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Realising the Right to Education
for Children Infected and
Affected By HIV/AIDS in South
Africa

- a Minor Field Study

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Summary

It has been over 25 years since the AIDS epidemic was first recognised. HIV/AIDS has claimed more lives in South Africa than in any other country in the world. The pandemic has devastating impacts on society. Children infected or affected by the virus are hit particularly hard and the AIDS pandemic negatively affects children and their human rights in numerous ways: physically, emotionally and economically. This thesis explores the issue of equal access to education for children infected or affected by HIV and AIDS in South Africa.

South Africa has, under both international and domestic legal instruments, undertaken to guarantee everyone the right to basic education without discrimination of any kind. The South African government is not only under a negative duty to ensure the realisation of the right to basic education, but also under a positive duty. Hence, the government is not only required to refrain from interfering with a child's exercise of his or her right to education, but is also under an obligation to *act* and remove obstacles to ensure that the right to education is realised.

During a ten week minor field study conducted in South Africa, in spring 2009, it was observed that despite legal protection and policy documents ensuring fair treatment of children infected or affected by HIV/AIDS, this group of learners still encounter significant obstacles hindering them from equal access to schooling. This thesis identifies and, with the backdrop of existing legal protection, discusses obstacles of social, financial and practical nature. This thesis ultimately argues that the significant problem in the context of equal access to education for learners infected or affected by HIV/AIDS is not primarily a matter of deficient legal protection, even though the law admittedly could benefit from a higher level of progression and elaboration, but rather the implementation of the law. It is essentially argued that a satisfactory functioning of the legal provisions intended to ensure equal access to education for children are hindered by specifics found in the South African context. It is reasonable to assume that the discrepancy between the protection offered through various relevant international and domestic legal provisions, and the reality of vulnerability and discrimination of children infected or affected by HIV/AIDS in South African schools, is a complex riddle that is caused by various factors; a riddle that does not lend itself to easy solutions or remedies. However, the final chapter of this thesis provides a brief analytical discussion on the authors' view of possible ways forward, to counteract the *de facto* discrimination of children infected or affected by HIV/AIDS in South Africa, preventing their right to equal access to education.

Sammanfattning

Det har gått över 25 år sedan AIDS-epidemin först uppmärksammades. I Sydafrika har fler människor dött av HIV/AIDS än i något annat land i världen. Pandemin har förödande konsekvenser för samhället och barn som är sjuka i eller på annat sätt berörda av viruset är särskilt hårt drabbade. AIDS-pandemin har negativ påverkan på barn och deras mänskliga rättigheter på flera olika plan: fysiskt, ekonomiskt och emotionellt. Denna uppsats utreder frågan om tillgång till utbildning på lika villkor, för barn i Sydafrika som är sjuka i eller på annat sätt berörda av HIV/AIDS.

Sydafrika har under både internationell och inhemsk lagstiftning åtagit sig att garantera rätten till grundläggande utbildning för alla, utan diskriminering på något sätt. Den Sydafrikanska regeringen har inte bara en negativ skyldighet att realisera rätten till grundläggande utbildning, utan har även i detta sammanhang en positiv skyldighet. Regeringen är således inte bara skyldig att avstå från att hindra ett barn från att åtnjuta sin rätt till utbildning, utan har även en skyldighet att agera på ett sådant sätt att hinder som ligger i vägen för realiserandet av rätten till utbildning undanröjs.

Under en tio veckor lång mindre fältstudie i Sydafrika våren 2009, observerades det att barn som är sjuka i eller på annat sätt berörda av HIV/AIDS möter stora svårigheter i utbildningssystemet, vilket hindrar realiseringen av deras rätt till utbildning. Detta trots legalt skydd och uppmärksamhet i regeringens handlingsplaner rörande lika behandling för denna grupp av elever. Uppsatsen identifierar och diskuterar, mot bakgrund av det befintliga rättsliga skyddet, hinder av social, finansiell och praktisk natur. Uppsatsen argumenterar för att de betydande problemen vad gäller lika tillgång till utbildning för barn som är sjuka i eller på annat sätt berörda av HIV/AIDS, inte primärt beror på undermålig rättslig reglering, även om det rättsliga skyddet visserligen kan stärkas. Problemen ligger snarare i den rättsliga implementeringen. Det är i huvudsak anförts att rättens effektiva genomslagskraft är hindrad av omständigheter funna i kontexten av det Sydafrikanska samhället. Det är rimligt att anta, att diskrepansen mellan det garanterade rättsliga skyddet som ges genom relevant internationell och inhemsk lagstiftning, och den verklighet av sårbarhet och diskriminering av barn som är sjuka i eller på annat sätt berörda av HIV/AIDS i det Sydafrikanska utbildningssystemet, är en mycket komplex fråga. Problemet med lika tillgång till utbildning i Sydafrika är av en sådan komplexitet att det vare sig enkelt kan förklaras eller lösas. Det sista kapitlet erbjuder dock läsaren en kortare analytisk diskussion kring författarnas syn på möjliga vägar framåt. Det som främst diskuteras i detta avsnitt är hur den *de facto* diskrimineringen av sydafrikanska barn sjuka i, eller på annat sätt berörda av HIV/AIDS, skulle kunna förhindras.

Preface

On October 17, 2008 very exciting news reached two law school students with a firm belief in the respect for human dignity and a true passion for human rights. An unforgettable experience started with the message of a granted scholarship from SIDA, to conduct a minor field study in the Gauteng province of South Africa. The decided topic for the study, which would come to serve as the foundation for this master thesis, marking the bittersweet end of five years in law school, was the right to education for children infected or affected by HIV/AIDS. The news of our accepted scholarship application was received with equal amounts of great anticipation and dread for the daunting task laying ahead of us.

By the end of January, both our mental and physical baggage was packed to the verge. Upon boarding of the plane that would take us to South Africa, a journey was started which would prove to be one of a life time. None of us could have really adequately prepared ourselves for what kind of reality we were about to face regarding the gigantic challenges posed to South African society. Witnessing the vast inequalities between rich and poor, the struggle to overcome past apartheid legacy and a ravaging AIDS pandemic sometimes took its toll on both body and soul. However, in the midst of all the hardships, the South Africans witnessed of immense spirit and courage.

During our 10-week minor field study we met so many people with such big hearts that have made an everlasting impression on us. First and foremost, we would like to express our heartfelt gratitude towards Marié Theron, librarian at the O R Tambo Law Library of University of Pretoria for the tireless support both academically and personally.

Secondly, we would like to express our appreciation towards the individuals involved in translating our ideas for this project into reality. Thank you, Christina Johnson, academic supervisor, for your confidence regarding our academic ability. You dared to believe in us and this project before we even did so ourselves. Thank you Elize Delport, academic supervisor in field, for pinpointing us in the right direction and for putting us in touch with individuals in the human rights field with valuable information for our study.

A sincere thank you shall be directed towards all the human rights scholars, practitioners and interview subjects who took the time to sit down with us and discuss the topic for this thesis. We want to express special gratitude towards the staff of the Centre for Human Rights and the Centre for the Study of AIDS at the University of Pretoria, for assisting with useful advice and helping us with reading recommendations on previous research relevant to our topic.

We have greatly appreciated the encouragement and support of all of our Swedish and South African friends throughout this experience. Special

thanks to Henk Boogertman Jr., a South African whom we had the pleasure to befriend and who not only showed us his extraordinary country but also helped us to find interview participants for our study.

Lastly, a warm thank you to both of our families who have always stood by us. Their pep-talks and encouragement throughout our law school studies will not be forgotten. A special heartfelt thank you to Michael Pildahl for being in such good spirits during the challenging period of writing this master thesis. We are both grateful for the immense patience and consideration showed. It made all the difference.

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Anna Hammarson and Jessica Nilsson

Abbreviations

ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immune Deficiency Syndrome
ARV	Anti-retroviral Drugs
BOR	Bill of Rights
CRC	International Convention on the Rights of the Child
HIV	Human Immunodeficiency Virus
SASA	South African School's Act
OVC	Orphans and Vulnerable Children
UNICEF	United Nation's Children's Fund
MTCT	Mother-to-child-transmission
NGO	Non-governmental Organisation
NP	National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions
LSEN	Learners with Special Education Needs

1 Introduction, Scope and Methodology

1.1 Introduction

HIV/AIDS continues its deadly and global marathon. Three decades since the virus was first discovered, it is apparent that the disease not solely concerns public health. Societies are radically and fundamentally changed, as the pandemic reverses decades of development gains and increases poverty. In the absence of a cure, the HIV/AIDS crisis continues to expand and has become the most devastating disease the world has ever faced. In South Africa, the disease has claimed more lives than in any other country in the world, and children infected or affected by the virus find themselves at the heart of this tragedy. The pandemic poses a major challenge to the already fragile education system in South Africa, which has been struggling to overcome the legalised inequalities and racial segregation created by apartheid.

Children infected or affected by the disease are facing a multitude of obstacles in the society so severely hit by the pandemic, hindering their equal access to schooling. The entire education system is put under immense stress as teachers are incapacitated by illness and subsequently die of AIDS. Furthermore, learners have problematic patterns of erratic attendance or drop out of school entirely, as they are forced to work in order to compensate for lost family income, or stay home to take care for sick family members from HIV and AIDS.

A statement made by the Ontario Human Rights Commission, in its Policy on HIV/AIDS, sets the tone of this thesis. The commission convincingly argues that: “a society is judged by how it responds to those in greatest need. A tragedy such as the HIV epidemic brings a society face to face with the core of its established values, and offers an opportunity for the reaffirmation of compassion, justice and dignity.”¹ The focus of this thesis is to explore the issue of equal access to education for children infected or affected by HIV/AIDS. While some significant efforts have been made to improve the situation for these children, obstacles of considerable proportions remain, that effectively hinders equal access to education.

¹ Ontario Human Rights Commission Policy on HIV/AIDS – Related Discrimination Report of 24 June 1988, <www.ohrc.on.ca/en/resources/Policies/PolicyHIVAids?page=PolicyHIVAids-INTRODUC.html>, viewed on 25 May 2009.

1.2 Research Questions and Premise

The main objective of this thesis is to explore and critically assess the right to education for children affected by HIV/AIDS in South Africa. The following questions will be addressed in this thesis:

- Where does children's right to education and HIV/AIDS meet?
- What do the most relevant international, regional and South African legal instruments state concerning the right to education in the context of HIV/AIDS?
- What major obstacles or problems do children infected or affected by HIV/AIDS meet with regard to realising their right to education?
- What ought to be done to secure equal access to education for children infected or affected by HIV/AIDS?

An underlying premise of this thesis is that legal provisions should not be regarded as operating in an autonomous sphere, distinctly separated from society. In essence, it is assumed that laws do not exist in a void and it is for this reason that this master thesis has consisted of both traditional legal method in order to establish the legal framework governing the issue of equal access to education for children infected or affected by HIV/AIDS, and the practical element of a minor field study to gain a better understanding of the context in which the law operates. The assumption is that this approach will result in a more comprehensive understanding of the topic.

1.3 Structure

Chapter one offers a brief introduction to the topic of this thesis including the presentation of research questions, structure, scope and methodology. Chapter two discusses the magnitude of the pandemic and explains how the virus adversely affects children's rights. Subsequently, the link between children's right to education and HIV/AIDS is established. Chapter three explores what legal obligations South Africa has undertaken regarding the right to education as embodied in international human rights law. In addition, a description of the attention, in the form of soft law documents, attributed to the issue of HIV/AIDS, in relation to the right to education, in international human rights law is offered. Chapter three provides the basis for the assessment of South Africa's performance with respect to its legal obligations on the right to equal access to education. Chapter four is structured along the establishment of the domestic South African legal framework governing the issue of equal access to education for children infected or affected by the disease. The chapter starts with some important information supposed to serve as a backdrop for the understanding of the legal provisions discussed later in the chapter. An analytical and evaluative

approach, where legal provisions are scrutinised and discussed in relation to the particularities of the South African context, is employed throughout the chapter. Chapter five presents the finding of a minor field study conducted over the course of 10 weeks in spring 2009. The purpose of the chapter is to explore how the legal provisions of relevance to the issue of equal access to education for children infected or affected by HIV/AIDS, function in society. When appropriate, the findings of the study, is complemented with what has previously been stated in literature and research in order to enable a comprehensive and coherent understanding of the topic. An analytical and evaluating approach is employed throughout the chapter. Finally, Chapter six offers the conclusion and final remarks of this thesis with the inclusion of some recommendations, directed towards both the South African state and the international community, on what measures could be taken to address the problem of impeded access to education for children infected or affected by HIV/AIDS.

1.4 Scope

The subjects of children's rights, the right to education and issues relating to the HIV/AIDS pandemic, are all separately extensively researched areas and many interesting academic excursions can be conducted in relation to each and every one of these areas. Of interest in this thesis, is the encounter between these three areas where much still seems to be missing from a coherent and efficient response to the wide-ranging deteriorating effects of the HIV/AIDS pandemic. The truth is that, the study of the reality of the everyday lives of children infected or affected by HIV/AIDS regarding their right to education paints a grim picture.

This thesis is selective and limits itself to the key issues emerging in the crossroads of HIV/AIDS and the right to education for primary school children infected or affected by the virus in South Africa today. The thesis confines itself to analysing the main international and domestic legal sources relevant to the topic and subsequently proceeds with a hands on analysis of the reality, based on data collected during a minor field study in the Gauteng province of South Africa. The purpose of the analysis is to critically assess whether or not the South African government is living up to their obligation to ensure equal access to education for all children under its jurisdiction.

Important to note is that this thesis is not concerned with all the elements encompassed in the right to education, nor the theoretical foundation or justification of the right to education in itself. An exhaustive discussion on international soft law instruments, relating to the right to education as such, like the Dakar Framework for Action and its Education For All goals is also left outside the scope of this thesis. Instead, this thesis is focused around the aspect of equal access to education for children infected or affected by HIV/AIDS in South Africa, from both a legal theoretical perspective and a practical perspective.

1.5 Methodology

This thesis is divided into three main parts with different primary methodologies. The first part offers an introduction to the magnitude of the HIV/AIDS pandemic and its consequences for children infected or affected by the virus and their equal access to education. The methodology employed in this descriptive introduction is a literature review.

The second part of the thesis concerns the theoretical aspect of the right to education and relates to the establishment of South Africa's legal obligations, both internationally and domestically. These legal obligations will be discussed by using classical legal method based on desk-based research (i.e. the analysis of relevant legal instruments and their application). The analysis of the most relevant legal instruments in international law and domestic law provides the foundation for the third part of the essay which consists of an analytical and evaluative discussion of the main findings of data collected during a 10-week minor field study conducted in the Gauteng province of South Africa.

The data was collected by the means of qualitative methods. Study methodologies include a literature review, semi-structured interviews with various relevant actors for the issue of HIV/AIDS infected or affected children and their right to education and field observations in primary schools, an orphanage etc. Interviews were conducted with non-governmental organisations, school staff and orphanage staff and the questions revolved mainly around the interview participants' view on the issue of equal access to education in general and more specifically, the possible barriers to access to education for children infected or affected by HIV/AIDS. All interviews but one took place in Gauteng, South Africa. One complementary interview was conducted in Malmö, Sweden. The main findings presented from the minor field study will illustrate the particularities of the educational situation for children infected or affected by HIV/AIDS from a more practical standpoint with the view of critically evaluating legal sources and their implementation in order to discover potential discrepancies between law and reality.

Former UN Special Rapporteur on the right to education, Katarina Tomasevski's 4-A Scheme, and more specifically the parameter of *access*, has served as a theoretical framework for this project. The content of Tomasevski's 4-A Scheme, and particularly the issue of access will be explored under Chapter 3.2.2. In essence, the parameter of access requires states to ensure education for all children on a non-discriminatory basis. Tomasevski's conceptualisation on government obligations regarding the parameter of access, has guided the formulation of interview questions for the study of equal access to education for children infected or affected by HIV/AIDS.

2 HIV/AIDS and the Right to Education

2.1 The Magnitude of the AIDS Pandemic

The history of AIDS stretches only some three decades back in time, but has relatively quickly attained pandemic status, posing one of the greatest threats to human health and development in the world. Sub-Saharan Africa remains the most affected region of the global AIDS pandemic. More than two thirds (68%) of all HIV-positive people in the world live here, and this is also where more than three quarters (76%) of all AIDS deaths occur. South Africa is today the country with the largest number of HIV infections in the world.² An estimated 5.7 million people are living with HIV in South Africa, which makes it the country home for the largest HIV epidemic in the world.³ AIDS is responsible for leaving vast numbers of children across Africa without one or both parents. The estimated number of maternal, paternal, and double orphans due to AIDS in South Africa rose from 1.2 million in 2001 to 2.9 million in 2007.⁴ Statistics show that 67% of South African households include one or more children orphaned by HIV.⁵

Extensive research has resulted in many lessons learned about the disease, such as the mapping out of symptoms and socio-economic consequences of the disease and possible ways of viral transmission. Despite the progress of knowledge made, a cure is yet to be found. In the absence of a cure, the HIV/AIDS crisis continues to expand and has become the most devastating disease the world has ever faced.⁶ As the pandemic devastates individual lives and entire societies, it becomes clear that the disease is not merely a medical condition and thus, cannot only be regarded as a matter concerning public health. HIV/AIDS poses a much bigger and more serious threat than the world could initially anticipate. The pandemic brings to the fore a complex set of issues relating to the physical, psychological and social wellbeing of humans. Societies are radically and fundamentally changed, and sometimes completely devastated, in areas where the pandemic ravages. Acknowledging the severity of the AIDS problem, UNESCO remarks that: “in the absence of a cure, and in most cases in the absence of adequate treatment, it diminishes or destroys quality of life before it takes away life itself.”⁷ In the midst of the disruptive chaos that HIV/AIDS causes,

² UNAIDS and WHO, AIDS Epidemic Update, 2007, p. 16.

