors.[813] The understanding according to this group is that higher education and the funding of higher education are not apolitical and/or immune from political influence.

Garritzmann explains that the countries of Europe, after the Second World War, all started with higher education student finance systems as low fee-low subsidy (student financial assistance) systems.[814] The first government(s) in power post war, depending on their specific political leaning, opted for one of "Four Worlds of Student Finance": 1. low tuition–high subsidy, 2. low tuition–low subsidy, 3. high tuition–high subsidy, or 4. high tuition–low subsidy.[815] Option 1 was the most "social" position, Option 4 the most "conservative" position.[816] Subsequent governments (when different political parties assumed power) would usually only effect smaller changes once a principled decision on student finance had been taken. As Garritzmann explains:

> I argue that the sustainability of the Four Worlds of Student Finance can be explained by the fact that over time strong "positive feedback-effects" emerge from the existing tuition-subsidy systems, bringing the opinions of the elites, interest groups, and public in line with the respective paths. Moreover, I argue that as the group affected directly (i.e., students) or indirectly (most importantly, students' families) by higher education increases over time as enrollment levels soar, the political salience of the topic of higher education increases. Consequently, governing parties' leeway in redesigning and changing the tuition-

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812 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 7.

813 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 11.

814 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 43.

815 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 57.

816 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 57-60.

> subsidy systems decreases. Departure from the respective paths becomes electorally more and more costly for parties.[817]

Applied to South Africa, the present student finance system is probably less necessitated by economic realities than it is a product of political choices made in the past when universities become modern institutions. For obvious historical reasons, the British university model had always, in some way or another, served as a role model, also in as far as student finance is concerned. South Africa's student finance system of (increasing) fees linked to student financial assistance (high fees–high (yet deficient) subsidies) probably has more to do with following that tradition than with any economic rationale.

What is evident from the above is that the funding of higher education is not a matter that falls simply in with the ambit of economics. There are various political considerations at play and the ultimate drive for progressively free higher education is as much a matter of political will as it is perhaps an economic matter. Hence, it is possible for the law, a supreme Constitution, to impose an obligation to progressively introduce free higher education. Doing so does not necessitate the impossible, requiring something that is by definition beyond available finances. It is rather a matter of legally compelling the adoption of a certain political mindset, and to the relinquishing of others.

6.5 The role of the private sector in funding higher education

From the outset it must be stated that, although the private sector can play an important role in the funding of higher education, it is important that higher education institutions should remain "mostly" public. Importantly, this does not mean that private actors are not allowed to establish additional private higher education institutions (universities). The private funding of public universities *may* play a role. This is so because higher education is not only a public but also a private good.[818] Yet, the role of the private sector in funding (public) universities should be only a *supplementary* one, not more. There is some leeway in construing what "supplementary" means, yet, the state must remain in control of the university

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817 Garritzmann *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries* 28.

818 See the discussion of higher education as a public/private good in Section 4.2 above.

sector, its purposes, functions, provisions, access, and quality. This proposition is premised on the caution that, the moment the private sector provides funding to higher education, it will also claim entitlement to have that money put to certain use. The private sector might demand that higher education be more narrowly directed at knowledge that is useful to the private sector, yet universities have a far greater responsibility: not merely to produce graduates for the economy, but also to "produce" well-rounded citizens. Article 13(1) of the ICESCR requires that "education shall be directed to the full development of the human personality" not only to economic skills. From this perspective, the role of universities is multifaceted and an excessive reliance on private funding may have the potential to jeopardise the greater goal of university education.

Turning to the definition of the term "private sector", this retains its traditional meaning. That is, it signifies that part of the national economy that is not directly owned and/or controlled by the state. Put differently, it is the sector of the economy which is owned by individuals and/or groups, such as private businesses. A partnership "light" between the state and the private sector could possibly assist in solving the funding challenges faced by higher education institutions in South Africa.

Importantly, the partnership proposed in this thesis is not one of equally shared responsibilities between the state and the private sector. What is contemplated is a regulatory scheme to lay down the parameters for the contribution by the private sector. Currently, there is no regulated role for the private sector in connection with the funding of higher education institutions in South Africa. According to Professor Naude, there is no reason why "government should not go to one or two big listed companies and say: We will provide the building costs, but you need to manage the project for us (to erect a new college or university)."[819] This suggestion is but one example of a role for the private sector. Other examples include: a regulated scheme for the provision of bursaries by the private sector (as part of companies' social corporate investment), the provision of loans by financial institutions (banks) at a

819 Peyper 2017 https://www.news24.com/fin24/economy/private-sector-key-for-higher-education-says-top-academic-20170127.

zero or miniscule interest rate, and a commitment not to engage in corruption when involved in business with the higher education sector.

For higher education institutions to rely on tuition fees as a primary source of income is simply unsustainable and appears to be inconsistent with the state's obligations in terms of section 29(1)(b) of the Constitution. This is the case because there exists a close relationship between access to higher education and tuition fees. If tuition fees could become the primary funding source of higher education institutions, this would lead to a situation where the fees dictate who gets access to higher education. Put differently, those who cannot afford to pay for higher education but qualify for it, would effectively be denied access to higher education – simply because they could not afford it. Making higher education accessible (and available) is the essential responsibility of the state in terms of the Constitution.[820]

This state obligation ought to be met with clear, decisive, progressive and reasonable state plans/programmes and not with what appears to be a retrogressive measure. However, evidently, the contribution/subsidy by government does not meet all the funding challenges faced by higher education institutions. This points to a need for serious intervention in the current scheme of funding of higher education institutions. The above discussion with regard to the NSFAS illustrates that the NSFAS cannot satisfy the growing demand for financial assistance by deserving students with financial constraints. Nkwanyana argues that the private sector has been a mere “bystander” in funding higher education and training in South Africa.[821] The author argues that the important business chambers in South Africa[822] must play an active role in suggesting and developing a funding mechanism for higher education and training in South Africa. This is a valid suggestion that deserves further consideration, taking cognisance of the fact that business benefits through the employment of graduates in the private sector.

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820 Section 29(1)(b).

821 Nkwanyana 2015 https://www.politicsweb.co.za/opinion/higher-education-the-private-sector-must-come-to-t.

822 The important chambers are: Business Unity South Africa (BUSA), the South African Chamber of Commerce and Industry (SACCI), and the Black Business Council (BBC).

Consequently, the private sector ought to play a regulated role in the higher education system.

Clearly, government will face challenges in funding higher education institutions alone if the enrolment figures outlined above continue to rise. Effective access to higher education means that an increase in the enrolment of students must be buttressed by increased funding. According to Olaleye, "poor funding is a major factor that militates against good access to university education."[823] With poor funding, the following problems materialise: (i) facilities cannot be expanded; and (ii) there will be inadequate provision of human and material resources as well as infrastructural facilities.[824]

Neither the Constitution nor the Higher Education Act prohibits the proposition put forward here for a regulated role of the private sector in the funding of higher education institutions.

In section 29(1)(b), the Constitution provides for the right to "further" education and not specifically the right to "higher" education. The term "further education" is not used in international law. International law refers to "primary", "secondary" and "higher education".[825] In South Africa, the term "further" education is accepted to cover any and all forms of education that do not fall under "basic" education or "adult basic" education.[826] In the South African context, "further" education encompasses technical and vocational training as well as higher/university education. Access to further education is a access right subject to internal qualifications, like to sections 26 (right of access to housing) and 27 (the right to access to health care) of the Constitution. In terms of section 29(1)(b), there is an obligation on the state to take reasonable measures to make further education progressively available and accessible.

