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The complexity of human rights in global times: The case of the right to education in South Africa

Pam Christie [a,b,*]

[a] The University of Queensland, Australian Centre for Peace and Conflict Studies, St Lucia, Brisbane 4072, Australia
[b] School of Education, Cape Peninsula University of Technology, Mowbray Campus, Cape Town, South Africa

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ABSTRACT

The right to education has an established legacy in international agreements and debates, but has nonetheless proved difficult to achieve across the countries of the world. This paper explores why this might be so. It begins by locating the current architecture of rights in Enlightenment philosophy and the political and legal formations of modernity, exploring the paradoxical legacy this brings. It then looks more specifically at the right to education, and why it cannot be assumed that statements of rights deliver what they promise. Finally, it looks at education in South Africa to explore both the limits and the possibilities of using a framework of rights to achieve greater social justice in global times.

1. Introduction

Since the adoption of the United Nations Universal Declaration on Human Rights (1948), it has become commonplace to talk of education as a basic human right, and to regard it as self-evident that the countries of the world are progressively moving towards this. Since the 1990s, the discourse of 'rights' has been supplemented by discourses of 'goals and targets', particularly in multilateral organisations (examples are the Millennium Development Goals and Education for All), and by the conceptually more elaborate discourse of 'capabilities' made famous by the work of Sen (1999) and Nussbaum (2000). Yet, whether framed as rights, as goals and targets, or as capabilities, the fact remains that basic education lies beyond the reach of millions of people across the world. And although globalisation foregrounds knowledge as a source of value in network societies across the world, it does not necessarily bring basic education to those on the margins. The right to education remains elusive. Why is this so?

This article explores a residual paradox within statements of rights, including the right to education, and that is, that rights do not necessarily deliver what they appear to promise. In spite of their apparent clarity, statements of rights are not simple tools for achieving desired educational outcomes. This article explores why this is so, and as well as the limits and possibilities of working with a discourse of rights in education. The article begins by locating the current concept of rights historically in Enlightenment philosophy and the political and legal formations of modernity. Exploring some of the conundrums and paradoxes of rights, I suggest that there is value in retaining rights if they are used as a framework for struggle in global times. Turning to consider the right to education, I explore some of the ways in which rights may be worked with to achieve more equitable outcomes in education with particular reference to South Africa.

2. Framing human rights

The current architecture of human rights, exemplified in various universal declarations, was established along with other formations of modernity, inspired by Enlightenment philosophy and the development of nation states (see, e.g., Donnelly, 2003; Douzinas, 2000; Falk, 2000). As with other dimensions of modernity, rights are not always what they seem. While elegant in abstract, rights are often less clear in the complex conditions of material life. These points will be illustrated by brief examples from the fields of Western philosophy and international relations. It is impossible to do justice to the richness of debates on rights in the brief comments that follow. Instead, the examples are intended to illustrate my argument that while the ontological basis of rights is open to question, there is nonetheless a place for universalist concepts such as rights in working towards greater social justice.

2.1. Rights in philosophy

On what grounds may human beings claim rights? Is there a common human nature that confers rights on humans as humans?

* Correspondence address: The University of Queensland, Australian Centre for Peace and Conflict Studies, St Lucia, Brisbane 4072, Australia.
Tel.: +61 7 3365 3163; fax: +61 7 3311 1277.
E-mail address: p.christie@uq.edu.au.

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Questions such as these have been much debated in Western philosophy, including Enlightenment philosophy.

For example, John Locke, writing in the 17th century, argued the case for human rights in natural law existing prior to the formation of political and social communities. These rights stem from natural law, which stems from God. Through the establishment of a 'social contract', abstract autonomous individuals exchange freedom for security to form political societies. Natural rights then take social and political forms as the rights of citizens.

Immanuel Kant, another key Enlightenment philosopher, provides an alternative approach by locating the basis of rights not in nature, but in the rational capacities of autonomous human beings. Kant provided a template of the sovereign individual, capable of courageous reasoning and possessing a moral consciousness. The realm of morality, he argued, stood outside of the realm of nature (and hence of 'natural law'), and its unchanging elements stemmed not from an external authority (such as God) but from human rationality. In his 'categorical imperative', Kant provided a universalist – and again, abstract – approach to moral reasoning. Kant's categorical moral imperative was: 'act only on that maxim through which you can at the same time will that it should become a universal law' (1785/1969:44). In other words, the test for a categorical moral imperative was that we should wish to apply it universally to all human beings, without exception. Thus, the human capacity for reason provides the basis for a universalist approach to morality. The exercise of reason in the context of moral duty is the universal feature of being human, and it is this that forms the basis for equality and rights. In this approach, human rights are rights we give ourselves and others as sovereign, autonomous, reasoning beings, able to follow duty rather than inclination.

