

## Social Justice and Education: The Crisis in the Social Transition from Apartheid to Democracy

JUSTICE DIKGANG MOSENEKE  
with an introduction by  
DR STEWART MOTHAS\*

*This is an edited version of the Introduction to Justice Dikgang Moseneke's speech on the occasion of the Law School's Patrick McAuslan Annual Lecture on 20th January, 2017.*

With this Annual Lecture we recall our esteemed colleague Patrick McAuslan who was a radical land reformer in east Africa and elsewhere in the world. Patrick helped to draft the land codes in many post-colonial African countries with the intention of strengthening traditional land tenure. His reforms helped to overthrow the colonial structures of land regulation, and ensured that women could acquire land and participate in communal decision-making. For instance in Tanzania, the land legislation that Patrick helped to draft put the management of rural land in the hands of ordinary people. This helped to establish 11,000 village councils, with women having equal rights in those councils. Patrick's contribution to education was extraordinary. He played a leading role in establishing the new Law School at the University of Dar es Salaam following his arrival there as a lecturer in 1961. Later he helped to establish Warwick Law School in 1969, and Birkbeck Law School in 1992. Patrick was a reformer and transformer: of laws, legal disciplines, and how land law and planning law is taught and understood.

It is fitting, then, that our speaker tonight has himself carved an extraordinary path from revolutionary to visionary jurist in one of the most exciting courts in the world, the Constitutional Court of South Africa. We welcome Justice Dikgang Moseneke who has recently

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retired as Deputy Chief Justice of the Constitutional Court of South Africa.

Despite the great reforms and transformations we have seen in the postcolonial world, we must not move too quickly to proclaim the 'end times' of Empire or colonial imaginaries. Erstwhile imperial powers have not lost their appetite for projecting power overseas. Nor have they got over their melancholia for Empire. The United States, we are told, is going to be great again. The language that launched Donald Trump's campaign and now sustains his Presidency is an explicitly racial one. Indeed, we might understand Brexit, the hostility to immigrants and refugees, and the potential demise of a post-national project in Europe as the resurgence of a homogenising conception of national sovereignty built on racialised identities. It is, to say the least, a rejection of a more open cosmopolitan plurality. Alarmingly, the best the left has managed so far is so-called 'Lexit'—a left articulation of national sovereignty as the basis to resist the ravages of global capitalism.

Racialism, and indeed the possibility of a non-racial political and social formation is precisely what South Africans faced in their struggle against colonialism and apartheid. In South Africa the struggle against apartheid had rival approaches—between the Pan Africanist Congress (PAC) and the African National Congress (ANC). The PAC took a radical stance on the nature of black liberation, insisting on a specifically African humanism distinct from the aspirations of the ANC's Freedom Charter of 1955. In Sharpeville in 1960, the PAC led a march to a police station where thousands came without passbooks in order to defy the pass laws. What followed was a massacre in which 69 people were killed and several hundred injured. These were the events that formed the backdrop to the personal, political and juridical journey of Dikgang Moseneke.

In his memoir *My Own Liberator*, Justice Moseneke recounts having to move school in 1962 because the land on which his cherished school, Kilnerton, was located was expropriated by the government for the exclusive use of those designated white.<sup>1</sup> As a teenager he was recruited to join the African Students Union of South Africa (ASUSA)—attending meetings and beginning to make fateful political choices. ASUSA was an entry point for youth to join the Pan Africanist PAC. Robert Sobukwe and other leaders of the PAC were by then in prison.

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<sup>1</sup> Dikgang Moseneke, *My Own Liberator: A Memoir* (Picador 2016).

Their defiance of the apartheid legal system was total. As Moseneke points out, when charged they entered no plea, asked for no bail, and did not put up a defence. They defied unjust laws and expected to be punished for it.

Dikgang Moseneke was arrested at 2am on 21st March, 1963, on an accusation of terrorism. He was 15 years old. What followed were months of solitary confinement, beatings, torture, being forced to sign statements and confessions, and appearances before magistrates and judges without legal representation. There were nonetheless small but significant acts of defiance: defying his captors' injunctions and showing the scars and cuts of his confinement to the magistrate is one such moment that struck me in reading his memoir. The ultimate charge he faced was of conspiring with a banned organization (the PAC) to overthrow the state by violent means. He would be tried in the famous courtroom in which a year later, in 1964, Nelson Mandela would stand trial for treason, and facing the death penalty would make an address about his fight against white domination and black domination, a cause for which, if necessary, he said he was willing to die. And so it was, that in this courtroom, Dikgang Moseneke was sentenced to 10 years imprisonment; a sentence served with Nelson Mandela and others on Robben Island.