³ UNAIDS Report on the Global AIDS Epidemic Report (2008), p. 40.

⁴ *Ibid.*, p. 47.

⁵ *Ibid.*, p. 166.

⁶ *Ibid.*, p. 40.

⁷ HIV/AIDS and Education: A Strategic Approach, International Institute for Educational Planning/UNESCO, Executive Summary, p. 13.

individual's human rights are jeopardised on a regular basis. UNDP also acknowledges the magnitude of HIV/AIDS and has proven concerned regarding its vast destruction. In its Human Development Report from 2005, it holds that "the HIV/AIDS pandemic has inflicted the single greatest reversal in human development"⁸. In conclusion, no one in Sub-Saharan Africa can escape the effects of the disease. Everyone is affected, either directly or indirectly. In sum, the brutal effects of the pandemic constitute a socio- and economic development disaster and the world can no longer turn its back on the magnitude of the AIDS pandemic.

2.2 Children in the AIDS Pandemic

Children Infected and Affected by HIV/AIDS

Children find themselves at the heart of the HIV/AIDS tragedy, and are, by scholars and the international community, acknowledged to be particularly vulnerable. Children are at risk in numerous ways: physically, emotionally and economically. According to UNAIDS, children under fifteen account for one in six AIDS-related deaths worldwide, and one in seven new HIV-infections. Ninety percent of the more than five million children who have been *infected* were born in Africa.⁹ Many children are *affected* by the disease even though they may not be infected with the virus themselves. HIV/AIDS affects children *directly*, for example, when parental illness cause children to drop out of school in order to work long hours to compensate for lost family income, or to stay at home to care for sick family members. Also, children may find themselves at high risk of HIV when living with a chronically ill parent (or parents). Children are *indirectly* affected when their communities, and the services these communities provide, are strained by the consequences of the epidemic. As nurses, doctors, teachers and others become ill and die from the disease, health care, education and other basic services in the community are inevitably severely affected. Furthermore, children are emotionally affected when daily forced to witness the illness, increasing inability, and subsequent death of family members, peers, teachers, and neighbours. Children are subjected to extensive trauma from having their loved ones torn away from them. Executive Director of UNICEF, Carol Bellamy explains that: "these children may experience anxiety and depression, loose out on their education, and, as they grow, may be at greater risk of HIV and other infections, as well as exploitation and abuse."¹⁰ Overall, much of the African younger generations find themselves living in a reality where communities are pushed towards the brink of complete and utter breakdown.

⁸ UNDP, Human Development Report 2005, p. 3

⁹ UNAIDS, 'Children and Orphans',
<www.unaids.org/en/PolicyAndPractice/KeyPopulations/ChildAndOrphans/>,
viewed on 21 April 2009.

¹⁰ UNICEF, Africa's Orphaned and Vulnerable Generations, Children Affected by AIDS, (August 2006), Executive summary, p. 18.

“As the second generation of children who have not known a world without AIDS is born, little progress has been made to protect children from the multiple effects this disease has on their lives. Children have only recently been included in HIV statistics: a child dies of an AIDS-related disease every minute; 2-3 million children live with AIDS worldwide; and more than 15 million are orphaned - 12 million in sub-Saharan Africa alone. These numbers cannot even begin to give insight into the difficulties that children living with HIV face”¹¹.

Children Orphaned by HIV/AIDS

AIDS is responsible for leaving vast numbers of children across Africa without one or both parents. The estimated number of maternal, paternal, and double orphans due to AIDS in South Africa rose from 1.2 million in 2001 to 2.9 million in 2007.¹² After illness and death caused by the pandemic, the harshest impact on children is the death of one or both parents and the resulting loss of affection, support and protection. Carol Bellamy expresses concern over the pandemic’s impacts on children and holds that: “the implications of [HIV/AIDS] are monstrous. The profound trauma of losing a mother or both parents has devastating long-term implications, not only for a child's survival, well-being and development, but for the stability of communities - and, ultimately, nations themselves.”¹³ In addition to the psychological trauma suffered by these children, evidence shows that orphans living with extended families or in foster care are frequently subject to discrimination and are less likely to receive healthcare, education and other needed services. According to Human Rights Watch, statistics show that children experiencing sickness or death of one or both parents are more likely than their peers to fall behind or drop out of school.¹⁴

2.3 HIV/AIDS Jeopardising Children’s Right to Education

The global HIV/AIDS pandemic has devastating impacts on the society, and children are hit particularly hard. Jonathan Cohen, researcher at Human Rights Watch, holds that "these children have lost enough. They should not be turned away from school and lose their right to an education as well."¹⁵

¹¹ The Lancet, ‘The Devastating Effects of HIV/AIDS on Children’, Lancet (British edition), Elsevier, (2006), Volume 368, Issue, 9534, p. 424.

¹² UNAIDS ‘Report on the Global AIDS Epidemic’, (2008), p. 47.

¹³ The Executive Director of UNICEF, Carol Bellamy, Speech 9 September, 2002, <www.unicef.org/media/media_9403.html>, viewed on 13 May 2009.

¹⁴ Human Rights Watch, ‘Letting Them Fail: Government Neglect and the Right to Education for Children Affected By AIDS’, October 2005, Vol. 17, No. 13 (A), p. 11.

¹⁵ Human Rights Watch, ‘Africa: Neglect of AIDS Orphans Fuels School Drop-outs’, <www.hrw.org/en/news/2005/10/11/africa-neglect-aids-orphans-fuels-school-drop-out>, viewed on 5 May 2009.

Children affected by the disease are facing a multitude of obstacles in the educational system, hindering them from equal access to schooling and educational resources. Human Rights Watch reports that children infected or affected by HIV/AIDS suffer a *de facto* discrimination in access to education. “By not confronting the special vulnerabilities of children affected by AIDS and extending basic protections to them and their families, governments create the conditions for de facto discrimination in access to education and undermine progress towards the goal of education for all”.¹⁶ Children infected or affected by the disease are discriminated access to education when they, for example, have to leave school in order to work to compensate for lost family income, or stay home to care for sick family members. Furthermore, they are discriminated access to education when schools refuse admission because they cannot pay school fees or afford other cost such as books and uniforms, or transportation to school.¹⁷

Jonathan Cohen stresses, "AIDS-affected children are failing to go to school, and it's because their governments are failing them".¹⁸ It is important governments take steps to keep children infected or affected by HIV/AIDS in school, since denying these children their right to education amounts to a significant violation of their human dignity, which simply cannot be tolerated.

¹⁶ Human Rights Watch, 'Letting Them Fail: Government Neglect and the Right to Education for Children Affected By AIDS', October 2005, Vol. 17, No. 13 (A), p. 2.

¹⁷ *Ibid.*, p. 51.

¹⁸ Human Rights Watch, 'Africa: Neglect of AIDS Orphans Fuels School Drop-outs', <www.hrw.org/en/news/2005/10/11/africa-neglect-aids-orphans-fuels-school-drop-out>, viewed on 5 May 2009.

3 International Legal Framework

3.1 The Right to Education under International Human Rights Law

The right to education is widely recognised as a fundamental human right in various international instruments. The status of the right to education as a fundamental right and its significance, both for the individual and society, is appreciated by the international community. The right to education is considerably accepted amongst different political, social, religious and cultural communities.¹⁹ The importance of the right to education can be illustrated by analysing its diverse functions. First, education is an empowerment right as it provides the individual with the necessary tools needed to claim and enjoy other human rights.²⁰ The right to education is essential for the enjoyment of, for example, the human right to vote, freedom of expression, freedom of information, freedom of association, labour rights and the right to participate in the cultural life of one's community. These human rights are all intrinsically linked to the right to education, as they all require a certain minimum level of education having been achieved to be meaningfully exercised.²¹ Secondly, the right to education is a development right as it promotes and facilitates the development of a nation through educating its human capital. Finally, the right to education has a societal function as it instils values such as tolerance and respect for human rights in individuals. These values play a significant role for the creation and maintenance of peaceful co-existence between people in society.²² In General Comment 13 written by the Committee on Economic, Social and Cultural Rights, the Committee expresses its views on the significance of the right to education and profoundly affirms its diverse functions. The Committee holds 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

¹⁹ K. D. Beiter, *The Protection of the Right to Education by International Law: Including a systematic analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights*, Martinus Nijhoff Publishers, 2006, The Netherlands. Chapter 2, p. 34.

²⁰ F. Veriava, Lecture: Good Governance Academy – The Right to Education, 12 March 2009.

²¹ D. Brande and C. Heyns (eds.), *Socio-economic rights in South Africa*, p. 57, Electronic resource, <www.chr.up.ac.za/centre_publications/socio/book/Chapter%202-Education.pdf>, viewed on 20th of September

²² F. Veriava, Lecture: Good Governance Academy – The Right to Education, 12 March 2009.

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."²³

In this sense education refers to the transmission to a subsequent generation of those skills needed to perform tasks of daily living, and further passing on the social, cultural, spiritual and philosophical values of the particular community.

3.2 Defining the Right to Education

Article 1(2) of the 1960 UNESCO Convention against Discrimination in Education, defines education as: "all types and levels of education, [including] access to education, the standard and quality of education, and the conditions under which it is given."²⁴ A more lucid definition of the term 'education' can be found in one of UNESCO's recommendations²⁵, where it is stated that education implies: "the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capabilities, attitudes, aptitudes and knowledge."²⁶

According to article 5 of the World Declaration on Education for All, "primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community". The term basic learning needs is defined as "essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning"²⁷. The Committee on Economic, Social and Cultural rights has in its General Comment No. 13 interpreted primary education as to encompass two important features: it shall be both compulsory and available free to all. The Committee has observed that

²³ Committee on Economic, Social and Cultural Rights, General Comment 13, 'The Right to Education'.

²⁴ UNESCO Convention Against Discrimination in Education, Article 1 (2).

²⁵ UNESCO's 1974 Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms, Article 1 (a).

²⁶ The Committee on Economic, Social and Cultural Rights, General Comment No. 13, The Right to Education.

²⁷ UNESCO 'Declaration on Education for All', Article 1.

compulsory schooling “highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education”²⁸. Available free to all is aimed to guarantee every child’s enjoyment of the right, since school fees and other direct and indirect costs are regarded as a threat to the realisation of the right to education on an equal basis for all children.²⁹

3.2.1 State Obligation to Protect, Respect and Fulfil

Governments have responsibilities at three different levels: they must respect the right; they must protect the right; and they must fulfil the right.³⁰ The obligation to *respect* requires states not to take any measures that would result in preventing individuals from the enjoyment of the human right. The obligation to *protect* requires measures by the State to ensure that third parties do not deprive rights-holders of their right to education. The obligation to *fulfil* incorporates two obligations upon the state. One the one hand, states are required to *facilitate*, meaning they have to “take positive measures that enable and assist individuals and communities to enjoy the right to education”. On the other hand, states are obligated to *provide*, which entails that the State, as a last resort, must provide education “when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal”³¹.

3.2.2 Indicators: Tomasevski’s 4-A Scheme

Former UN Special Rapporteur on the right to education, Katarina Tomasevski, has made a significant contribution to human rights law through the development of a set of indicators aimed at measuring state obligations regarding human rights. Tomasevski uses human rights indicators, designed to monitor and evaluate the extent to which education policies and practices conform to the international legal obligations of governments.³² The importance of human rights indicators, as a tool for measurement of a certain right’s implementation in a given context, should not be underestimated. As a method, human rights indicators, have the potential to concretise government’s human rights obligations and thus make the degree of implementation of the right to education measurable. As Tomasevski puts it: “making human rights measurable elevates their visibility in designing education strategies, both global and national”³³. Katarina Tomasevski’s 4-A Scheme consists of the parameters availability,

²⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 11, para. 6.

²⁹ *Ibid.*, para. 7.

³⁰ A. Eide, Economic, Social and Cultural Rights as Human Rights. In Eide A, Krause C, Rosas A (Eds). *Economic, Social and Cultural Rights: A Textbook*. Dordrecht: Martinus Nijhoff, 1995, pp. 23-25.

³¹ K. Tomasevski, *Human Rights Obligations in Education: the 4 A-Scheme*, Wolf Legal Publishers, the Netherlands, (2006), p. 128 ff.

³² *Ibid.*, pp. 128 ff.

³³ *Ibid.*, pp. 128.

accessibility, acceptability and adaptability. The parameters of the 4-A Scheme together describe the state's core obligations regarding the right to education. According to Tomasevski's scheme, governments are under an obligation to make basic education available, accessible, acceptable and adaptable. The state has to make education available by, for example, ensuring physical access to educational institutions by the establishment of schools, providing teaching materials and hiring school staff. The government also has to make education accessible by ensuring equal access to schools, preventing exclusion and discrimination in the educational system. The essence of the parameter accessibility in the 4-A Scheme is that the state has to ensure not only physical access to educational institutions, by building schools, providing teaching materials etc. but also ensure access on the basis of non-discrimination. Educational institutions must be open to everyone. Furthermore, educational curriculum needs to be acceptable which means that educational institutions and school curriculum must hold a certain qualitative standard. Minimum standards of health and safety, professional requirements for teachers, and respect for human rights are required to fulfil this obligation. Adaptability essentially requires the state to ensure that educational institutions adapt to children and their needs, following the cardinal principal of the best interests of each child as enshrined in CRC and other binding human rights instruments in South Africa.³⁴

As previously stated, the focus of this thesis is the parameter of *access*, which essentially obligates governments to provide education on a non-discriminatory basis. Under the conceptual framework of the parameter access, Tomasevski identifies main obstacles preventing equal access to education, which the government is under an obligation to eliminate. These include legal and administrative barriers, financial obstacles, and obstacles to compulsory schooling such as fees, and distance. Furthermore, according to Tomasevski's scheme, governments must identify and eliminate discriminatory denials of equal access to education.³⁵

3.3 The Convention on the Rights of the Child

The most important international legal instrument protecting children is the Convention on the Rights of the Child (CRC), which entered into force on 2 September on 1990. The Convention has reached almost universal acceptance in the international community with its 193 state parties and as such, it can be regarded as the foremost important instrument in the field of children's rights. CRC sets out the rights of the child in a comprehensive manner. The treaty is holistic in nature, protecting both the civil and political rights as well as economic, social, and cultural rights of the child. It was the first legally binding instrument of its kind with the inclusion of the entire range of rights (i.e. civil, political, economic, social and cultural

³⁴ K. Tomasevski, *Education Denied*, Palgrave, New York, 2003, p. 51.

³⁵ K. Tomasevski, *Right to Education Primer No. 3, 'Human Rights obligations: Making Education Available, Accessible, Acceptable and Adaptable'*, p. 12.

rights).³⁶ The interpretation of the rights set out in CRC is guided by the following four general principles: non-discrimination (Article 2), the best interest of the child (Article 3), the right to life, survival and development (Article 6), and the right to express views and have them taken into account (Article 12). These principles shall guide the interpretation of all the rights enshrined in the CRC, including the right to education.³⁷ By ratifying the convention, states parties are under an obligation to protect and ensure all of the rights enshrined in the CRC. Hence, the South African government has committed to protect and ensure the rights of children, and agreed to be held accountable for this commitment before the international community.³⁸

3.3.1 Relevant Legal Provisions

Article 1 of CRC defines the child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.³⁹ The relevant provisions protecting the right to education in CRC are article 28, which requires all state parties to establish educational systems and ensure equal access to those. As a means in ensuring equal access to education, the article holds that states are under an obligation to measure attendance and drop-out rates.⁴⁰ Furthermore, the states are required to make primary education compulsory, and available free for all.⁴¹ Article 28 must be read together with Article 4 of CRC, which requires states parties to take all appropriate measures to implement the rights enshrined in the convention. Article 4 stipulates that “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention”. Regarding economic, social and cultural rights, “States Parties shall undertake such measures to the maximum extent of their available resources”.⁴² Despite the fact that the right to education is regarded as a progressive right, meaning it can be implemented gradually, an obligation is imposed on the government to move as expeditiously and effectively as possible towards the full realisation of the right, with the maximum of its available resources. Even though progressive realisation of the right to education is acceptable under certain circumstances, it can never be justified to realise the right on a discriminatory basis. Discrimination is prohibited under Article 2 of the CRC. According to the provision, States parties shall respect and ensure the right set forth in the Convention “without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other

³⁶ <http://www.right-to-education.org/node/217>, viewed on 21st of April 2009.

