

THE 2016 ANNUAL FOUNDERS LECTURE

**“IS THE CLAIM THAT UNIVERSITY ‘FEES MUST FALL’
AT ODDS WITH THE DEMOCRATIC PROJECT?”**

THURSDAY 27 OCTOBER 2016

UNIVERSITY OF SOUTH AFRICA

BY JUSTICE DIKGANG MOSENEKE

Introduction and salutations

I am privileged to be delivering the 2016 Annual Founders Lecture. I owe my presence here to the Principal and Vice-Chancellor, Professor Mandla S. Makhanya, who, on behalf of the Council of the University of South Africa, asked me to do so.

Since 2003, at its inception, the Founders Lecture has sought to cultivate intellectual engagement of the highest order on higher education at both global and national levels. That honour falls on me this year. For that I am grateful. The honour is special and fitting on two counts. First, this is my *alma mater* and the only university I graduated from against all odds. My presence here is as befitting as my return to my home village, Atteridgeville – *Pheli* – this past Saturday, where amidst thousands of joyous home girls and homeboys President Thabo Mbeki and I launched my autobiography, *My Own Liberator*. Tonight too is a homecoming.

Second, our country is again in the throes of a nationwide revolt over the access to quality, and might I add “decolonised”, higher education. For that reason I have chosen to ask the question: “Is the claim that fees must fall at odds with the democratic project?”

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. What I said then bears repetition.

“Teaching and learning are as old as human beings have lived. Education is primordial and integral to the human condition. The new arrivals into humankind are taught and learn how to live useful and fulfilled lives. So education’s formative goodness to the body, intellect and soul has been beyond question from antiquity. And its collective usefulness to communities has been recognised from prehistoric times to now. The indigenous and ancient African wisdom teaches that *“thuto ke lesedi la sechaba”*; *“imfuno yisiban”* (education is the light of the nation) and recognises that education is a collective enterprise by observing that it takes a village to bring up a child.

Of this Aristotle, Immanuel Kant, Karl Marx, Mahatma Gandhi, Helen Keller, Nelson Mandela, Kofi Annan, Malala Yousafzai, the Holy Bible, Buddha, and the Holy Quran have said:

“Education is an ornament in prosperity and a refuge in adversity.” – Aristotle

“How then is perfection to be sought? Wherein lies our hope? In education, and in nothing else.” – Immanuel Kant

“The education of all children, from the moment that they can get along without a mother’s care, shall be in state institutions.” – Karl Marx

“If we want to reach real peace in this world, we should start educating children.” – Mahatma Gandhi

“Education should train the child to use his brains, to make for himself a place in the world and maintain his rights even when it seems that society would shove him into the scrap-heap.” – Helen Keller

“Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine that a child of a farmworker can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another.” – Nelson Mandela

“Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development.” – Kofi Annan

“There are many problems, but I think there is a solution to all these problems; it’s just one, and it’s education.” – Malala Yousafzai

“My people are destroyed for lack of knowledge.” – The Holy Bible: Hosea 4:6

“To have much learning, to be skilful in handicraft, well-trained in discipline, and to be of good speech – this is the greatest blessing.” – Buddha

“Are those equal, those who know and those who do not know? It is those who are endowed with understanding that receive admonition.” – The Holy Quran: Surah Al Zumar 39:9

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’.¹

The right to further education

¹ Section 29(1)(a) – *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).

The debate over fees must fall compels us to start where we should – our Constitution. This is so because it is emblematic of our collective convictions on the democratic project since 1994. It represents the minimum programme of action to found a just society. In particular, section 29 of our Bill of Rights 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.”

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.

South Africa ratified the International Covenant on Economic, Social and Cultural Rights, 1966 in January 2015.² 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”.³ It also ratified the African Charter on the Rights and Welfare of the Child⁴ 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.

² 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*.

³ Article 17 of the African Charter.

⁴ African Charter on the Rights and Welfare of the Child, 1990.

The 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 the people.

The entitlement to further education 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, on the one end, and section 29(1)(b), on the other, it is justifiable to conclude that the guarantee to have access to further education is 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 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 quality basic and adult education and over time, increasing access to useful and quality higher education. Implicit in all this is that the state is 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 FET education, is a good one. The claim has always been embedded in the objectives of our long struggle for freedom 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, provided it 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 cannot 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 people who will afford access.

At higher education level, Professor Bozzoli, a former Deputy Vice-Chancellor of the University of the Witwatersrand, draws attention to the doubling of the number of university students between 1994 to 2014, from half a million to a million – but the increases were not budgeted for. She 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.”⁵

Let me repeat the point in this way: We must smell the coffee. Rising higher education fees must and will reduce progressive access to the sector. A spectre of permanently rising fees will bar access to higher education and frustrate the constitutional injunction. Inequality will remain stubborn as social distances increases. Through the demand that fees must fall our youth are invoking a complex grievance about an incomplete and inchoate transition from colonial and racialized injustice to a society prefigured in the democratic project. Their grievance points to a faltering social transition dogged by economic exclusion, poor governance and wastefulness and predatory tendencies.