Kant's legacy has been immensely important in moral and political philosophy. However, it is not without its critics. In particular, the abstract notion of the human subject, standing apart from context and social relationships and acting on reason, has been a target for criticism. Douzinas (2000) provides a good overview of this critique in the context of rights. He illustrates, for example, how philosophers such as Hegel, Heidegger and Levinas (whom he terms 'philosophers of alterity') have argued against Kantian abstractions of the sovereign individual. Hegel, engaging with Kant's ideas, asserted the importance of historical context over abstraction, and argued that the identity of the individual is constituted in relation to others in the struggle for reciprocal recognition. Heidegger's phenomenological explorations of Being and Levinas's 'face of the other' both assert the absolute necessity of an 'other' in the constitution of the 'I'—again calling into question the notion of the abstract, sovereign individual as the primary unit of analysis. Extending these arguments, for philosophies of alterity, rights cannot inhere in the rationality of the sovereign individual. Rather, they arise in inter-human engagement and it is there that their basis must be sought.

Enlightenment thinking, including foundationalist notions of a universal human nature and the sovereign subject, has been severely challenged by a range of critics. Most obviously, even as they claim universality of application, human rights are clearly linked to Western notions of the subject. These have developed historically and are grounded in particular ideological and political struggles. Claims to 'foundational truth', in particular, are vulnerable to claims that the universalising of rights may be read as a Western imposition on other cultures. Indeed, a strong postmodern critique would view human rights as no more than a particular discursive construction, without 'foundation' or 'truth'.

Edward Said's perspective is particularly interesting, given the significance of his work to postcolonial and indeed postmodern theorising. In *Humanism and Democratic Criticism,* Said (2004) is scathing of extreme anti-humanist versions of postmodernism which reduce the subject to a discursive construct as if material history does not exist and intellectual traditions may be simply dispensed with. He points out that concepts such as justice and equality (and, one might add, human rights) have inspired political and social activism historically across the world, with powerful effect. If rights are understood in terms of human agency in historical struggle, their validity does not hinge on a choice between ontological foundations or discursive construction.

Poststructuralist theorising, which analyses relationships between power and knowledge, also opens constructive approaches in terms of engaging with foundationalist concepts (see Christie, 2005). Butler's (1995) work on 'universalism' is particularly useful in this regard. Butler argues that foundationalist categories cannot be simply abandoned, since all theories incessantly posit foundations. In her words, 'foundations function as the unquestioned and unquestionable within any theory' (1995:39). Rather than doing away with categories like 'universalism', the task is to work differently with them, so that they are rendered as 'permanently open, permanently contested, permanently contingent, in order not to foreclose in advance future claims for inclusion' (1995:41). This logic may be powerfully applied to the concept of rights, which may then be viewed as radically incomplete and inviting engagement.

From the perspective of postcolonial theory, Chakrabarty's (2000) discussion of political modernity illustrates a similar position to the poststructural analysis outlined above. Chakrabarty argues convincingly that concepts such as citizenship, civil society, social justice and human rights are western political concepts that 'entail an unavoidable – and in a sense indispensable – universal and secular vision of the human' (2000:4). These concepts are indispensable in political discussions, yet their western, modernist forms are also inadequate. As Chakrabarty shows, they are not stable and singular in meaning, and their political history shows them to be contested and hybrid in practice. Yet it is this very quality of radical incompleteness which allows universalist categories to be worked with towards alternative configurations.

In the global context, Balibar (2006) suggests the importance of engaging with 'the universal'. His argument is that 'the universal' already exists in a globalised world, and does not need to be defended on grounds of essentialism or foundationalism. Indeed, given conditions of globalisation, it is necessary to be able to speak 'from the standpoint of the universal' (2006:25). This is not to say that 'the universal' is conceived of in the same way under globalised conditions. Instead, as he notes, 'different geo-histories engender profoundly heterogeneous points of view on the same questions of principle' (2006:25). Nonetheless, he makes the point that in the current political and ideological conjuncture, rivalries between competing versions of 'the universal' have become more significant than rivalries of 'the universal-particular type'. Globalisation, in other words, provides both the context and the necessity of universal discourses, regardless of their ontological grounds. That said, it is important to be alert to the westernising hegemonies that rights discourses may encourage, such that, in Ashis Nandy's words, we do not turn away from 'the plurality of critical traditions of human rationality' (1983:x).

In engaging in the discourse of rights, it is important to remain alert to ambiguities and silences. For example, the narrative of social contract theory seldom acknowledges the violent founding of many states, or their past and continuing exclusions. M. Anne Brown (2002:7) makes this point well:

> ... [T]he instruments that at least the dominant traditions of rights bequeath, and in particular the categories of 'community' and of 'person' in which understanding of human rights is routinely embedded, have also carried their own forms of damage, their own significant myopias and exclusions. The

> language of human rights has at some junctures given expression to and been shaped by otherwise silenced voices – of indigenous and colonised peoples, women, alienated minority peoples, urban and rural workers and the propertyless poor; at some junctures it has acted to deepen the deafness which has systematically excluded the voices of those constituted as inferior or as outcasts.

