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# **Obligations of Independent Schools in South Africa**

*Report for the Centre for Child Law, University of Pretoria*

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# 1. BACKGROUND

1. This research has been prepared for the Centre for Child Law in Pretoria, South Africa. In response to recent cases the Centre has asked us to research the obligations that independent schools have in respect of the right to a basic education, enshrined in section 29 of the South African Constitution.<sup>1</sup> The Centre has been working with a partner in Soweto, Johannesburg, on issues arising from the practices of some inner-city independent schools. When parents cannot pay fees, some schools follow the practice of suspending the learners<sup>2</sup> until the parents can pay the fees. Schools also sometimes withhold the children's end of year results, which means that the children cannot move into the public school system. The questions they have asked us to address are:
  - a. Do independent schools have obligations in respect of children's right to a basic education? If so, then where are these responsibilities derived in law?
  - b. How are the content and extent of the responsibilities to be determined?

This report addresses these questions by analysing the South African legal position and drawing on comparative jurisprudence where appropriate.

2. Independent schools play a small but rapidly increasing role in the provision of education in South Africa.<sup>3</sup> The most prominent independent schools are lavishly resourced and cater to a wealthy, predominantly white, elite. However, the last two decades have seen a dramatic increase in low-cost independent schools as low-income families have increasingly sought alternatives to underperforming, unsafe public schools.<sup>4</sup>

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<sup>1</sup> Constitution of the Republic of South Africa, 1996.

<sup>2</sup> 'Learners' is the preferred term for school pupils in South Africa.

<sup>3</sup> As of March 2011, the Department of Basic Education (DBE) recorded 1,486 registered independent schools in South Africa, serving 479,958 learners (3.8% of learners in the country), compared with 24,365 public schools serving 11,808,036 learners. Statistics exclude unregistered independent schools and independent special needs schools. See DBE 'Education Statistics in South Africa 2011' (2011) <<http://www.education.gov.za/LinkClick.aspx?fileticket=mpjPX4pwF9s%3D&tabid=93&mid=2399>> accessed 17 May 2013.

<sup>4</sup> See Jane Hofmeyr and Simon Lee, 'The New Face of Private Schooling' in L Chisholm (ed) *Changing Class: Education and Social Change in Post-Apartheid South Africa* (HSRC Press, 2004) 143 <[http://www.hsrepress.ac.za/downloadpdf.php?pdf=file/1937/1937\\_05\\_Changing\\_Class~22122004024839PM.pdf&downloadfilename=Changing%20Class%20-%20Chapter%205:%20The%20new%20face%20of%20private%20schooling](http://www.hsrepress.ac.za/downloadpdf.php?pdf=file/1937/1937_05_Changing_Class~22122004024839PM.pdf&downloadfilename=Changing%20Class%20-%20Chapter%205:%20The%20new%20face%20of%20private%20schooling)> accessed 17 May 2013; Centre for Development and Enterprise (CDE), *Hidden Assets: South Africa's Low-Fee Private Schools* (2010) 29-30 <<http://www.cde.org.za/index.php/education-skills-and-markets/79-education/126-hidden-assets-south-africa-s-low-fee-private-schools>> accessed 17 May 2013; Julia De Kadt, 'Learner Mobility in Johannesburg-Soweto, South Africa: Dimensions and Determinants' (PhD thesis, University of the Witwatersrand 2011) 26, 114; CDE, *Promoting School Choice for the Poor: Practical ideas from international experience* (2012) <[http://www.cde.org.za/images/pdf/PROMOTING\\_SCHOOL\\_CHOICE\\_FOR\\_THE\\_POOR\\_Practical\\_ideas\\_from\\_international\\_experience.pdf](http://www.cde.org.za/images/pdf/PROMOTING_SCHOOL_CHOICE_FOR_THE_POOR_Practical_ideas_from_international_experience.pdf)> accessed 17 May 2013.

3. Many of these independent schools provide a valuable service.<sup>5</sup> However, some are accused of engaging in unscrupulous practices, including the use of heavy-handed tactics to extract fee payments from parents. This is evident in the cases that motivated this research request.
4. Neither national nor provincial legislation expressly prohibits independent schools from suspending learners or withholding reports and other services due to the non-payment of fees. In contrast, section 41(7) of the South African Schools Act<sup>6</sup> expressly prohibits state schools from engaging in these practices:

- (7) A learner may not be deprived of his or her right to participate in all aspects of the programme of a public school despite the non-payment of school fees by his or her parent and may not be victimised in any manner, including but not limited to the following conduct:
  - (a) Suspension from classes;
  - (b) verbal or non-verbal abuse;
  - (c) denial of access to –
    - (i) cultural, sporting or social activities of the school; or
    - (ii) the nutrition programme of the school for those learners who qualify in terms of the applicable policy; or
  - (d) denial of a school report or transfer certificate.

5. In the absence of regulation, independent schools may invoke contractual principles as grounds for suspending learners or refusing to release reports. For example, one prominent independent school's suspension policy states that:

A school may exclude (suspend or expel) a pupil when fees are not paid, because the parents have *broken the legal contract to pay fees*. Best practice dictates that adequate warning must be given, especially before year-end exams.<sup>7</sup>

The Independent Schools Association of South Africa (ISASA) further advises that 'the contractual right of the school *vis a vis* the parent might justify the withholding of the report because fees are not paid' but notes that 'there is no settled law on this point.'<sup>8</sup>

6. This research addresses whether independent schools are subject to a constitutional duty to respect and promote the right to a basic education and, if so, whether this requires independent

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<sup>5</sup> See CDE *Hidden Assets* ibid 45-46. See also *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu-Natal* [2013] ZACC 10 (25 April 2013) [40].

