

The Constitution in
the classroom:
Law and education
in South Africa
1994-2008

Stu Woolman & Brahm Fleisch

Pretoria University Law Press
PULP

2009

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Published by:

Pretoria University Law Press (PULP)

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Cover:

Yolanda Booyzen, Centre for Human Rights

ISBN: 978-0-9814124-5-0

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ACKNOWLEDGMENTS

Over the last several years, other academics who work in this particular domain have helped us to refine our arguments. We owe significant debts to Danie Brand, Rassie Malherbe, John Pampallis, Daria Roithmayr, Christina Murray, Jonathan Jansen, Matthew Chaskalson, Michael Dorf and William Simon. We should like to single out Michael Bishop for his especially important contribution to our understanding of the right to an adequate, basic education.

We have received additional constructive criticism from colleagues at seminars held at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), the University of the Witwatersrand School of Education, the Wits Institute for Social and Economic Research (WISER), the University of Pretoria's Centre for Human Rights (CHR) and Columbia Law School.

We would like to thank the editors, and the anonymous referees, of several journals: *Perspectives in Education*, the *South African Journal on Human Rights, Education & the Law* and the *Stellenbosch Law Review*. Their interventions enabled us to make subtle, but important, corrections in course. These journals – and the publisher of *Constitutional Law of South Africa*, Juta Law – have also proved extremely generous in permitting us to use material originally published in their pages. We would also like to thank the anonymous reviewers for this work: They saved us from making errors both large and small.

February 2009

ABBREVIATIONS

CODESA	Convention for a Democratic South Africa
CRLC	Commission for the Protection and the Promotion of Cultural, Religious and Linguistic Communities
EEA	Educator's Employment Act
EFA	Education for All
ERLC	Education Labour Relations Council
ERP	Education Rights Project
FRC	Financing, Resourcing and Costs of Education
GDoE	Gauteng Department of Education
GEC	General Education Certificate
GEPA	Gauteng Education Policy Act
GER	Gross Enrolment Ratio
HoD	Head of Department
MEC	Member of the Executive Council
MPNF	Multi-Party Negotiation Forum
NCOP	National Council of Provinces
NECC	National Education Coordinating Committee
NEPA	National Education Policy Act
NER	Net Enrolment Ratio
NP	National Party
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PIRLS	Programme in International Reading Library
RCL	Representative Council of Learners
SACMEQ	Southern and Eastern Africa Consortium for Monitoring Education Quality
SADTU	South African Democratic Teacher's Union
SASA	South African Schools Act
SGBA	School Governing Body Association
SGBs	Social Governing Bodies
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WCDoE	Western Cape Department of Education

We would like to thank our parents for giving us the
best education possible.

CHAPTER 1

INTRODUCTION: SOUTH AFRICA'S RECENT HISTORY OF CONTESTED CLASSROOMS

1 Introduction: South Africa's recent history of contested classrooms

This book does not claim to be a comprehensive text on law and education in South Africa. The law on education and educational practices in South Africa is too vast a subject to be covered in a single monograph. Instead, we have identified six themes that reflect the broader currents and conflicts in South African education debates: (a) school choice and school fees as understood through the rubric of the negotiated settlement and the consequent open texture of such legal texts as the Constitution, the National Education Policy Act (NEPA) and the South African Schools Act (SASA); (b) the right to a basic education and the right to instruction in a preferred language when viewed through the lens of the various freedoms enshrined in our Constitution; (c) the autonomy of school governing bodies and independent schools as refracted through SASA and our basic law's complex commitment to participatory democracy, to freedom and to community rights.

2 Origins

This book has its origins in innumerable conversations between two colleagues over a period of some four years. What initially struck us both, what dissatisfied us most, were rather the desiccated debates taking place in both the education policy community and the legal academy. Educators were perfectly content to discuss policy. But they appeared constitutionally incapable of discussing, in a meaningful or subtle fashion, the law and its ramifications for the state of education in this country. Legal academics, on the other hand, seemed uninterested in how primary and secondary schools actually work in South Africa. They engaged in the most arid and disengaged ruminations on what our basic law required. We quickly recognised how each discipline (with its own unique forms of analysis

and discrete bodies of apposite literature) working in concert could advance our understanding of law and education in South Africa.