Nonetheless, as Brown elegantly states, rights do provide 'an available language and tool for articulating suffering in a political voice, for asserting the value and vulnerability of people, and for grappling with the ongoing question of how we value each other in the complex circumstances of our different and interwoven lives' (2002:3).

What this brief sketch of different philosophical approaches illustrates is that there is no simple ontological agreement about claims to rights based on the existence of natural law or a common human nature. Acknowledging this, however, need not mean that universalist concepts of rights need be set aside altogether. Instead, universalist concepts may be worked with in ways that acknowledge that they are historically constructed and contestable. I suggest that approaching the concept of rights in this way – as a historical construction that is radically incomplete – opens it to continual (re)construction, without foreclosing future forms. Historically, rights have an established record in struggles for social change, particularly struggles against domination of varying kinds, and this record itself provides a foundation for action. This approach requires that statements of rights be engaged with carefully and put to work in order to take effect; it does not assume that they will straightforwardly deliver what they appear to promise.

Turning to the field of international relations, a similar argument may be made: that a discourse of rights does not simply deliver what it appears to promise, and may indeed mask injustices. Nonetheless, rights may be put to work in struggles for greater justice.

2.2. Rights in law and international relations

Framed in discourses of the law and international relations, as Henkin (1989) usefully points out, human rights as we currently know them are not about philosophical notions of justice, democracy, or 'the good society'. Rather, they are about claims which individuals may legitimately make upon their societies for certain defined freedoms and benefits. Historically, the legacy of human rights is associated with the emergence of the modern constitutional state—the American Constitution and Bill of Rights, and the French Declaration of the Rights of Man and Citizens, both originating in the 1700s (though individual protection against sovereign power may be traced back to Magna Carta). Rights are part of a political tradition in which the entitlements and obligations of people are enacted within society, and importantly, limitations are set on what governments may do (see Donnelly, 2003; Douzinas, 2000). Human rights protect people from abuse by others, including their own governments. Foucault sums this up well in saying:

> Human rights are, above all, that which one confronts governments with. They are the limits that one places on all possible governments. (Foucault, 1994:471).

Conventionally, human rights in this tradition are regarded as falling into two (and possibly three) categories. First generation rights are civil and political rights, including, for example, the right to freedom of conscience, religion and expression; the right to fair judicial process; and the right to life and physical integrity. Second generation rights are social and economic: the right to work, to eat, and to obtain health care, housing and education. Third generation rights, it has been proposed, are 'solidarity rights' that are people-centred rather than individual-centred: the rights to development, to peace, and to a healthy environment (see Ife, 2006; Rich, 2002). It is important to recognise that first generation rights are more likely to be justiciable than second generation rights (of which education is one), while third generation rights are aspirational rather than actual.

In international relations, rights entered the world stage only after World War Two, with the formation of the United Nations and proclamation of the Universal Declaration of Human Rights (1948). In the sphere of international relations, the notion of human rights, while recognised as undeniably Western in origin, has spread to most of the countries of the world. In international law, human rights are the product of negotiations through multilateral organisations, and represent agreements about the way people should be regarded and treated both at national and international levels. These are exemplified in the UN Universal Declaration of Human Rights, followed by the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), and others.

However, the gap between the expression of rights and their delivery in practice has haunted their existence. Internationally, enforcing human rights is difficult, not least because universal declarations do not necessarily signal the value consensus they suggest. Although many countries have signed universal declarations of rights, this does not mean that they interpret them in the same ways. Indeed, Henkin (1989) argues that while there may be widespread support across cultures for many first and second generation rights, it is quite apparent that a number of countries do not support all of the rights that they have signed up to—the most apparent being freedom of expression, religious tolerance, and equality for women.

Indeed, it is not it hard to find examples where rights are violated by the very people who claim to support them. Nowhere is this more evident than in the continuing discrimination against women in all spheres of life, in western and non-western contexts. As Douzinas points out, if the 20th century is the epoch of human rights, it is also an epoch of extreme human rights violation and social suffering—of massacres, genocides and ethnic cleansing. Nonetheless, the importance of rights in history cannot be denied.

Interestingly, the gap between promise and delivery is evident in past declarations of rights as well. Henkin (1989) notes that the US Constitution with its Bill of Rights did not bring an end to slavery; this happened 80 years later, and racial discrimination still lingers on. France, having proclaimed the Declaration of the Rights of Man in 1789, certainly did not put rights into practice for another 150 years. In short, in legal terms, declarations of human rights should not be taken at face value as delivering what they appear to promise.

One of the major shortcomings of formal statements of rights is that when they encounter the texture of lived experience, they easily prove to be abstract and empty. This is powerfully argued by Arendt (1951/1967) in her work on the displaced people in Europe after the two World Wars and the Holocaust.