³⁷ K. D. Beiter, *The Protection of the Right to Education by International Law: including a systematic analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights*, Martinus Nijhoff Publishers, 2006, The Netherlands. Chapter 4, p. 115

³⁸ UNICEF, <http://www.unicef.org/crc/>

³⁹ United Nations Convention on the Rights of the Child (1989), Article 1.

⁴⁰ *Ibid.*, Article 28 (1) (e).

⁴¹ *Ibid.*, Article 28 (1) (a).

⁴² *Ibid.*, Article 4.

status”.⁴³ It shall be noted that the term ‘other status’ has been interpreted by the Commission on Human Rights as to encompass health status, including HIV/AIDS.⁴⁴ Hence, South Africa is under an obligation to respect and ensure the rights in the Convention to each child within its jurisdiction without discrimination of any kind.⁴⁵ This provision obligates states to actively identify marginalised groups of children and individuals whose realisation of rights demand special efforts.⁴⁶

3.4 African (Banjul) Charter on Human and Peoples’ Rights

The regional African legal system also provides protection of the right to education. The African Charter on Human and Peoples’ Rights (ACHPR), more commonly known as the ‘Banjul Charter’, was adopted in 1981 and entered into force in South Africa in 1986.⁴⁷ The Charter makes a short reference to the right to education in Article 17 (1) which states that “every individual shall have the right to education”.⁴⁸ The provision gives however no further explanation on the specific content of the right. Furthermore, according to Article 2, the rights and freedoms enshrined in the Charter shall be entitled to everyone, “without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”.⁴⁹

3.5 African Charter on the Rights and Welfare of the Child

The former Organisation of African Unity (OAU) adopted the African Charter on the Rights and Welfare of the Child (ACRWC) in 1990, which entered into force in South Africa in 2000.⁵⁰ ACRWC spells out the rights that African state parties must ensure for children under their jurisdiction. The charter emerged through the context of perceived insufficiency of the CRC regarding the socio-cultural and economic situation of children living in the African setting. In many respects, the provisions in ACRWC are similar to those of the CRC. However, the Charter stresses the peculiarities of the African context in relation to children’s rights and attempts to close the alleged gap in human rights protection for African children. Some

⁴³ United Nations Convention on the Rights of the Child (1989), Article 2.

⁴⁴ Commission on Human Rights resolutions 1995/44 of 3 March 1995 and 1996/43 of 19 April 1996.

⁴⁵ United Nations Convention on the Rights of the Child (1989), Article 2

⁴⁶ CRC, General Comment No 5, General Measures of Implementation for the Convention on the Rights of the Child, CRC/GC/2003/5, (27/11/2003), p. 4. [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/\\$FILE/G0345514.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/$FILE/G0345514.pdf)

⁴⁷ <http://www.dfa.gov.za/foreign/Multilateral/africa/treaties/banjul.htm>, viewed on 9 May, 2009.

⁴⁸ African Charter on Human and Peoples’ Rights, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, Article 17 (1).

⁴⁹ *Ibid.*, Article 2.

⁵⁰ <http://www1.umn.edu/humanrts/instree/afchildratifications.html>, viewed on 6 May, 2009.

scholars have argued that the ACRWC offers a higher level of protection than that offered by the CRC.⁵¹

All State Parties to the ACRWC are also parties to the CRC. Despite the context of criticism in which the treaty emerged, one should not regard CRC and the African Children's Charter as competing legal instruments. The ACRWC should rather be regarded as complementary legal protection and care for African children, paying special attention to their specific needs and taking into account the African social and cultural values. Together, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, provide a framework of legal protection for children in Africa, acknowledging the child as a subject, possessing of certain rights.⁵²

3.5.1 Relevant Legal Provisions

Article 1 stipulates that state parties to the ACRWC are expected to put in place the necessary machinery to give effect to the rights laid down by the charter and discourage “any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations”⁵³ in the charter. Regarding the right to education, a more extensive and elaborate provision than the one offered in the African regional human rights instrument the ACHPR can be found in the ACRWC. It shall also be noted that the ACRWC does not contain the inbuilt limitations, commonly known as “claw-back-clauses”, that are present in ACHPR which essentially undermines human rights as they are made subject to the dictates of state law instead of enjoying an elevated status (i.e. not regarded as superior to state law).⁵⁴ The right to education is set out in lengthy Article 11 (1) – (7), with the right to education granted to every child in Article 11 (1). South Africa is, according to Article 11 (3) (a), required to provide free and compulsory basic education, which is an obligation it has yet to fulfil. State parties are further required to take measures to encourage regular attendance at schools and reduce drop-out rates.⁵⁵ South Africa is further bound to take special measures to ensure equal access to education for female, gifted and disadvantaged children.⁵⁶

⁵¹ Julia Sloth-Nielsen (ed.), 'Dejo Olowu, Chapter 2 in “Children's Rights in Africa: A Legal Perspective”, p. 23.

⁵² 'Dejo Olowu, Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child”, The International Journal of Children's Rights, issue 10, 2002, p. 127-128.

⁵³ African Charter on the Rights and Welfare of the Child, Article 1.

⁵⁴ 'Dejo Olowu, Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child”, The International Journal of Children's Rights, issue 10, 2002, pp. 127-128.

⁵⁵ African Charter on the Rights and Welfare of the Child, Article 11 (3) (d).

⁵⁶ *Ibid.*, Article 11 (3) (d).

3.6 International Human Rights Law and HIV/AIDS

One of the major problems individuals infected or affected by HIV/AIDS experience is discrimination. Despite acknowledgment of the vulnerability of people infected or affected by HIV/AIDS, there is no international human rights convention that specifically provides protection against unfair discrimination on the basis of HIV/AIDS. However, though legally not binding, soft law documents such as the International Guidelines on HIV/AIDS and Human Rights and the Declaration of Commitment on HIV/AIDS illustrate recognition of the HIV/AIDS pandemic and its resulting deterioration of human rights.

3.6.1 International Guidelines on HIV/AIDS and Human Rights

The International Guidelines on HIV/AIDS and Human Rights, (the Guidelines) adopted by the UNAIDS and the Office of the United Nations High Commissioner for Human Rights in 1996, aims at guiding states on how to take concrete steps to protect human rights in the context of HIV and AIDS.⁵⁷ The Guidelines consists of 12 steps with the aim of helping states implement an effective rights-based approach towards HIV/AIDS.⁵⁸ With regard to the right to education for children infected or affected by HIV/AIDS, Guideline 5 and 8 are of most relevance. Guideline 5 emphasises the importance by states to both enact and strengthen existing anti-discrimination laws in order to protect people living with HIV, and holds that it is important that discrimination laws covers both direct and indirect discrimination. Furthermore, discrimination laws should cover people living with HIV infection, people living with AIDS but also those who merely are suspected of HIV or AIDS. Guideline 5 also recommends that HIV and AIDS should be included as one form of disability in disability laws.⁵⁹ Guideline 8 concern women, children and other vulnerable groups and stresses the importance of addressing underlying prejudices and inequalities by promoting a supportive and enabling environment in society. According to the commentary on Guideline 8, “states should take measures to reduce the vulnerability, stigmatization and discrimination that surround HIV and promote a supportive and enabling environment by addressing underlying prejudices and inequalities within societies and a social environment conducive to positive behaviour change”. The commentary further stresses how the vulnerability often is due to “their limited access to resources, information, education and lack of autonomy”. Therefore, the issue of access is stressed as of outmost importance for these groups in society, and hence, special programmes and measures should be established

⁵⁷ Human Rights Protected? Nine Southern African country reports on HIV, AIDS and the law, Chapter 6, HIV, AIDS and the law in South Africa, Pretoria University Law Press, (Pretoria, 2007), p. 213.

⁵⁸ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, ‘International Guidelines on HIV/AIDS and Human Rights’, 2006, Consolidated Version, p. 17.

⁵⁹ *Ibid.*, p. 31.

to guarantee they are not denied access to resources, information and education.⁶⁰ The Guidelines also comment upon the application of specific human rights in the context of the HIV/AIDS pandemic. The issue of non-discrimination and equality is addressed, and it is noted that the Commission on Human Rights has confirmed that ‘other status’ in non-discrimination provisions shall be interpreted as to encompass health status, including HIV/AIDS.⁶¹ The right to education is also commented upon, and it is stressed that children living with HIV/AIDS should not be denied access to education, or be subjected to restrictions because of their HIV status.⁶²

3.6.2 Declaration of Commitment on HIV/AIDS

In 2001 the United Nations General Assembly sets out five priority areas in the context of HIV/AIDS, of which two more or less address the issue of equal access to education for children infected or affected by HIV/AIDS. One of the priority areas is the realisation of human rights, education as one example, for those who are made vulnerable by HIV/AIDS.⁶³ Another priority area that the Declaration stress is care and support for children orphaned and made vulnerable by HIV/AIDS.⁶⁴ The declaration is not legally binding, yet the annual review of states’ progress towards the realisation of the promises enshrined in the declaration provides a powerful tool to encourage government action in responding to the devastating effects which the disease poses.

3.6.3 General Comment No. 3

General Comment No. 3, written by Committee on the Rights of the Child, deals with the issue of HIV/AIDS and its impact on children’s rights.⁶⁵ In this general comment, the committee deals with relevant provisions of CRC and their connection to HIV/AIDS. The committee acknowledges the fact that HIV/AIDS not only impacts children’s human right to health but a whole range of other rights. In the words of the committee: “HIV/AIDS impacts so heavily on the lives of all children that it affects all their rights – civil, political, economic, social and cultural”.⁶⁶ In the view of the

⁶⁰ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, ‘International Guidelines on HIV/AIDS and Human Rights’, 2006, Consolidated Version, pp. 55-56.

⁶¹ *Ibid.*, pp. 83-84.

⁶² *Ibid.*, pp. 96-97.

⁶³ Declaration of Commitment on HIV/AIDS, United Nations General Assembly, Special Session on HIV/AIDS, 25-27 June 2001, p. 24.

⁶⁴ *Ibid.*, p. 29.

⁶⁵ CRC, General Comment No 3, HIV/AIDS and the Rights of the Child, CRC/GC/2003/3, (17/03/2003).

[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/309e8c3807aa8cb7c1256d2d0038caaa/\\$FILE/G0340816.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/309e8c3807aa8cb7c1256d2d0038caaa/$FILE/G0340816.pdf)

⁶⁶ CRC, General Comment No 3, HIV/AIDS and the Rights of the Child, CRC/GC/2003/3, (17/03/2003).

committee, the four guiding interpretational principles “provide a powerful framework for efforts to reduce the negative impact of the pandemic on the lives of children. The holistic rights-based approach required to implement the Convention is the optimal tool for addressing the broader range of issues that relate to prevention, treatment and care efforts”.⁶⁷ Regarding the right to education, the committee sheds light on the fact that many children living in communities with high prevalence of HIV are struggling to stay in school and that the number of school staff dying from AIDS is further threatening their access to education. In this context, the committee reminds state parties of their obligation to ensure availability of primary education to all children, whether infected, orphaned or otherwise affected by HIV/AIDS. In the area of education, General Comment No. 3 generally stressed the obligation of state parties to take adequate measures to ensure better protection of the right to education for children affected by HIV/AIDS.

3.7 Conclusion

In conclusion, it is evident that South Africa, voluntary through the ratification of relevant international human rights instruments, such as the CRC and the ACRWC, has undertaken the obligation to ensure the right to free and compulsory education for all children without discrimination of any kind. Documents such as the general comment no. 3 to CRC, undoubtedly recognises the vulnerability of children infected and affected by HIV/AIDS and demands positive government action to address stigma and discrimination. Hence, the South African government thus clearly has a legal duty to ensure equal access to education for children infected or affected by HIV/AIDS.

[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/309e8c3807aa8cb7c1256d2d0038caaa/\\$FILE/G0340816.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/309e8c3807aa8cb7c1256d2d0038caaa/$FILE/G0340816.pdf), p. 2-3.

⁶⁷ *Ibid.*, p. 3.

4 Domestic Legal Framework

4.1 Understanding Education and HIV/AIDS in South Africa

In order to fully grasp the educational context of South Africa, it is necessary to understand both the country's special historical setting of apartheid with its consequent deterioration of education, and the very real threat that HIV/AIDS has increasingly come to pose to education in South Africa today. The South African education system of today must be viewed against the backdrop of the old apartheid regime and the subsequent political challenges associated with overcoming this legalised system founded on racial disparities. A new constitution, substantial reform of the education system and an elevated attention to children's rights have all formed part of the efforts made towards a new democratic South Africa. The HIV/AIDS pandemic has made the task of creating a new education system, founded on democratic values and respect for fundamental human rights, more complex than anticipated. The HIV/AIDS pandemic has proven to be a very real and serious challenge to the South African education system. After a slow start and an initially fragmented response, the international community pressured the South African government to deal consistently and efficiently with the devastating effects caused by the AIDS pandemic.

4.1.1 Addressing Apartheid Legacy with Legal Reform

The major challenge to eliminate the legalised system of inequality created under apartheid originated with the adoption of the current South African Constitution. The adoption of a new Constitution on 8 May 1996 formed an important step in overcoming the inherent injustices of apartheid, and constituted a significant step in addressing the established discriminatory practices and inequalities. The new Constitution marked the beginning of the struggle towards the creation of a new democratic South Africa. A Bill of Rights (BOR) was incorporated in chapter 2 of the Constitution, offering protection of civil and political, as well as socio-economic and cultural human rights.⁶⁸

Professor John Cantius Mubangizi explains that the decision to include socio-economic rights in the South African Constitution "has to be seen in the context of the unique history of the country – a history that was characterised by gross human rights violations, denial of access to social goods and services to the majority of the people and lack of access to

⁶⁸ J. C. Mubangizi, *The Protection of Human Rights in South Africa, A Legal and Practical Guide*, Juta and Company Ltd, (2005), p. 71

economic means and resources.”⁶⁹ He continues to hold that the inclusion of socioeconomic rights must “be seen in the context of the level of widespread poverty occasioned by a historically unfair and unjust political and socio-economic system – a system that created a society of gross inequality described more than a decade ago as a society of ‘poverty amidst plenty’”.⁷⁰

Mubangizi concludes that this societal inequality was aggravated by the fact that South Africa is vastly diverse and that it therefore was “envisioned that including socio-economic rights in the constitution would play some role in off-setting the imbalance and reducing the inequality”.⁷¹

The adoption of the South African Schools Act 84 of 1996 (SASA), continued the transformation of society in the same spirit as the Constitution, with the main purpose to abolish the previous racially discriminatory apartheid education system. The law created a uniform system regarding the organisation, management and financing of South African schools.⁷²

The current education system is aimed towards the eradication of the residue of human rights abuses and other negative effects that the apartheid education system created and forcefully upheld. During apartheid, education was strictly structured along racial lines, socialising learners of different colours (so called ‘race groups’) into their expected roles in a racially divided South Africa. Distinguishing features of the apartheid education system was the significant inequalities in the financing of education, different curricula for different race groups and restricted access of black learners to higher education. Financial disparities in education, structured along racial lines, created immense differences regarding the quality of education enjoyed by the learners of the different assigned groups.⁷³ Hence, the enactment of the South African School’s Act laid the foundation for a new national system for schools that would redress the injustices of the past.⁷⁴

The South African post-apartheid government has also prioritized children’s well-being as a key development goal and the adoption of the Children’s Act 38 of 2005 is yet another law that replaces legislation originating from the apartheid period.⁷⁵ The Commentary on the Children’s Act describes the

⁶⁹ J. C. Mubangizi, *Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience*, 2007. p. 3
<http://www.enelsyn.gr/papers/w13/Paper%20by%20Prof.%20John%20Cantius%20Mubangizi.pdf>, retrieved on 2009-05-13.

⁷⁰ *Ibid.*, pp. 3-4.

⁷¹ *Ibid.*, p. 4.

⁷² South African School’s Act, 84 of 1996.

⁷³ F. Veriava, Lecture: Good Governance Academy – The Right to Education, 12 March 2009.

⁷⁴ South African School’s Act, 84 of 1996, Preamble.

⁷⁵ R. September and M. Dinbabo, (2008) ‘Gearing Up for Implementation: A New Children’s Act for South Africa’, *Practice*, Volume 20, No: 2, p. 113.

context, in which the urgency for a comprehensive and holistic reformation of law affecting South African children arose, as “children have always been vulnerable yet voiceless members of society. They suffered both directly and indirectly from human rights violations associated with apartheid policies, deep-rooted poverty and unemployment, inadequate or non-existent education, breakdown of family life and separation from parents”.⁷⁶ Acknowledging children’s particular position of vulnerability, the Children’s Act is significant in the educational context as it regulates issues such as HIV/AIDS testing, confidentiality and disclosure which traditionally have been grounds for discrimination of HIV/AIDS infected and affected children.⁷⁷

However, despite the government’s considerable efforts on legal reform through the enactment of laws aimed at redressing injustices of the past, and the enhancement of children’s rights through the adoption of the Children’s Act, the current education system in South Africa is still struggling to overcome the vast inequalities established and upheld by the apartheid regime.