3 Approach

It would be disingenuous to suggest that the authors have no political pre-commitments: we are both strong social democrats. However, that says virtually nothing about our approach to this book. What we have tried to do is engage with interesting arguments on the right, in the centre and to the left. And, in the end, we would be surprised if we did not find many of our friends and colleagues agreeing with some of our positions and dissenting vigorously from others.

We hope to engage our fellow scholars by offering clear and careful legal arguments supported by evidence provided by South African and international researchers on education. In many respects, the six substantive chapters in this book look like what litigators call Brandeis briefs: a legal argument supported by the best available empirical evidence.

The need for such ‘academic’ Brandeis briefs has been articulated above. When lawyers argue, they tend to cherry pick the evidence to be found in educational policy statements and the secondary literature. They are, after all, advocates. Educators, on the other hand, tend to eschew engagement with the sophisticated constitutional, statutory and regulatory arrangements that bracket education policy. Nor do you see most educators looking at legal texts for support of their propositions. Again, then, the purpose of this work is to demonstrate how each discipline is best informed by the other, and how, together, they produce a clearer conception of law and education in South Africa.¹

¹ That said, Enver Motala and Jon Pampallis do stop to note the varying political axes around which education law and policy turn: ‘[L]aw and policy are unequivocal regarding the need to address both the ‘humanistic’ elements of reconstruction and issues which are more narrowly concerned with economic development. Concerns for democracy, redressing historical injustice, ensuring a human rights culture, providing an environment for participation and accountability are matched with concerns for economic regeneration, human resource development, and – in the international economy’: E Motala & J Pampallis ‘Education law and policy in post-apartheid South Africa’ in E Motala & J Pampallis (eds) *Education and equity: the impact of state policies on South African education* (2001) 14 30. But Motala and Pampallis then write (31) that the enabling legislation – SASA, NEPA, EEA – ‘is less fulsome in its orientation to the core values of the Constitution’. Motala and Pampallis simply fail to take cognisance of the extent to which those ‘core values’, and the various rights in the Constitution, and within FC sec 29 itself, pull in very different directions.

In the process of writing the chapters that make up this work, a fairly clear four-fold argument emerged.

The legal space we describe is variable. Its open texture is a function of negotiated settlements between political parties, state bureaucracies, national government, provincial government, unions, local communities, principals, teacher, parents and learners. These open spaces in the law expand and contract, at least at the penumbra, as a result of the political exigencies of a given historical moment.

Those exigencies have been subject to different characterisations. The standard account begins with the widely accepted, but radically incomplete, story of how the National Party's belated attempts to decentralise control over public school education, and subsequent concerns about Afrikaner succession, resulted in the current, and significant, degree of constitutional and statutory control exercised by provincial governments, unions, principals, parents, learners and school governing bodies (SGBs).² Or, to put it more pointedly, the standard account emphasises how the fragility of the ANC-led government in 1994 required it to cede authority to multiple groups in order to avoid concentrating power in a group that might contest the government's new agenda.

Indeed, we shall argue, as do Woolman and Bishop and Woolman and Botha, that harmonising these values [openness, democracy, human dignity, equality and freedom] is no easy task. Indeed, they invariably pull in different directions in every hard case that comes before the Constitutional Court (and any lower court with constitutional jurisdiction). Woolman and Botha note: 'The[se] tensions ... are constitutive of the South African constitutional order ... Any attempt to eradicate these conflicts and to deny the distinctive meaning each of these values would do real violence to the constitutional text and deny the commitment to openness and to plurality on which it is premised': S Woolman & M Bishop 'Law's autonomy' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 15, quoting S Woolman & H Botha 'Limitations: shared constitutional interpretation, an appropriate normative framework & hard choices' in Woolman & Bishop (eds) (above) 149. See also S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2006) chap 34.