President Thabo Mbeki, in his Foreword to Justice Moseneke's memoir, recalls the role played by Alexander Hamilton and John Marshall in the formation of the early Republic of the United States. Marshall in particular served as the 4th Chief Justice of the US Supreme Court for a long tenure of over 30 years, and helped to entrench the liberal ambitions of that Constitution. The rule of law, separation of powers and constitutional supremacy, it was felt, would be best protected by those who fought in the revolution against British feudal rule. The implication President Mbeki's comment in relation to Justice Moseneke is clear: protecting the revolution requires those with the 'requisite knowledge and requisite integrity'—that is, those who were part of the revolution.

Justice Moseneke's judgments and statements attest to the fact that President Mbeki's trust was placed in the right hands. His judgment in the Joe Slovo Community eviction case comes to mind.<sup>2</sup> Other statements include: 'Constitutionalism in South Africa has

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<sup>2</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16 (10 June 2009).

undoubtedly and commendably taken a pro-poor stance, which was to be expected, though it is often the Constitutional Court that has been at the forefront of this rather than government itself.<sup>3</sup>

He also stated, in statements that no doubt won him no friends in the current regime, that: 'Judgments show that courts have insisted on the rule of law and on executive transparency and accountability. They have protected and upheld freedom of expression alongside privacy and human dignity. ... [I]t is the courts that have repeatedly warned that the scourge of public corruption and patronage will ultimately imperil the war against poverty, disease and equality.'<sup>4</sup>

It is clear, then, that Justice Moseneke is aware that the promise of revolution is one thing, and the reality is another. If radical possibilities were sewn in the struggle against apartheid, the reality of transition has had to grapple with continuing social inequalities, unemployment, and poverty. The Marikana Massacre of striking mineworkers in 2012, in which a black police force controlled by the ANC government unleashed violence against civilians, is emblematic of the failures and challenges in South Africa. The massacre has been compared to the Sharpeville Massacre of 1960. Democracy and a much-lauded constitutional dispensation have not created social and economic emancipation.

Part of Justice Moseneke's response to these challenges is first to assert that one cannot just dream of revolutionary ideals; one must take real and concrete steps to pursue legitimate goals. Second, recalling Robert Sobukwe and others who demanded freedom in 'our lifetime', he stresses, 'I was my own liberator'.

To elaborate this message of liberation, we will now hear from Justice Moseneke, whose lecture is titled: 'Social Justice and Education: The Crisis in the Social Transition from Apartheid to Democracy'.

Stewart Motha

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<sup>3</sup> Moffet Mofokeng, George Matlala and Dianne Hawker, 'Moseneke in New Clash with Zuma', *Sunday Independent*, 14 May 2012.

<sup>4</sup> *ibid*

## The 2017 Patrick McAuslan Annual Law Lecture

### **Introduction and salutations**

I am privileged to be delivering the 2017 Patrick McAuslan Annual Law Lecture. It is a tribute to one who deserves this honour richly. I am also grateful for this kind invitation of the Birkbeck School of Law.

Our country, South Africa, is again in the throes of a nationwide students' revolt. They demand access to free, quality, and might I add in their very words, 'de-colonised' and 'de-commodified' higher education. Their memorable slogan is 'Fees Must Fall'. The iconic weapon of resistance of 'Fallists', as they have come to be known, has been the total disruption or shutdown of academic life on university campuses until fees have fallen. Sadly, some of the protests have been accompanied by destruction of property and a heavy-handed response by the police and other state security apparatus. This genre of protest has been on the go with varying intensity for nearly two years now.

The last major student revolt was 40 years ago in the winter of 1976. What sparked that revolt was a rather mindless attempt by the apartheid minority regime to impose the Afrikaans language as a medium of instruction in all African schools. That June '76 uprising became as famous as it was emblematic of the resistance against apartheid. In 1994, formal racial oppression ended and Nelson Mandela was inducted as our first democratic president under an imaginative and inspired constitution.