Analysing the position of refugees and stateless people, Arendt argues that rights do not inhere in individual human beings, but in their membership of political communities. More specifically, rights are linked to citizenship of nation states. Those without rights to citizenship have, in practice, no rights to rights. In a chapter in *The Origins of Totalitarianism* aptly entitled 'The Decline of the Nation-State and the End of the Rights of Man', Arendt points out that as soon as the concept of the Rights of Man meets 'the nakedness of human beings' (1951/1967:299) it has nothing much to offer. In a cruel twist, refugees and stateless people, the

survivors of extermination camps and the inmates of concentration and internment camps, found themselves rightless in Europe when they lost a place to belong:

> The Rights of Man, after all, had been defined as 'inalienable' because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back on their minimum rights, no authority was left to protect them and no institution was willing to guarantee them (1951/1967:291–2).

Arendt argues further that:

> If a human being loses his [sic] political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually, the opposite is the case. It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man (1951/1967:300).

Without political community, human beings lack voice and the right to opinion, and become 'a specimen of an animal species called man [sic]' (1951/1967:302). Bare life – stripped of a profession, citizenship, without a place in the world from which to speak and act – finds itself without significance. Reflecting on this situation, Arendt's words are stark: 'The world found nothing sacred in the abstract nakedness of being human' (1951/1967:299).

There can be little doubt that Arendt's analysis applies to current movements of people, particularly those viewed as 'economic migrants' rather than 'genuine refugees'. Picking up on this point, Giorgio Agamben states:

> The basic point is that every time refugees no longer represent individual cases but rather a mass phenomenon (as happened between the two wars, and has happened again now), [international] organizations and the single states have proven, despite the solemn evocations of the inalienable rights of man, to be absolutely incapable not only of resolving the problem but also simply of dealing with it adequately (1995:114 2).

This sober analysis of the limits of human rights needs to be borne in mind in relation to all statements and declarations of rights. However, as I will argue in the next section, the haunting gap between expressions of rights and their delivery in practice does not mean that all claims to rights are without value, or necessarily fruitless.

2.3. Rights and political struggle

If nation states are, as Anderson (1983) has famously claimed, 'imagined communities', rights may be viewed as representations of an imagined social order within and between nation states. This social order has an undeniably Western imprint and bears the hallmarks of particular historical struggles. While declarations of rights are presented in universal and abstract form with politics and ideology washed out of them, it is useful to remember that their very articulation points to times and places where they did not exist (a point well made by Wendy Brown, 2000).

Rights are part of a long history of struggles against domination, and have served powerfully in struggles against oppression (as is the case with South Africa's anti-apartheid struggle). Historically, the realisation of rights is the product of political struggles—even if the struggles that gave rise to them are now out of view. Rights are fought for, won, lost, and won again, in particular contexts, times and places. Indeed this may be viewed as another of the paradoxes of rights: that while they may be formulated as timeless and universal, they are contingent historical products signalling their prior – or existing – absence. As the focal points of historical struggle, they offer significant opportunities for engagement for greater social justice—but without social action to accompany them, statements of rights may simply be inert documents.

As mentioned earlier, there are dangers in not recognising the limited nature of rights. Universal, acontextual statements of rights tend to mask existing power relations and social inequalities or appear to offer transcendent solutions beyond them. In the unequal relations of capitalism, particularly global capitalism, rights may offer little more than participation in institutions that are already unequally structured, whose unequal outcomes are almost completely predictable (a point I return to in relation to education in South Africa). Moreover, agendas of goals and targets set by multilateral organisations and donor agencies may mask a power relationship where wealthier countries decide on social agendas (including education) for poorer countries—agendas which poorer countries seldom have the resources to implement.

Nonetheless, against these cautions, it could be argued that rights provide a platform for making claims—particularly claims against governments. Within the limits of the nation state, rights are not without meaning, even if they are not enacted; at very least they provide a vision of desired arrangements and a basis for working towards them. As international agreements, rights provide a common frame within which the conditions of human existence may legitimately be discussed and, hopefully, addressed. In global times, they provide a discourse for engaging with the universal. Even if rights do not accord with certain cultural practices and histories, they may nonetheless provide a space for working against practices of domination. One of the benefits that 'rights' have above 'targets' and even 'capabilities' is that they do have a certain legal standing, however tenuous this may be. Problematic as they may be, rights are, as M.A. Brown points out, what we have to hand to work with against human suffering. Conceived in Foucault's terms as a means of placing limits on all possible governments, the rights project is not finished – and cannot be finished as long as people are governed.

3. Education and rights

Having outlined the complexity underpinning the apparent clarity of statements of rights in philosophy and international relations, I now turn to explore what the right to education might entail within the argument set out so far. What does the right to education appear to promise?

The right to education is set out in a number of international declarations and conventions. So familiar are these broad statements of rights, that there is value in reviewing their extent and sampling their detail. Since the UN Universal Declaration of Human Rights in 1948, there have been numerous conventions and covenants relating to the right to education. These include:

- International Convention Against Discrimination in Education (1960)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- Convention Concerning Indigenous and Tribal Peoples (1989)
- Convention on the Rights of the Child (1989)

As well as conventions and covenants, an additional process has been to use declarations of intention from international conferences to press for EFA through setting goals and targets such as:

- The Jomtien Declaration on Education for All (EFA) (1990)
- The Vienna Declaration and Programme of Action (1993)
- The Beijing Declaration and Platform for Action (1995)
- The Dakar Framework for Action (2000)

It is ironic that this plethora of declarations signals that the right to education, reframed as 'education for all', remains to be achieved.