² That account, as John Pampallis writes, turns primarily on the rearguard actions of the apartheid state to maintain white, privileged public schools. He first notes that: 'In its dying days, the apartheid government took a significant step towards decentralising the white education system. After the government's unbanning of the liberation movements in 1990, pressures began to build for the desegregation of white state schools ... In 1990, the Minister responsible for white education ... announced that white state schools would be allowed to change their status from the beginning of 1991. Three new school models were available: (1) Choosing Model A would result in the privatisation of the school; (2) A Model B school would remain a state school but could admit black students up to a maximum of 50% of its total enrolment; (3) A Model C school would receive a state subsidy but would have to raise the balance of its budget through fees and donations.' J Pampallis 'The nature of educational decentralisation in South Africa' (Centre for Education Policy Development, Evaluation and Management) *Decentralisation and Education*

Our historical account, culled from the *travaux préparatoires* of both the interim Constitution and the final Constitution, as well as extant education framework legislation (SASA), the National Education Policy Act (NEPA) and the Educators' Employment Act (EEA), demonstrates that appeasing the privileged or the provincial bureaucracy or the unions is but a small part of this story. SGB autonomy, for example, was driven to a very large extent by the

Conference, Johannesburg, South Africa (11 - 14 June 2002) 3, citing Department of Education 'Education and training in a democratic south Africa: first steps to develop a new system' GN 16312 (March 1995) 8. See also S Badat 'Educational politics in the transitional period' in P Kallaway *et al* (eds) *Education after apartheid: South African education in transition* (1997) 9. Pampallis continues (4 - 5): 'By early 1992, most of the 1 983 white state schools had chosen to retain their old status ... The following year, however, the government announced that all the formerly white schools ... would become Model C schools unless parents voted by a two-thirds majority to remain status quo or become Model B schools, and that subsidies to all school models would be cut. As a result, ... 96% of the former white state schools became Model C schools, thus giving themselves the possibility of raising additional funds from parents to make up for the decrease in all the formerly white schools ... would become Model C schools unless parents voted by a two-thirds majority to remain status quo or become Model B schools, and that subsidies to all school models would be cut. As a result, ... 96% of the former white state schools became Model C schools, thus giving themselves the possibility of raising additional funds from parents to make up for the decrease in state funding ... The parent body in each Model C school elected a governing body. Title to the fixed property and equipment of the school was given by the state to the school, to be administered by the governing body. The schools became juristic persons with the right to enter into contracts and to sue and be sued. They gained a high degree of autonomy, including the right to charge compulsory school fees and to determine their own admissions policy. The reasons for this change in the status of the white schools appear to have been twofold. First, the state was increasingly unable to provide the same level of financial support to white schools as previously ... [T]he changing political climate ... obliged [the] government to move to greater equality in spending on black and white education ... Second, the change to Model C was an attempt to ensure that white communities could continue to control their schools rather than allowing them to fall into the hands of a democratically-elected government, which was (rightly) seen as imminent.' See, further, Education Affairs Act (House of Assembly) Act 70 of 1988. What was truly surprising was how few schools and parents opted for Model A. The sense of entitlement to government largesse in large sectors of the white community was so ingrained that most white parents could not foresee a future without access to state-funding. This lack of foresight explains (a) why advocates for historically privileged schools continue to misread FC sec 29(2) as protecting continued access to state funding for single-medium public schools and (b) why so few cases have turned on the protection afforded independent schools under FC sec 29(3). The need to reverse this sense of entitlement was recognised in one of the first ANC government's white papers. See Department of Education *White Paper II: The organisation, governance and funding of schools* GN 1229 (November 1995) 6.23 ('*White Paper II*') ('The provision of state aid to a semi-privatised school system ... served to entrench existing privileges and retain the best schools, the best facilities and the most highly qualified teaching staff in the interest of those who had historically been most advantaged by the policy ... of racial preference in this country.') See also: J Samuel 'The state of education in South Africa' in B Nasson & J Samuel (eds) *Education in South Africa: From poverty to liberation* (1990) 17.

fundamentally democratic commitments of the African National Congress to grassroots politics.³

The drafting history discloses how the multiple constituencies with whom the state had to contend, and the conflicting imperatives within the state's own agenda, led to greater decentralisation of decision-making.⁴ Three points need to be made about this