On a narrow reading of section 29(1)(b), it could be said that further education is the sole responsibility of the state. However, according to Kriel, this need not be the

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823 Olaleye 2012 *JETERAPS* 581.
824 Olaleye 2012 *JETERAPS* 581.
825 Woolman and Bishop "Education" 57-36.
826 Woolman and Bishop "Education" 57-36.

case.[827] Section 29(1)(b) can also be interpreted differently, so as not to prohibit the state from involving the private sector in the funding of higher education, and as ultimately permitting the private sector to assist the state in making higher education available and accessible.[828] Complying with the constitutional obligation to make higher education available and accessible can be done in various ways. It is a common practice in South African law for the private sector to perform public functions and to be entrusted with "public" obligations. Section 29(1)(b) calls upon the state to make higher education accessible through "reasonable measures", which could include the involvement of the private sector.[829]

The Higher Education Act of 1997 was enacted to give effect to section 29(1)(b) of the Constitution. Chapter 5 of Act addresses the aspect of the funding of higher education, which is central to this thesis. Section 40 of the Higher Education Act deals specifically with the funds of public higher education institutions. This section outlines what the funds of public higher education institution consist of funds allocated by the Minister, any donations or contributions received by the institution, money raised by the institution, money raised by means of loans and overdrafts, income derived from investments, money received for services rendered to any other institution or person, money received through study fees, money received from students or employees of the institution for accommodation or other services provided by the institution, and other receipts from whatever source.[830]

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827 Kriel "Education" 8-8.

828 Kriel "Education" 38-1–38-8.

829 Kriel "Education" 38-8.

830 Section 40 states:

"(1) The funds of a public higher education institution consist of –

(a) funds allocated by the Minister in terms of section 39;
(b) any donations or contributions received by the institution;
(c) money raised by the institution;
(d) money raised by means of loans and overdrafts;
(e) income derived from investments;
(f) money received for services rendered to any other institution or person;
(g) money payable by students for higher education programmes provided by the institution, but the council may discriminate in a fair manner between students who are not citizens or permanent residents of the Republic and students who are citizens or permanent residents of the Republic when the amount payable is determined;
(h) money received from students or employees of the institution for accommodation or other services provided by the institution; and
(i) other receipts from whatever source."

The Higher Education Act does not address financial aspects in greater detail. The Act must be read in conjunction with the NSFAS Act, which was specifically enacted to establish a financial aid scheme for students at higher education institutions in order to provide financial aid to eligible students who meet the criteria for admission to a higher education programme.[831] The funds that NSFAS allocates to eligible students come in the form of loans and bursaries. There is an evident connection between the state's obligation to make higher education accessible and the NSFAS Act is a measure taken by the state to comply with its constitutional obligation in terms of section 29(1)(b). Through the assistance of the NSFAS between 1991 and 2014, R50.5 billion has been allocated to about 1,5 million eligible students.[832] More recently, in the 2016/17 financial year, more than R4,5 billion was reprioritised to the NSFAS as additional funds in order to fund 205, 000 students entering universities for the first time or continuing with their studies in that financial year.

As commendable as these figures are, the underfunding of higher education institutions in South Africa is a reality. State funding of universities in 2014 accounted for 38% of the total university income compared with 49% in 2000.[833] The primary reason for the decline in funding is that the state's subsidy/funding struggles to keep pace with the growing student enrolments.[834] The figures suggest that the state has difficulty in addressing all the funding challenges faced by public higher education institutions. It is here that the involvement of the private sector in the funding of higher education could play a role. Ultimately, the Higher Education Act also mentions “other receipts from whatever source.”

Higher education in South Africa should meet the prevailing demand for access to higher education. No student who qualifies for access to higher education should be turned away due to a lack of finances. The state is constitutionally obliged to make higher education accessible and available “through reasonable measures”. The latter part of the state’s obligation, namely, availability, appears not to be the primary concern at present. What is of great concern is the former part, accessibility.

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831 Section 2(1) and (2) of the NSFAS Act.

832 Nxasana 2016 http://www.bdlive.co.za/opinion/2016/03/24/sa-has-the-means-to-make-higher-education-more-accessible.

833 Commission Report para 383.

834 Commission Report para 392.

"Reasonable measures" is capable of an interpretation wide enough to encompass the involvement of the private sector in the funding of public higher education institutions. Moreover, both the Higher Education Act and the NSFAS Act do not explicitly prohibit the involvement of the private sector in the funding of public higher education. Neither the Constitution nor the Higher Education Act or NSFAS Act is prescriptive of how this should be done. South Africa's legal framework is permissive of creative ways which the state could utilise to comply with its constitutional obligations in terms of section 29(1)(b).

6.6 Assessing the South African legal framework on the funding of higher education and student finance in the light of section 29(1)(b) of the Constitution, as read in the light of international law

The funding of higher education institutions in South Africa is facing ever-increasing challenges. Perhaps the biggest challenge is the decrease in the state funding of higher education institutions. As indicated above, the decrease in state funding has wider implication for access to higher education. Higher education institutions are hard-pressed to deal with the deficit created by the decrease of state funding. These institutions are forced to rely more on student fees to overcome the deficit created by the decrease of funding. The notion of ever-increasing student fees is unsustainable and in direct contrast with the state's international obligation to progressively introduce free higher education. Deserving students with financial challenges are effectively denied access to higher education due to increasing tuition fees because of the decreased state funding. The Constitution properly construed envisages enhanced access to higher education and decreased state funding achieves the opposite.

The Vienna Convention provides States parties with some leeway in order to review all domestic law and policy to ensure that it will be in compliance with the obligations imposed by the treaty at the moment of ratification.[835] In the South African context, it is not a complex exercise to implement the Covenant in that most of the provisions

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[835] Khumalo *The Ratification of the International Covenant on Economic, Social and Cultural Rights in South Africa* 15.

that are in the Covenant are already enshrined in the Constitution.[836] This proposition bolsters the argument that one can find a harmonious way of interpreting section 29(1)(b) of the Constitution together with articles 2(1) and 13(2)(c) (and (e)) of the Covenant. The relationship between the above provisions was established by the Constitution of South Africa. The relevant sections of the Constitution establishing the relationship are sections 39(1)(b) and 231 respectively.

An interpretation of section 29(1)(b) without due consideration of articles 2(1) and 13(2)(c) (and (e)) would both be incomplete and inaccurate, at least from a South Africa perspective. The three provisions appear to complement one another. These provisions acknowledge the pivotal role that a state budget plays in terms of national resource-related decision making and activities. Nolan and Dutschke emphasise the role of the state budget in realising economic, social and cultural rights:

> Budgetary allocations must therefore be designed to ensure improvement in the implementation of rights, as well as expanding access to the rights. In other words, states have to ensure that the available resources are used to benefit a progressively increasing number of people as well as expanding access to the rights. In other words, states have to ensure that the available resources are used to benefit a progressively increasing number of people as well as a progressively increasing range of people. This has been explicitly noted by the Constitutional Court in South Africa in the famous Grootboom case. Here, the Court stated that the requirement of progressive realisation means that "accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time".[837]

Various other international law instruments and bodies acknowledge the important role played by a state's budget in the realisation of socio-economic rights. For instance, the UN High Commissioner for Human Rights has observed that:

> As for all human rights, achieving economic, social and cultural rights requires budget allocations and corresponding expenditures, in particular in regard to the positive obligations that they entail. The provisions of educational services, the promotion and facilitation of the enjoyment of the right to food, the monitoring of the duties of employers regarding workers' rights, for instance, necessarily require financial resources, sustainable over time. Therefore, the budget — as the instrument that determines the extent of the State's resources, their allocation and prospective expenditures — is

836 Khumalo *The Ratification of the International Covenant on Economic, Social and Cultural Rights in South Africa* 15.

837 Nolan and Dutschke 2010 *EHRLR* 4.

> particularly relevant for the realisation of economic, social and cultural rights.[838]

The theme of a state's budget is present in the provisions. The provisions advocate the importance of a state's budget in relation to the realisation of socio-economic rights. Section 29(1)(b) does not contain the phrase that the measures taken by the state need to be "within its available resources". Article 2(1), however, requires that the steps taken by a state utilise "the maximum of its available resources". This could be interpreted as signifying that the South African government has even less discretion in making resources available than envisaged under the Covenant. Hence, one could potentially argue that the South African government must use all of the resources it can identify to make further education accessible.[839]

However, the provisions also emphasise the state's duty to levy sufficient taxes to realise socio-economic rights. Countries should aim to raise at least 20% of their GDP in taxes if they are to be able to realise socio-economic rights, including higher education. OECD countries raise on average 37% of their GDP in taxes. "The tax-to-GDP ratio in South Africa increased by 0.7 percentage points from 28.4% in 2017 to 29.1% in 2018. ... The highest tax-to-GDP ratio in South Africa was 29.1% in 2018, with the lowest being 22.4% in 2000."[840] Hence, there is room for further improvement. Tax exemptions need to be reduced, the tax base widened, and tax avoidance and evasion halted. Tax collection needs to be improved and; relevant infrastructure strengthened. The state might even consider imposing a special tax on university graduates for a certain number of years post their graduation and once they are employed, to have graduates as private beneficiaries of state funds "pay back" to society for a benefit not bestowed on those that decide not to, or do not qualify for, university studies. Additionally, effectively fighting corruption would boost state funds significantly. It is estimated that the cost of state capture over the second term of the Jacob Zuma administration amounted to R1.5 trillion Rand.[841]

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838 "Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights" UN Doc. E/2009/90 para 46.