<sup>6</sup> Act 84 of 1996.

<sup>7</sup> St John's College's 'Suspension Policy' clause 2.1 <<http://www.stjohnscollege.co.za/studentSuspensionPolicy.php>> accessed 17 May 2013.

<sup>8</sup> Independent Schools Association of South Africa (ISASA) 'Withholding Reports' <<http://www.isasa.org/content/view/full/321/201/>> accessed 17 May 2013.

schools to refrain from suspending learners or withholding other services as a means of extracting payment.

## 2. HORIZONTAL APPLICATION IN THE SOUTH AFRICAN CONSTITUTION

7. The right to a basic education is found in section 29(1)(a) of the South African Constitution<sup>9</sup> which provides:
  - (1) Everyone has the right-
    - (a) to a basic education, including adult basic education; and
    - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
  
8. This is supplemented by sub-section 29(3) which affords the right to establish independent schools and sub-section 29(4) which makes provision for state subsidies for independent schools:
  - (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
    - (a) do not discriminate on the basis of race;
    - (b) are registered with the state; and
    - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
  - (4) Subsection (3) does not preclude state subsidies for independent educational institutions.
  
9. Section 8 of the Constitution provides that the Bill of Rights binds all organs of state and natural and juristic persons, to the extent that the rights are applicable:
  - (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
  - (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
  - (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
    - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
    - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
  
10. There may be some room to argue that independent schools, particularly those receiving state subsidies, qualify as organs of state under section 239<sup>10</sup> of the 1996 Constitution. Under the

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<sup>9</sup> Constitution of the Republic of South Africa, 1996.

<sup>10</sup> Section 239 provides:

interim Constitution,<sup>11</sup> courts applied a strict ‘control test’ in identifying organs of state, requiring the state to exercise effective control over the organisation.<sup>12</sup> In *Wittmann v Deutscher Schulverein Pretoria*,<sup>13</sup> Van Dijkhorst J applied this test in finding that private schools cannot be classed as organs of state as they are not under the effective control of the state. However, the courts have moved away from the strict application of the control test under the 1996 Constitution.<sup>14</sup> The definition of an ‘organ of state’ under section 239 is fluid, encompassing any institution that a) exercises a public power or performs a public function and b) does so in terms of legislation. Boezaart, for example, argues that independent schools do qualify as ‘organs of state’ under this definition.<sup>15</sup> Her argument is that independent schools are subject to state control, for example through registration and standard-setting. They also ‘function within the broader legal framework created for public education in South Africa.’<sup>16</sup> As a result, she concludes that these schools can be classified as performing a public function in terms of the national and provincial education legislation.

11. However, we submit that this argument is unlikely to succeed. Although education may be seen as a ‘public function’ for the purposes of section 239(b),<sup>17</sup> it seems unlikely that independent schools can be classified as performing such a function ‘in terms of the Constitution’ or ‘legislation’ First, the fact that the Constitution grants individuals the liberty to establish independent schools does not entail that the powers and functions of independent schools are exercised ‘in terms of’ the Constitution, in the same way that a trade union is not an organ of

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‘organ of state’ means—

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer;

<sup>11</sup> Constitution of the Republic of South Africa Act 108 of 1993, s 7(1).

<sup>12</sup> *Directory Advertising Cost Cutters CC v Minister for Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T) 808-811

<sup>13</sup> 1999 (1) BCLR 92 (T) 88-89.

<sup>14</sup> *Minister of Education, Western Cape and others v Governing Body Miko Primary School* 2006 (1) SA 1 (SCA) [20].

<sup>15</sup> Trynie Boezaart *Child Law in South Africa* (Juta 2009) 499.

<sup>16</sup> *ibid* 499.

<sup>17</sup> In *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) Langa CJ explained, at [186]

Determining whether a power or function is “public” is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.

state merely because the Constitution affords a right to establish trade unions. Second, the Schools Act and other national and provincial legislation do not provide the source of independent schools' power and functions, but merely regulate the registration of independent schools and some ancillary matters, leaving independent schools with a great deal of autonomy. As a result, these schools could not be said to be exercising public powers or functions in 'terms of legislation'. Furthermore, it is clear from section 29(3) that the Constitution envisages that independent schools will have a greater degree of autonomy than public schools, particularly in the pursuit of linguistic, cultural or religious aims that have the potential to be exclusionary to other groups.<sup>18</sup> Classifying independent schools as 'organs of state', subject to the same constitutional duties as public schools, would go against this constitutionally envisaged autonomy. Thus, we submit that it is more appropriate to determine independent schools' constitutional duties under sections 8(2) and 8(3).

12. For our purposes, then, it is best to approach the issue of the obligations of independent schools regarding the right to education as one of horizontal application. The Constitutional Court, in *Khumalo v Holomisa*,<sup>19</sup> set out a useful framework for determining whether, and to what extent, a particular provision in the Bill of Rights is horizontally applicable. Firstly, it is necessary to determine whether or not a particular right or duty binds the private entity in question.<sup>20</sup> Secondly, if it is decided that the private entity is bound by a particular provision of the Bill of Rights, section 8(3) comes into play, requiring the court to apply and if necessary develop the common law to the extent that legislation does not give effect to the right.<sup>21</sup> The discussion below follows this framework.