Violence, security issues and militarised campuses

⁵ Daily Maverick 24 October 2016 accessed at <http://www.dailymaverick.co.za/article/2016-10-24-video-between-the-lines-belinda-bozzoli-does-the-anc-want-universities-to-fall/>.

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.

Before I leave the matter of violence, I urge our university students not lightly to flirt with terms like revolution and violent uprising. A revolution may be apt only when there is no real prospect for a democratic accommodation. There is no ideological or practical

justification for toying with delusions of an armed revolt within a stable society capable of democratic correction. Students in tertiary institutions are in as good a position as any citizen to resort to electoral correction.

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 universal 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. Much as we who have anything to do with universities hate the militarisation of campuses, we cannot afford to watch scarce university resources destroyed only to need them again when campus peace returns. The violence on campuses must stop forthwith before it delegitimises a valid claim for universal access to higher education subject to reasonable qualifications.

The state of our education seen through the lens of statistics.

The inexorable question is: What's to be done? A helpful answer compels a rushed bird's eye view of the state of our education.

So what have we done in the last 22 years? Much indeed has been achieved to make basic education and to a lesser degree, adult education accessible. Secondary education is troublesome and displays frightening drop-out rates and consequent endemic unemployment. In tertiary education the intake has grown but access has become increasingly less as admission places become fewer and fees higher. The state funding of education has increased but the academic outputs have to keep up with the rising expenditure. The outcome is that our global competitiveness has become sadly low and unimpressive.

After that executive summary, let's look at some numbers. Access to education was not equally available to all South Africans before 1994. In the 1996 Census, South Africa was recorded as having an estimated population of 40 583 573.⁶ The most recent Global Competitiveness Report shows that 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.⁷ Black males were also in the minority with 14% not having received any education. Conversely, 99% of whites aged 20 years and older received some secondary education.

⁶ Statistics South Africa (2004) *Census 2001: Primary tables South Africa – Census '96 and 2001 compared*, Report 03-02-04.

⁷ Central Statistical Service (1996) *Living in South Africa: Selected findings of the 1995 October household survey*.

In a report prepared by Statistics South Africa (Stats SA) on information gathered by the 1996 Census,⁸ 89% of all children between the ages of 7-15 years old were attending school.

Basic education

According to a report by the Department of Basic Education,⁹ there were 25 741 schools in South Africa in 2014, 14 927 of which were primary schools, 6 068 of which were secondary schools and 4 746 of which were combined and intermediate schools. It was calculated to include 12 117 015 learners in public sector schools and 538 421 learners in independent schools. As of 2014, there were 12 655 436 learners in primary and secondary schools in South Africa.

The enrolment rate for primary school learners (ages 7-13) of 99% was reached in 2011.¹⁰ Also in 2011, South Africa had a 94.7% successful primary school completion rate, compared to 93.8% in other middle income countries.¹¹ This sorry picture of universal access must be qualified by reports of NGOs like Equal Education that run troublesome statistics of lack of proper classrooms, teaching amenities, textbooks, ablution and toilet facilities, drinkable water and electricity and access to digital platforms.¹²

⁸ Statistics South Africa (2001) *Education in South Africa: Selected findings from Census '96*.

⁹ Department of Basic Education (2016) *Education Statistics in South Africa 2014*.

¹⁰ Statistics South Africa (2013) *Millennium Development Goals: Achieve Universal Primary Education*.

¹¹ Statistics South Africa (2013) *Millennium Development Goals: Achieve Universal Primary Education*. Primary school completion rate refers to the number of learners who complete primary school (Grade 7).

¹² 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

However, the successful completion rate for secondary schooling is a mere 43.9%.¹³ This has a big impact on the unemployment rate amongst adults that have not completed secondary schooling. Of those who are unemployed in each racial group in South Africa, more than 58% of the 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 your people who have come to the end of their career roads – neither ready for tertiary education nor for useful deployment in the economy.

Adult education

Stats SA shows that in 2002, 52.6% of males and 59.4% of women over the age of 60 were functionally illiterate.¹⁴ That number reduced to 40.1% in men and 48.6% of women 2012. The illiteracy rate for those between the ages of 15-59 have also decreased with 22.6% of males and 22.3% of females being

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.

¹³ Secondary school completion rate refers to the proportion of individuals from the ages of 20-24 who have completed Grade 12.