839 Coomans 2005 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 188.

840 Revenue Statistics in Africa 2020: South Africa, https://www.oecd.org/tax/tax-policy/revenue-statistics-africa-south-africa.pdf.

841 Merten 2019 https://www.dailymaverick.co.za/article/2019-03-01-state-capture-wipes-out-third-of-sas-r4-9-trillion-gdp-never-mind-lost-trust-confidence-opportunity.

Hence, what does it entail to interpret section 29(1)(b) in the light of article 13(2)(c) and (e)? Firstly, section 29(1)(b) would be interpreted in a manner which comfortably accommodates the progressive introduction of free higher education, and, secondly, the state would be obliged to realise the right to higher education within its available resources, as interpreted above. Importantly, section 29(1)(b), in its current wording, requires the state to take reasonable measures. In the light of article 13(2)(c), the progressive introduction of free higher education is one such measure to make higher education accessible. However, other reasonable measures must be taken as well. Another reasonable measure is indicated by Article 13(2)(e). Speaking in the language of the ICESCR, the NSFAS is a "fellowship system" as understood in Article 13(2)(e). States parties are obliged under the latter provision to establish such systems as make education financially accessible. Hence, a fellowship system is also envisaged under *Article 13(2)(c)*, in terms of which higher education is to be made accessible "by every appropriate means". Yet, it should be kept in mind that a fellowship system must be understood as a *supplementary* measure in making higher education progressively free, as progressively free education is explicitly singled out by the Covenant as the most effective way of enhancing access.

Notably, the freer higher education becomes, the more reduced the need will be to rely on a fellowship system. This said, fellowship systems will always remain important, as higher education always entails some or other costs that students may (unexpectedly) face. Applied to section 29(1)(b), the NSFAS will remain a central instrument in enhancing access to higher education. Its function will diminish from its present role as higher education becomes free(r). Yet, it will always play some role. Any fellowship system must embrace notions of equality and non-discrimination, seen in the light that levying exorbitant tuition fees creates a barrier preventing poor students from accessing higher education. The primary idea behind a fellowship system as envisaged in Article 13(2)(e) is to assist students from lower income groups to attend school or university. Evidently, the role of the NSFAS as a fellowship system is to see to it that deserving students are not denied access to higher education based on their parents' financial status. The intention is to alleviate the financial burden on those students who are deserving, but do not have the financial means to pursue higher education. Therefore, such a system must be

sensitive to and cognisant of the finance-related needs of deserving students from poor backgrounds.

In its current form the NSFAS appears to be out of touch with the financial needs of students from poor backgrounds. The NSFAS appears to be overly focussed on tuition fees and insufficiently on other related expenses such as textbooks and stationary, living expenses, food and, to some extent, accommodation. The amount awarded by the NSFAS to students is insufficient to cover all study-related costs. Inevitably, the students and their families must look to other means to cover the shortfall. Moreover, the fact that only 60% of the funds are converted into a bursary contributes to student debt. This is so because the already financially distressed graduate is mired in student debt in the formative years of his/her working life. This is unfortunate because those students who rely on the NSFAS can hardly afford additional debt. This places an extra financial burden on young graduates. Although the NSFAS has achieved some success as a fellowship system, there is much to be improved to ultimately fulfil the primary objective of a fellowship system, namely, to ensure that people are not denied access to higher education because they cannot afford it.

Article 13(2)(c) in fact broadens the operational scope of section 29(1)(b). The ultimate question that must be answered is whether the South African state has taken reasonable measures, in terms of its constitutional obligations in relation to higher education, to realise the right to higher education envisaged by the Constitution. It is argued that the South African Constitution impliedly links the right to higher education to the progressive introduction of free higher education. The obligation of the state in terms of section 29(1)(b) is generously worded in that the progressive introduction of free higher education could be one of the reasonable measures adopted by the state to make higher education accessible. Section 39(1)(b) of the Constitution compels an interpretation of the Bill of Rights in the light of international law – and international law advocates the progressive introduction of free higher education. This argument is bolstered by section 231(2) of the Constitution, which makes an international agreement binding on South Africa once it has been approved by both houses of Parliament. The ICESCR is such an international agreement, and it envisages the progressive introduction of free higher

education. South Africa must be understood to envisage the progressive introduction of free higher education, otherwise it would not have ratified the treaty in the first place.

A purposive interpretation of section 29(1)(b) of the Constitution is one which fosters access to higher education. Section 29(1)(b) of the Constitution read together with section 7(2) of the Constitution obliges the state to fulfil and promote the right to higher education. The decrease in the funding of higher education institutions is not consistent with the state's obligation to fulfil and promote the right to higher education. Furthermore, the decrease in the funding of higher education institutions is inconsistent with the state's obligation to make higher education available and accessible. Accessibility is evidently impeded if the primary funder of higher education institution effectively decreases its funding. Constitutionally, the state is prohibited from reneging on its obligation of making higher education available and accessible. Essentially, the state is obliged to see to it that every year access to higher education improves. Ever-increasing tuition fees achieve the opposite. The increase of study fees beyond the ordinary inflation rate constitutes a retrogressive measure and, as such, a violation of article 13(2)(c) or section 29(1)(b). It needs to be justified under the general limitation clause in article 4 of the Covenant or in section 36 of the Constitution, as relevant. Importantly, beyond economic arguments, there are political factors that play a role in the funding of higher education. The South African government needs to be sufficiently politically resolute as to effect a paradigm change in its financing of higher education – and to move from a high fees high (yet deficient) subsidies student finance system to a low fees high subsidies system.

6.7 Conclusion

The constitutional obligation to make higher education available and accessible and the issue of the funding of higher education go hand-in-hand. The funding of higher education inevitably has a bearing on its availability and accessibility. If higher education institutions are insufficiently funded, tuition fees are likely to be high and unaffordable. This follows from the interrelatedness of the three streams of income of higher education institutions, government funding, student fees, and own funding.

The Constitution has left it to the state to devise the exact ways of funding higher education. Put differently, the Constitution is not prescriptive as to how exactly higher education should be funded, although, as has been argued in this thesis, higher education must, notably during the period of the actual enjoyment of the right, be made progressively free. What the Constitution requires is that higher education must be made available and accessible, and this should be done progressively. In terms of section 237 of the Constitution, "constitutional obligations must be performed diligently and without delay."[842] Although (free) higher education must be realised progressively, it must be done diligently and be started with without any delay.

Importantly, these constitutional obligations are imposed primarily on the state. The reason for this is that higher education is considered a public good, for which reason the state should primarily be responsible for its funding. The fact that the state is primarily responsible for the funding of higher education does not automatically mean that other role players are precluded from playing a meaningful role in the funding of higher education. The private sector, being a beneficiary of higher education, can and should have an important role to play in the funding of higher education. What remains important though is that the role of the private sector in the funding of higher education should remain a supplementary one. The private sector should cooperate with government in a regulated manner in the funding of higher education.