22 years later, in a less than peaceful nationwide uprising, students with clenched fists first shouted 'Rhodes Must Fall'. They in effect posed difficult questions about the legitimacy of the post-colonial institutional culture of tertiary education. Many universities had remained remarkably Eurocentric and in quick succession renewed protests took root under #FeesMustFall. Students, like elsewhere in the world, harnessed the near full potential of social media to organise widespread and resilient protests.

This startling development prompted me to think again about the promise of social justice embedded in the preamble to our Constitution; about the guarantee of universal access to basic education; and about the additional warranty of progressive access to higher education. In this lecture I ask the question: Whether the 2016 student revolt is suggestive of a crisis in the transition from apartheid to a non-racial and socially inclusive democratic rule?

On the last day of my watch as Deputy Chief Justice of the Republic I delivered a judgment on a dispute over access to basic education. I started the judgment by trawling the thoughts of Aristotle, Immanuel Kant, Karl Marx, Mahatma Gandhi, Helen Keller, Nelson Mandela, Kofi Annan, Malala Yousafzai, the Holy Bible, Buddha, and the Holy Quran on the place of education in society. I went on to observe that:

Despite these obvious ancient virtues, access to teaching and learning has not been freely and widely accessible to all people at all times. All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age and the information economy are girded, in great part, by inadequate access to quality teaching and learning. At the end of a long and glorious struggle against all forms of oppression and the beginning of a democratic and inclusive society, we, filled with rightful optimism, guaranteed universal access to basic education. We collectively said: '[e]veryone has the right to basic education, including adult basic education'.<sup>5</sup>

### **The right to further education**

The debate over university fees that must fall compels us to start where we should—our Constitution. This is so because it represents our collective convictions on the democratic project since 1994. It contains the minimum programme of action to found a just society. It carries bold and justiciable provisions on socio-economic rights. In particular, section 29 of our Bill of Rights, one in a veritable collection of fundamental rights meant to underpin social justice, affords us the opportunity to look closely at what our people had hoped for on access to further education, which plainly includes tertiary education.

In plain language section 29(1)(b) lays down that:

Everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

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<sup>5</sup> Section 29(1)(a) of the Constitution—Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another [2016] ZACC 14; 2016 (4) SA 547 (CC); 2016 (8) BCLR 1050 (CC).

Our posture on higher education places us in good company. It accords with international human rights instruments on education. Article 26 of the Universal Declaration of Human Rights, 1948, in its words, says:

- (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.

Rather belatedly, in January 2015, South Africa ratified the International Covenant on Economic, Social and Cultural Rights, 1966.<sup>6</sup> Article 13(2)(c) of the Covenant provides for the right to higher education in these terms:

Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

And our continental human rights instrument, the African Charter on Human and Peoples' Rights, 1981, which our country ratified in 1996, provides in Article 17 that '[e]very individual shall have the right to education'.<sup>7</sup> Our country also ratified the African Charter on the Rights and Welfare of the Child<sup>8</sup> in 2000, which provides in relevant part:

1. Every child shall have the right to an education.
- ...
3. States Parties ... shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
  - ...
  - (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means.

Returning home, our constitutional covenant saddles the state with the duty, through reasonable measures, to make further education increasingly available and accessible. This is hardly surprising. The

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<sup>6</sup> SAHRC (2016) National Human Rights Institution Report on the South African Government's combined Fourth to Eighth Periodic Country Report on the International Convention on the Elimination of Racial Discrimination.

<sup>7</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter) art 17.

<sup>8</sup> African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49.

demand for doors of learning to be open to all has been a core demand of our long glorious struggle over centuries. More so, the devastation of colonial exclusion left many destitute. Only the state could effectively bear the burden of bringing further education to its impoverished people. This was not a task to be left to the private sector or market forces.

The entitlement to further education in our Constitution is to be contrasted with the right to basic education and adult education which the state must provide universally and without the qualification of progressive access or availability of state resources. The Constitution makes the rights to have access to housing and to other social amenities such as healthcare, food, water and social security subject to the express condition of the state's 'available resources'. Strangely, the Constitution is silent on whether access to further education is subject to available state resources as it is subject to progressive realisation. Without making a lawyer's fine point between the difference in the wording of sections 26 and 27,<sup>9</sup> on the one hand, and section 29(1)(b), on the other, it is justifiable to conclude that the guarantee to have access to post-school education is also subject to available resources.