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<sup>18</sup> Pointedly, section 29(3)(a) only expressly prohibits discrimination on the basis of race. See further Stu Woolman and Brahm Fleisch, *Constitution in the Classroom* (PULP 2009) ch 4.

<sup>19</sup> *Khumalo v Holomisa* 2002 (8) BCLR 771.

<sup>20</sup> *ibid* [31].

<sup>21</sup> *ibid* [31].

### 3. IS THE EDUCATION RIGHT APPLICABLE HORIZONTALLY?

13. Under section 8(2) of the Constitution, the enforceability of the section 29(1)(a) right to a basic education against independent schools must be determined by taking into account the nature of the right and the nature of the duty. Section 8(2) thus provides the broad criteria for deciding when a provision in the Bill of Rights will bind an independent school.<sup>22</sup>
14. Further guidance on the considerations relevant to determining whether, and to what extent, a particular right has horizontal application, can be found in the judgment of *Khumalo v Holomisa*. This case concerned the right to freedom of expression, and specifically, whether this right altered the common law rules regarding an action for defamation. The court emphasised the importance of the right to freedom of expression, stating that this right is ‘integral to a democratic society,’<sup>23</sup> and ‘constitutive of the dignity and autonomy of human beings.’<sup>24</sup> Also relevant was the power of the private entity to interfere with the interests protected by the right. The court ultimately concluded:

Given the intensity of the constitutional right in question, coupled with the potential invasion of the right which could be occasioned by persons other than the State or organs of State, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution.<sup>25</sup>

Relevant considerations in the context of independent schools are thus the importance of the education right, and the power of the school to interfere with that right.

15. Furthermore, the horizontal application of the Bill of Rights must be decided in context, taking into account the particular circumstances of the case at hand.<sup>26</sup> Thus, in determining whether or not a right applies horizontally it is important to take into account whether or not it is appropriate to apply a particular duty to the specific private institution. In deciding whether, and to what extent, independent schools are bound by section 29(1) of the Bill of Rights, it is necessary to consider the nature of the right to education, the potential for the particular school

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<sup>22</sup> Sandra Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution*, (Juta 2010) 327.

<sup>23</sup> *Khumalo* (n8) [21].

<sup>24</sup> *ibid* [21].

<sup>25</sup> *ibid* [33].

<sup>26</sup> Liebenberg (n11) 322.

in question to interfere with that right, and the appropriateness of imposing a particular duty on that school.

## **A. THE NATURE OF THE RIGHT AND THE POTENTIAL FOR INTERFERENCE**

16. The right to education is a particularly important right. It has value both as an end in itself, and in empowering people to realise other human rights. This has been recognised by the Committee on Economic, Social and Cultural Rights, in General Comment 13 on the International Covenant on Economic, Social and Cultural Rights:

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 exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised 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.<sup>27</sup>

17. The importance of the right to education is also stressed in Article 1 of the 1990 World Declaration on Education for All,<sup>28</sup> which explains that the right to basic education is a guarantee that:

Every person — child, youth and adult — shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both 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.

18. In the South African context, this right has even greater significance. As Nkabinde J held in *Governing Body of the Juma Masjid Primary School v Essay (Juma Masjid)*:<sup>29</sup>

The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of

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<sup>27</sup> ICESCR Committee General Comment 13 (21<sup>st</sup> Session, 1999) “The Right to Education (art 13)” UN Doc E/C.12/1999/10 at para 1.

<sup>28</sup> Adopted by the World Conference on Education for All, Jomtien (1990) available at [http://www.unesco.org/education/pdf/JOMTIE\\_E.PDF](http://www.unesco.org/education/pdf/JOMTIE_E.PDF), accessed 17 May 2013.

<sup>29</sup> 2011 (8) BCLR 761 (CC) at para 42-43.

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

Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.

19. Therefore, the right to education is one which runs to the heart of South African constitutional values, as education is necessary for a person to develop to their fullest extent, to live in dignity, and generally to lead a fulfilling life. There is no question that the right involved in this case is one of resounding importance.
20. Furthermore, the state is not the only entity that is capable of impairing this right. On the contrary, there is a very real danger that independent schools may interfere with a child's education right, to the extent even of making it impossible for a child to attend any school for a period of time. A child whose parents have not paid fees is potentially in a very vulnerable position. He/she has no power to pay the fees him/herself; neither does he/she have any control over the terms of the agreement between the school and his/her parents. An incredibly important right, then, falls to be either upheld or impaired at the instance of a private entity – the independent school – and the child is vulnerable to that entity's actions. Given this immense vulnerability and the intensity of the right in question, there can be no question that the right to a basic education as guaranteed in section 29 of the Constitution must be, to at least some extent, horizontally applicable to independent schools.