The state is constitutionally obliged to be diligent in the realisation of its constitutional duty of making higher education available and accessible. This must be commenced with and pursued without delay. To achieve this, the state will have to focus on the effectiveness of the NSFAS as a fellowship system. The serious maladministration and corruption within the NSFAS pose a major threat to the vision of assisting those who cannot afford higher education to access higher education. Maladministration and corruption contribute to the ineffectiveness of the NSFAS and ought to be eradicated immediately. They pose a serious risk to the status of the NSFAS as an effective fellowship system. Concerted efforts are required to fund

842 Section 237 of the Constitution.

higher education and to make the NSFAS effective. The approach to higher education funding must be firmly cognisant of and measuredly sensitive to the needs of financially distressed students. The NSFAS must strive for an approach to funding which is more inclusive of all study-related costs – tuition fees, accommodation, living expenses, food, and books and stationery. Furthermore, consideration must be given to making the funds awarded by the NSFAS to students full bursaries. Graduates should not be over-burdened with student debt. This argument is made in the light of the fact that NSFAS is currently struggling to recover funds from former students.[843] It is imperative to the constitutional obligation of making higher education available and accessible that the NSFAS operates optimally and effectively.

[843] Tutu 2015 https://www.sowetanlive.co.za/good-life/2015-02-11-if-you-think-nsfas-is-hard-to-get-wait-until-you-have-to-find-a-job-and-pay-them-back.

CHAPTER 7: ACHIEVING COMPLIANCE WITH INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS: CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

The right to education is an empowerment right. It is a central right in the Constitution. It empowers people to exercise the other fundamental rights of the Bill of Rights effectively. Without the right to education, freedom and security of the person (section 12); freedom of religion, belief and opinion (section 15); freedom of expression (section 16); political rights (section 19); freedom of trade, occupation and profession (section 22); and access to information (section 32) are less effective. Likewise, the socio-economic rights of housing, health care, food, water, and social security (sections 26, 27, and 28) could hardly be realised to their full. Neither could the cultural and language rights (section 30 and 31) assume full significance. Ultimately, human dignity, as postulated in section 9, would in many ways remain an empty shell. Education thus empowers people to take control of their lives and to become effective role players in the civil, political, economic, social, cultural, and developmental spheres of their country. This sentiment was recently echoed by the Constitutional Court, when it emphasised that education is the key to a better life.[844] On education, former U.N. Secretary General Kofi Annan had said:

> Literacy is a bridge from misery to hope. It is a tool for daily life in modern society. It is a bulwark against poverty and a building block of development, an essential complement to investment in roads, dams, clinics and factories. Literacy is a platform for democratisation, and a vehicle for the promotion of cultural and national identity. Especially for girls and women, it is an agent of family health and nutrition. For everyone, everywhere, literacy is, along with education in general, a basic human right.[845]

The right to education is recognised as a fundamental human right globally. This right is arguably the human right which requires the most significant intervention on the part of the state. This is the case because education plays such a central role in the exercise of other fundamental human rights – as it were, in facilitating success

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844 *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12 at para 1.

845 Kofi Annan's speech was delivered on International Literacy Day in 1997. It may be retrieved at: https://un.org/press/en/1997/19970904.SGSM6316.html.

in life – and because, unlike as is the case with other human rights, individuals can be expected to realise their education needs through own resource provision only to a limited extent. Education requires enormous investment, which only the state can provide. As the U.S. Supreme Court stated in the landmark 1954 case of *Brown v. Board of Education of Topeka*, education "is perhaps the most important function of state and local governments."[846]

The state bears clear obligations in relation to education under both international law and the Constitution. For instance, the state may not provide education that is sub-standard, fail to provide learners with learning materials, neglect to provide proper educational infrastructure, prohibit learners from attending school due to the non-payment of school fees, or subject learners to ever-increasing school fees/tuition fees, etc. Education on all levels must be available, accessible, acceptable and adaptable. State intervention is a *sine qua non* to achieving education that is thus available, accessible, acceptable and adaptable on all levels. In terms of General Comment No.13 of the U.N. Committee on Economic, Social and Cultural Rights, this 4-A scheme provides the essential guidelines for giving substantive content to the right to education on all educational levels, from primary to university. The Constitution expressly refers to availability and accessibility in respect of the right to further education in section 29(1)(b) of the Constitution. Although not expressly stated in the Constitution, a purposive interpretation of the Constitution appears to recognise the import of the 4-A scheme in defining the basic principles of the right to education, in general.

Despite the clear stipulations of the Constitution and international law, there are some commentators who hold the view that higher education is not a right but a privilege. This view is untenable. Firstly, the Constitution unambiguously states that everyone has a right to further education, which includes higher education. Secondly, the Constitution obliges the state to make further education available and accessible. From this perspective, it is evident that higher education is a fundamental human right as opposed to a mere privilege. Perhaps the view that higher education is a privilege is informed by the inevitable consequence of high

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846 *Brown v Board of Education of Topeka* 347 US 483 (1954) 493.

tuition fees in universities, namely the exclusion of the poor from accessing higher education. The importance of higher education is beyond dispute, especially in a country like South Africa with its history of injustice and inequality. Institutions of higher learning like universities play a central role in the Constitution's commitment to social justice. Since the dawn of democracy, these institutions have been repurposed to benefit society at large. Moreover, to quote Kofi Annan again, "[t]he university must become a primary tool for Africa's development in the new century."[847] From this perspective, the progressive introduction of free higher education is consistent with the constitutional commitment to social justice and economic development.

7.2 Summary of the international law position in respect of progressively free higher education

International law has had a role to play in South Africa's domestic law since the enactment of the interim Constitution. In the final Constitution, the role of international law is constitutionally recognised and preserved. Four provisions of the Constitution are of relevance in this respect, namely section 39(1) (interpretation of the Bill of Rights), section 231 (international agreements), section 232 (customary international law), and section 233 (application of international law). These provisions make it very clear that the Constitution, as a firm reaction against the neglect and violation of international law in the old South Africa, is a very international law-friendly Constitution, counting among the most international law-friendly Constitutions that exist in the world today.

The stated provisions also highlight the different roles played by international law in South Africa's domestic law. Over the years, the South African courts have pronounced on the role of international law in South Africa's domestic law. What is evident from the jurisprudence, and a consideration of the different constitutional provisions, is that, in terms of South African law, international law does not have a singular role. Depending on the particular international law instrument being considered, such an instrument (or any provision thereof) can be any one or more

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[847] UN Secretary-General, Kofi Annan, Address at the University of Ghana (2 August 2000), http://www.unis.unvienna.org/unis/en/pressrels/2000/sg2625.html.

of the following: it can be internationally binding on the Republic, binding on the courts by virtue of having been transformed into domestic legislation, binding on the courts as "directly applicable" treaty law (it has, for example, been stated that this is the case for Article 13(2)(c) of the ICESCR, in as far as this negatively directs that fees in higher education must not be introduced or increased), or "merely" be of persuasive value in the interpretation of a domestic statute or the common law. The role of international law in South African law is accordingly fairly well established.

From an international law perspective, the right to education entails that primary education, must be compulsory and available free to all, and in the context of available resources, the state must progressively make secondary and higher education available and accessible, the latter "in particular by the progressive introduction of free education".[848] Importantly, there is a clear distinction in respect of "free education" insofar as it relates to primary education and secondary and higher education, respectively. Whilst primary education must be free, secondary and higher education, must be made free progressively. The notion of progressiveness here is to take account of the reality that state resources more often than not are scarce, and that in an assessment of their relative importance to a child's life success, primary education must be considered more important than secondary and higher education – so that, while the former must be free immediately, the latter two are to be made progressively free. This does not mean, however, that there are not clear obligations to move towards free secondary and higher education as expeditiously as possible. This point, as shown earlier, has been stressed by the CESCR in its General Comment No 13.