¹⁴ Statistics South Africa (2013) *Social Profile of Vulnerable Groups 2002-2012*, Report 30-19-00.

functionally illiterate in 2002, decreasing to 11.9% of males and 11.4% of females in 2012.¹⁵

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.¹⁶ 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

¹⁵ The provision of Adult Education and Training (AET) is provided for by the Adult Education and Training Act which provides for the establishment, governance and funding of AET Centres in South Africa. Learners in these Centres have an opportunity to study different levels of Adult Basic Education and Training programmes and are able to complete Grade 10, 11 and 12. In 2013, there were 3 150 public AET Centres in South Africa. In the same year, 257 823 adults were enrolled in public and private AET Centres, a decrease from 315 068 students in 2012 and 297 634 students in 2011.

¹⁶ 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.

black persons and 14.1% of employed coloured persons enjoyed the same benefit of tertiary education.¹⁷

The South African Human Rights Commission attributes the slow rate of transformation in the higher education sector to: (i) a lack of understanding of what transformation means; (ii) a lack of capacity and institutional will to successfully implement transformation plans; (iii) a lack of appreciation for or understanding of cultural diversity; and (iv) a myriad of persisting social challenges and inequality which exacerbates access to higher education.¹⁸

International reports

Organisation for Economic Co-operation and Development (OECD) statistics

An OECD Report notes that our employment sector places importance on higher educational attainment.¹⁹ To this end, 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

¹⁷ Statistics South Africa (2016) *Quarterly Labour Force: Quarter 2*.

¹⁸ 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*.

¹⁹ OECD (2016) *Education at a Glance 2016: South Africa*.

15% of 55-64 year olds have attained upper secondary or post-secondary non-tertiary education as their highest level of education. Shockingly though, 51% of young South Africans have still not attained upper secondary education.

It also notes that South Africa spends significantly below the OECD average on each primary and secondary student:

“South Africa’s annual expenditure per student in the public system tends to be lower than EU or OECD countries on average. At the primary level, expenditure is USD 2 366 per student compared to the OECD average of USD 8 477, and at the secondary level it is USD 2 513 per student, compared to the OECD average of USD 9 811. South Africa is more comparable to a country such as Colombia, which spends USD 2 074 per student at primary level and USD 2 835 at secondary level each year.”

The Global Competitiveness Report 2016-2017²⁰

General statistics for South Africa according to the Report are:

- (i) Population: 55 million
- (ii) GDP per capita (USD): 5 694.6
- (iii) GDP (USD billions): 313.0

Global competitive comparisons are truly unflattering. According to the Report, South Africa is ranked 123rd in health and primary education and 77th in higher education and training, which seems to include secondary education (out of 138). Focusing on the

²⁰ Klaus Scwab World Economic Forum *The Global Competitiveness Report 2016-2017*.

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

Expenditure on education in South Africa

According to the United Nations Development Programme (UNDP), our country spends 5.3% of its GDP on education. This percentage has fluctuated between five and six per cent since then. In 2012, the UNDP found that 6.0% of the country's GDP is spent on education.²¹ This is similar to the World Bank's finding of 6.4% in 2012.²²

A report by Stats SA on the progress of achieving basic education as a Millennium Development Goal notes that the expenditure on basic education in 2002 was R7 912,20.²³ This amount increased

²¹ UNDP (2013) *Expenditure on Education* accessed at <http://hdr.undp.org/en/content/expenditure-education-public-gdp>.

²² The World Bank (2013) *Expenditure on Education* accessed at http://data.worldbank.org/indicator/S.E.XPD.TERT.PC.ZS?name_desc=true.

²³ Statistics South Africa (2013) *Millennium Development Goals: Achieve Universal Primary Education*.

to R17 930.00 per learner by 2008. The report 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 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.”²⁴

In the 2016/2017 budget, R205.8 billion was allocated to basic education, R28 billion to university subsidies, R14.4 billion to the National Student Financial Aid Scheme, R15.0 billion to Skills development levy institutions and R6.9 billion to technical and vocational education and training.

A process to the solution?

The call by the “fees must fall” movement in universities is often framed in absolute terms. It is unclear whether all fees – tuition, textbooks, internet access, boarding and lodging, transport and pocket money – must fall. Equally uncertain 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

²⁴ Statistics South Africa (2013) *Millennium Development Goals: Achieve Universal Primary Education* at page 19.

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.

The state has not persuaded the 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 – a CODESA OF EDUCATION –by civil society at which leaders and representatives of students, all civil society formations and stakeholders with serious interest in the education of our youth, come together to debate the composition, process and substantive objects of the forum. At the forum 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.

The education forum must sit from now to the end of December 2016 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.

Good night and
God bless.

Dikgang Moseneke
Pretoria
27 October 2016