## **B. THE NATURE OF THE DUTY: THE APPROPRIATENESS OF NEGATIVE OBLIGATIONS**

21. We submit that, at the very least, independent schools have a negative duty not to interfere with learners' exercise of their right to a basic education. The Constitutional Court has consistently affirmed that natural and juristic persons have a negative duty to respect socio-economic rights, including a duty not to prevent individuals from accessing socio-economic goods or from

interfering in their present enjoyment of these goods.<sup>30</sup> This principle was applied to the section 29(1)(a) right to a basic education in *Juma Masjid*, a matter concerning an eviction application brought by a private landowner (the Juma Masjid Trust) to remove a public school from its land. In setting aside the High Court's eviction order, which showed no regard for the learners' section 29(1)(a) right, the Constitutional Court confirmed that private parties 'have a negative constitutional obligation not to impair ... learners' right to a basic education.'<sup>31</sup>

22. We submit that, at the very least, this negative duty would require independent schools to refrain from practices that prevent learners from accessing a basic education in a public school, such as withholding reports to prevent learners from registering at public schools.

### **C. THE NATURE OF THE DUTY: THE APPROPRIATENESS OF POSITIVE OBLIGATIONS**

23. The more complex question is whether independent schools are under a positive duty to provide a basic education to those who are unable to afford their fees. In *Juma Masjid*, the Court emphasised that the primary duty to provide a basic education falls on the state:

It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC.<sup>32</sup>

As a result, it stressed that the Trust was not obliged to continue to make its land available to the public school for all time. However, the Court recognised that the Trust was subject to a duty to minimise the impact of an eviction order on the learners:

At most, the Trust's constitutional obligation, once it had allowed the school to be conducted on its property, was to minimise the potential impairment of the learners' right to a basic education.<sup>33</sup>

By analogy, it may be argued that once an independent school has assumed responsibility for the education of a learner it is not barred from suspending or expelling the learner. However, it must make efforts to minimise the impact of these steps on the learners' right to a basic education.

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<sup>30</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) [78]; *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) [33]-[34]; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) [68]-[71]; *Minister of Health and Others v Treatment Action Campaign and Others (1)* 2002 (5) SA 721 (CC) [46]; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) [34]; and *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) [13].

<sup>31</sup> *Juma Masjid* (n19) [60].

<sup>32</sup> *ibid* [57].

<sup>33</sup> *ibid* [62].

24. Alternatively, it may be argued that the duties of private landowners are distinguishable from the duties of independent schools. Unlike private landowners, the very purpose of independent schools is to provide education. By engaging in this activity, independent schools place themselves under more onerous obligations than other private entities who have not taken on an educational mandate. As a result, it may be argued that independent schools are subject positive duties to assist the state in providing a basic education, which go beyond the ‘minimum impairment’ rule in *Juma Masjid*.
25. This point was made in the Indian Supreme Court, in the case of *Unnikrishnan*.<sup>34</sup> Justice Mohan, in his concurring opinion, admitted the possibility that Article 14 of the Constitution (the right to equality before law) might be applicable in claims against schools. Justice Mohan found that education is so vital and important a function within society, that the very fact of engaging in that enterprise brings an entity – through a legal fiction that assimilates it with the State – within the scope and rubric of fundamental rights claims against it.<sup>35</sup> The learned Judge stated:
- These private institutions discharge a public duty. If a student desires to acquire a degree, for example, in medicine, he will have to route through a medical college. These medical colleges are the Instruments to attain the qualification. Therefore, since what is discharged by the educational institution is a public duty, that requires it to act fairly. In such cases, it will be subject to Article 14.<sup>36</sup>
26. The issue of independent schools’ positive duties to provide an education was raised in the Indian Supreme Court decision in *Society for Un-Aided Private Schools v Union of India (Un-aided Private Schools)*.<sup>37</sup> This concerned a challenge to the Right of Children to Free and Compulsory Education Act<sup>38</sup> which placed a positive duty on independent schools to provide free schooling to children from disadvantaged groups and to reserve at least 25% of places in schools for these children. In defence of this Act, it was argued that, because independent schools exist to provide an education, they owe a positive duty to assist the state in providing a basic education. The majority refrained from deciding this question, holding instead that the state could impose a statutory duty on independent schools to admit disadvantaged learners in furtherance of the state’s duty to promote access to education. The court did, however, suggest that the right to education was not merely a right against the state:

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<sup>34</sup> *Unnikrishnan v State of AP*, AIR 1993 SC 2178 (Mohan J. Concur. Op.).

<sup>35</sup> *ibid* [6.2].

<sup>36</sup> *ibid* [5].

<sup>37</sup> *Society for Un-Aided Private Schools v Union of India* (2012) 6 SCC 1.

<sup>38</sup> Right to Education Act, 2008.

The right to education envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society.<sup>39</sup>

27. While the positive duties of independent schools to admit disadvantaged learners are extremely controversial, section 29(3) of the Constitution clearly indicates that independent schools owe some duties to learners currently enrolled at the school. Section 29(3)(c) provides that independent schools owe a positive duty to learners to ‘maintain standards that are not inferior to standards at comparable public educational institutions.’
28. The scope of this duty has not been tested, leaving at least three questions open: a) do these standards relate to the *actual* standards in public schools or the standards that *ought* to be attained by these schools? b) what aspects of the educational experience do these standards cover? and c) what counts as a comparable public educational institution?
29. Reading section 29(3)(c) purposively<sup>40</sup> and in light of s 29(1)(a), we submit that, at the very least, it requires independent schools to maintain standards that ensure that all enrolled learners receive a basic education. We submit that any activity or practice that prevents learners from receiving a basic education would therefore be in breach of this duty, including the suspension of learners or the withholding of services without taking adequate precautions to ensure the learners continue to receive a basic education.
30. The European Court of Human Rights, in *Costello-Roberts v the United Kingdom*,<sup>41</sup> held that the disciplinary code followed by a school falls within the ambit of the right to education. The court held that:

Functions relating to the internal administration of a school, such as discipline, cannot be said to be merely ancillary to the educational process.<sup>42</sup>

Further, the state had an obligation to secure to children their right to education under Article 2 of Protocol No. 1 to the European Convention on Human Rights. As a result, the United Kingdom was responsible for disciplinary practices at all schools, state and independent. The court stated that:

The fundamental right of everyone to education is a right guaranteed equally to pupils in state and independent schools, no distinction being made between the two.<sup>43</sup>

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<sup>39</sup> *ibid* [20].

<sup>40</sup> *S v Zuma* 1995 (2) SA 642 (CC) [17]; *S v Makwanyane* 1995 (3) SA 391 (CC) [9], [301]-[302]; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) [232].

<sup>41</sup> *Costello- Roberts v the United Kingdom* App no 13134/87 (ECHR, 25 March 1993).

<sup>42</sup> *ibid* [27].

Similarly, it could be argued that suspension policies and fee policies fall within the ambit of the right to education, as admission and suspension are functions which, like discipline policies, are integral, not merely ancillary, to the education process. Hence, a policy that prevents a child from receiving access to a basic education would be a breach of an independent school's constitutional duty to maintain standards comparable to those at public institutions.

31. Brazilian law also provides some support for this interpretation. Like section 29(3)(c) of the South African Constitution, the Brazilian Constitution also provides that private schools must comply with the basic norms of national education.<sup>44</sup> Although the extent of this obligation has not been judicially considered, the legislative framework enacted to give effect to the constitutional right to education in Brazil is useful in understanding what it means to say that private schools must comply with national education standards. The responsibilities of independent schools in Brazil are not very different from those of state schools. In fact, the main difference between the two is that state schools are subject to stringent norms regarding their governance (democratic governance; selection of tenured teachers through entrance examinations; and national minimum wage defined by law),<sup>45</sup> whilst independent schools are not. Except for these aspects related to governance, private schools must provide educational services in accordance with the constitutional framework of the fundamental right to education. We submit that section 29(3) could be interpreted to give a broad definition to the term 'educational standards', so as to require independent schools to ensure that all learners enrolled at the school receive a basic education for the time that they are at the school, and not to enact fee- or suspension policies that would impair an enrolled child's access to education.
32. Therefore, we submit that independent schools have both a negative duty not to interfere with learners' section 29(1)(a) right to a basic education and a positive duty under section 29(3) to maintain educational standards 'that are not inferior to standards at comparable public educational institutions,' requiring independent schools to ensure that all enrolled learners receive a basic education.

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<sup>43</sup> *ibid* [27].

<sup>44</sup> Art. 209 of the Brazilian Constitution.

<sup>45</sup> Art. 206 of the Brazilian Constitution.

## 4. APPLYING SECTION 8(3)

33. Section 8(3) details how a right in the Bill of Rights may be applied to private parties – in essence, it sets out the methodology a court should apply when applying a right horizontally. Section 8(3) provides:

- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

### A. LEGISLATION GIVING EFFECT TO THE DUTY

34. First, it must be determined whether legislation expressly gives effect to these duties. As indicated above, no legislation explicitly prohibits independent schools from suspending learners or withholding services as a means of extracting payment. Section 3(6)(b) of the South African Schools Act<sup>46</sup> is the only provision that has some bearing on these practices:

[A]ny other person who, without just cause, prevents a learner who is subject to compulsory attendance from attending a school, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

We submit that this provision could apply where an independent school expels a learner for non-payment of fees but withholds school reports or other documentation, preventing the learner from being enrolled in a public school. The only question is whether the collection of fee debts is a ‘just cause’ for this practice. This requirement must be read in light of the right to a basic education and independent schools’ negative duty to refrain from interfering with this right.<sup>47</sup> In light of these duties and the availability of alternative means to recover fee debts, discussed further below, we submit that the recovery of fees could not be considered a ‘just cause’ for preventing a learner from accessing public education.

35. However, this legislative duty would have limited effect and would not prevent independent schools from suspending or expelling learners or withholding services as a means to extract

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<sup>46</sup> 84 of 1996.

<sup>47</sup> Section 39(2) provides:

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

payment. In the absence of legislation, the focus must turn to developing common law rules to give effect to independent schools' constitutional rights and duties. This task necessarily involves balancing the section 29(1)(a) right to a basic education against independent schools' competing interests.

36. Before turning to the development of the common law, it should be noted that the absence of legislation or regulations on this issue could be grounds for a constitutional challenge against the state, as it could be argued that the state is failing in its duty to protect learners' right to a basic education.<sup>48</sup> However, this issue falls beyond the scope of the questions addressed in this research.