³ See S Woolman & B Fleisch 'Democracy, social capital and school governing bodies in South Africa' (2008) 20(1) *Education and the Law* 37. Extant SGB autonomy has its roots in the practices of South Africa's liberation movements. Many of the ANC government's early educational initiatives were predicated on the assumption that sustained school improvements must develop organically out of community participation and that community participation is contingent upon stronger (read autonomous) school governance structures. See Gauteng Department of Education 'Gauteng school renovation programme implementation plan' (1994) ('Physical reconstruction and visible improvement in conditions at schools are tied to an incentive for strengthened school governance structures'). See also Gauteng Department of Education 'Circular No 2' (1995) ('The key to successful school development lies in the capacity of communities at all levels to guide and manage their own development ... [and] the revitalisation of participatory structure[s]'); Gauteng Department of Public Works 'Evaluation of the Gauteng schools *Toilet Building Project*' (1997) 10 - 11 ('It was envisaged that community participation would prompt greater civil society participation in school governance, and stimulate emerging builders ... It was believed that the toilet project would help to transfer power from the State to school governing bodies'). See, generally, African National Congress *The reconstruction and development programme* (1994) ('[T]he people affected must participate in decision-making ... Democracy is not confined to periodic elections. It is, rather, an active process enabling everyone to contribute to reconstruction and development'); ANC National Education Coordinating Committee *National education policy initiative* (1992) (calls for dual structures of power: the state, on the one hand, community stakeholders on the other). It is, among other things, a testimony to the ANC's commitment to democracy that a party without a real opposition would divest itself of decision-making power based upon its belief that local schools and local communities would be best served by local political structures – in this case the SGB. However, the ANC's belief in the need of a strong central government to effect transformation may have militated against giving too much power to the community. See Y Sayed 'Discourses of the policy of educational decentralisation in South Africa since 1994: an examination of the South African Schools Act' (1999) 29(2) *Compare* 141 at, 143 (Sayed notes that community representatives – unlike parents – do not have voting status on SGBs in terms of SASA. But it seems reasonable to ask why community representatives, who have no direct tie to the school, should have such status.) But see R Malherbe 'Centralisation of power in education: have provinces become national agents?' (2006) 2 *Tydskrif vir Suid-Afrikaanse Reg* 237 (Malherbe contends that the ANC believed that 'political power should centralised as far as possible').

⁴ Jonathan Jansen offers his own complex historical narrative to explain the constitutional choices and the educational policies that we have today. For Jansen, the trade union movement, the ANC's National Education Crisis Committee, the international aid community, the business community, the NGO sector and the National Education and Training Forum constitute the seven most important bodies with respect to educational policy development in the run-up to and aftermath of the 27 April 1994 elections. See J Jansen 'The race for education policy after apartheid' in Y Sayed & J Jansen (eds) *Implementing educational policies: the South African experience* (2001) 12. Jansen (12) writes: '... [A] flurry of Education policies was unveiled in the anticipation of the

commitment to decentralisation.⁵ First, the partial decentralisation of decision-making had less to do with a belief that local is always *lekker* and more to do with the state's need to ensure that no one interest group would be able to use the law as a means of organising in opposition to the state. Second, the partial decentralisation of decision-making flows from inevitable conflicts between the egalitarian, utilitarian, democratic and communitarian commitments clearly manifest in the ANC's political agenda and the two new Constitutions (as it would in any well-developed, non-reductionist social democratic political theory.) Third, the new government realised that various political and legal choices would have a number of unintended consequences. The drafting history is, as a result, replete with references to the 'provisional' nature of the structures being created by the state and the state's commitment to revisiting and to revamping those structures as it consolidated its power and shifted its policy imperatives. Indeed, the state put on notice those

formal and legal termination of apartheid: by the private sector, through the private sector Education Council and then the early National Training Board; by the labour movement, through ... COSATU ...; by the broad democratic movement through the National Education Policy Investigation; by the self-reforming apartheid state through the Education Renewal Strategy ...; by the international aid community ...; and by the non-governmental sector ... All these actors jostled for position ... in 1990 as they prepared to develop ... policy positions for a "democratic South Africa".