Moreover, none of the provisions of the ICESCR can be interpreted in isolation. This is true for Article 13 of the Covenant on the right to education as well. Articles 2(1), 4, and 13(2)(e) play an important role in the proper interpretation of Article 13(2)(c). Article 2(1) is the linchpin of the ICESCR. It is this provision that describes the general nature of the positive obligations imposed on states parties in their implementation of the rights laid down in the Covenant. Article 2(1) requires that all Covenant rights be realised progressively, to the maximum of a state party's

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848 Article 13(2)(a), (b) and (c) of the ICESCR.

available resources, and by the taking of all appropriate measures, including the adoption of legislation. Clear steps towards this goal must be taken immediately. The notion of progressiveness in Article 2(1) applies accordingly, unless a substantive provision of the Covenant qualifies this by adding urgency to implementation. In this sense, therefore, primary education is subject to a special regime, as it is subject not to progressive but to immediate realisation. On the other hand, secondary and higher education are subject to the progressive realisation requirement. Maximum resources must be invested towards the progressive realisation and the progressive introduction of free education at these levels. Legislation should spell out and give contours to a state's obligation in this context.

Another provision which plays an important role in the proper understanding of the Covenant is Article 4. Article 4 allows states parties to limit the rights in the Covenant. However, the important qualification is that any such limitation must occur by law, only for the purpose of promoting the general welfare in a democratic society, and must not affect the nature (the core) of a right. Hence, any increase in study fees that leads to discriminatory effects as regards access could be said to impinge on the core of the right to education (as non-discrimination is of crucial importance). Such a limitation would not pass muster under the limitation clause. It is submitted that all deliberate attempts by a government (or at any rate a *public* university itself) to introduce or increase tuition fees in higher education must be justified under Article 4. Whenever household costs in higher education increase in different circumstances, such increases would have to pass muster under Article 2(1).

Article 13(2)(e) of the ICESCR requires the establishment of an adequate fellowship system. This is a system entailing the granting of financial assistance to individual students to assist them to cover the direct and indirect costs of education. Such assistance may be in the form of wholly or partially refundable, or non-refundable bursaries and/or low-interest loans.[849] The primary objective of an adequate fellowship system is to enhance accessibility to higher education, ultimately to eradicate all forms of discrimination against vulnerable groups in society. A fellowship system plays an important role in respect of secondary and higher

[849] Beiter *The Protection of the Right to Education by International Law* 532.

education, as these levels of education, unlike primary education, need not immediately be free, but need only be made free over time. In practice, secondary education has reached fairly high levels of being free, at least in certain countries. Hence, fellowship systems remain of crucial importance in as far as higher education is concerned. It is important to understand the interaction between Article 13(2)(c) and (e). The former requires higher education to be made progressively free, the latter that an adequate fellowship system be set up. A fellowship system will have a more important role to play for as long as higher education is not yet free. It loses significance as higher education is made progressively free. However, even once higher education has been made mostly free, a fellowship system would retain a role in order to be able to cover the imposition of unexpected and new forms of fees or to address particular situations of hardship.

From the above it is evident that at least from the ICESCR perspective, international law is more explicit in respect of free higher education than South African law. The same is actually true for free primary/secondary or basic education. Section 29(1)(a) of the Constitution merely states that there is a right to basic education. Section 29(1)(b) merely states that further education, through the adoption of reasonable measures, is to be made progressively available and accessible.

The ICESCR is not the only international agreement that protects the right to higher education. The right to higher education is also protected by the following treaties: (i) Article 4(a) of the Convention against Discrimination in Education (1960); (ii) Article 28(1)(c) of the CRC (1989); (iii) Article 11(3)(c) of the African Charter on the Rights and Welfare of the Child (1990); and (iv) Article 13(3)(f) of the African Youth Charter (2006). Article 17(1) of the Banjul Charter merely states that the right to education is to be protected. The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Banjul Charter, as adopted by the African Commission on Human and Peoples' Rights in 2011, holds that this covers the obligation of states parties "[t]o ensure that higher education is made generally available and accessible to all, on the basis of capacity, by all appropriate

means, and in particular by the progressive introduction of free education."[850] The express provision that the accessibility of higher education is to be enhanced "in particular by the progressive introduction of free education" is also found in Article 13(2)(c) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988). With the exception of the latter instrument, all these instruments are internationally binding on the Republic. Additionally, *all* the instruments constitute persuasive authority for the purposes of interpreting Section 29 of the Constitution, in accordance with Section 39(1)(c) of the Constitution.

Though all of the global and African treaties mentioned above have been ratified by South Africa, at any rate their provisions on (free) education have not really, or only very haphazardly, been incorporated into South African domestic law by any Act(s) of Parliament, as referred to in section 231(4) of the Constitution. Essentially this means that these treaty provisions are binding on South Africa at the international level. The duties that flow from these treaties are as yet "purely" international duties. No legislative duties have been formulated based on them. While the Schools Act, 1996, contains certain provisions in respect of fees in the context of basic education, the positive obligation to progressively introduce free higher education has not been transformed into statutory law whatsoever. The Higher Education Act, 1997, does not contain such an obligation and also does not contain parameters concerning its concrete implementation. However, the self-executing provisions of a treaty would be immediately applicable as part of domestic law even without legislative enactment, thus Section 231(4) of the Constitution. This applies in respect of the negative obligation not to deliberately undertake retrogressive measures, especially, in this context, measures which introduce or increase tuition fees in higher education. In this sense, Article 13(2)(c) of the ICESCR is a self-executing provision which is automatically part of the law in South Africa. It can be considered to give rise to enforceable legislative and executive duties to respect free higher education. The essential negative obligation can be complied with by the state, without the adoption of legislation being necessary to detail how compliance should

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[850] Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, as adopted by the African Commission on Human and Peoples' Rights in 2011, para 71(e).

occur. In addition, it is an obligation that is easily justiciable by a court of law. A court of law can thus be approached to enforce compliance with this negative obligation without further ado. Other Constitutional provisions (also not Section 29 itself) do not stand in the way of direct enforcement. Any deliberate introduction of or increase in fees would have to be justified under strict limitation as envisaged in Article 4.

Moreover, there is also the immediate negative obligation not to discriminate (under both Article 2(2) and Article 13(2)(c) of the ICESCR). The importance of the non-discrimination obligation in the sphere of higher education is underlined by the fact that non-discrimination in access to education forms part of customary international law. Hence, under the Constitution, the obligation immediately forms part of South African law. Also, this negative obligation is self-executing, directly applicable, and justiciable.

Article 13(2)(c) envisages improved access to higher education through legislative, financial, administrative, and other relevant measures. Measures expressly include the progressive introduction of free higher education. Importantly, for as long as higher education is not yet free, there must, in accordance with Article 13(2)(e), be set up an adequate fellowship system, which envisages bursaries and/or loans benefitting poor students.

7.3 Summary of the South African legal position in respect of progressively free higher education, including possible shortcomings.

The right to education is enshrined as a fundamental human right in section 29 of the Constitution. Importantly, section 29 embodies the educational rights of both citizens and non-citizens in the Republic on all levels of education.[851] In terms of section 7(2) of the Constitution, the state is obliged to respect, protect, promote, and fulfil the rights in the Bill of Rights. The obligations of the state as imposed by section 7(2) also relate to the right to education in section 29. Fulfilling the right to education could well be understood to mean making education free or progressively free. Respecting the right could well be understood to mean not taking deliberate steps

[851] At any rate, in *Centre for Child Law, the School Governing Body of Phakamisa High School & 37 Children v. Minister of Basic Education & 4 others (37 children case)* 2840/2017 [2019] ZAECGHC, it was held that also undocumented immigrant children were entitled to access basic education.

introducing or increasing fees in education. Moreover, in terms of section 237 of the Constitution, the state is obliged to perform its constitutional obligations diligently and without delay. Section 237 explicitly requires this: "[a]ll constitutional obligations must be performed diligently and without delay."[852] These constitutional obligations are applicable to the right to education on all its levels, namely, basic, including adult basic education, and further education, which includes higher/tertiary education.

In as far as the interpretation of section 29 of the Constitution is concerned, the Constitution makes it clear that this must be interpreted with due consideration being given to international law. This is clear from section 39(1)(b) of the Constitution. On the other hand, where an international agreement protecting the right to education is binding on the Republic in terms of section 231 of the Constitution and forms part of domestic law in one form or another, this should be applied and implemented co-jointly with section 29, if not clearly conflicting with section 29.