## **B. DEVELOPING THE COMMON LAW**

37. In the absence of legislation giving effect to the right, it is necessary to look to the common law to give effect to independent schools' constitutional obligations. The relationship between independent schools and parents is regulated by contract. Thus, the question is whether or not contract law already provides sufficient protection for the rights of children enrolled at independent schools, or whether judicial development of the common law would be required in order to bring contract law in line with constitutional requirements.
38. The Court's approach in *Khumalo v Holomisa* is useful in setting out how to go about the section 8(3) analysis. The court stated its approach as follows:

The first question we need then to determine is whether the common law ... unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by section 8(3) of the Constitution.<sup>49</sup>

The court held that, in answering the question whether or not the common law is inconsistent with the Constitution, it is necessary to consider whether or not the common law strikes an appropriate balance between the relevant competing rights and interests – in *Khumalo v Holomisa*, the right to freedom of expression, and the constitutional value of human dignity. Relevant to

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<sup>48</sup> Section 7(2) requires that the state must 'respect, protect, promote and fulfil the rights in the Bill of Rights'. See, for examples of this type of challenge, *Women's Legal Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) (a challenge to the legislature's failure to enact legislation recognising and regulating Muslim marriages); *Equal Education and Others v Minister of Basic Education and Others* (ECB) case no 81/2012 (an application to compel the Minister of Basic Education to promulgate regulations establishing norms and standards for the provision of school infrastructure).

<sup>49</sup> *Khumalo* (n8) [33].

this query is the importance of the interest protected by the common law, relative to the importance of the competing constitutional right or value.

39. Therefore, in determining whether or not the common law of contract is inconsistent with the Constitution, the overarching question will be whether or not the common law strikes an adequate balance between the interests of the independent school, on the one hand, and the child, on the other, taking into account the respective importance of each set of interests.
40. The relationship between independent schools and parents is generally governed by the law of contract.<sup>50</sup> Parents agree to pay fees in a certain amount, in return for which schools provide educational services to the child. In some cases, however, parents are not able to pay the agreed fees. This constitutes a breach of the contract, as the parents have failed to perform in terms of their agreed obligations. The precise legal effect of a failure to pay timeously will depend on the particular contract in question. For example, the contract may include a cancellation clause, giving the school the right to cancel the contract on non-payment. The contract may also include a penalty clause, setting out consequences of non-performance. In the absence of such clauses, the common law relating to remedies on breach of contract applies.
41. Under the common law, breach entitles the other party – in this case the school – to a range of remedies, including specific performance, interdict, damages, the defence of *exceptio non adimpleti contractus*, and, in some circumstances, cancellation.<sup>51</sup> The most relevant of these for our current purposes is the *exceptio non adimpleti contractus*. Invoking the *exceptio non adimpleti contractus* would allow the ‘innocent’ party, the school, to refuse to perform its own contractual obligations until the breaching party, the parent, has performed in full by paying the outstanding school fees.<sup>52</sup> This approach seems most relevant to independent schools in South Africa. In suspending a child or withholding documents, the school is not cancelling the contract altogether; rather, the school is withholding the educational services that constitute its performance under the contract with the child’s parents, until such time as the parents perform their own contractual obligations. Thus, were the parents of a child to demand that the school continue to teach the child despite non-payment, the school would be able to rely on this defence. Under the common law, then, an independent school would be permitted to suspend a child as a result of their parents not having paid the required fees.

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<sup>50</sup> See para 4 and footnote 5 above.

<sup>51</sup> Dale Hutchison and Chris-James Pretorius (eds) *The Law of Contract in South Africa* (Oxford University Press 2012) 310.

<sup>52</sup> *ibid.*

42. The question, then, is whether or not this common law position strikes an adequate balance between the interests of the parties concerned. Clearly, the common law protects the interests of the ‘innocent’ party in the contract – in this case, the school. What is the nature of the interests being protected under the common law, and how important are these interests? Firstly, the common law is protecting the freedom of contract – broadly, the right of parties to order their own affairs as they see fit. *Pacta sunt servanda* has been repeatedly emphasised by the South African courts as an important principle in the common law.<sup>53</sup>
43. Secondly, the common law is protecting an innocent party’s economic interest in not rendering performance in respect of a reciprocal agreement, where the other party has failed to render performance. Again, this is an important interest; to require parties to perform despite lack of performance by the other party would clearly be detrimental to commerce. In the specific instance of independent schools, to require schools to continue teaching children despite fees not being paid may result in the school no longer being sustainable, it could provide perverse incentives for parents who cannot afford school fees to enter into contractual obligations they have no intention of performing,<sup>54</sup> and it could negatively impact on the school’s ability to provide services to other learners.
44. However, it is important not to lose sight of the rights of the child concerned.<sup>55</sup> The importance of education rights cannot be overstated, as explained in paragraphs 16 to 19 above. The common law, in allowing schools to escape obligations to children under their care by relying on the *exceptio non adimpleti contractus*, does not strike a balance between the two competing sets of interests at all. The common law position is heavily weighted to preserving the economic interests of the independent school. Given the importance of education rights, and the vulnerable position of the child in the contractual relationship, this situation is clearly untenable. It should be noted that the child is entirely vulnerable in such a contractual relationship, as it is the parents who are contracting with the school. Thus, the child’s rights stand to be curtailed through a contractual agreement in which the child him/herself plays no part. In such a situation, it is of the utmost importance that the courts safeguard the child’s interests. Under the common law, independent schools would be able to evade entirely both their negative and positive constitutional obligations to children under their care. Furthermore, it should be

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<sup>53</sup> Liebenberg (n11) 358-375.