Even that said, here is the fundamental issue. Since 1994, the state was obliged to devise and implement a master plan that would afford, at the very least, its citizens universal and quality basic and adult education and an increasing access to higher education. The plan had to be reasonable, transparent, capable of prompt and effective implementation and well-aligned with the social objectives of our people and country. A plan of that order would have regard to the spatial and demographic, economic and budgetary imperatives of our land. In short, the plan of the state had to be reasonably capable of affording universal access to basic and adult education promptly and, increasing access to higher education over time. Implicit in all this is that the state was obliged to prioritise, and indeed sometimes re-prioritise, resources in order to give prompt effect to access to all education including higher education progressively.

So the demand for free access to further education, obviously including university and post-school technical education, is a good one. It properly derives from our constitutional quest to shorten the social distance and fashion a more just society. The claim that fees must fall is well embedded in the objectives of our long struggle for freedom and

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<sup>9</sup>The right to housing and health care respectively.

equality and is now rightly located within the democratic project as represented by the collective constitutional pact and international human rights instruments our country has ratified.

Like all fundamental rights, the entitlement to access to higher education is open to a limitation by way of a law of general application, provided the legislation is reasonable and justifiable in an open and democratic society based on values such as ours. Limitations that might be constitutionally permissible may include an admission requirement of merit or of channelling students to a course selection that is likely to help enhance research or to grow the economy, or other limitation closely allied to a compelling societal need.

But the state or its universities should not every year hike university fees and still assert that they are complying with the constitutional injunction to make higher education, through reasonable measures, progressively available and accessible. The higher the fees, the more education will be commoditised and the lesser the deserving people who will afford access.

Our higher education crisis has many mother and father progenitors. The first seem to be the “massification” of the demand for university education. The colonial higher education offering was racially limited, elitist and reflective of the class interest of our colonial masters. Universities were enclaves of privilege open to those who could or were assisted to afford them. But within 20 years of the advent of democracy—from 1994 to 2014—the number of university students doubled from half a million to a million and now stands at nearly 1.3million; but the number of universities and admission places in existing universities did not increase.

The second transitional challenge was that the state, beleaguered by diverse demands for social funding, did not adequately budget for the bigger numbers of students. Prof Bozzoli explains that:

[The] result was that government funding of universities decreased from 50% to 40% of university budgets. That shortfall had to be dealt with. Part of the result was bigger and bigger classes, which meant less attention to students. Donors did increase funding slightly, but the biggest

increase had to come from student fees, which pitted students against the universities.<sup>10</sup>

All this meant the new breed of university students were increasingly drawn from working class and poor backgrounds. Aside sparse scholarships and bursaries, their impoverished guardians had to fund the rising fees. That state of affairs was bound to reduce progressive access to the sector and frustrate the socially transformative purpose of our constitutional democracy. In other words, inequality would remain stubborn as social distances increased. Through the demand that fees must fall our youth are invoking a complex grievance about an incomplete and inchoate transition from colonial and racialised injustice to a society prefigured in the democratic project. Their grievance, I suggest, points to a faltering social transition dogged by high unemployment amongst the poorly educated youth, their resultant economic exclusion compounded by poor public governance, wasteful public expenditure and predatory tendencies on the part of most within the ruling elite. That state of affairs has spawned fast—radicalising youth who are calling for a drastic social transformation of society rather than the reconciliation and social cohesion Nelson Mandela, our first democratic president, stood for.

The third blight of our post-colonial education system has not been getting a proper recognition in spite of our public investment in education. In 2012, the United Nations Development Programme found that 6.0% of the country's GDP is spent on education.<sup>11</sup> This is similar to the World Bank's finding of 6.4% in 2012.<sup>12</sup>

A report by Statistics South Africa<sup>13</sup> also recognised the disparity between government expenditure of education and education outcomes:

As of 2010/11, government expenditure on education was the largest single line item in the budget, standing at 20% of

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<sup>10</sup> Daily Maverick 24 October 2016 <<http://www.dailymaverick.co.za/article/2016-10-24-video-between-the-lines-belinda-bozzoli-does-the-anc-want-universities-to-fall/>>.