Inequality in Education Persists

While the formal discrimination on racial grounds are removed and schools now must admit learners of all race groups, the major inequalities still persists between schools that in the past political regime were “white” and schools that were “black”. The main reason put forward to explain this inequality has been the structure of the governmental funding system. All public schools receive financial support from the government but these funds are not sufficient for proper improvement and maintenance of the schools. According to the South African School’s Act, the schools are allowed to charge school fees as a means of additional funding. The inevitable consequence of this funding system is that schools that were historically “white” and used to enjoy higher funding, situated in wealthy areas essentially remain privileged as they can charge higher school fees and thus manage to maintain a high standard of education. In contrast, historically “black” schools in poor areas cannot charge high school fees and therefore continue to deteriorate.⁷⁸

In the preface of the book “Schools and the Law: A Participant’s Guide” Brendan Barry reflects over the significant legal shift that the South African education system has undergone over the past years. Education during the apartheid era was characterised by racial inequality, segregation and fragmentation. Barry notes that the South African school system has undergone substantial change over a remarkably short period of time, with a

⁷⁶ C. J. Davel and A. M Skelton, Commentary on the Children’s Act, Juta & Co Ltd, Cape Town (2007), Chapter 2, p. 2.

⁷⁷ R. September and M. Dinbabo, (2008) ‘Gearing Up for Implementation: A New Children’s Act for South Africa’, Practice, Volume 20, No: 2, p. 113.

⁷⁸ S. Khoza (ed.), Socio-Economic Rights in South Africa, p. 414.

surprising amount of societal consensus. However, while impressed over the significant progress and the establishment of the current system with a constitutional guarantee of basic education, Barry remarks, that “the school system still bears the scars of its past and schooling remains at the centre of intense debate in [the South African) society”.⁷⁹ The debate revolves around issues relating to “access and equality, curriculum and quality, language, freedom of conscience and religion, resources and facilities, state funding and school fees”.⁸⁰

4.1.2 The South African Government’s Response to the AIDS Pandemic

The first South African national response towards AIDS was initiated in 1990, leading to the creation of a National AIDS Convention and subsequently a comprehensive and progressive AIDS Plan for the country. At this period of time, AIDS prevalence in South Africa was still low. When the ANC came to power in 1994 the plan was adopted and the country appeared to be having a comprehensive approach to address HIV/AIDS. Health minister at that time, Nkosazana Dlamini-Zuma was critical towards the truthfulness of leading AIDS science and highly sceptical towards the effectiveness of antiretroviral drugs (ARVs). A position strengthened when Thabo Mbeki came to power in 1999.⁸¹ Mantombazana Tshabalala-Msimang was appointed health minister in Mbeki’s new government, and occupied the position for nine years (between 1999 and 2008). Tshabalala-Msimang has repeatedly questioned the effectiveness of ARVs and supported the use of alternative medicines for the treatment of HIV/AIDS.⁸² She became infamous worldwide for promoting vegetables, such as beetroot and garlic, rather than ARVs for treatment of HIV/AIDS, and has sarcastically been nicknamed “Dr. Beetroot”.⁸³ In addition to questioning the effectiveness of ARVs, she has been accused for supporting ‘Rath Health Foundation’, which is a company who sells multivitamins as alternative treatment for cancer and AIDS and which has published adverts in South Africa claiming that ARVs are toxic and cause AIDS.⁸⁴ The criticism against the South African government for not taking the HIV/AIDS problem seriously, and for not taking sufficient action to prevent the spread of the disease, peaked when Mbeki appeared to be questioning

⁷⁹ B. Barry, *Schools and the Law: A Participant’s Guide*, Juta Ltd, Cape Town, 2006, p. iii (preface).

⁸⁰ *Ibid.*, p. iii (preface).

⁸¹ N. Nattrass, ‘AIDS and the Scientific Governance of Medicine in Post-Apartheid South Africa’, *African Affairs*, Volume 107, Issue 427, (2008), p. 157-158.

⁸² *Ibid.*, pp. 157-159.

⁸³ Reuters, October, 9, (2007), News Article by Michael Georgy, ‘Interview: South Africa forgets children in AIDS fight UN’.

⁸⁴ N. Nattrass, ‘AIDS and the Scientific Governance of Medicine in Post-Apartheid South Africa’, *African Affairs*, Volume 107, Issue 427, (2008), p. 169.

the scientifically established link between HIV and AIDS at the International AIDS conference in 2000.⁸⁵

Treatment Action Campaign brings Government before the Constitutional Court

South Africa has received criticism and negative publicity regarding its lack of AIDS awareness and effective policies from various domestic and international actors. AIDS activists have continuously raised their voices about the government's persistent denial and mixed messages regarding HIV/AIDS, and have worked tirelessly for the rights of people living with HIV/AIDS. An important accomplishment in this struggle was made in 2002 when the most influential AIDS lobby group in South Africa, 'the Treatment Action Campaign', (TAC) won a litigation process against the state in the Constitutional Court. The case concerned antiretroviral drugs for pregnant HIV positive women, an area of controversy as the government was critical towards, and ultimately had resisted to ensure that mother-to-child transmission prevention (MTCTP) was available to all pregnant women. The Constitutional Court ruled in favour of TAC, and the government was forced to provide ARVs to HIV positive pregnant women in state hospitals. The judgment provided a way to mitigate the impact of HIV/AIDS as HIV can be transmitted from a mother to her child during pregnancy, labour, birth or breastfeeding, and ARVs substantially reduces the risk for the child to get infected with the virus. The TAC judgement was an important victory in the battle against HIV/AIDS and the protection of human rights. Furthermore, the outcome of the TAC-case (i.e. the granting of access of ARVs to positive HIV pregnant women) has greatly progressed both women's and children's rights in South Africa by affirming that women and children have the same right to health as everyone else.

Continuous Concern by International Community

At the AIDS Conference in Toronto in 2006, AIDS activists and the international community were continuously concerned about the governmental denial and mixed messages around HIV/AIDS issues. During the conference, Mark Heywood, leader of NGO 'the AIDS Law Project' spoke very critically about the health minister performance and urged her to resign. Heywood pointed out that he was not being disloyal to the government, but loyal to "the people that are dying at this very minute in poor communities throughout [South Africa] and are being deprived of medical services."⁸⁶ Heywood continued his criticism and was of the opinion that "one of the greatest missing pieces at this conference has been the question of political leadership."⁸⁷ Ann Veneman, Executive Director at

⁸⁵ CBC News, August 17, (2006). News Report from the International AIDS Conference in Toronto, and Reuter, October 9, (2007). News Article by Michael Georgy. 'Interview: South Africa forgets children in AIDS fight UN'.

⁸⁶ CBC News, August 17, 2006. News Report from the International AIDS Conference in Toronto 2006.

⁸⁷ *Ibid.*,

UNICEF, has also expressed serious concern and called upon both the government and community leaders in the country to end what she defined as 'a state of denial'. According to Veneman, it is necessary for the government to acknowledge the magnitude of the HIV/AIDS problem, and realise its harsh impacts upon the society, especially upon children.⁸⁸

At present, the international community is still concerned with the South African government's denial and inadequate action on HIV/AIDS. The new five-year 'National Strategic Plan' for the fight against HIV/AIDS adopted in 2007, and the removal of harshly criticised health minister Tshabalala-Msimang together with Mbeki's resignation as head of state in 2008, offered a glimpse of hope in the otherwise gloomy picture that government response to HIV/AIDS has painted. Scholars and academics in the world greatly anticipated a shift in attitudes from the South African government regarding the AIDS pandemic. Despite the careful hope by the international community, that South Africa would develop a more progressive and efficient HIV/AIDS response, the new president Jacob Zuma, elected in April 2009, might not be the perfect match for such a complex task. Zuma has been criticised for giving mixed messages around HIV/AIDS, and his commitment to fighting the disease has been questioned. Newly appointed health minister Aaron Motsoaledi also has a critical task on this table, and will therefore have the world's critical eyes on him, monitoring his performance. It remains therefore to see, whether the new government will take a strong and vocal stand against, what creatively has been labelled 'AIDS denialism'.

Consequences of AIDS Denialism by the Government

If the South African government would have responded more consistently and effectively towards HIV/AIDS, more lives could have been saved and the quality of many people's lives could have been drastically improved. As previously stated, children are at the heart of the pandemic, suffering perhaps the most by government denialism and negligence. They are subjected to deprivation of their family members and friends, getting infected with the virus themselves, and are being affected in numerous other ways because of a response towards the disease which is essentially insufficient and irresponsible.

HIV Response in Education

UNICEF has drawn the world's attention to the fact that children are largely missing in the global response to HIV and AIDS and has raised criticism over the fact that children infected or affected by HIV/AIDS have systematically been disregarded or overlooked in AIDS-programmes,

⁸⁸ Reuters, October, 9, (2007), News Article by Michael Georgy, 'Interview-South Africa forgets children in AIDS fight-UN'.

policies and budgets.⁸⁹ While this largely remains true, it shall be acknowledged that the South African government has recognised the threat that the AIDS pandemic poses to the right to education for South African children. The government has created the ‘National Policy on HIV/AIDS for learners and educators in public schools of 1999’, which addresses the issue of HIV/AIDS in schools and how this should be handled. Another important to address HIV/AIDS within the education system has been the introduction of the subject ‘Life Orientation’. The introduction of Life Skills training in the curriculum aims at equipping children and youth with the necessary life skills, concerned with creating “knowledge about the self and the skills that will enable young people to engage socially, to be responsible citizens, living healthy and productive lives.”⁹⁰

In conclusion, understanding education and HIV/AIDS in the South African context requires awareness of the apartheid system and its creation of an inherently unequal education system, and the subsequent political challenge to overcome apartheid legacy through legal reform. Considerable efforts to address the injustices of the past have been made. However, inequality in education is still a problem, and the HIV/AIDS pandemic exacerbates factors contributing to injustice. The South African government’s HIV/AIDS response has, at its best, been fragmented and at its worst, been stubbornly misinformed. Denial of scientific facts and general inadequateness of action has undoubtedly adversely affected the right to education for South African children infected or affected by HIV/AIDS. Government policies on HIV/AIDS can never be fully affected unless the government deliver a consistent and coherent message on the issue, even though the potential outcome of legal reform efforts and policy documents protecting learners infected or affected by HIV/AIDS in education shall not be underestimated. The legal status of the right to education, and the legal provisions relevant to the study of equal access to education for children infected or affected by HIV/AIDS will be further explored below.

4.2 The Right of Everyone to Basic Education

The right of everyone to basic education is guaranteed under section 29 (1) (a) of the Constitution. It shall be noted that while everyone is entitled to basic education, children are regarded as the principal beneficiaries of the right to basic education, and section 29 (1) (a) has been described as first and foremost a child right.⁹¹

⁸⁹ UNICEF, Children and HIV/AIDS, <www.unicef.org/aids/index_42838.html>, viewed on 19th of September 2008.

⁹⁰ R Ferguson, Life Orientation: What’s it all about?, Education in South Africa today, p.29.
<http://web.wits.ac.za/NR/rdonlyres/B868698E-FCC4-4EDD-A4B4-E7B0CFA40B4B/7451/LifeOrientationWhatsitallabout.pdf>, viewed on 16th May, 2009.

⁹¹ ‘Monitoring Child Socio-Economic Rights in South Africa: Achievements and Challenges, edited by Erika Coetzee and Judith Streak, Chapter Two, p. 54.

4.2.1 Lack of Clearly Defined Right and Corresponding Governmental Duty

The Constitution does not specify the exact content and scope of the right to basic education for children and the Constitutional Court has not yet addressed the question.⁹² The lack of a clearly defined right and the corresponding obligation upon the state has been a concern for leading human rights scholars. It has been pointed out that: “a critical issue that needs to be addressed is how to deal with the practical problem of clarifying the nature and scope of the obligations in relation to children’s socio-economic rights”⁹³. Furthermore, scholars have warned that “a lack of clarity around the level of entitlements implied by the rights is dangerous: it leaves room for government to arbitrarily decide on what level of services to provide to children in order to give effect to their rights”⁹⁴. In essence, at the most elementary level, it is difficult for the state to deliver something if it does not know what it is. Furthermore, a monitoring of the deliverance of something that is undefined is simply rendered impossible.⁹⁵ While the Constitution requires the state to “respect, protect, promote and fulfil”⁹⁶ the rights enshrined in the BOR, this offers little guidance as to determine the exact nature and scope of government obligation. However, in the ‘Schools Education Bill case’, the Constitutional Court laid down that the right to basic education places not only a negative duty upon the state to prevent a person from attaining an education, but also a positive duty for the state to provide basic education for everyone.⁹⁷ Hence, the government is not only required to refrain from interfering with a child’s exercise of his or her right to education, but is also under an obligation to act to ensure that the right to education is realised.⁹⁸ The right of children to basic education is an unqualified socio-economic right that, unlike the qualified socio-economic rights, is not subject to ‘reasonable legislative measures’, and ‘progressive realisation’ within the state’s ‘available resources’.⁹⁹ It has been convincingly argued by leading scholars on children’s rights, such as Judith Streak, that unqualified socio-economic right of basic education given to children differs from socio-economic rights given to everyone. However, while children’s right to basic education is indeed an immediate, unqualified right, some legal scholars have argued that it has to be presumed that the right only needs to be met to a very basic level even though this does little

⁹² Socio-Economic Rights in South Africa, A Resource Book, Second edition, (2007), edited by Sibonile Khoza, Community Law Centre (University of Western Cape) South Africa, Chapter 12, p. 417.

⁹³ ‘Monitoring Child Socio-Economic Rights in South Africa: Achievements and Challenges, edited by Erika Coetzee and Judith Streak, Chapter Two, p. 54.

⁹⁴ *Ibid.*, p. 54.

⁹⁵ *Ibid.*, pp. 54-55.

⁹⁶ South African Constitution, Chapter 2, Section 7 (2).

⁹⁷ In re: The Schools Education Bill of 1995 (Gauteng), para. 9.

⁹⁸ ‘Monitoring Child Socio-Economic Rights in South Africa: Achievements and Challenges, edited by Erika Coetzee and Judith Streak, Chapter 6 The Child’s Right to Basic Education, p. 224.

⁹⁹ Socio-Economic Rights in South Africa, edited by Sibonile Khoza, p. 417.

to clarify the obligation imposed upon the government. Thus, the critical question of the exact scope of entitlements which children are afforded with respect to basic education in the South African Constitution, and the governments corresponding duty to realise these entitlements, remains insufficiently unclear. Furthermore, it shall be noted, that the limitations clause in section 36 of the Constitution, allow a law of general application to limit any of the rights set out in the BOR. Limitations of a right, such as the right to basic education, must be in accordance with certain criteria, and be both reasonable and justifiable. Judith Streak notes however that, at present, no such law exist in relation to the right of everyone to basic education, and hence the limitation clause in section 36 of the BOR is currently not relevant when interpreting the right to basic education.¹⁰⁰

Interpretation of Socio-Economic Rights by the Constitutional Court

Since there is no specific jurisprudence by the Constitutional Court on the right to basic education for children, one has to look at other cases regarding government obligations in relation to the delivery of socio-economic rights. Unfortunately, the South African Constitutional Court does not offer much for a better understanding regarding the interpretation of the socio-economic rights enshrined in the Constitution either. According to Jackie Dugard, senior researcher at the Centre for Applied Legal Studies (CALs), at the University of Witwatersrand, this is mainly because there have been so few cases at the Court's desk, but also because the decisions have not "advanced a rights or violations-based interpretation of socio-economic rights"¹⁰¹. While the Constitution has been praised and described as progressive due to its holistic approach, incorporating socio-economic rights in the Bill of Rights, acknowledging the indivisibility and interdependence of human rights, the question of the exact scope and nature of the South African government's obligations regarding socio-economic rights remain unsolved. Scholars have criticised the government's implementation both from a perspective of a lack of resources and the timely manner of implementation of government programmes. In this context, Judith Streak criticises the Constitutional Court for refraining from imposing a minimum core obligation relating to socio-economic rights in general, and the right to basic education in specific. The Constitutional Court of South Africa has up to date proved unwilling to impose a core minimum obligation regarding the implementation of socio-economic rights. The Court has instead developed a 'reasonable test' as a standard of review for the qualified socio-economic rights in the Constitution.

Government of the Republic of South Africa v Grootboom and others

¹⁰⁰ 'Monitoring Child Socio-Economic Rights in South Africa: Achievements and Challenges, edited by Erika Coetzee and Judith Streak, Chapter 6 The Child's Right to Basic Education, p. 224-227

¹⁰¹ Inter Press Service News Agency (IPS), Q&A: 'Unlocking the Power of Constitutional Rights', Zahira Kharsany interview with Jackie Dugard, Centre for Applied Legal Studies, (2009), <ipsnews.net/africa/nota.asp?idnews=45522>, viewed on 12 May 2009.