<sup>54</sup> Note, however, that the Brazilian Supreme Justice Tribunal has rejected an argument by an independent school that the Brazilian legislative obligations placed on independent schools create perverse incentives. See paragraph 51 and footnote 66 below.

<sup>55</sup> See *Khumalo* supra note 8 at para 41.

recognised that schools have alternative means available to secure payment of outstanding school fees that are less restrictive of learners' right to education, such as launching civil proceedings to recover debts. Therefore, we submit that the common law does not adequately protect the rights of children in this situation, and needs to be developed in order to meet constitutional standards.

45. In developing the common law, it is necessary to incorporate the constitutional duties imposed horizontally on independent schools by the right to education. As discussed above, independent schools have, at the very least, a negative obligation not to interfere with the education rights of children. We submit that this means that this negative duty would require independent schools to refrain from practices that prevent learners from accessing a basic education in a public school, such as withholding reports to prevent learners from registering at public schools.
46. Furthermore, following *Juma Masjid*, independent schools, as entities whose actions impact on children's enjoyment of education rights, have an obligation to make efforts to minimise the impact of their actions on the learners' right to a basic education. The question then, is what is entailed by the term 'minimise.' The court in *Juma Masjid* made it clear that the ultimate duty fell on the state, not the private entity. Thus, following this case, it cannot be argued that private entities are obliged to not to take any actions at all which might impair a child's education rights. 'Minimise' simply means that the impairment must be as minor as possible. A contentious point is likely to be the issue of what is possible for independent schools, and hence what it is reasonable to expect them to do. Is a policy that allows a child to be suspended at the end of the school term, in order to ensure an independent school is financially profitable, one which minimally impairs a child's right? From the child's point of view, there is clearly room for improvement. His/her education right would be less affected by a policy that allowed him/her to remain at the school until the end of the school year, or until he/she is able to transfer to another school. On the other hand, from the point of view of a school set up to make a profit, the answer is arguably 'yes.' In their view, they are doing as much as is possible, given their profit-motive. A child who cannot pay fees must be replaced with one who can, in order for the school to continue functioning according to its institutional and economic mandate. The obligation on the school is thus not only a function of the nature of the child's right, but also the school's capacity to meet that right. The exact extent of the obligation to 'minimise' the impairment of the right is thus something that will need to be determined in the context of the facts of each specific case.<sup>56</sup>

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<sup>56</sup> Liebenberg (n11) 322.

47. We submit that, at the very least, the obligation to minimise the impairment of the child's right means that a school cannot take any actions that would result in the wholesale denial of the child's right for a period of time. To withhold reports where this prevents learners from accessing the public school system would be a violation of this duty. Similarly, although schools may be entitled to expel children whose parents do not pay the required fees, such expulsion must be carried out in such a way that minimises the impact on the child's educational rights. Thus, for example, to expel a child in the middle of a school term would make it very difficult for that child to move to a public school, whose intake is determined at the beginning of each year. This too would result in the child not being able to attend school at all, which clearly infringes the child's right to a basic education.
48. In addition to this minimum impairment obligation, as outlined in paragraphs 24 to 26 above, it may be argued that the current case is distinguishable from *Juma Masjid*, as the obligations of independent schools are distinguishable from those of private landowners. Unlike private landowners, the very nature of independent schools is to provide education. By engaging in this activity, independent schools place themselves under more onerous obligations than other private entities who have not taken on an educational mandate. As a result, we submit that they do have positive duties to assist the state in providing a basic education, which go beyond the 'minimum impairment' rule in *Juma Masjid*. In addition, independent schools, in terms of section 29(3), have duties to maintain standards that ensure a basic education. As argued in paragraph 32 above, this entails that they cannot implement policies which actively prevent learners from receiving a basic education.
49. The question, then, is how the common law ought to be developed in order to give effect to an independent school's positive obligations. It is instructive to look to the practices of comparative jurisdictions, where the balance between the interests of independent schools and children has been more evenly struck.
50. In Brazil, independent schools' obligations are governed by federal legislation – the School Annual Fees Act (1999).<sup>57</sup> Once a student is formally matriculated in an independent school, lack of payment can never be ground for suspension of school exams, retention of school documents, or any other application of pedagogical sanctions.<sup>58</sup> In addition, independent schools may only proceed civilly against a child's parents to recover the outstanding amount.<sup>59</sup> The

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<sup>57</sup> Federal Law n. 9.870/99.

<sup>58</sup> Article 6 of Federal Law n. 9.870/99.

<sup>59</sup> Article 6 of Federal Law n. 9.870/99.

school cannot terminate the contract during the academic year due to lack of payment. They are required to provide equal treatment to all students, including those whose parents could not pay their fees. Only at the end of the academic year are independent schools allowed to refuse to matriculate these students again.<sup>60</sup> However, if the parents manage to pay all debts before the end of the academic year, the student has the right to renew his/her matriculation.<sup>61</sup> On the other hand, if they remain unable to pay, students are entitled to a place in public schools at the beginning of the new academic year.<sup>62</sup> In this case, independent schools must not retain school transcripts or any other documents. This abusive practice is strictly prohibited and private schools are obliged to provide all requested documents for student transfers at any time, regardless of payment of their fees.<sup>63</sup>