The extensive work of the late Katarina Tomasevski highlights the challenges of working to achieve rights in education. As a human rights activist, legal academic and UN Special Rapporteur on Human Rights and the right to education, Tomasevski worked primarily from a framework of international law. Viewing rights as safeguards against the abuse of power by governments, she argued strongly for an international commitment to the right to education, accompanied by obligations. Her argument was that if education is a right, then its denial and abuse of education is a violation, with accompanying remedies. If the status of a right is lost, then denial and abuse have no legal remedy.

Tomasevski warned against the watering down of the right to education she observed in the decades following the Universal Declaration. She pointed out that initial treaties defined the core content of the right to education as:

> To ensure that primary education is all-encompassing, free and compulsory; to guarantee parental choice in the education of their children; to apply non-discrimination to the right to education and human rights in education; and, most important, to prevent abuse of education by defining what education is for (2003:53).

However, these clear and strongly worded points did not carry through as a template in the development strategies of subsequent decades. Tomasevki charts how education shifted from being a public good protected by public law and public funding, to being viewed as human capital development in World Bank discourse, and, under GATTS, to a traded service (2003:87). In all cases, the right to education has receded and its formal status has been eclipsed.

Tomasevki's determined stance in defence of rights contains a warning against reframing rights in terms of 'goals and targets' (see King and Rose, 2005; Colclough, 2005, 2008) and even the conceptually rich notion of 'capabilities', originally developed by Sen (1999) and Nussbaum (2000) as a normative framework for promoting human well-being in development debates (see also Unterhalter, 2003, 2007; Robeyns, 2006). The danger in moving away from rights lies in the loss of legal basis. It may be the case that targets are useful in monitoring rights (Colclough, 2008) and that capabilities may be used in ways that do not displace rights. However tenuous, the legality bestowed by rights may ultimately provide more leverage for change than the pragmatism of targets and the humanism of capabilities.

What, then, might the right to education entail? Declarations on the right to education provide remarkably clear answers to this question. For example, the UN Universal Declaration of Human Rights (1948) states that:

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

The Declaration provides an unambiguous statement that free, compulsory education should be regarded as a basic human right. The fact that education is compulsory means that parents are responsible for ensuring that their children receive education. Though the child is the subject of rights, the child is not a party to the decision-making about the realisation of her rights. The right of parents to choose education is enshrined, protecting against state monopoly—but states have the right to establish standards and regulations for children's education.

The UN Convention on the Rights of the Child (1989) provides further detail on the right to education:

States parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential.
(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.
(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own.
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.
(e) The respect for the natural environment.

These are remarkable statements of the 'imagined social orders' of modern state formations. They are idealised and abstracted from context, and they bear distinctive signs of their western modernist legacy. Viewed as frameworks for struggle, they provide a comprehensive agenda to be realised. It is sobering to note, therefore, that the realities of educational provision in many of the countries of the world – even relatively rich western countries – do not always match these ideals. Though these ideals provide a hegemonic norm for what education across the world should look like, they are certainly out of the reach of most of the world's children, as numerous EFA Reports show. Indeed, what international studies illustrate repeatedly is that globalised hegemonic norms for education are often far from actual conditions, even in developed countries.

There are a number of reasons why this is so. First, the reach of international declarations is limited by the boundaries of nation states, even under globalisation. The responsibility for educational provision lies with nation states, including governments-of-the-day, local agencies and providers, private as well as public. While superficially similar in form and structure, education systems reflect national and local priorities and resources, and the social and cultural patterns of context. Funding allocations, conditions of work of teachers, curriculum content and other significant features are crucial in determining what the right to education might mean in practice—and policies for these are enacted at national level, often out of the reach of international declarations.

Second, aspirational statements cannot prevail over socio-economic and political contexts, which fundamentally shape what forms rights take in practice. A number of examples illustrate this. First, in contrast to wealthier countries, poor countries may simply be unable to afford what they say they aspire to. In terms of education, they may not have the economic or institutional capacity to provide hegemonically idealised EFA even if they endorse this in various forms such as rights, goals and targets, or capabilities. Second, cultural beliefs and practices may mitigate against rights to equality or protection against discrimination. This is particularly evident in the case of gender. As well as overt discrimination against the education of girls, restrictions may also take the form of 'protecting' girls by not allowing them to be taught by male teachers, or considering the journey to school to be too unsafe for them to undertake. Third, politically unstable or conflict ridden places may be unable or unwilling to deliver political and social rights, including education. In unstable or violent contexts, education is often disrupted and, if anything, may slip down on the list of priorities.