This test was developed in the case ‘*Government of the Republic of South Africa v Grootboom and others*’¹⁰² (the Grootboom case), which concerned the right to housing. In essence, for government policies to be constitutional, the Court requires a reasonableness standard as the baseline requirement.¹⁰³ The Court emphasised that when testing whether the state is meeting its obligations with respect to socio-economic rights, special attention must be given to whether the interests of the most destitute, particularly children without parental care are reflected in budget allocations and programmes, and whether implementation is progressive and resources are being used efficiently. According to Judith Streak, the government must set aside a substantial, yet sustainable portion of its budget to establish programs to give effect to the socio-economic rights. If there is no such program, the government must justify this, which, according to Judith Streak, is difficult, particularly regarding the basic socio-economic rights in the Constitution. There is however no direction about which programs or how much the government must spend.¹⁰⁴ The Court has not yet had the opportunity to review government measures in regard to any of the unqualified rights in the Constitution. Since the right to basic education in section 29 is an unqualified socio-economic right, not subject to ‘reasonable legislative measures’, and ‘progressive realisation’ within the state’s ‘available resources’, it is therefore unclear whether the Court would apply the same test. According to leading human rights scholars, it is more likely that the standard of review for this right should be higher than other socio-economic rights.¹⁰⁵ Furthermore, it cannot be disregarded that the Court even would adopt a more progressive approach, and entitle all children a direct claim for the immediate realisation of their basic needs.¹⁰⁶

Treatment Action Campaign v. Minister of Health.

Another important case regarding socio-economic rights in South Africa is the *Minister of Health and Others v Treatment Action Campaign and Others*,¹⁰⁷ (TAC case), in which the Court obligated the government to, without delay, implement a comprehensive nationwide programme for the prevention of mother-to-child transmission of HIV. Important to note with the case, with regard to children’s constitutional right to basic education, is that it clearly shows how socio-economic rights in South Africa is justiciable: i.e. legally enforceable through the courts. It is important since

¹⁰² The Constitutional Court of South Africa, *Government of the Republic of South Africa v Grootboom and others*, 4 October 2000.

¹⁰³ *Ibid.*, para. 33.

¹⁰⁴ Judith Streak Power Point Judith Streak, Researcher at Children’s Budget Unit, Idasa, ‘Conducting budget analysis for child socio-economic rights advancement’, power point, <www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=999>, viewed on 14 May 2009.

¹⁰⁵ ‘Monitoring Child Socio-Economic Rights in South Africa: Achievements and Challenges, edited by Erika Coetzee and Judith Streak, Chapter 6, The Child’s Right to Basic Education, p. 68.

¹⁰⁶ *Ibid.*, p. 68.

¹⁰⁷ The Constitutional Court of South Africa, *Minister of Health and Others v Treatment Action Campaign and Others*, 5 July 2002.

the inclusion of socio-economic rights in the South African Constitution was a question of controversy, and the extent of the enforcement and protection of socio-economic rights still is an issue of debate.¹⁰⁸ Some scholars argued that socio-economic rights were inherently non-justiciable, because they are premised on budgetary allocations and the protection of the rights inevitably is dependent on the availability of resources. Furthermore, it was questioned whether an inclusion of such rights in the Constitution would be inconsistent with the separation of powers doctrine: having the effect of a transfer of power from the legislature and the executive to the judiciary.¹⁰⁹ According to Geoff Budlender, the TAC case shows that the government cannot rely on the doctrine of separation of powers, with regard to socio-economic rights enshrined in the Constitution, in order to escape responsibility. Budlender holds that “the exercise of all public power must conform with the Constitution. The role of the courts is to decide whether it does so conform. If not, the courts will declare this, and order an effective remedy”¹¹⁰. However, with that being said, one must keep in mind that mounting a socio-economic case is not easily done, but rather extremely difficult. It requires huge resources and takes extremely long time. According to Jackie Dugard it is “very hard for people without huge resources and organisations to draw and mount these kinds of cases because the kind of evidence you have to put before the courts about the policies and reasonableness of the policies is just incredibly difficult”¹¹¹.

Government’s Delivery Obligation Remains Unclear

Furthermore, the question of the exact scope and nature of the South African government’s obligations regarding socio-economic rights remain unsolved. The Constitutional Court of South Africa has up to date proved unwilling to impose a core minimum obligation regarding the implementation of socio-economic rights, and has instead developed the reasonable test as a standard of review. In particular, the question of how the government should allocate its budget and delivery obligations remains vague.¹¹² South African courts are particularly uncomfortable with interferences in decisions relating to budget allocations. This reluctance is clearly based on a respect for the separation of powers where the judicial branch refrains from interfering in

¹⁰⁸ J. Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Practical Guide*, Juta and Company Ltd, (2004), p. 119.

¹⁰⁹ *Ibid.*, p. 119.

¹¹⁰ Daily Mail and Guardian, Johannesburg, (July 12, 2002), Opinion: ‘A Paper Dog With Real Teeth: The TAC case has proven that the Constitution is a powerful people’s tool’, Geoff Budlender. www.aegis.com/news/dmg/2002/MG020705.html viewed on 14 May 2009.

¹¹¹ Inter Press Service News Agency (IPS), Q&A: ‘Unlocking the Power of Constitutional Rights’, Zahira Kharsany interview with Jackie Dugard, Centre for Applied Legal Studies, (2009), <ipsnews.net/africa/nota.asp?idnews=45522> viewed on 14 May 2009.

¹¹² J. Streak, *Is South Africa Making Progress in Realising the Rights of Children Affected by HIV/AIDS?*, Volume 15, No. 1. January 2002, p. 24.

the territory of the executive branch.¹¹³ While the government's exact delivery obligations with respect to socio-economic rights are not entirely clear, cases such as Grootboom and TAC can offer useful guidance. Raylene Keightley from the Centre of Applied Legal Studies (CALs) holds that, while these cases, on the one hand, clearly illustrate that the Constitutional Court offers the government a certain margin of appreciation regarding its fulfilment of socio-economic rights, they also show that the Constitutional Court takes these rights seriously and regards them as justiciable. Successful litigation against the state about "better policy options" is not possible. However, individuals can successfully litigate around the issue of reasonableness of measures taken to implement a certain socio-economic right.¹¹⁴

4.3 Dealing with HIV/AIDS in Primary Education

A number of legal provisions in South African laws together form the domestic legal framework on the issue of equal access to education for children infected or affected by HIV/AIDS. These provisions deal with the issue either directly or have an indirect significance for these children and shall be discussed below.

4.3.1 Equality and Elimination of Unfair Discrimination

South African Constitution

The South African Constitution provides that the country is founded on the values of: "human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism".¹¹⁵ Chapter 2 of the Constitution consists of a Bill of Rights (BOR), offering protection of civil and political, as well as socio-economic and cultural human rights.¹¹⁶ The Bill of Rights constitutes the cornerstone of democracy in South Africa and it enshrines the values of human dignity, equality, and freedom.¹¹⁷ Everyone has their right to have their dignity respected and protected.¹¹⁸ The right to basic education has to be read together with the constitutional equality clause and the principle of non-discrimination.

Section 9 of the Constitution guarantees equality and holds that: "everyone is equal before the law and has the right to equal protection and benefit of the law". Furthermore, "equality includes the full and equal enjoyment of all

¹¹³ R. Keightley, Centre for Applied Legal Studies, Lecture at Norwegian Embassy, Pretoria (18 March 2009).

¹¹⁴ *Ibid.*,

¹¹⁵ South African Constitution, Chapter 1, Section 1 (a) and (b).

¹¹⁶ Mubangizi, *The Protection of Human Rights in South Africa, A Legal and Practical Guide*, Juta and Company Ltd, (2005), p. 71.

¹¹⁷ South African Constitution, Section 7 (1).

¹¹⁸ *Ibid.*, Section 10.

rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”¹¹⁹. The right to equality occupies a central place in the Constitution. Section 9 (3) protects equality through the prohibition of unfair discrimination on seventeen grounds. The legally protected grounds of unfair discrimination are race, gender, sex, pregnancy, marital status, ethnic origin, social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.¹²⁰

The South African Constitution regrettably does not list HIV/AIDS as one of the prohibited grounds of unfair discrimination. However, positive HIV/AIDS status could arguably, at least at a certain point where the disease has reached significant progression, and the individual has suffered substantial deterioration, be derived from the protected discrimination ground of ‘disability’. It shall be noted though, that the ground of disability would not protect an individual suffering from HIV/AIDS *per se*, and it remains uncertain at what stage of the progression of the disease an individual would be regarded as disabled. Thus, even though the Constitution might offer some protection to individuals and children suffering from HIV/AIDS, this ground of protection is only applicable at the stage of *disability* which offers far from adequate legal protection against discrimination for this group. Furthermore, children affected by HIV/AIDS are not protected under the ground disability. Hence, the lack of positive HIV/AIDS status as a protected ground for unfair discrimination, together with the very limited potential protection that the disability ground offers, South African HIV/AIDS infected or affected children find themselves without adequate constitutional protection against discrimination.

Equality Act

The South African government passed the law Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 (Equality Act) which is intended to give effect to the equality clause of section 9 of the Constitution. One of the declared purposes of the law is to “prevent and prohibit unfair discrimination and harassment”¹²¹ and to “promote equality and eliminate unfair discrimination”.¹²² According to section 5 (1), the act binds both the state and individuals and thus has both vertical and horizontal effect. (For the sake of accuracy, it shall be briefly noted that act does not apply to persons to whom the Employment Equity Act applies. The Employment Equity Act applies to employers and employees, and thus

¹¹⁹ South African Constitution, Section 9 (2).

¹²⁰ *Ibid.*, Section 9.

¹²¹ Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4 of 2000).

¹²² *Ibid.*

protects educators from discrimination, it can be concluded that further commentary of the act lay outside the scope of this paper as the focus of the present thesis is learners infected or affected by HIV/AIDS and not educators).

The Equality Act contains a general prohibition on discrimination and offers a list of protected grounds of unfair discrimination. The act defines discrimination as “any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantages on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the grounds of discrimination”.¹²³ The Equality Act offers a list of protected grounds of unfair discrimination and it does not include HIV and AIDS. This list should however not be regarded as closed.

While the listed prohibited grounds correspond to the grounds protected in the Constitution and thus consist of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, the Equality Act offers wider protection than the Constitution as it opens up for the possibility of protection of unlisted grounds of discrimination. It provides for the protection of “any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on [one of the listed] ground[s].¹²⁴

Attached to the Equality Act is an illustrative list of unfair practices. Relating to education the examples provided are: to unfairly discriminate a learner from educational institutions, including learners with special needs and unfairly withholding scholarships, bursaries, or other form of assistance from learners of particular groups identified by the prohibited grounds. It is also listed that an unfair practice is the failure to reasonably and practically accommodate diversity in education.¹²⁵ The act also expressly recognises that HIV and AIDS status frequently leads to discrimination and courts are free to include HIV/AIDS under the prohibition of unfair discrimination as an unlisted ground.¹²⁶ Thus, apart from the same protection under the ground of disability, that the Constitution also offers, the Equality Act offers additional protection for children infected or affected by HIV/AIDS through the possibility of protection under “any other ground”.

Other Laws and Policy on Equality and Non-Discrimination

¹²³ Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4 of 2000), section 1 (viii).

¹²⁴ *Ibid.*, Section 1 (xxii).

¹²⁵ *Ibid.*, Section 29 (2).

¹²⁶ *Ibid.*, Section 34.

Apart from the limited Constitutional protection against discrimination on grounds of HIV/AIDS for learners infected or affected by HIV/AIDS and the complementary yet arguably insufficient protection the Equality Act provides, the South African Children's Act stipulates a number of cardinal principles relevant for the issue. Section 6 (2) (d) protects "the child from unfair discrimination on any ground, including the grounds of the health status or disability of the child or a family member of the child".¹²⁷ The provision's explicit reference to 'health status' as a prohibited ground for discrimination, both related to the child and family members of the child, naturally plays a significant role in the context of equal access to education for children affected by HIV/AIDS. This provision undoubtedly strengthens the picture of the South African post apartheid government's increased commitment to children's rights. Furthermore, the South African School's Act 84 of 1996 offers some provisions that can be used to address unfair discrimination on account of HIV status in public schools.. The South African School's Act obligates public schools to "admit learners and serve their educational requirements without unfairly discriminating in any way".¹²⁸ No learner may be unfairly discriminated against at a public school on the basis of his or her HIV status.

The Ministry of Education has issued the National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions (NP). This policy sets out guidelines aiming at non-discrimination of learners infected or affected by HIV/AIDS. The NP specifically addresses the handling of HIV/AIDS within the education system and provides explicit, hands-on guidelines relating to non-discrimination of HIV/AIDS infected or affected learners, and not merely general provisions that might have relevance for this group of learners. The NP is not legally binding, but it shall however be noted that parts of the policy simply inform about already existing legal rights such as for example the right to privacy in the context of HIV/AIDS and schooling. Despite its unfortunate lack of legally binding character, the policy should not be dismissed as it aims to establish a coherent code of conduct to be applied in schools that accommodates all learners including the ones infected or affected by HIV/AIDS.

The NP states that learners living with HIV/AIDS should be treated in a just, humane and life affirming way.¹²⁹ Section 3 (1) of the policy demands, stated in negative terms, fair treatment of HIV positive learners, students and educators as no one may be unfairly discriminated against directly or indirectly.¹³⁰ Educators should be aware of instances of discrimination and unfair accusation against any person suspected of having HIV/AIDS.¹³¹ The school governing body and the principal shall ensure that no learner is

¹²⁷ Children's Act, Article 6 (2) (d).

¹²⁸ South African School's Act, Section 5 (1).

¹²⁹ NP, Section 3.2

¹³⁰ *Ibid.*, Section 3 (1).

¹³¹ NP, Section 3.1

unfairly discriminated against. Schools shall together with the department of education ensure that learners, educators, and parents have accurate and understandable information about HIV/AIDS.¹³²

The legal provisions and policy relating to equality and non-discrimination constitute a starting point for the establishment of a legal framework governing the issue of equal access to education for children infected or affected by HIV/AIDS in South Africa. However, in order to gain a more comprehensive understanding of the relevant legal framework governing this issue, legal provisions relating to problem areas, experienced by this group of learners in school, needs to be explored. All the legal provisions discussed below have the common denominator of being associated with problem areas for children infected or affected by HIV/AIDS, obstructing their access to education.

4.3.2 Admission, Compulsory Attendance and School Fees

Chapter 2 of the South African Schools Act contains provisions regarding admission, compulsory attendance and school fees. Public schools are required to admit children and to serve their educational needs without unfair discrimination in any way.¹³³ Brendan Barry remarks that “this [admission policy] reflects the constitutional guarantee that everyone is equal before the law and has the right to equal protection and equal benefit of the law and also the constitutional prohibition of unfair discrimination”.¹³⁴

According to the SASA, public schools are not authorised to admit children on the basis of admission test.¹³⁵ The NP further explains that no learner may be denied admission to, or hindered from continued attendance at a school due to his or her HIV/AIDS status or perceived HIV/AIDS status.¹³⁶ Inability to pay school fees shall, according to law, not constitute an obstacle to the right to education as the SASA holds that no child may be refused admission to a public school on the grounds that their parents are unable to pay the school fee.¹³⁷ Section 5 (1) of the NP stipulates that learners living with HIV have the right to attend any school. Furthermore, the needs of learners living with HIV should as far as possible be accommodated in the school with regard to their right to basic education.

Section 3(1) of the SASA stipulates compulsory schooling. Every child is required to attend school from the age of 7 until 15 or the ninth grade, whichever occurs first. Parents have a duty to make sure that their children

¹³² *Ibid.*, Section 11.1-11.3

¹³³ South African School's Act, 84 of 1996, Section 5 (1).

¹³⁴ B. Barry, *School's and the law: A Participant's Guide*, Juta & Co Ltd, Cape Town, 2006. p. 35.

¹³⁵ South African School's Act 84 of 1996, section 5 (2).