51. Although these obligations are provided for in legislation, they are rooted in the Brazilian Constitution, which recognises the importance of the right to education.<sup>64</sup> Furthermore, these requirements have survived constitutional challenges to the Superior Tribunal of Justice, the highest Federal Court in Brazil.<sup>65</sup> In a series of judgments, the STJ reaffirmed these educational rights and refused to accept claims of private schools based on lack of proportionality, unfair allocation of economic burden, or providing incentives for parents to act in bad faith.<sup>66</sup>
52. Indian law goes even further, as the Right of Children to Free and Compulsory Education Act requires independent schools to admit, to an extent of 25% of their total intake, neighbourhood children who come from social and economic backgrounds that preclude them from being able to afford the school's fees.<sup>67</sup> Again, this is a legislative requirement rather than one arising purely from the education right in the Indian Constitution; however, it has survived constitutional challenge.<sup>68</sup> Moreover, the Indian Supreme Court has held that education is primarily a charitable activity, which imposes not only rights against the state, but also imposes an 'affirmative burden

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<sup>60</sup> Article 6, § 1, of Federal Law n. 9.870/99.

<sup>61</sup> Article 5 of Federal Law n. 9.870/99.

<sup>62</sup> Article 6, § 3, of Federal Law n. 9.870/99.

<sup>63</sup> Article 6, § 2, of Federal Law n. 9.870/99.

<sup>64</sup> Articles 6 and 205 of the Brazilian Constitution.

<sup>65</sup> These controversies related to educational rights and responsibilities of private schools have not yet reached the Brazilian Supreme Federal Tribunal (equivalent to the South African Constitutional Court), but have been considered by the Superior Tribunal of Justice (STJ), which is the highest federal court.

<sup>66</sup> See *Ricardo Guidini Sonni v UNOPAR* (STJ, RE n. 780.563-PR, J. Fux, 24/07/07); *Jacob Cardozo v UMC* (STJ, RE n. 725.955-SP, J. Calmon, 18/05/07); *Sandra Araújo Oliveira v UPIIS* (STJ, RE n. 712.313-DF, J. Benjamin, 13/02/08); *Liège Elisa Pereira Pires v Unisinos* (STJ, RE n. 868.253-RS, J. Calmon, 06/11/08).

<sup>67</sup> Right to Education Act, 2008.

<sup>68</sup> *Society for Un-Aided Private Schools* (n27).

on all stakeholders in Indian society.<sup>69</sup> However, the precise nature of this duty has been left unspecified.

53. It is also useful to look to the policy guidance to independent schools in the UK and Australia. UK legislation does not specifically deal with the obligations of independent schools in respect of education rights. However, the Independent Schools Council in the UK indicates that while situations will be dealt with by each individual school on a case by case basis, there are alternative options preferred to excluding the child from school.<sup>70</sup> The anecdotal evidence shows that many private schools will not remove children when their families are unable to pay, and that sometimes schools will allow fees to accumulate in arrears and will accommodate parents through payment plans.<sup>71</sup> Such plans allow the fees in arrears to be paid in instalments, and are calculated in relation to the ability of the parents to afford instalment payments.<sup>72</sup>
54. Similarly, in Australia, although there is no explicit legislative guidance, it seems that general practice in instances where children are unable to pay fees, is that private schools allow families to enter into payment plans or grant them some form of fee help, as opposed to removing the child from the school. This is particularly common in religious private schools.<sup>73</sup>
55. We do not argue that all of these approaches are suitable to the South African situation. The nature of horizontal application of the Bill of Rights is that it is a context-based determination, and any development of the common law will have to be based on the specific case at hand. The approaches in the comparative jurisdictions do, however, provide a useful starting-point in assessing best practice around the world. Even where safeguards are not legislated but merely policy-driven, it is clear that independent schools ought not to be given complete freedom to act contrary to children's education rights. Although schools have an economic interest to protect, it is possible to do this in less draconian manner than the immediate suspension of a child in the middle of the school year. Approaches such as creating payment plans allow for the school's economic interest to be safeguarded, while also securing the best interests of the child.
56. In summary, we submit that the common law needs to be developed, in order to achieve an appropriate balance between the rights of the child concerned, and the interests of the

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<sup>69</sup> *ibid* [20].

<sup>70</sup> Independent Schools Council, 'Help with School Fees' <<http://www.isc.co.uk/find-a-school/information-for-parents/help-with-school-fees>> accessed 17 May 2013.

<sup>71</sup> Daily Mail, 'The Shame When You Can't Pay the School Fees' <http://www.dailymail.co.uk/news/article-2007568/The-shame-pay-school-fees.html>, accessed 17 May 2013.

<sup>72</sup> *ibid*.

<sup>73</sup> See eg <http://www.catholic.tas.edu.au/Resources/documents/School%20Fees%20Assistance.pdf>, accessed on 21/05/13.

independent school. At the very least, independent schools have a negative obligation not to interfere with a child's right to education, for example by withholding documents necessary to transfer to a public school. Further, there is also a clear obligation to minimise the impairment to a child's education rights caused by any of their actions. In addition, as a result of their position as education-providing entities, they incur positive obligations to ensure the education rights of the children under their care. Finally, they are obliged to maintain standards, including policies, comparable to those at public schools. Therefore, practices such as withholding reports and suspending learners mid-way through the school year may be contrary to schools' constitutional obligations. As the common law does not currently provide an appropriate balance between the interests of schools and the rights of children, development is needed in order to ensure independent schools meet their constitutional obligations as outlined above.