Moreover, in advocating the right to education, it is important to consider more fully what this might entail. In a minimal definition, the right to education could mean simply ensuring that there are schools for children to attend, and that children actually attend them. (And this leaves aside matters of adult education, lifelong learning, and learning outside of schools.) Universal Primary Education in the first instance may present itself as a matter of provision and access. But education entails more than this.

Education is a socio-cultural practice, where young people are given access to formal knowledge codes in mediated relationships with others (see Christie, 2008). Schools are institutions of modernism, with misleadingly common forms across the world, within which vastly different experiences may be provided. Moreover, schools are linked with nation-building and social cohesion, and they also interlace with labour markets to provide, or close off, access to jobs. In short, schools are not simple institutions, and experience shows they are not easily amenable to change. In spite of the dreams of social reformers, schools tend to reproduce the patterns of inequality and privilege of their broader societies, rather than change them—though they may indeed be part of strategies for change. Students' home backgrounds are a stronger predictor of their life chances than their schooling. And schools themselves are often unequal, reflecting the socio-economic status of their neighbourhoods.

As institutions, schools tend to be rigid if not unimaginative in terms of what they offer, when and where. Their timetables and hours of opening are generally inflexible, their subject offerings are generally standardized and insensitive to local needs, and their location is fixed. They assume standardized age groups, moving in cohorts uniformly through days and weeks and years, and those who are different or do not fit are generally given short shrift. Schools are structured around uniformity of provision, rather than meeting special cases or individual needs. Teachers are themselves not necessarily able to deliver a more lateral or imaginative curriculum. They are limited by their own knowledge bases, language capabilities and life experiences.

Yet schools do have a central and important function in the teaching of formalised knowledge codes to young people, and I would argue that it is important to hold them to this mandate. Unless schools do provide systematic teaching and learning of some quality, they might as well be 'warehouses' for children, as Castells (2001:18) points out, or even gaols, which is how some students experience them. Alternatively, if schools are simply places of care, they might as well be hospices.

In short, I suggest that schools are best viewed as essential but complex institutions in providing the right to education. And it is important that those who advocate the right to education are aware of both their limitations and their possibilities.

4. The right to education in South Africa

The case of South Africa provides a good illustration of the complexities entailed in the right to education and its delivery. Four points will be presented here, in order to stake out a possible terrain of engagement with rights (though these points are not new to scholars of South African education).

First, the case of South Africa illustrates without doubt what I have highlighted as the paradox of rights: that statements of rights do not deliver what they appear to promise. The post-apartheid constitution (1996), an exemplar of liberal modernity with its attendant rights and freedoms, states unequivocally that everyone has the right to basic education provided by the state, and progressive rights to further education. These principles are unambiguously stated in the first White Paper on Education and Training (1995), which provides the framework for a restructured education system.

However, in practice, education was not made freely available by the post-apartheid government. Faced with the context of neo-liberal globalisation, the government opted for a macro-economic policy that severely curtailed social spending, including spending on education (Seekings and Nattrass, 2005; Gelb, 2003). Instead of providing free and compulsory basic education for all, the government introduced a market-related system of fees, with protections against discrimination for those who could not pay. Though a number of schools were subsequently declared 'no-fee schools', the costs associated with schooling effectively constrained the rights of many poor children to education. In effect, this created an impediment to the right to education, meaning that the state did not meet either its positive obligations to provide access to education, or its negative obligations not to impede access. Basic education was effectively treated as a limited right, to be realised progressively. This contradiction between promise and delivery has been noted by the South African Human Rights Commission (2006) and is highlighted through the Education Rights Campaign and other civil society groups. The issues are well set out in the work of Spreen and Vally (2006), Wilson (2004), Roithmayr (2003) and Seleoane (2003).

A second point relates to rights and markets. The decision to introduce fees into the system was intended both to supplement the overall education budget, and to retain those able to pay fees within the public system (Fiske and Ladd, 2004). The state provides funding for staff for all schools in terms of established norms and standards. However, public schools, run by governing bodies with considerable powers, are able to charge fees, and thereby supplement their budgets for staffing. National funding norms enable non-personnel education expenditure to be redistributed in favour of poor schools, but this section of the national budget is small compared with personnel expenditure.

In both regards, the fee policy succeeded; it increased the overall budget for education and retained people with the capacity to pay fees within the state system. However, it also meant that a form of structural inequality was built into the state system. Schools in wealthier communities – most often the former white schools previously privileged by apartheid – were (and still are) able to charge relatively high fees, thereby being able to employ additional staff, have smaller classes, and offer broad curriculum alternatives. Schools in poor communities – the poorest being black rural schools – have limited, if any, capacity to supplement state funding with private contributions through fees. The overall result is that the racial inequalities of apartheid education have been overlaid by the class relations of the market. Schools with limited or no capacity to raise fees have become the residualised

schools of the poor (Christie, 2008; Soudien, 2007; Emerging Voices, 2005).