<sup>11</sup> UNDP (2013) *Expenditure on Education* <<http://hdr.undp.org/en/content/expenditure-education-public-gdp>>.

<sup>12</sup> The World Bank (2013) *Expenditure on Education* <[http://data.worldbank.org/indicator/S.E.XPD.TERT.PC.ZS?name\\_desc=true](http://data.worldbank.org/indicator/S.E.XPD.TERT.PC.ZS?name_desc=true)>.

<sup>13</sup> Statistics South Africa (2013) *Millennium Development Goals: Achieve Universal Primary Education*.

the budget and 6% of the GDP. However, international assessment and comparisons indicate that our education outcomes do not mirror the investment levels which prevail in South Africa (DBE, 2012). Given the labour-intensive nature of schooling, the vast majority (78%) of the education budget goes to personnel expenditures, mainly teacher salaries.<sup>14</sup>

This has raised cutting questions about the quality and content of teaching in public schools. Many doubt the commitment of most teachers to the task at hand. South African Democratic Teachers Union (SADTU), a teacher union, is the biggest public sector union within the labour federation that is in a political alliance with the ruling party. Some commentators insinuate that through SADTU's alliance arrangement, the ruling party has undermined the state's oversight responsibility over educators?

### **Basic education**

So what have we done right in the last 22 years? Under apartheid, education was not equally available to all South Africans. Then we were a population of 40.5 million.<sup>15</sup> We are now a population of 55 million. In 1996, black females, 20 years and older, had the lowest educational qualifications, with 20% having received no education at all.<sup>16</sup> Black males were also in the minority with 14% not having received any education. Conversely, 99% of whites aged 20 years and older had received secondary education. The silver lining was that 89% of all children between the ages of 7–15 years old were attending school.<sup>17</sup> In the 20 years following the end of apartheid, basic education flourished. As of 2014, there were 12,655,436 learners in primary and secondary schools in South Africa. This was calculated to include 12,117,015 learners in public sector schools and 538,421 learners in independent schools.<sup>18</sup>

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<sup>14</sup> *ibid* 19.

<sup>15</sup> Statistics South Africa (2004) Census 2001: Primary tables South Africa—Census '96 and 2001 compared, Report 03-02-04.

<sup>16</sup> Central Statistical Service (1996) Living in South Africa: Selected findings of the 1995 October household survey.

<sup>17</sup> Statistics South Africa (2001) Education in South Africa: Selected findings from Census '96.

<sup>18</sup> Department of Basic Education (2016) Education Statistics in South Africa 2014.

The enrolment rate for primary school learners (ages 7–13) of 99% was reached in 2011.<sup>19</sup> Also in 2011, South Africa had a 94.7% successful primary school completion rate, compared to 93.8% in other middle income countries.<sup>20</sup> This adorable picture of universal access to basic education must be qualified by reports of non-governmental organisations like Equal Education that run troublesome statistics of a lack of proper classrooms, teaching amenities, textbooks, ablution and toilet facilities, drinkable water and electricity and access to digital platforms.<sup>21</sup>

But before you applaud our universal access to basic education, here comes the crunch. The successful completion rate for secondary schooling is a mere 43.9%.<sup>22</sup> Shockingly though, 51% of young South Africans have still not attained upper secondary education. This horrific secondary schooling drop-out rate has a big impact on the unemployment rate amongst adults. Of those who are unemployed in each racial group in South Africa, more than 58% of black unemployed persons, 67.9% of coloured unemployed persons, and 29% of white and Indian unemployed persons did not complete secondary schooling.

Research evidence points to declining low uptake of subjects most needed for effective entry into tertiary education institutions, skilled jobs, entrepreneurship and the economy. So matric pass rates announced with much pomp every new year tell us nothing about troublesome percentages of our people who have come to the end of the road in terms of their career—neither ready for tertiary education nor for useful deployment in the economy.

## Higher education

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<sup>19</sup> Statistics South Africa (2013) Millennium Development Goals: Achieve Universal Primary Education.

<sup>20</sup> *ibid.* Primary school completion rate refers to the number of learners who complete primary school (Grade 7).