¹³⁶ NP, Section 4.1

¹³⁷ South African School's Act 84 of 1996, section 5 (3) (a).

attend school.¹³⁸ If a child is not enrolled or fails to attend school, the matter may be investigated by the Head of an Education Department at provincial level, to find out the circumstances of the learner's absence from school and take appropriate measures to remedy the situation. If such a remedy fails, a written notice may be issued to the parent of the learner requiring compliance with compulsory attendance, as required by section 3 (1). It shall be noted that a parent who fails to enrol his or her child at a school or fails to make sure the child attends school commits a criminal offence if there is no just cause for the failure of school enrolment or attendance. This offence is punishable by law and upon conviction is liable to a fine or to imprisonment for a period not exceeding six months.¹³⁹ Any other person who, without just cause, prevents a child from attending school also commits a punishable offence.¹⁴⁰

According to the NP, learners living with HIV are expected to attend classes and in accordance with the requirement of compulsory schooling for as long as they are able to do so.¹⁴¹ Schools should make schoolwork available for home studies and support continued learning where possible for learners with HIV/AIDS who have become incapacitated through illness. There is also a possibility of parents home schooling the sick learner.¹⁴² Finally, learners who have developed serious HIV/AIDS related illnesses and are unable to attend school can be placed in specialised residential institutions for learners with special education needs. It shall be noted though, that availability of special schools should not be used as an excuse to remove learners with HIV/AIDS from mainstream schools.¹⁴³ The SASA and NP open up for the possibility of granting learners with HIV/AIDS, who are too sick to attend school, exemption from the requirement of compulsory schooling.¹⁴⁴

While the South African Schools Act stipulates compulsory schooling, education is not provided free of charge. Public schools are allowed to charge school fees unless declared to be no-fee schools according to section 39 of the SASA. The decision to grant a school non-fee school status is based on the poverty of the community served by the school. Due to sharp criticism regarding the malfunctioning of the system of school-fee waivers, the South African government has recently (in 2007) made efforts to ensure that learners within poor communities are ensured access to education by increasing the number of no-fee schools from 40 percent of the poorest primary schools to 60 percent.¹⁴⁵ However, no learner in a school allowed

¹³⁸ South African Schools Act, 84 of 1996, section 3 (1).

¹³⁹ *Ibid.*, section 3 (6) (a).

¹⁴⁰ South African School's Act, 84 Of 1996, section 3 (6) (b).

¹⁴¹ NP Section 5 (2).

¹⁴² *Ibid.*, Section 5 (4).

¹⁴³ NP, Section 5 (5).

¹⁴⁴ South African School's Act, Section 4 (2) and NP, Section 5 (3).

¹⁴⁵ Iol, South Africa, 'More no-fee schools', <www.iol.co.za/index.php?click_id=13&set_id=1&art_id=nw20081021141545501C25260>, viewed on 19 May 2009.

to charge school-fees may be denied access to school due to parents' inability to pay, or non-payment of school fees.¹⁴⁶ Furthermore, parents who cannot afford to pay school fees must be exempt from payment.¹⁴⁷

4.3.3 Testing, Confidentiality and Disclosure

The Children's Act protects learners from any requirement of HIV testing without informed consent.¹⁴⁸ In a South African government policy document, informed consent relating to HIV testing has been described as providing a person with information that he or she comprehends, and on the basis on this information the individual freely chooses to undertake an HIV test.¹⁴⁹

The Children's Act provides that no child below the age of twelve can legally give informed consent to HIV/AIDS testing. Informed consent for these children must be collected from a parent or guardian if the child is not of "sufficient maturity to understand the benefits, risks, and social implications of such a test."¹⁵⁰ Individuals living with HIV/AIDS are not required to disclose their positive status due to their constitutional right to privacy.¹⁵¹

The NP states that no learner may be forced to reveal his or her HIV/AIDS status to the school.¹⁵² However, a welcoming enabling should be cultivated in which a learner may voluntarily disclose HIV/AIDS status.¹⁵³ The life-skills program and HIV/AIDS education shall encourage learners' voluntary disclosure of HIV/AIDS status.¹⁵⁴ The confidentiality of such disclosure should be ensured and unfair discrimination on the grounds of this information shall not be tolerated.¹⁵⁵ Unauthorised disclosure of HIV/AIDS related information could give rise to legal liability.

Confidentiality regarding the information on HIV status of children is legally strong. An important main rule is that no person may disclose a child's status as HIV positive without prior consent. The child can consent to disclosure of positive HIV status from the age of twelve. Legally acceptable consent can also be given if the child is younger but has reached sufficient maturity. Hence, the provisions on consent for HIV testing and disclosure of HIV positive status of children correlate.¹⁵⁶

¹⁴⁶ South African School's Act, 84 Of 1996, section 5 (3) (a).

¹⁴⁷ *Ibid.*, Section 39.

¹⁴⁸ South African Children's Act, Section 130 (1) and (2).

¹⁴⁹ Employment Equity Act No. 55 of 1998, 'Code of Good Practice on Key Aspects of HIV/AIDS and Employment', Section 7.1.7.

¹⁵⁰ Children's Act 38 of 2005, Section 130 (2) (a) (i) and Section 130 (2) (b).

¹⁵¹ South African Constitution, Section 14.

¹⁵² NP, Section 6.1

¹⁵³ *Ibid.*, Section 6.2

¹⁵⁴ *Ibid.*, Section 6.3

¹⁵⁵ *Ibid.*, Section 6.2

¹⁵⁶ Children's Act 38 of 2005.

4.4 Conclusion

In conclusion, the legal framework governing education in South Africa reflects the efforts made in order to overcome the inequalities in education, created under the former apartheid system. Substantial efforts have been made, and problems faced by learners infected or affected by HIV/AIDS have been recognised and received legal attention. However, inequality in education still remains, and the HIV/AIDS pandemic exacerbates factors contributing to injustices.

Furthermore, the South African government's response towards the AIDS pandemic has been slow, fragmented, and characterised by inconsistent messages. One problem in the South African context is that the right to education under the Constitution has not been clearly defined, and the exact scope and nature of the South African government's obligations therefore remains unclear.

5 Main Findings of Minor Field Study

5.1 Social Obstacles to Realising the Right to Education

A main finding of the minor field study is the general impression of social stigma surrounding issues relating to HIV/AIDS in the South African context. While the international and domestic legal frameworks both contain provisions on equality and non-discrimination, it is evident that a stigma of gigantic proportions surrounds the issue of HIV/AIDS, with the consequence of undermining satisfactory functioning of legal provisions and government policy protecting children infected or affected by HIV/AIDS with regard to their right of access to education. It cannot be stressed enough that the prevalence of stigma is outrageously extensive in South African society and it leads to substantial complications of all matters relating to the disease and its effects. The destructive power of stigma cannot be disregarded. One simply cannot understand HIV/AIDS in South Africa without understanding and acknowledging the existence of stigma. The presence of stigma was evident from the very beginning of the study and this impression continuously grew during its 10-week course until it had reached gigantic proportions.

5.1.1 Stigma leading to Issues of Discrimination

In various ways, all interview participants acknowledged and had witnessed the widespread stigmatisation and marginalisation of individuals infected or affected with the disease. Stigma and prejudices surrounding the disease was observed on all levels of society; on a governmental, communal and individual level. Social stigmatising of a group is very serious, as it makes the group vulnerable, marginalised and an easy target for discriminatory practices and other human rights abuses. To be the object of social stigma is to suffer a violation of the respect for one's inherent human dignity.¹⁵⁷ The unfortunate South African reality is that large parts of the society, children included, are severely stigmatised because of positive HIV status or a perception or association thereof, and thus subjected to serious deprivation of human rights.

In this thesis, it has previously been stated that HIV/AIDS affects children's right to education in numerous ways. Discrimination in the education

¹⁵⁷ Siyam'Kela Project, The POLICY Project and the Centre for the Study of AIDS, HIV/AIDS Stigma Resource Pack, p. 6.

system of children infected or affected by HIV/AIDS is one of the dangers in a context such as the South African characterized by extensive stigmatisation surrounding the disease. UNAIDS defines HIV-related stigma as: “a ‘process of devaluation’ of people either living with or associated with HIV and AIDS”¹⁵⁸ UNAIDS categorises stigmatising attitudes to HIV and those at most risk of HIV infection as deriving from two principal sources. The first is fear of contagion which is a common stigma related to diseases in general, the second is “negative, values-based assumptions about people living with HIV which fuels prejudice and discrimination”.¹⁵⁹

Human Rights Watch reports of cases of overt discrimination against HIV and AIDS-affected children that has directly impeded both their access to education and the treatment they receive in the classroom. The explanation Human Rights Watch puts forward for the existence of such discrimination recognises the stigma that festers on all levels in the South African society by holding that “such discrimination is often driven by ignorance on the part of parents, educators, and community members, and fueled by school systems and officials that fail to address the problem and ensure the inclusion of such children”.¹⁶⁰

Experiences like the one of famous Nkosi Johnson, an openly HIV positive boy who in 1997 struggled to gain admission to a primary school in Johannesburg, witness of discrimination through overt denial of admission due to the HIV infection. After substantial media coverage of this little boy’s struggle, the school reversed its decision not to admit Nkosi and he was subsequently enrolled in the primary school. It shall be noted that while cases of outright direct discrimination such as denial of admission of learners infected or affected by the disease have been reported, the South African government has acknowledged the problem of impeded access. The case of Nkosi Johnson planted the seed for the government to address this problem of discrimination of this group of learners in schools. The ordeal Nkosi Johnson was put through was an important reason for the creation of the ‘National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions’.¹⁶¹

In sum, while it can be argued that direct discrimination in the form of outright and open denial of admission to schools due to learner’s positive HIV/AIDS status, or association thereof, significantly has decreased, the wide-spread stigma and its negative consequences persist and adversely affect these learners’ right to education. Stigmatising attitudes and unequal

¹⁵⁸ UNAIDS, ‘Report on the Global AIDS epidemic’, (August 2008), p. 78.

¹⁵⁹ *Ibid.*, p.76.

¹⁶⁰ Human Rights Watch, *Failing Our Children: Barriers to the Right to Education*, New York (2006), p. 18.

¹⁶¹ N. Senosi, *HIV/AIDS: The Rights of Learners and Educators*, Education Rights Project, 2005, p. 2.

treatment of learners infected or affected by HIV/AIDS might have become less visible and outspoken, but still remain problematic.¹⁶²

5.1.2 Stigma leading to Issues of Testing, Confidentiality and Disclosure

The government has drawn attention to the fact that HIV and AIDS is perhaps one of the most stigmatised diseases in the world and that stigma results in interferences with HIV prevention, diagnosis and treatment.¹⁶³ Diagnosis through HIV testing is of utmost importance to effectively stall the further spread of the disease and provide those infected with the chance of living longer, healthier lives. During the field study, it was quickly discovered that HIV testing in South Africa is a major issue surrounded by fear and denial. UNAIDS report that “HIV-related stigma and discrimination undermine HIV prevention efforts by making people reluctant to be tested; to seek out information about how to protect themselves from infection”. An interview participant involved in the NGO Star for Life working with the Star School project, aimed at educating youth on HIV/AIDS and equipping them with the necessary tools to make the right choices and protect themselves against the disease, recognised the widespread reluctance and fear of testing. The interview participant reasoned around the origins of this attitude and believed they originated from the common perception that a delivered message of positive HIV status equals a death sentence.¹⁶⁴ While it should be acknowledged that the legal protection against compulsory HIV testing in schools admittedly has a certain rationale as this sort of information is sensitive and could be abused, it is regrettable that the resistance of testing is so strong. Knowledge of HIV status opens many more doors than living in ignorance for the individual who can receive treatment and live a healthier and longer life. Knowing one’s status does not have to mean a death sentence but could rather be a strong empowerment tool for the individual and for society as a whole. The presence of such an extensive stigma hindering social acceptance of testing and disclosure and the general impression of lethal silence surrounding the disease leading to further infections and discrimination of those infected or affected, appears ironic in the context of a country where so many are infected and virtually all are affected. The paradox of the taboo and stigma surrounding the disease is difficult to grasp against the backdrop that an estimated 5.7 million people are living with HIV infection in South Africa.¹⁶⁵

¹⁶² F. Veriava, Lecture: Good Governance Academy – The Right to Education, 12 March 2009.

¹⁶³ South African Department of Health, HIV and AIDS and STI Strategic Plan for South Africa, 2007-2011, p. 31.

¹⁶⁴ Interview with individual involved in the NGO Star For Life, Malmö, Sweden, May 11th 2009.

¹⁶⁵ UNAIDS, Country Situation Report: South Africa, July 2008, p. 1.

Another crucial finding of the minor field study is the emphasis on the human right to privacy in the context of HIV/AIDS through the discussions on issues relating to confidentiality and disclosure of positive HIV status. As stated previously under the expose of domestic legal framework, the right to privacy, as legally protected in the South African Constitution section 14, is commonly put forward as a main consideration in HIV/AIDS discourse. This extreme emphasis on confidentiality often occurs with a defensive undertone which was evident during an interview with a vice-principal of a primary school located in the township Mamelodi about 20 km east of Pretoria. The vice-principal was of the view that it was best that she was unaware of any learner's HIV status. She explained this opinion by saying that if she had been trusted with the information of a learner's positive HIV status and it would somehow 'leak out', she would be blamed for this even though she had not told anyone. The vice-principal witnessed of a real fear of being blamed for someone else's disclosure of a learner's positive HIV status (lacking informed consent) and would rather not know of this, even though she understood that her possibility to keep an extra eye and support a learner would drastically increase with such knowledge. The paralysing fear of the vice-principal, witness of the enormous stigma involved around the disclosure of HIV/AIDS status.¹⁶⁶ It shall be noted that the vice-principal said that surely there are cases of learners suffering from infection in the school but that this merely is an unconfirmed suspicion. The vice-principal had never, not once, during her professional career experienced a parent disclosing a child's positive HIV status.¹⁶⁷ It is needless to say that it will pose a significant challenge to provide the help and support that children infected or affected by the disease need if they remain formally unidentified. The interview with the vice-principal gave the impression that the school staff did not really make a genuine effort to concern themselves with talking truly openly about the disease but rather chose to remain silent because of fear of stigma.

The attitudes relating to disclosure was further explored during an interview with a staff member of an orphanage for HIV/AIDS infected or affected children. The children at the orphanage were of varying ages, some of them in primary school, but none of the HIV positive children knew their status. The interview participant expressed concern around the issue of disclosure. She always made the teacher aware in cases where the child had the diagnosis of HIV and felt that this was important information to share.¹⁶⁸ The views of this interview participant seemed rather progressive, as during previous interviews had seemed uncommon for parents or guardians of HIV-positive children to willingly share this information. However, even the progressive interview participant at the orphanage asked herself the

¹⁶⁶ Interview with Vice-principal at primary school, Mamelodi, Gauteng, South Africa. March 16th 2009.

¹⁶⁷ *Ibid.*

¹⁶⁸ Interview with staff from orphanage in Hammanskraal, Gauteng, South Africa, (11 March 2009).

fundamental question of ‘what happens when my child raises its hand in class and says that I have HIV’?¹⁶⁹

During further discussions on stigma with the vice-principal at a primary school, the interview participant said that it was very unusual for learners to speak about AIDS as a cause of death and could only recall one single incident of a learner telling her out rightly that somebody in the learner’s environment had died of AIDS. She informed that it was common to make reference to one of the opportunistic diseases often associated with AIDS, such as tuberculosis or pneumonia, as a cause of death and thus, avoid the mentioning of AIDS. She recognised large stigma surrounding the disease especially in the rural areas, and held that disclosed status could mean that an individual with HIV/AIDS and family members could become shunned from the society. The fact that learners suffer from stigma through mere association with the disease through illness of a family member became even more evident when speaking to two learners in the primary school library. One of the learners witnessed of being subjected to great stigmatisation when her uncle died of AIDS. After her uncle’s passing her neighbours stopped greeting her and subsequently the news spread and the entire community fell silent. She explained that the community gossiped about her and the rest of her family as being bewitched. The other learner nodded sympathetically and confirmed the picture of prejudice and stigma related to HIV/AIDS.

A significant, and distressing, observation was the learners’ obvious need to speak about their personal experiences with HIV and AIDS. Learners were contact seeking and on numerous occasions wanted to unburden their troubled minds on the matter. The question of emotional support was raised during interviews with both the principal of a primary school, and a teacher of another primary school in the province of Gauteng. The principal answered that learners were allowed to seek emotional support and counseling from a ‘qualified pastor’ who had several years of working experience with youth.¹⁷⁰ He appeared oblivious to the fact that this pastor, despite his qualifications, might not be able to cater to the needs of traumatised and stigmatised infected, orphaned or otherwise affected learners. There simply seemed to be no difference in his mind between a professional psychologist and a servant of God. A primary school teacher felt that the interview questions posed, relating to emotional support of this specific group of learners opened up for an entirely new perspective. She held that while no such emotional support mechanism as a school psychologist existed at her school, due to a lack of financial resources, she would welcome such a development.¹⁷¹ Besides thinking about the best interest of the learners, it was apparent that she felt that the presence of a

¹⁶⁹ Interview with staff from orphanage in Hammanskraal, Gauteng, South Africa, (11 March 2009).

¹⁷⁰ Interview with Principal of Primary School, Mamelodi, Gauteng, South Africa, (9 March 2009).