What this highlights is that under market conditions, the right to education does not mean the same education for all; it means the right to the education one can afford to pay for. Market choices depend upon capacity to pay fees, so those with no capacity have no choice. Thus where the logic of rights meets the market, the logic of the market will operate to benefit some above others. Put differently, rights become subordinate to markets as the organising principle for allocation of schooling.

This leads into a third point about the right to education, and that is that rights do not necessarily mean equality. This is particularly so in conditions of profound social inequality, as the South African situation illustrates well. Patterns of privilege and disadvantage ripple extensively through the education system and beyond, so that the schools which students attend, the teaching and learning situations they experience, the results they achieve, and the opportunities that are open to them after school, are markedly unequal (see OECD, 2008; Christie, 2008; Fleisch, 2007; Chisholm, 2004; Chisholm et al., 2003; Sayed and Jansen, 2001; Weber, 2002).

Where race and class produce such unequal effects, it can hardly be claimed that South African children have equal rights to education—in spite of near universal enrolment in schooling. Indeed, it could be argued that the right to education basically means the right to participate in an existing and enduring system of stratification.

This illustrates the crucial relationship between access and quality, recognised as part of the EFA agenda since the Dakar Framework for Action of 2000. South Africa appears to have near universal access to basic education (fees notwithstanding), yet there are problems of quality within the system. South Africa has performed extremely poorly on national and comparative international tests. It came last of the fifty participating countries in the 2003 TIMSS test, and last of forty participating countries in the most recent PIRLS test (see Reddy, 2006, 2005; Howie, 2001). Where quality is in question to such a degree, access alone is not a sufficient indicator that the right to education has been achieved.

A more masked problem is that when results are disaggregated, South Africa's performance on national and international tests is clearly bimodal, with privileged schools (formerly White and Indian) performing much better than the majority of schools (formerly African and Coloured) (Reddy, 2006; van der Berg, 2001). All of the national and international tests, at all levels of schooling, show convincingly that historical patterns of inequality remain; and that they are not reducing with time, and may even be strengthening. The right to education must surely mean more than attending a school where teaching and learning is so poor that failure is assured—this, when historically privileged schools in the system, now multiracial, offer assurance of success.

A fourth point pertains to the status of education as a second generation, socio-economic right (see Dugard, 2004). In practice, second generation rights are difficult to enforce, both nationally and internationally. In South Africa, the right to basic education is not a limited right under the constitution, though it appears to be treated as such by the government in terms of the limited funding made available. At the point of writing, there has been no legal challenge in the Constitutional Court on the right to free, compulsory basic education, although there have been landmark cases in health (the Treatment Action Campaign, 2002) and housing (the Grootboom case, 2000). Both of these cases show the difficulties inherent in deciding second generation rights through the courts. In both cases, the implementation of the judgment in support of rights proved problematic, suggesting that the judiciary may have a limited role in practice in ensuring that the government actually delivers a service. And this in turn raises more general questions about the relationship between the judiciary and its counterparts in government, the legislature and executive, in a constitutional democracy. In the case of education, it could be argued that the many issues related to provision of schooling in a democracy – including the curriculum, the required qualifications and remuneration of teachers, and the financing of infrastructure such as buildings and other resources – are appropriately debated in civil society and in parliament, supported by a budget vote, and implemented through bureaucracies. Arguably, these issues lie beyond the competence of the judiciary. And what role may the judiciary play in a constitutional democracy when the budget allocation of the legislature cannot cover the costs of provision?

The points I have highlighted in this section illustrate that even when rights to education are apparently in place, achieving them in practice is a complex matter. However, as I have argued throughout this article, this does not mean that the right to education is without value. The paradox of rights does not mean that they should necessarily be abandoned. The following section explores this argument further in relation to the right to education in South Africa.

4.1. Working with rights as paradox in South Africa

The first part of this article sampled the rich history of human rights, illustrating their different conceptualisations within the complex textures of modernity. The point was made that rights are often presented as clear and abstract formulations, which belie both their historical construction and their uneven implementation. So it is in the South African case. However, I have suggested that, despite their contested nature and unfulfilled promises, rights provide an available language and tool for inter-human engagement, within and between nation states, as well as globally. This is not to claim an exclusive space for rights in a plurality of traditions. Rather, it is to suggest that rights be put to work to achieve what is possible in specific contexts, instead of being abandoned because of their obvious shortcomings.

Given the historical association of rights with the architecture of the modern state, it is not surprising that discourse of rights accompanied the establishment of a liberal modernist constitution and rule of law in South Africa. It is interesting to note that rights *per se* were not a prominent rallying point of the anti-apartheid struggle in education. Instead, the discourse of popular struggle in education focused on redressing the inequalities of apartheid, achieving education of equal quality for all, combating racism and sexism, and establishing democracy. Rights entered educational discourse in the first White Paper on Education and Training, which framed education within the ambit of the new constitution. It may, indeed, be seen as ironical that the constitutional right to education came together with policies that did not provide for this right to be achieved. Radical demands for fundamental change were reframed so that, in spite of constitutional provisions, they were deferred, with the promise of free and compulsory schooling to be achieved in an unspecified future through incremental changes.