As indicated, the South African Constitution recognises three categories/levels of education: (i) basic education; (ii) adult basic education; and (iii) further education. As in the case of international law, the state's obligations differ for each level of education.

The Constitutional Court has consistently interpreted the right to basic education to be immediately realisable, whereas the state is merely obliged to take reasonable measures to make further education progressively available and accessible.[853] In *AB v Pridwin Preparatory School* (*Pridwin*),[854] Nicholls AJ stated the following regarding basic education:

> While it is difficult to establish where the line should be drawn between basic education and further education, it cannot be disputed that basic education includes what is commonly known as primary education.
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> ….
>
> Accordingly, it is clear that every institution, elite or non-elite, that provides non-secondary or non-tertiary education is necessarily simultaneously engaged in providing those attending it a basic education.[855]

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852 Section 237 of the Constitution.
853 *Juma Musjid* at para 37 and *Moko* at para 27.
854 2020 (5) SA 327 (CC).
855 *Pridwin* at paras 78 and 80.

In *Moko*, the Constitutional Court expanded on the above understanding of the parameters of basic education. The Court stated that "…school education culminating in the 'nationally recognised qualification' of the National Senior Certificate is basic education under section 29(1)(a)."[856] Apart from positive duties to implement basic education, there are also negative duties under section 29(1)(a). Dealing with the negative obligation of the state in respect of basic education, the Constitutional Court in *Moko,* relying on *Juma Musjid*, noted that the core of section 29(1)(a) "'negatively protects' the right to basic education from improper invasion, which imposes a basic duty to not impair or diminish a student's right to basic education."[857]

Importantly, section 29(1)(a) of the Constitution is a universal right to basic education subject to neither progressive realisation nor the capacity of a learner. On the other hand, section 29(1)(b) of the Constitution, although potentially applicable to everyone, is ultimately not a universal right. Section 29(1)(b), insofar as it pertains to higher education, is a right that is to be realised progressively and which grants access to higher education based on capacity (i.e., intellectual or related aptitude). In this sense, the state need not make higher education generally available in the same way as primary and secondary education. But the state remains obliged to ensure equal access to higher education to those that have the required capacity.[858] Section 9 of the Constitution on equality, read in conjunction with section 29(1)(b) of the Constitution, guarantees equal access to higher education, which ought to be realised through positive measures, including funding and reducing and eliminating fees. As in the case of basic education, the state also has a negative obligation in relation to higher education. Hence, the state must refrain from interfering with the right to further education as provided for in section 29(1)(b) of the Constitution. Prohibited interference could cover the case of introducing or increasing fees in higher education. The real difference between section 29(1)(a) (basic education) and (b) (higher education) lies in the prescribed modalities of the realisation of the rights. Basic education must be realised immediately, further (and higher) education

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856 *Moko* at para 31.

857 *Moko* footnote 22.

858 This construction is very much in accordance with Article 13(2)(c) of the ICESCR, requiring that "[h]igher education shall be made *equally accessible to all, on the basis of capacity*, by every appropriate means, and in particular by the progressive introduction of free education" (emphasis added).

is subject to progressive realisation. Section 29(1)(b) obliges the state to progressively enhance the availability and accessibility of further education. State action (or inaction) in this respect is susceptible to constitutional challenge. The applicable standard which would be used in this regard is roughly that of "reasonableness" as expounded in *Grootboom*. However, the standard might be stricter, as Section 29(1)(b), unlike other socio-economic rights in the Constitution, does not include the internal qualifier that the right must be realised in accordance with "available resources."[859]

Section 29(1)(b) of the Constitution is worded differently from Article 13(2)(c) of the ICESCR on higher education. Unlike Article 13(2)(c) of the ICESCR, section 29(1)(b) of the Constitution does not explicitly refer to "higher" education and also does not expressly require the "progressive introduction of free education". The ICESR is "more substantive" than the Constitution in its regulation of the right to higher education. On the national/domestic level, the state has no explicit obligation to progressively introduce free higher education. As a positive obligation to make higher education progressively free, Article 13(2)(c) has not yet been incorporated into South African municipal law. Yet, via section 233 of the Constitution it must, as international law, play a role in the interpretation of *any legislation*, thus also the Constitution, where this promotes conformity with international law. Also, section 39(1)(c) of the Constitution is relevant. It would require that Article 13(2)(c) of the ICESCR be had regard to when interpreting section 29(1)(b) of the Constitution. From this perspective it could possibly be argued that section 29(1)(b) encompasses an obligation on the state to progressively introduce free higher education. This conclusion requires a proper interpretation of the Constitution. It is well-established that provisions of the Bill of Rights must be given a purposive and generous meaning "so as to give individuals full protection of their fundamental rights and freedoms."[860]

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859 See, e.g., Section 26(2) (housing), Section 27(2) (health care, food, water and social security) of the Constitution.

860 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28 at para 181.

In *S v Mhlungu*,[861] the Constitutional Court endorsed the following statement from the decision of the Supreme Court of Appeal of Namibia:

> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the "austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.[862]

Dickson J in the Canadian decision of *R v Big M Drug Mart Ltd*, referencing the Canadian Charter of Rights, made a similar statement:

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my views this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated with the text of the Charter. The interpretation should be … a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection.[863]

Naturally, whilst a constitutional provision ought to be interpreted generously and purposively, this does not mean that the language of the provision can be extended beyond reasonable limits to give the provision a meaning never intended by that provision and/or the Constitution as a whole. It is submitted, however, that section 29(1)(b) of the Constitution cannot be meaningfully or purposively interpreted without giving some weight to the substantive content of Article 13(2)(c) of the ICESCR.

From both the international law and the Constitutional perspectives, the right to higher education entails that it should be economically accessible in other words, higher education must be affordable. There can be little doubt that reducing and eventually eliminating fees constitutes the sincerest way of interpreting "affordable". Study bursaries or loans (although also important on the way "towards the goal")

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861 1995 (3) SA 867 (CC) at para 8.

862 *Government of the Republic of Namibia v Cultura 2000* 1994 (1) SA 407 (NMS) at 418.

863 *R v Big M Drug Mart Ltd* 1985 SCC 69; [1985] 1 SCR 295 (*Big M Drug Mart Ltd*) at 395-6 (18 CCC (3d) 385).

would be only “the second-best option” from the perspective of perfect accessibility, as they usually leave students with study debts after they have left university. Therefore, it must be considered to be a duty (which is explicit on the international level) to progressively introduce free higher education. It would not be permissible to introduce or increase study fees in higher education. This construction has various bases of justification. On the one hand, if this construction had been contested, the South African government would not have ratified the ICESCR or would have limited the application of Article 13(2)(c) to South Africa by noting a reservation. This was not done. On the other hand, affordable higher education is so crucial to the Constitution’s fundamental mission of eradicating inequality resulting from Apartheid that a heightened significance must be accorded this aspect. The preferred interpretation of section 29(1)(b) of the Constitution, which is also consistent with international law, is thus one which encompasses the progressive introduction of free higher education. The silence of section 29(1)(b) on the progressive introduction of free higher education does not automatically mean that this is not envisaged by the provision.

The progressive introduction of free higher education is part and parcel of the right to higher education. Deliberate measures taken by the state that increase tuition fees will likely have retrogressive effects. Such measures evidently limit the realisation of the right to higher education. To pass constitutional muster, they must be justifiable under the limitation clause of Section 36 of the Constitution (which arguably mirrors the substance of Article 4 of the ICESCR).