<sup>21</sup> For instance, according to Equal Education and Equal Education Law Centre's joint comment on the draft National Water Sanitation Policy GN 70 GG 39668 of 12 February 2016, 474 public schools have no sanitation facilities and 4,681 do not have reliable water supply. 49% of schools either do not have any sanitation facilities or are forced to rely on pit latrines and other facilities. In a Basic Education Shadow Report, Equal Education highlights the fact that 862 public schools do not have access to water and 1,366 schools do not have access to electricity.

<sup>22</sup> Secondary school completion rate refers to the proportion of individuals from the ages of 20–24 who have completed Grade 12.

I turn briefly to higher education. In 2013, there were 136 higher education institutions with 1,103,639 students enrolled; 667 further education and training (FET) or technical and vocational education and training (TVET) Colleges in South Africa with a total of 794,250 students enrolled; and 3,212 Adult Education and Training (AET) Centres with 257,823 students enrolled.<sup>23</sup> In total, there were 4,025 public and private post-school education and training institutions.

Despite this remarkable proliferation of higher education institutions, tertiary output for economic growth is inadequate. The effects of not having adequate tertiary education are evident in the employment sector. Recent statistics have shown that the biggest segment of the employed population with tertiary qualifications is among the white and Indian population groups. To this end, 47.5% of employed white persons and 28.7% of employed Indian persons had a tertiary education while only 15.9% of employed black persons and 14.1% of employed coloured persons enjoyed the same benefit of tertiary education.<sup>24</sup>

An OECD Report notes that our employment sector places importance on higher educational attainment.<sup>25</sup> According to this, 82% of adults with a bachelor's degree (at minimum) will enjoy employment while only 49% of adults with a lower secondary education will become employed. This is below the OECD average of 60%.

As of 2014, 35% of 25–34 year olds had attained upper secondary or post-secondary non-tertiary education as their highest level of education. This means that young South Africans are achieving higher levels of education than their parents' generation as only 15% of 55–64 year olds have attained upper secondary or post-secondary non-tertiary education as their highest level of education.

The upshot of all I have related thus far is that our global competitiveness on education output is truly unflattering. The Global Competitiveness Report 2016–2017<sup>26</sup> has ranked South Africa 123 out of 138 in health and primary education and 77<sup>th</sup> in higher education

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<sup>23</sup> Department of Higher Education and Training (2015) Statistics on Post-School Education and Training in South Africa: 2013. These statistics include public and private institutions.

<sup>24</sup> Statistics South Africa (2016) Quarterly Labour Force: Quarter 2.

<sup>25</sup> OECD (2016) Education at a Glance 2016: South Africa.

<sup>26</sup> Klaus Schwab World Economic Forum, The Global Competitiveness Report 2016–2017.

and training, which seems to include secondary education. Focusing on the quality of primary education, South Africa is ranked 126. This is up five places from last year. The following detailed rankings are set forth for higher education in South Africa, including secondary education:

- (i) Secondary education enrolment rate (gross %): 67<sup>th</sup>
- (ii) Tertiary education enrolment rate (gross %): 99<sup>th</sup>
- (iii) Quality of the education system: 134<sup>th</sup>
- (iv) Quality of math and science education: 138<sup>th</sup>
- (v) Quality of management schools: 21<sup>st</sup>
- (vi) Internet access in schools: 111<sup>th</sup>
- (vii) Extent of staff training: 19<sup>th</sup>

In short, we are in a deep education crisis.

### **What's to be done?**

The inexorable question is: What's to be done? Foremost we must restore peace to our riotous campuses and resume teaching and learning even in the face of an education system that is facing enormous challenges.

But conceding the constitutional and ethical validity of the call for fees must fall, important as it is, is the easy part. A number of trenchant allied issues call for attention.

First, the violence that has reared its head during or connected to demands that fees must fall is wholly unacceptable and should stop immediately. It bears no justification whatsoever and in effect amounts to punishable criminal conduct. However correct one's demand might be and however strong one might feel about the demand, it may not be prosecuted violently in a society set up to mediate disputes within a democratic tradition and indeed, subject to the rule of law and not the rule by coercion. Violence is antithetical to peaceful mediation of differences and democratic practice. I know that the absence of violence does not always denote justice and yet peace affords the best space to find justice.