¹⁷¹ Interview with teacher at a primary school, Mamelodi, Gauteng, South Africa, (16th March 2009).

qualified school psychologist could also serve the purpose of some well needed relief of the teachers' heavy burden. In the context of the HIV/AIDS pandemic schools have been assigned a great burden of expectation. Education has commonly been described as a social vaccine¹⁷² for HIV and Jonathan D. Jansen points toward the difficulty in a school situation with both learners and teachers infected and affected by the virus. He holds that "infected teachers grow weaker at the very point that the administrative demands of teaching grow stronger¹⁷³ and understands how HIV/AIDS "along with all the other stressors, take their toll on individual morale, on human emotions, on physical energy, and on the professional commitment of. Even resilience has its limits"¹⁷⁴.

Apart from this teacher fatigue, which gave the impression that the teachers, out of necessity, had been forced to turn their backs on the learners, the existence of diminishing attitudes towards children and their ability to comprehend and discuss issues relating to HIV and AIDS was shocking. The vice-principal of the primary school spoke cautiously about the content of life skills lessons upon inquiry. She gave assurances that the primary school children only received 'very basic' and 'age- appropriate information'.¹⁷⁵ This shall be contrasted against the view of an eleven-year-old learner who expressed concern over the fact that no adults speak about AIDS with children of his age, as they believe children cannot comprehend the issue and that it is simply regarded as inappropriate to discuss such matters with children.

5.1.3 Government Fuelling of Stigma

On a national level, a slow governmental response, and inadequate action against the pandemic has created an enabling environment for the growth, further advancement and fuelling of stigma and prejudices leading to discrimination in society. As described above, the former president Mbeki long doubted leading HIV/AIDS research, and questioned the causal link between HIV and AIDS. Manto Tshabalala-Msimang, health minister during Mbeki's entire presidency, urged AIDS sufferers to eat more beetroot and garlic to strengthen their immune systems and backed the use of traditional medicines, rather than ARVs for treatment of the disease. The use of vegetables as a treatment for HIV/AIDS derives from the culture of traditional healers and medicine in South Africa. Traditional healers play an influential role in the lives of many African people's lives. According to the World Health Organisation, an estimated 80% of the population in Africa makes use of traditional medicine.¹⁷⁶ Traditional medicine can be described

¹⁷² Human Rights Watch, *Letting Them Fail: Government Neglect and the Right to Education for Children Affected By AIDS*, October 2005, Vol.17, No. 13 (A), p. 4.

¹⁷³ J. D. Jansen, *Bodies Count*, AIDS Review 2006, University of Pretoria, 2007, p. 25.

¹⁷⁴ *Ibid.*, p. 25.

¹⁷⁵ Interview with Vice-principal at Primary School, Mamelodi, Gauteng, South Africa. March 16th 2009.

¹⁷⁶ World Health Organisation (2003), 'Traditional Medicine', Factsheet No.134

as “the sum total of knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures that are used to maintain health, as well as to prevent, diagnose, improve or treat physical and mental illnesses”.¹⁷⁷

The existence of traditional healers and beliefs of alternative medicines cannot be ignored. While not all traditional healers are sceptical to the use of ARV's, the strong culture of traditional medicine in the African setting, undoubtedly complicates matters relating to awareness and treatment of HIV/AIDS. Some traditional healers reject, what is perceived as the concept of western medicine, and there is a widespread confusion among the general population on HIV/AIDS. This confusion is partly due to the South African government's inconsistency in message, which is characterised by great ambivalence and strong cultural beliefs of traditional medicine in rural communities where it might not be socially acceptable to seek medical treatment at a hospital. An additional explanation for the reluctance of HIV-testing and treatment in public hospitals or clinics, put forward by a nurse working in Mamelodi, was the risk of being stigmatised by the community. Visiting a clinic or a hospital tends to raise suspicion of positive HIV status amongst the members of communities, which can lead to stigmatisation and exclusion. The nurse further pointed out that confidentiality is often violated within the context of public hospitals and clinics, further fuelling the individual's fear and risk of stigmatisation.¹⁷⁸

Mixed messages and ambiguity has characterised the government's response towards the disease, which has allowed for stigma and discrimination to fester in society. It was not until 2004, after the successful litigation by the Treatment Action Campaign against the government in the constitutional court, when the government was forced to adhere to scientifically proven standards of treatment and thus, forced to distribute ARVs preventing MTCT at government clinics started. On the one hand, the present strategy on the prevention of spread of HIV and AIDS is based on the concept that HIV causes AIDS, and the government acknowledges that HIV and AIDS possibly is one of the most stigmatised diseases in the world. On the other hand, there is a huge gap between a plan on paper and its implementation on the ground, which is why a strong political leadership with a firm and consistent message regarding the disease is highly important.

It is not acceptable that leading government officials prove to be highly ignorant regarding the disease or show signs of denial of established scientific truths, like the examples of the former president Mbeki and his health minister. Furthermore, it is a major concern that the mixed government messages and institutionalised 'denialism' that has for so long characterised the South African government's response to HIV/AIDS does not seem to be an issue of the past. The newly elected president Jacob Zuma

¹⁷⁷ *Ibid.*

¹⁷⁸ Informal conversation with nurse working at clinic, Mameoldi, Gauteng, South Africa.

has been highly criticised for stating that he took a shower as a precaution to protect himself from acquiring HIV after having sex with an HIV-positive woman.

Jean Baxen and Anders Breidlid join this criticism of inconsistent governmental messages and notes with concern that “the result has been a population ravaged by the pandemic, yet still confused and receiving mixed messages from its leaders. South Africa is a nation that one level is perplexed about the disease’s social and material impact and on another level is ambivalent in its beliefs, attitudes, and subsequent responses and actions regarding the disease.”¹⁷⁹

It can justly be argued that the government has created an enabling environment for stigma and discrimination to fester through its inconsistent message on HIV/AIDS. This stigma has had numerous harmful effects on individuals in society, and adversely impacted the right to education for children infected or affected by the disease. A shocking finding is that these children remain largely unidentified in school because of the stigma associated with HIV/AIDS which prevents parents and guardians from disclosing a learner’s positive status or positive status of a member of the learner’s family. The stigma also affects teachers that rather remain ignorant to the HIV status of a learner or the learner’s family, as described above. While learners infected or affected by the disease are often informally subjected to suspicion of disease or association thereof, it is evident that the formal anonymity of these children prevents them from enjoying various supportive measures, be it financial, social, practical or emotional, to remove the obstacles preventing them from realising their right to education.

In sum, the government has to take responsibility and realise that its behaviour strongly influences individuals’ and society’s perception on HIV/AIDS in more than the most well-composed policy document ever can. At the end of the day, what can be read in policies matter but governmental actions and verbal statements matter more.

5.2 Financial Obstacles to Realising the Right to Education

During the minor field study, it was evident that schooling in South Africa largely depends on resources – resources that many families and individuals in the community simply do not have. Significant financial obstacles impede the effective realisation of the right to education, which affects particularly vulnerable children such as those infected or affected by HIV/AIDS. To

¹⁷⁹ J. Baxen and A. Breidlid (eds.) *HIV/AIDS in South Africa: Understanding the Implications of Culture and Context*, Chapter 10, J. Baxen and A. Breidlid, Afterword: *Towards a Hermeneutic Understanding of HIV/AIDS in South Africa*, UCT Press (Cape Town) 2009, p. 118.

fully understand the issue of financial obstacles to education in South Africa, one needs to acknowledge, first of all, that South Africa is a country characterised by extremes of wealth and poverty. South Africa is a country with immense differences in incomes and wealth. Although it is classified as a middle-income country, the vast majority of the people are extremely poor. There is a consensus amongst economic scholars and political analysts that approximately 40% of the South African population are living in poverty.¹⁸⁰ While absolute poverty has declined during the last years, inequality across race, gender and location has increased.¹⁸¹ ‘The Gini coefficient’, commonly used to measure income distribution or inequality in a country, is very high in South Africa.¹⁸² The Gini coefficient can vary between ‘0’ and ‘1’, the closer to 1, the more unequal a society, and the closer to 0 the more equal a society. With a Gini coefficient at about 0.6, South Africa is in fact one of the most unequal countries in the world with regard to income distribution.¹⁸³

Second, it shall be kept in mind that unemployment rates are particularly high. Statistics show, that the current unemployment rate is 23.5%.¹⁸⁴ However, if using a broader definition of unemployment, including the so called ‘discouraged workers’ which are people not actively searching for jobs, the percentage is possibly around 31.2%.¹⁸⁵ Unemployment rates differ around the population groups in the country: it is higher among the black (27.7%), coloured (19.5%), Asian and Indian (12.7%) population than the white population (4.6%).¹⁸⁶ Factors influencing whether being unemployed in South Africa, besides race, is geographic location, sex and levels of skill.¹⁸⁷

¹⁸⁰ J.P. Landman, ‘Breaking the grip of Poverty and Inequality in South Africa 2004-2014, Current trends, issues and future policy options’, Executive Summary, December 2003, Electronic copy, p. 1.

¹⁸¹ World Bank, ‘Measuring Inequality’
<web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20238991~menuPK:492138~pagePK:148956~piPK:216618~theSitePK:430367,00.html> viewed on 8 May 2009.

¹⁸² *Ibid.*

¹⁸³ J.P. Landman, ‘Breaking the grip of Poverty and Inequality in South Africa 2004-2014, Current trends, issues and future policy options’, Executive Summary, December 2003, Electronic copy, p. 3.

¹⁸⁴ Statistics South Africa, Statistical Release P0211, Quarterly Labour Force Survey, Quarter 1, 2009, p. v.
<www.statssa.gov.za/publications/P0211/P02111stQuarter2009.pdf>, viewed on 8 May 2009.

¹⁸⁵ Bloomberg.com,
<<http://www.bloomberg.com/apps/news?pid=20601116&sid=aXzmVcNsodxs>> viewed on 8 May 2009.

¹⁸⁶ Statistics South Africa, Statistical Release P0211, Quarterly Labour Force Survey, Quarter 1, 2009, p. ix.
<www.statssa.gov.za/publications/P0211/P02111stQuarter2009.pdf>, viewed on 8 May 2009.

¹⁸⁷ Isobel Frye, NALEDI, National Labour & Development Institute, (January 2006), ‘Poverty and unemployment in South Africa’, p. 6.

Continuation of poverty, high unemployment and extreme inequalities in income distribution illustrate the difficulty in breaking the legacy of the former apartheid system. Many people in South Africa are still marginalised or living in fragile environments, and it is only against this background one can fully grasp the enormous challenge the AIDS pandemic poses to the South African society. Hence, HIV/AIDS enhances vulnerability in an already vulnerable context, with devastating effects. In general, several studies have documented a causal relationship between declining household wealth and AIDS.¹⁸⁸ This relationship can easily be illustrated by the fact that “as a household member falls ill, medical care and other expenses increase, while both ability to work and capacity to generate income are likely to decrease”.¹⁸⁹

Recognising education as one of the fundamental tools in addressing poverty, it is highly remarkable how the South African government has not prioritised making education free. Furthermore, the question can be posed if the South African government has created a sustainable and fair structure regarding the financing of education. In the context South Africa being classified as a middle income country¹⁹⁰, with such huge disparities between rich and poor and where so many are so poor, the rationale of a compulsory yet not free education system can strongly be questioned.

5.2.1 Dysfunctional School Fee System

It has been widely recognised that school fees poses a major obstacle to access to education, particularly for children affected by HIV/AIDS. As was illustrated in Chapter 4, South African schools are allowed to supplement government funding by charging school fees, unless declared to be no-fee schools.¹⁹¹ According to law, no learner may be denied access to school due to parents’ inability to pay, or non-payment of school fees.¹⁹² Furthermore, parents who cannot afford to pay school fees must be exempt from payment, granted a so-called school fee waiver.¹⁹³

While this might sound promising in theory, the system of school fee waivers has received some fair, and sharp, criticism. In a report from Human Rights Watch, the issue of school fees is illuminated as a significant barrier to access to education. While it can be acknowledged that in developing countries, the rationale for the existence of a system allowing for the charging of school fees with possible exemptions through school fee waivers is that it, at least theoretically, targets the poor and disadvantaged

¹⁸⁸ Africa’s Orphaned and Vulnerable Generations, Children Affected by AIDS, UNICEF, p. 10.

¹⁸⁹ *Ibid.*, p. 10.

¹⁹⁰ SIDA, <sida.se/sida/jsp/sida.jsp?d=352&language=en_US>, viewed on 11 May 2009.

¹⁹¹ South African Schools Act, Section 39.

¹⁹² *Ibid.*, Section 5 (3) (a).

¹⁹³ Human Rights Watch, *Letting Them Fail: Government Neglect and the Right to Education for Children Affected By AIDS*, October 2005, Vol.17, No. 13 (A), p. 10

children and mitigates the loss of the government resources it would cost to introduce free schooling for all children. However, Human Rights Watch also further notes that “research shows that those in most need of such programs – the poorest families – are often unaware of exemption schemes and do not know that they can apply, or how to do so”.¹⁹⁴ During an interview, two staff members of Save the Children, Sweden joined the critical voices regarding the system of school fee waivers for a number of reasons. At the most fundamental level, it was reiterated that the guardian of the child must have the knowledge that there is a possibility to be partially or fully exempt from the payment of school fees. Not all school staff shares this information willingly as a granted exemption entails decreased revenue to the school. Hence, not all parents or guardians are even aware that they have a right to request a school fee waiver which of course prevents them from exercising such a right.¹⁹⁵ Furthermore, Human Rights Watch reports that it has been shown that “the ability for orphans or children lacking parental care to benefit from a waiver of school fees often depend on the presence of a community-based organization who would demand that the school allow them to enrol”.¹⁹⁶

The noteworthy level of dysfunction of the South African system of school fee waivers can neatly be illustrated with the case of a survey, carried out in the substantially impoverished uMkhanyakude district. In this impoverished area, merely 1 % of the school-going children aged 6-16 were exempt from the payment of school fees. The simple explanation for the unreasonably low rate of granted school fee waivers is the fact that it is up to the local schools to waive fees and the schools are reluctant to do so, as this consequently means reduced revenue to the school. As governmental funding is not sufficient to make ends meet regarding the running and maintenance of schools, the revenue from school fees are much needed. It is against this backdrop that Hein Marais criticises the system of school fee waivers as a powerful disincentive that neutralises the governmental guarantee of possible exemptions of the payment of school fees.¹⁹⁷

One attempt to remedy the acknowledged problems associated with the system of school-fee waivers is the extended percentage of declared no-fee schools. In relation to this, it shall first be noted that the increase in no-fee schools makes no difference for the poor learners finding themselves in the remaining 40 percent of the South African primary schools that have not been granted such a status. The parents and guardians of these learners still have to fight for their right to exemptions and, as has been discussed, are frequently subjected to denial of school fee waivers despite eligibility.

¹⁹⁴ Human Rights Watch, *Failing Our Children: Barriers to the Right to Education*, New York (2006), pp. 16-17.

¹⁹⁵ Interview with Save the Children, Sweden, Pretoria, South Africa, (March 23rd 2009).

¹⁹⁶ Human Rights Watch, *Failing Our Children: Barriers to the Right to Education*, New York (2006), pp. 16-17.

¹⁹⁷ H. Marais, Buckling; *The Impact of AIDS in South Africa*, Centre for the Study of AIDS, University of Pretoria (2005), p. 81.

Another concern with the extended system of no-fee schools is that it appears that the government simply gives additional revenues to cover the exact loss of income that the prohibition to charge school fees result in. If the government only compensates for the lost revenue from school fees, it can easily be concluded that the quality of education will be continuously severely compromised as these impoverished schools never had the chance to charge sufficient school-fees that actually cover their needs of renovation and maintenance, stemming from the unfair distribution of economic resources and complete negligence of the apartheid education system.¹⁹⁸ It can also be noted that the system of no-fee schools merely removes one financial obstacle to the right to education, while other additional costs, such as expenses for uniforms, books stationary and transport remain.

Another issue that has been put forward to criticise the system of school fee waivers is the stigma involved in doing so. A staff member from Save the Children, Sweden said that: “being poor is stigmatising” and held that it had been reported of cases where parents were reluctant to ask for an exemption because of the stigma involved.¹⁹⁹ A final and important remark relating to the area of financial obstacles is that school fees do not cover the entire expenses related to the schooling of a child. School uniforms, books, stationary and transport are not covered through the payment of school fees and pose a significant economic challenge that many parents simply cannot overcome even in the event of being granted a school-fee waive.²⁰⁰

The problems of structuring the financing of education around a system of charging school fees and granting exemptions to the poorest in the community where so many are so poor are apparent. Such a system is fragile and builds upon premises such as the assumption that everyone is correctly informed of the possibility of a school fee waiver, and also has the ability to claim their right to a school fee waiver if needed.

It has also been warned that the South African school system creates a harmful incentive structure of vulnerability and dependency of children, as the learners who cannot afford to pay school fees and related school expenses can be forced into sexual exploitation, where the child’s body is reduced to a mere commodity that can be traded for money to pay school fees.²⁰¹ It has also been reported that teachers take advantage of poor students and coerce them to have sex for money or grades in exchange. Jonathan D. Jansen notes this problem and explains that “older teachers prey on younger, vulnerable girls and where poverty is acute, there is a dependent relationship that develops”.²⁰² It can be argued that the South

¹⁹⁸ K. Hall and J. Monson, *Free to Learn; The School Fee Exemption policy and the National School Nutrition Program*, South African Child Gauge, Children’s Institute (2006), p. 46.