Currently there are three core legal instruments in South Africa that apply directly to higher education, namely the Constitution, the Higher Education Act and the NSFAS Act. As already discussed, the Constitution sets out the constitutional right to higher education. The Higher Education Act regulates the governance of higher education institutions in South Africa, including the funding of these institutions.[864] The NSFAS Act provides for the granting of loans and bursaries to eligible students at public

[864] Preamble to the Higher Education Act 101 of 1997.

higher education institutions to cover the costs of education in an endeavour to enhance access to higher education.[865]

Both the Higher Education Act and the NSFAS Act seek to give effect to section 29(1)(b) of the Constitution. However, despite the fact that section 29(1)(b) of the Constitution, the Higher Education Act and the NSFAS Act form part of the law now, accessing higher education has remained a serious challenge, especially for learners from poor families, due to the fees associated with higher education. Neither the Higher Education Act nor the NSFAS Act can be described as an (adequate) mechanisms to facilitate the progressive introduction of free higher education. Though the NSFAS since its inception has greatly improved access to higher education institutions, especially by poor students, the preferred 60/40 ratio (repayable/non-repayable loan) and the decrease in state funding have significantly affected the NSFAS's ability to ease the financial burden of university study. There is traction to the argument that the 60/40 ratio preferred by the NSFAS Act contributes to growing student debt. This arrangement (or ratio) temporarily enables students from poor families to access higher education but leaves the same students with huge student debt because they have to repay 60% of the loans received from the NSFAS. Because the majority of the students come from poor families, often they become the breadwinners in their families. Therefore, these students are burdened with having to take care of their families and repay their loans. Proper access to higher education is supposed to bring change for the better in the socio-economic conditions of these students and their families. However, student debt seems to worsen their socio-economic conditions.

Moreover, the decrease in state funding creates an unsustainable situation where deserving and eligible students are negatively affected because the funds relied on become insufficient to timeously, properly, or whatsoever meet the demand for adequate access to higher education. Viewed from a constitutional and international law perspective, this should not be the case. The state should not be a party to conduct which amounts to a deliberately retrogressive measure. Deliberately retrogressive measures amount to *prima facie* violations of human rights and need

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865 Preamble to NSFAS Act 56 of 1999.

to be strictly justified under a limitation clause. If they remain unjustified, human rights have been violated. The decrease of state funding to the NSFAS is an unexplained retrogressive measure and therefore amounts to a violation to the right to access to higher education.

Then there is the issue of the “missing middle”. The reference here is to those students who are too rich to qualify for NSFAS funding, but too poor to pay for their tuition fees. The issue of the “missing middle” is perhaps the one persistent criticism of NSFAS. This issue relates to the definition of or the criteria for determining the eligibility of students for the NSFAS support. The criticism is that the threshold is too low and unfairly excludes the “missing middle”. Because of the decrease in state funding, the NSFAS currently cannot give aid to all eligible students. Broadening the definition or adjusting the threshold to accommodate the “missing middle” would result in an administrative catastrophe. Funding from the state is crucial for the proper and effective functioning of the NSFAS and currently the state is struggling to fulfil its constitutional obligation, resulting in many students being denied access to higher education.

This is the clearest indication that serious intervention by the state is required for it to comply with its constitutional obligations. It is evident that the NSFAS faces many challenges due to persistent underfunding by the state and the widely reported scale of corruption in the NSFAS administration. The allegations of maladministration and corruption pose a serious threat to the functioning of the higher education sector. Ultimately, it is the poor students who are affected by the ineffectiveness of the NSFAS.

Interestingly, the current legislative framework pertaining to higher education does not explicitly provide for the role of the private sector in the funding of higher education. This omission is regrettable as the private sector should be accorded “some” role in the funding of higher education. A closer analysis of the wording of section 29(1)(b) of the Constitution reveals that the measures the state can take to make higher education progressively more available and accessible would certainly encompass legislative measures aimed at involving the private sector in the funding of higher education institutions. As a beneficiary of higher education, the private sector ought to be given such a role. The state and students now play a dominant

role in respect of the funding of higher education institutions. The time has come for serious reflection as to why the private sector should not have a prescribed role in the cost-sharing model in respect of the funding of higher education institutions. The private sector could contribute through bursaries, but also through a carefully crafted tax.

This is not to say that the state does not retain the ultimate responsibility for a functioning system of higher education, which is to be primarily funded by the state. This is the implication of the right to access to higher education having been made a socio-economic right protected in the Constitution.

Sight should finally not be lost of the political considerations involved in the funding of higher education. Socio-economic rights, including the right to higher education, even though proper legal rights, should attract political attention because they are also political in nature. Yet, in public and other discourse, socio-economic rights are often considered solely from the economic perspective of whether they are affordable, here often relying on pseudo-economic rather than real arguments. Realising socio-economic rights is also a matter of whether there is genuine political will to realise them.

The present South African student finance system is probably less necessitated by economic realities than it is a product of political choices made in the past when universities become modern institutions. Historically, the British university model had always served as a role model, also in as far as student finance is concerned. South Africa's student finance system of (increasing) fees linked to student financial assistance (high fees–high (yet deficient) subsidies) probably has more to do with following that tradition than with any economic rationale.

It is submitted that once progressively available and accessible higher education becomes a fundamental right enshrined in the Constitution, this must also be taken seriously. Not all political choices can then just be allowed to stand, but they must instead be measured for their sincerity. (Economic) arguments against free higher education are often more alleged than substantial. Using maximum the available resources to realise socio-economic rights also means stopping corruption, preventing large-scale tax avoidance and evasion, properly collecting taxes,

efficiently using funds, and so on. Such measures release enormous funds but require a determined political will. The argument that there are insufficient funds to progressively realise free higher education needs to be reconsidered.

There is a deep political desire to bettering the living standards of the citizenry. The development of the economy is firmly fixed in political will. The funding of higher education and the introduction of progressively free higher education legally require political decisions. The inclusion of socio- economic rights in the Constitution means that political decisions become legal issues, even if the exact nature of the political decisions cannot be prescribed. In summary, the funding of higher education is not a matter falling simply within the ambit of economics. There are various political considerations at play and the ultimate drive for progressively free higher education is as much a matter of political will as it is perhaps an economic matter.

7.4 Recommendations

Pursuing higher education in South Africa comes at a high cost for both those who can afford to pay for themselves and those who cannot. The poor are especially negatively affected by the high costs occasioned by higher education in South Africa. Either they will decide not to embark on higher education, with all the socio-economic consequences this entails for their own future and that of the country, which will not develop as it could and should or they will embark on university studies and still struggle because of receiving insufficient financial assistance or subsequent carrying a heavy student debt. The NSFAS system, albeit a step in the right direction, is ineffective in addressing the various challenges faced by eligible or deserving students who want to pursue higher education. More is required. The intervention of various stakeholders is required. South Africa comes from a past where education was used to exclude the majority of South Africans, especially black South Africans, from becoming full citizens. Black South Africans were excluded from quality education. This prevented their meaningfully participation in the mainstream economy of the country. The impact of the unjust past persists:

> The challenges for higher education institutions in South Africa are formidable. They must provide high quality education to increasing numbers of students, deliver highly skilled person power to the economy, produce internationally competitive research, and where large numbers of students from poor families have yet to participate

> in higher education as "first generation" students. In order to achieve equity in access and success, the pressure at the level of both institutions and the higher education system is simultaneously to provide access to students from low-income families, and to increase expenditure on financial aid, academic development and new forms of curriculum interventions required to achieve the desired equity in outcomes. All this must be achieved despite falling real subsidies per student and a reluctance and inability to pay fees by some students.[866]

As it is transformative Constitution, the South African Constitution should be interpreted in a manner which seeks to change the social conditions created by the apartheid regime, which at best neglected the human rights of most South Africans. Higher education often remains inaccessible especially to black students from poor families. The progressive introduction of free higher education would facilitate greater access to higher education by deserving students from poor families. This is the full impact that section 29(1)(b) of the Constitution could have if interpreted purposively, taking cognisance of the history and current socio-economic conditions of the majority of South Africans. The money to accomplish this may well be available!

The wording of section 29(1)(b) of the Constitution is of such a nature that the state, which is the ultimate bearer of constitutional obligations, can take a wide range of measures and involve other stakeholders in complying with its constitutional obligation of making higher education progressively more available and accessible. Neither the Constitution nor the Higher Education Act prescribes the measures the state is required to take in the fulfilment of its constitutional obligations. The standard for the measures to be taken is reasonableness, yet, the specific measure of progressively free higher education must play some role.