For ample and obvious reasons, democracies eschew violence in favour of a mechanism of democratic accountability. That is why terms of office of public representatives are tenuous. They are tied to a fixed term and always subject to re-election, if they were to continue in office. In a credible and peaceful election, the electorate is the final arbiter on whether the ruling elite has honoured or frustrated the legitimate

claim of citizens such as the demand for universal access to quality and liberating education.

Universities are the wrong targets for a violent uprising. First, they are soft targets. They were never meant to be fortresses. They have no effective means to deal with violent protests, disruption and coercion. If anything, universities were always meant to be open spaces in which ideas, new knowledge and other innovation would flourish. In that setting, protests and contestation of ideas are permissible but only if they are peaceful and cognisant of the entitlement of others. It cannot be correct that when an overwhelming majority of students choose to resume tutorials they are coerced by the threat of violence or violence not to. Second, in truth universities can never rightly promise progressive access to higher education. Only the state can. The true counterparty to claims that fees must fall is the state. So universities are the wrong target. The violence on campuses must stop forthwith before it delegitimises a valid claim for universal access to higher education subject to reasonable qualifications. Equally, our state must agree to demilitarise the academic spaces. Our history has shown that state coercion against protesting students is an inappropriate response. We must find a peacefully mediated solution.

### **A few steps to the solution?**

The call of the Fallist movement in universities is often framed in absolute terms. It is indeed unclear whether all fees—tuition, textbooks, internet access, boarding and lodging, transport and pocket money—must fall. That open-ended demand that fees must fall poses the anterior question about what kind of university we deserve and can afford. Must it be an omnibus of social services or should a university offer only its core academic calling.

Equally uncertain of the Fallist position is whether every student, irrespective of financial need, must be fully funded by the state. There are also crucial issues of time frames within which free access to tertiary education must be realised—must it be now or nothing? Part of the grievances pertains only to institutional issues, limited to senior management of institutions and other customised disaffection. All these matters call for in-depth conversations not only with students and their parents but also with broader civil society and the state.

The state has not persuaded students that it has a credible solution to the fees crisis. It has conceded the grievance in broad terms lacking specificity on the remedy it proposes. In instances it has

characterised the protests as attempts at regime change funded by enemies of the state. The latter analysis of the student revolt may be unimaginative and perhaps lazy.

I understand the stance of the state that the nation should await the outcome of the *Heher* Commission report. At a formalistic level that may be the correct approach. But the students in protest will not wait. This means the prospect of heightened unrest during university registration and later in January 2017 is real and ominous.

What we collectively need to do, in my humble view, wearing my hat as a patriot and indeed as Chancellor of Wits, sometimes called the epicentre of the student uprising, is to convene a prompt negotiating forum by civil society at which leaders and representatives of students, civil society formations, business and stakeholders with serious interest in the education of our youth, come together to talk and fashion a Marshall Plan to overcome the education crisis. That forum would be doing what we never did in 1994 when we ended apartheid and picked on our socio-economic guarantees.

At the negotiating forum or national convention the government will occupy a place of importance because it, in the end, bears the duty to provide legitimate access to higher education. The policy or legislative measure government would take thereafter would be responsive to and enjoy the support of vast stakeholders in education. After all, only government can formulate effective policy or legislative measures. But peace in the education sector cannot be achieved by state coercion or unilateral declarations and positions. Responsiveness and cohesion, and not coercion, is called for.

To this end, at the invitation and insistence of several civil society, university and student formations, I have agreed to convene a National Education Crisis Forum which has been in deep conversation with all stakeholders including government at the highest level. I have been joined by esteemed other South Africans as co-convenors of the Forum. The Forum plans to convene a nationwide convention, not later than the end of February 2017, to tease out all the disputes and issues around the protest, including endemic violence and campus militarisation, in a way that points to a master plan on access to education envisaged by our democratic project, as mirrored in our Constitution. In that way we may save the 2017 academic year and indeed place education where it belongs in our long struggle for a just society.

Justice Dikgang Moseneke, with an introduction by Stewart Motha

Our Constitution has been phenomenal and our democratic project is well on course despite a measure of turbulence. Even with all of our glorious constitutional jurisprudence, if we do not fix our education a just society will remain a pipe dream.

Good night and God bless.

*Dikgang Moseneke*  
*Friday, 20th January, 2017*  
*Common Room, The Law Society*  
*London, UK*