¹⁹⁹ Interview with Save the Children, Sweden, Pretoria, South Africa, (March 23rd 2009).

²⁰⁰ *Ibid.*

²⁰¹ Interview, vice-principal at primary school, Mamelodi , Gauteng, South Africa, March 16th 2009.

²⁰² J. D. Jansen, *Bodies Count*, AIDS Review 2006, University of Pretoria, 2007, p. 34.

African school system creates a particularly harmful structure for already vulnerable children such as children infected or affected by HIV/AIDS. It is apparent that the risk of sexual exploitation is higher for learners who have to compensate for lost family income because parents are incapacitated by illness and cannot work, compared to students who have healthy and employed parents. In addition, both children infected and affected by HIV/AIDS are arguably more emotionally vulnerable and unstable and thus make easy targets for different kinds of abuse, sexual abuse included.²⁰³

Furthermore, the current South African financing system of education completely disregards the stigma involved in asking for being granted an exemption of the payment of school fees. Even with due regard for the new development of increased no-fee schools, it is remarkable that the existence of no-fee schools and school-fee waivers still do not remove all of the financial obstacles of schooling. In conclusion, there is little doubt that even in the best of worlds, where this system works properly and poor learners are not charged school fees, substantial obstacles of financial nature still remain and often pose a very real and serious threat to learners' access to education.

5.3 Practical Obstacles to Realising the Right to Education

Another significant obstacle compromising the access to education for children infected or affected by HIV/AIDS is the demand of regular attendance associated with compulsory schooling. Practical problems such as poor learner attendance and teacher absenteeism due to illness pose serious challenges to education in the context of HIV/AIDS, which should not be underestimated.

5.3.1 Poor Learner School Attendance

In a report from 2005, Human Rights Watch noted that “it is particularly disturbing that as overall school attendance improves in many countries, inequalities are deepening between AIDS-affected children and their peers”.²⁰⁴ Several root causes can be used to explain why the attendance requirement is a particular problem for these learners.

First of all, an apparent reason for sporadic school attendance in this context is of course the situation of a HIV positive learner simply being too sick to make it to school. There was little discussion revolving around this situation in interviews which largely was due to the fact that learners infected with HIV are not identified in the school environment and thus are not subjected

²⁰³ *Ibid.*, p. 34.

²⁰⁴ Human Rights Watch, *Letting Them Fail: Government Neglect and the Right to Education for Children Affected By AIDS*, October 2005, Vol. 17, No. 13 (A), p. 10.

to any extra supportive measures such as the possibility of being assigned home studies, as suggested in section 5.4 of the NP.

Poor school attendance often has connections to the chain of AIDS and poverty. Recognising the link between school attendance, AIDS and poverty, Human Rights Watch reported that “numerous experts have observed that as parents fall ill and become unable to work, a common coping mechanism is to withdraw children from school either to save the cost of school expenses or use the child for household or other labor”.²⁰⁵ Thus, learners affected by the disease are being taken out of school to compensate for lost family income or care for sick family members. It shall be noted that there is a gender factor in play when parents or guardians are confronted with the choice of removing children from school. Girls are more likely to be taken out of school as a means to cope and thus are more vulnerable in this perspective. Statistically girls are more likely to have their right to education denied and suffer from social barriers and unfavourable gender stereotypes.²⁰⁶ The effects of young learners dropping out of school, for whatever reason, have been widely acknowledged to be devastating as completed schooling, among other things, “offers children, especially females, a possible exit from extreme poverty and its associated risks”.²⁰⁷

Reports indicate that as many children are forced to become the primary breadwinners of the family, care givers and sometimes both at the same time, it becomes increasingly hard to cope with the demands of formal schooling.²⁰⁸ While primary school enrolment rates appear to be meeting acceptable standards, it has been reported that there are no statistic on attendance for learners in South Africa²⁰⁹ which has been supported by findings from the minor field study.

During an interview with a teacher working at a primary school, it became clear that while attendance was recorded every morning in order to record who was present and who was absent, this information was not systematised into any statistical data to monitor the general picture of attendance among learners as a whole (let alone to specifically monitor disadvantaged groups of learners such as those infected or affected by HIV/AIDS).²¹⁰ There appeared to be little concern, among the interviewed school staff, related to problems of erratic attendance or much reflection upon the fact that basic education in South Africa is compulsory, according to section 3 (1) of the SASA. A general picture of passivity related to learners’ absenteeism was

²⁰⁵ Human Rights Watch, *Letting Them Fail: Government Neglect and the Right to Education for Children Affected By AIDS*, October 2005, Vol.17, No. 13 (A), p. 10.

²⁰⁶ L. Berry and T. Guthrie, Rapid assessment: The Situation of Children in South Africa, November 2003, Cape Town, p. 28.

²⁰⁷ H. Marais, Buckling; The Impact of AIDS in South Africa, Centre for the Study of AIDS, University of Pretoria (2005), p. 81.

²⁰⁸ L. Berry and T. Guthrie, Rapid assessment: The Situation of Children in South Africa, November 2003, Cape Town, p. 26.

²⁰⁹ *Ibid.*, p. 25.

²¹⁰ Interview with primary school teacher, Mamelodi, Pretoria, (16 March, 2009).

conveyed during interviews with school staff. A principal of a primary school appeared to be perplexed when asked about statistics on attendance for specific groups of learners and did not know whether such a record was kept. Furthermore, it is noteworthy that the principal of a primary school did not know if any specific measures were taken at his school to help a learner who has fallen behind due to absenteeism, which is a common problem for learners infected or affected by the disease.²¹¹

During an interview with staff members from Save the Children, the faulty assumption that statistics of primary school enrolment is an adequate indication of how well implemented the right to education is in a given context was discussed. While a large focus has been put on enrolment through the Millennium Development Goal No. 2, it was put forward that this is not the only factor in focus when analysing the progress towards the achievement of universal primary education. It was stressed that many children start school but a lot of children also drop out, which is why enrolment rates only communicate part of the picture of the status and implementation of the right education.

5.3.2 Teacher Absenteeism

Reports discuss not only unpredictable school attendance due to HIV/AIDS on behalf of learners, but also on behalf of educators. Teacher absenteeism increases as teachers fall ill and are must stay home from time to time. With the progression of illness and deterioration, teachers are ultimately hindered from showing up to school to teach at all.²¹² The consequence of this unpredictable school attendance of educators, pose a serious challenge not only to access to education, as important instructional time is lost due to absenteeism because of the disease, but also to quality of education as teachers are hindered from effectively doing their job.²¹³ Hein Marais describes the downward spiral of illness and death that characterises the South African education system and holds that “as absenteeism and personnel shortages in the public school system worsen, educators’ morale and job satisfaction are likely to dip further. At the same time, the demand for skills in the private education system and in other sectors will rise – increasing the odds of educators being lured out of the public school system”.²¹⁴

In conclusion, learners infected or affected by HIV/AIDS are facing significant practical challenges in the school environment impeding their access to education. Affected learners are prone to drop-out of school due to the need to work as a compensation for lost family income, and the care of

²¹¹ Interview with Principal of Primary School, Mamelodi, Gauteng, South Africa, (9 March 2009).

²¹² J. D. Jansen, Bodies Count, AIDS Review 2006, University of Pretoria, 2007, p. 29.

²¹³ *Ibid.*, p. 30.

²¹⁴ H. Marais, Buckling; The Impact of AIDS in South Africa, Centre for the Study of AIDS, University of Pretoria (2005), pp. 92 – 93.

sick family members. While literature witness of erratic school attendance of both infected and affected learners, interviews with school staff revealed a deficiency with regard to the recording of statistics on attendance rates of this group of learners. The absence of statistical records can primarily be attributed to a lack of identification of the learners infected or affected by the disease. In addition, the problem of teacher absenteeism (i.e. cancelled lessons) and so-called brain drain further complicates the situation for these learners.

5.4 Conclusion

In conclusion, despite legal protection for children infected or affected by HIV/AIDS, it is evident that these children face a multitude of obstacles in the South African education system of social, financial and practical nature. Unfortunately, not all school staff was aware of this. The words of principal of a primary school illustrate shocking unawareness of the issues discussed in this chapter. Upon question if the principal thought that the disease could have any particular impact on a child's schooling, he answered that did not know of any particular problem experienced by these children, other than possibly poor sports performance.²¹⁵ His answer, together with the information that the learners infected or affected by HIV/AIDS remain formally unidentified in schools was very disheartening, as these learners will inevitably lose out on much needed special measures aimed at supporting them and improving their equal access to education.

²¹⁵ Interview with Principal of Primary School, Mamelodi, Gauteng, South Africa, (9 March 2009).

6 Conclusion and Final Remarks

In the international setting, it can be concluded that South Africa, voluntarily through the ratification of relevant international human rights instruments, such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, has undertaken the obligation to ensure the right to free and compulsory education for all children without discrimination of any kind. It can be concluded that the post-apartheid South African government has made both international and domestic efforts to strengthen children's right to basic education, and has taken legislative measures to offer protection against unfair discrimination of learners infected or affected by the disease, through both the South African Children's Act 38 of 2005 and the South African Schools Act 84 of 1996. The Ministry of Education has issued the National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions, as a means of recognising the vulnerability of children infected or affected by HIV/AIDS in the education system. This policy complements the Children's Act and the South African School's Act, and offers guidance on protection against unfair discrimination of learners on account of HIV/AIDS and also addresses the stigma surrounding the virus in the school environment. A collected assessment of the relevant legal provisions, taking into account both international and domestic law, provides that the South African government has guaranteed everyone the right to basic education without discrimination of any kind. However, despite the legal protection and policy document concerning fair treatment of this group of learners, children infected or affected by the disease still encounter significant obstacles impeding their access to education. Obstacles identified and discussed are of social, financial and practical nature. The major discrepancies between the theoretical legal dimension of protective provisions in place, and the vulnerable reality that the children infected or affected by HIV/AIDS encounter everyday, were apparent during the course of field research in South Africa.

One plausible explanation for the existing discrepancies between legal protection against discrimination in the education system, and the systematic occurrences of discrimination in reality, stems from the exploring of the particularities of the South African context in which these legal provisions operate. A major finding concerned the existence of widespread stigma and prejudices surrounding the disease on all levels of society. The South African government's response to the AIDS pandemic has been characterised by denial and inadequate action, which ultimately has compromised its effectiveness. The denial of the truthfulness and accuracy of leading HIV/AIDS science has damaged the AIDS response and confused the population. Inconsistent governmental messages have allowed

stigma and prejudice to fester in society with the effect of fuelling intolerance and discrimination. If the South African government would have responded more consistently and effectively towards HIV/AIDS, more lives could have been saved and the quality of many people's lives could have been drastically improved.

Despite sharply phrased criticism, one can ask if not Stephen Lewis, UN Special Envoy for HIV/AIDS, has a valid point in holding that South Africa "is the only country in Africa whose government continues to propound theories more worthy of a lunatic fringe than of a concerned and compassionate state. Between six and eight hundred people a day die of AIDS in South Africa. The government has a lot to atone for. I'm of the opinion that they can never achieve redemption."²¹⁶

Apart from the need to deal with the substantial stigmatisation of HIV/AIDS positive individuals (learners included), which poses a serious social obstacle to equal access to education for children infected or affected by HIV/AIDS, there is also a clear need for the removal of financial obstacles.

Despite the fact that South Africa voluntarily has undertaken the legal obligation to introduce free, compulsory schooling under international law, education is still not provided free of charge. School fees, together with other costs related to education, pose major obstacles for the realisation of equal access to education, even though the government has made attempts to remedy this situation, such as the introduction of no-fee schools. The fact remains that these efforts simply are not enough to remove the financial obstacles for education and does not absolve South Africa of its legal obligation to introduce a free schooling system. It appears clear that the South African government has no intention of providing education free of charge for all²¹⁷, and as long as alternative routes, such as the no-fee school system and school fee waivers, are taken, the system creates and further exacerbates vulnerability in all children, and more so for children infected or affected by HIV/AIDS who are particularly vulnerable. Structuring a school system to be dependent on the charging of school fees creates a harmful incentive structure for vulnerable children such as children infected or affected by the disease. It creates a dangerous opportunity for sexual exploitation of these children, where sex could be traded for money to pay for school and books or where sex could be used as a form of teacher coercion of students for grades.

In addition to social and financial obstacles, learners infected or affected by HIV/AIDS experience practical obstacles, such as difficulties to enrol and

²¹⁶ Remarks by Stephen Lewis, UN Special Envoy for HIV/AIDS in Africa, to the Closing Session of the XVI International AIDS Conference, Toronto, Canada (2006). www.kaisernet.org/health_cast/uploaded_files/Lewis%20Closing%20Speech.pdf, viewed on 14 May 2009.

²¹⁷ F. Veriava, Lecture: Good Governance Academy – The Right to Education, 12 March 2009.

attend school because of personal ill health, or the need to work to compensate for lost family income, or care for sick family members.

In conclusion, this thesis has argued that the significant problem in the context of equal access to education for learners infected or affected by the disease is not primarily a matter of deficient legal protection, even though the law admittedly could benefit from a higher level of progression and elaboration, but rather the implementation of the law. It is reasonable to assume that the discrepancy between the protection offered through various relevant international and domestic legal provisions, and the reality of vulnerability and discrimination of children infected or affected by HIV/AIDS in South African schools, is a complex riddle that is caused by various factors; a riddle that does not lend itself to easy solutions or remedies.

It lays outside the scope of this thesis to even attempt to provide a systematic and comprehensive explanation of all the intersecting factors that together could serve as a plausible explanation for the discrepancy between law and reality regarding the issue of equal access to education for children infected and affected by HIV/AIDS in South Africa. However, it appears safe to argue that the widespread and systematic stigma surrounding the disease, which the South African government itself bears responsibility in contributing to, is an important key to understanding, explaining and ultimately solving the situation for learners infected or affected by HIV/AIDS. One of the interview participants also speculated, that the reason for why these learners do not seem to have the same protection in practice as they have in theory (i.e. why the implementation of the laws has failed) is largely due to an ineffective bureaucracy and an unaccountable state.²¹⁸

A number of measures can be recommended in order to effectively improve access to education for learners infected or affected by HIV/AIDS. From a legal perspective, it would be appropriate to include 'health status', of both the individual and the individual's family, as a protected ground of unfair discrimination in the Constitution. To include such a ground in the supreme law of the country would send a powerful message of the South African government's commitment to actively work for the acceptance and inclusion of both people infected and affected by the disease. Constitutionally prohibiting unfair discrimination on account of health status would illustrate an elevated level of visibility, and the acknowledgement of the problems of discrimination associated with HIV and AIDS, which could be a crucial aspect for the reduction of stigma.

The South African government also ought to take measures to improve its consistency in its AIDS message. In essence, the government should develop a coherent and consistent AIDS response as opposed to its past

²¹⁸ Interview with individual involved in the NGO Star For Life, Malmö, Sweden, May 11th 2009.

highly fragmented and inconsistent AIDS responses. It is only through the development of a coherent and scientifically friendly AIDS approach, that the South African government slowly but surely can deal with the harm caused by its inconsistencies in the past.

It is advisable that the South African government, apart from dealing with the destructive stigma that leads to social obstacles, also removes the financial obstacles adversely affecting the right to education for learners infected or affected by the disease. Through the ratification of international instruments, South Africa is legally bound to provide not only compulsory but also free education. The introduction of free education would remove the harmful incentive structure of sexual exploitation, hazardous labour and dependency that currently threatens the dignity of South African learners in general, and vulnerable learners such as children infected or affected by HIV/AIDS in specific.

Practical obstacles also need to be removed in order to ensure equal access to education for this group of learners. It is crucial to identify vulnerable children infected or affected by HIV and AIDS in the school environment to be able to provide adequate support. As adequate support requires adequate resources, it is evident that government funding of schools must increase, if schools are to be expected to carry the heavy burden which the AIDS pandemic poses. Practical problems such as poor learner attendance are not easily solved. However, with increased funding schools could, for example, give lectures multiple times during the semester to enable absent learners to catch up with missed classes. Increased funds would also allow for professional support and counselling of children infected or affected by the disease.

As this thesis has illustrated, the reality for children infected or affected by HIV/AIDS in the South African school system remains harsh and their access to education is, in many cases, compromised. While the South African government bears primary responsibility to remove the obstacles impeding equal access for these children, the international community also have an important role to play in this context. It would be constructive to put South Africa under closer scrutiny regarding the governmental response to the AIDS pandemic in general, and in particular regarding its inconsistent message. Furthermore, the international community could remind South Africa of its legal obligation to provide education free of charge.

The South African government has a daunting task ahead of itself, and one can only hope that the political leadership will rise to the challenge and make considerable efforts to ensure equal access to education for all children in South Africa – including the ones infected or affected by HIV/AIDS.

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