This thesis makes the following recommendations in an effort to achieve the progressive introduction of free higher education:

7.4.1 Recommendation 1 – Legislative intervention/amendment

The Higher Education Act and the NSFAS Act are the legislation enacted to give effect to the right to higher education in terms of section 29(1)(b) of the Constitution.

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866 HESA Task Team Tuition Fees: Higher Education Institutions in South Africa 50.

Both of these acts are silent on free higher education. It is recommended that specifically the Higher Education Act should be amended in the following respects:

1. The Higher Education Act should explicitly spell out that government is obliged to attend to the *progressive introduction of free higher education* as a measure to make higher education accessible.

2. The Higher Education Act should explicitly spell out that any deliberate increase in tuition fees, undertaken by the government or any public university, constitutes a *prima facie* violation of the right to access to higher education. Any such increase will require to be clearly justified under the limitation clause of Section 36 of the Constitution. In other words, a right to action before any competent court of law should be created, enabling interested stakeholders to call on the government to legally account for its action.

3. The Higher Education Act should include a clear allusion to Article 13(2)(c) of the ICESCR. Domestic law ought to be more explicit regarding the obligations in international law in respect of higher education which South Africa has accepted. Article 13(2)(c) states that "The States Parties to the present Covenant recognize that, with a view to achieving the full realization of [the right to education] … [h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education".

7.4.2 Recommendation 2 – A focus on making the NSFAS an adequate fellowship system

The NSFAS ought to be reformed in the following ways:

1. The NSFAS Act should clearly articulate the state's duty to ensure that the NSFAS is sufficiently funded. The state ought to take its statutory obligations in respect of the NSFAS seriously and ensure that the fund is properly resourced. Where the state fails to do so, it should be possible to lodge a public interest claim before a court of law, seeking to oblige the government to make the funds available. The NSFAS Act should clearly detail the funding formula.

2. The lion's share of funding made available to students by the NSFAS should be in the form of a non-repayable bursary. Currently 40% of the funds NSFAS awards to poor students is converted into a loan which the students must repay upon commencing employment. This figure loses sight of the fact that many of the recipients are "first generation" students who, frequently, have the responsibility of taking care of their parents and relatives. The figure of 40% burdens these students with debt which in many instances cannot be fully repaid. The prospect of having to repay a loan further acts as a deterrent and discourages students from applying for NSFAS funding (or embarking on higher education at all).

3. As a token of recognition for the resources that those students that pursue higher education studies enjoy by virtue of the fact that higher education receives substantial public resources, the government might instead consider imposing a modest tax on those that earn a sufficiently high salary, post university their education, for a limited period of time.

4. The amounts the NSFAS awards to students must reasonably take account of the costs that higher education entails. Apart from actual tuition fees, NSFAS funding must take proper account of other study-related costs such as study material, accommodation, food, and living expenses. A poor student, who exclusively on NSFAS funding, will currently scarcely be able to adequately access higher education. Where it is evident from the financial assessments of the applications of students that they rely exclusively on NSFAS funding, those students ought to be considered for a full bursary or a form of a social grant specifically and exclusively directed towards higher education. The government is already well equipped to deal with social grants in compliance with the constitutional commitment to social justice. The government should devise a social grant for those poor eligible students directed to higher education. In this way the government will not only be realising the constitutional commitment to social justice and the obligation to make higher education accessible and available, but it will also be acting in compliance with its international obligation to make higher education progressively free. The point of departure should be at focus on the most vulnerable and poor students.

5. The NSFAS must also cater for the so-called "missing middle", those students that do not belong to the poorest segment of society, but yet struggle to afford higher

education. The threshold criteria applied to determine eligibility for participation in the NSFAS scheme need to be substantially lowered. Should there not be an inclination to lower the threshold criteria, alternatively, these students should have the option of applying for a subsidy directly from the University in respect of some of the study-related costs. The higher education institutions in collaboration with government should consider subsidising the students falling within the "missing middle". This system could be akin to the subsidy system already in operation on the primary and secondary education levels.

6. Whenever possible, the statutory entitlements of students under the NSFAS scheme should be able to lead to easily enforceable claims before a court of law, with costs, unless claims are clearly malicious, being borne by the state.

7. Furthermore, the state is obliged to act diligently and swiftly in dealing with the allegations of maladministration and corruption in NSFAS, which are seriously affecting the fund's effectiveness and ability to meet its statutory obligations.

8. The NSFAS Act should include a clear allusion to Article 13(2)(e) of the ICESCR. Article 13(2)(e) states that "The States Parties to the present Covenant recognize that, with a view to achieving the full realization of [the right to education] … an adequate fellowship system shall be established".

7.4.3 Recommendation 3 – The funding of higher education, including a regulated role for the private sector

1. Relevant legislation, perhaps the Higher Education Act, should spell out the state's duty to spend at least 1% of its GDP on higher education. All countries with adequate higher education systems invest at least 1.0% of their GDP in higher education.[867]

2. The duty to allocate the maximum available resources to making higher education available and accessible requires legislative concretisation. South Africa needs to increase its current tax-to-GDP ratio from under 30% to between 37% and 40% (this

[867] For comparative figures, see here: Szmigiera 2021 https://www.statista.com/statistics/707557/higher-education-spending-share-gdp.

is roughly the average tax-to-GDP ratio in OCED countries). It is increasingly recognised by countries around the world that states should bear clear duties to levy sufficient taxes to realise socio-economic rights. Hence, legislation should give concrete shape to claims such as that tax exemptions need to be reduced, the tax base widened, and tax avoidance and evasion halted. A minimum tax (of at least 25%) should be applicable to all companies, without any possibility that these may rely on profit-shifting schemes. Tax collection needs to be improved and the; relevant infrastructure strengthened. Additionally, effectively fighting corruption is a major source of state funds. As pointed out earlier, the cost of state capture over the second term of the Jacob Zuma administration amounted to R1.5 trillion Rand.[868]

3. Again, legislation should whenever possible create enforceable legal claims that may be brought by directly affected individuals or by concerned citizens in the form of public interest actions.

4. The private funding of public universities may play a role. However, higher education institutions should remain “mostly” public. The role of the private sector in funding (public) universities should be only a supplementary one, not more. Importantly, the state must remain in control of the university sector, its purposes, functions, provisions, access and quality. The role of universities is multifaceted and an excessive reliance on private funding may have the potential to jeopardise the greater goal of university education. Yet there may be a partnership-like relationship between the state and the private sector to assist in solving the funding challenges faced by higher education institutions in South Africa. Ultimately, the private sector is a beneficiary of higher education through the number of graduates it employs. This is not to be a partnership for equally shared responsibility between the state and the private sector, but one entailing certain supplementary obligations for the private sector. The state can through legislation ensure the involvement of the private sector in the funding of higher education. What is contemplated here is a regulatory scheme that lays down the parameters for the contribution by the private sector. There could, for example, be a voluntary fund into which private sector operators pay money, with such contributions somewhat reducing the taxable

868 Merten 2019 https://www.dailymaverick.co.za/article/2019-03-01-state-capture-wipes-out-third-of-sas-r4-9-trillion-gdp-never-mind-lost-trust-confidence-opportunity.

income of private sector operators as a motivation to make a contribution. Alternatively, or even additionally, there could be a tax paid by private sector operators towards “the improvement of higher education”. Naturally, private actors can always make bursaries available to promising and deserving students.

The importance of education in general and higher education in particular cannot be gainsaid. In South Africa higher education is one of the central pillars of the social justice agenda to which the Constitution commits South Africa. It is through higher education that South Africa will improve the quality of life of all citizens, free the potential of each person and take its rightful place as a sovereign state in the family of nations.[869] Accordingly:

> Higher education cannot be a luxury reserved just for a privileged few. It is an economic necessity for every family. And every family should be able to afford it.[870]

869 Preamble to the Constitution.
870 Quotation by Barack Obama who served as the 44th President of the United States of America.

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