However, it would be a mistake to underestimate the significance of the new constitutional arrangements, including the right to education, in redefining the terrain of political engagement. Similarly, it would be mistaken to assume that the limits of political transformation were reached in the post-1994 settlement, or that there is no further role for popular struggle and civil society action in education. New state structures, different policy actors, and different policy logics have ongoingly changed the terrain in fundamental ways, and this brings different possibilities for engagement for change. Rights, I suggest, are one of the legitimate tools that the new dispensation makes

available to a range of actors in both the state and civil society in struggles for greater social justice and educational change.

In the previous section, I outlined four points in relation to the right to education in South Africa: the unequivocal statements in the constitution regarding rights to education; the practical limitations placed on the rights by fees and the subordination of rights to markets; the importance of equality and quality in understanding the right to education; and the status of second-generation rights in working for change. Insofar as these points illustrate problems in realising the right to education in South Africa, they also suggest points to be addressed on an agenda for legitimate pressure for rights-based educational change. This provides an alternative perspective on the paradox of rights by showing where rights may be put to work.

In terms of law and education, the work of Woolman and Fleisch (2009), *The Constitution in the Classroom*, is helpful in suggesting possibilities for legal engagement. Woolman and Fleisch argue that the space between education and the law is a variable one, enabling the law to 'expand and contract'. The 'open texture' of legal space, they suggest, 'is a function of negotiated settlements between political parties, state bureaucracies, national government, provincial government, unions, local communities, principals, teachers, parents and learners' (2009:3). The authors trace a number of competing interpretations of basic law and enabling legislation across several themes, including the right to basic education as a second-generation right, and the debates on rights, markets and fees. They argue that constitutional litigation may well be possible to secure rights to what they term 'adequate' basic education, particularly if there is sufficient public sector and private sector pressure to 'fix our school system' (2009:164).

Without necessarily endorsing their specific arguments (particularly on fees and markets), it is valuable to read their account in terms of opening spaces for active engagement for change. Approached in this way, the right to education is by no means exhausted as a focus of legal and political struggle, even considering the complexities of litigation on second-generation rights.

The problems of inequality and poor quality in the South African education system may similarly be used to contribute to an agenda for change. Inasmuch as these impede the right to education, they, too, may be focal points for 'fixing the system'. Recognising that 'quality education' is a normative term does not exclude possibilities for defining what it might entail, as is well illustrated by the UNESCO (2005) *Global Monitoring Report* focusing on quality and the UNESCO/UNICEF (2007) publication, *A Human Rights-Based Approach to Education*. In the South African context, Woolman and Fleisch suggest that quality be included in a definition of 'adequacy' in working towards the right to education.

Chisholm's (2007) work on children's rights to education explores a number of national and global monitoring systems, arguing that good monitoring systems, including targets, may play a key role in gathering information on the right to education with a view to rectifying problems. The Annual Performance Plans for provincial education departments in South Africa do, in fact, link several performance measures explicitly to the right to education. This is not to say that performance measurement systems are without problems, notably in gathering accurate information, in setting targets that are achievable rather than over- or under-ambitious, and in developing the capacity to use information to remedy problems. Nonetheless, they may be used to support rights-based targets.

Drawing on the many formulations of the right to education, from the original international treaties and conventions to more recent work on EFA, there is much potential for a rights-based agenda for educational change. On one reading, these treaties and declarations illustrate the 'imagined educational order' of the western modernist state in global times. Read in the context of post-apartheid South Africa, however, there is much in this work to inform an agenda for change in both civil society and the state. It is evident that a campaign for the right to education would need to extend well beyond bare access to schooling to include considerations of equality and quality. Access to equal schooling might well begin with demands for adequate material resourcing and school environments that are safe and secure. But it would be important to go beyond this to encompass classroom experiences. Providing classroom experiences of equal quality for all would require teachers who are well qualified, well paid and well regarded (as teachers generally are in prestigious schools). It would require a curriculum that is accessible to all students, not simply an elite minority, and assessment practices that are fair to all. It would require consideration of language of instruction and additional language teaching, so that official policies of multilingualism are enacted in all schools and the structural inequalities of language medium are redressed. It would require measures to work against inequalities of race, gender, abilities and so on. And the list could continue.

Though a list like this may seem ambitious or utopian, the argument I have made in this article is that rights are not likely to be realised without struggle, and that there exists in South Africa the basis for a legitimate rights-based movement for change. The current situation with regard to the right to education is certainly not the end point, particularly if rights are used, as Foucault suggests, in struggles to hold governments to account. For, as Foucault states in a general discussion about liberation and power,

> . . .when a colonized people attempts to liberate itself from its colonizers, this is indeed a practice of liberation in the strict sense. But we know very well,. . .that this practice of liberation is not in itself sufficient to define the practices of freedom that will still be needed if this people, this society and these individuals, are to be able to define admissible and acceptable forms of existence or political society (1989/1996:433).

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