⁵ Sophie Oldfield describes this process of decentralisation of power in terms of a 'fragmentation' of state policy that had not, prior to 1994, been anticipated by those who would govern the post-apartheid state: S Oldfield 'The South African state: a question of form, function and fragmentation' in Motala & Pampallis (eds) (n 1 above). Oldfield writes (32 - 33): 'The broader dismantling of the apartheid legacies has involved a process of rereading and rewriting the legal and social contracts that govern relationships between state and society. However, the process of making society legible to post-apartheid imperatives of equity and then simplifying these realities into social policy to redress inequality has been fraught with difficulties ... The reconstruction of education [through state policy] lies at the heart of this transformation [of South Africa] because education marks a path for individual, community and collective development ... To give effect to these policies, Parliament has passed a host of legislative measures ... to reconfigure educational structures from the level of the school, to the district, the provinces and the national state. In the process of constructing ... solutions to post-apartheid transformation, the state's role in development has rotated in orientation. This rotation has altered the development process itself – so much so that the agenda of the post apartheid state has fragmented from one of prioritising reconstruction and redistribution ... to one of facilitating the delivery of social services beyond the ambit of state responsibility.' Oldfield then goes on to frame her discussion in terms of three questions similar in feel to those inquiries that animate our project: 'First, what is the structural distribution of power in the various tiers of the post-apartheid state? ... Second, how is the state embedded or interconnected with organisations of civil society ...? Concomitantly, how do these relationships enhance or constrain the state's autonomy in its developmental projects ...? Lastly, ... [d]oes the state have the "transformative" capacity to mediate between local and international forces that enable it to pursue objectives such as an equitable and accessible educational system' (above 33).

by the new government in such a variable space lay beyond the government's control. In the DoE's second *White Paper*, then Minister of Education Bengu wrote:

Policies are stated in general terms and cannot provide for all situations. Our legacy of injustice and mistrust continuously throws up problems which need the wisdom of Solomon to settle. In this protracted transitional period, in which new policies for a democratic society are being developed and implemented, the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognised and corrected. The possibility of damage will be reduced if new policies are based on knowledge of our charter of fundamental rights and on sufficient consultation with those who are affected by them, if conflicts are negotiated, and if principled compromises are sought.⁶

So, unlike the standard account, our legal history of education in South Africa follows a different, but no less discernable, narrative arc. The South African system of public education is no longer the product of a parlous, fragile state: it is the product of a government with a much firmer grip on the levers of power. This narrative arc correlates with the state's attempt – with varying degrees of success – to use the variable space of the law '*to experiment*' quite consciously with changes in education policy so that education policy might be both more effective and more closely aligned to the ANC's current political agenda. (The commitment to 'constitutional experimentalism' is expressly captured in Chapters 4, 5 and 6, and the state's response to the right to an adequate education, the shifting

⁶ See Department of Education *White Paper II: The organisation, governance and funding of schools* GN 1229 (November 1995) 6 ('*White Paper II*'). Minister Bengu seems to be saying that the state understood that it would have an opportunity to revisit these *experiments* in education at some later date and to revise them as circumstances required. And so it has. Why characterise FC sec 29 and South African education law as a variable legal space? Every legal regime is a variable space in which general legal norms – the axes – interact with a range of variables – political exigencies and economic conditions – to generate a range of possible outcomes. The universe of South African education law that came into being in 1994 with the interim Constitution was determined by an unusual concatenation of reconciliation politics and liberation politics. The ANC's liberation movement turned government possessed an ideological commitment to, and a well-founded faith in, the power of the people to effect real change. The ANC therefore crafted a legal regime for education that sought to tap the transformative potential of local communities and was designed to rebuild a decimated school system from the ground up. The new state, though highly centralised in terms of actual political power and policy determination, relied heavily on provincial government for the execution of its directives. The new South African government thus created a legal regime that permitted a broad array of disparate groups to determine educational outcomes. This regime produced results that few in this new egalitarian government could have contemplated. See Sayed (n 3 above) 142 ('Both the National Party and the anti-apartheid movement shared a commitment to some form of educational decentralisation albeit for very different ... ideological reasons').

powers of SGBs and debates about, and empirical evidence regarding, school fees.)

The ANC's complex political agenda mirrors, but does not always match, the egalitarian, utilitarian, democratic and communitarian commitments found within the Constitution. The ANC as a governing party in the 21st century, and no longer a liberation movement in the 20th century, must pursue: (a) an egalitarian agenda that aims to provide a formally, if not substantively, equal start for all its citizens; (b) a libertarian agenda that recognises the agency of its citizens; (c) a utilitarian agenda designed to create the greatest good for the greatest number of its denizens; (d) and a democratic and a communitarian agenda that privileges, in some important respects, the face-to-face relationships found in kin, clan and commune over the more abstract relationships that bind us, at a highly abstract level, as citizens of the Republic of South Africa.

How do these competing political claims – evident, we believe, in any social democratic state – play themselves out in our Constitution, the enabling legislation and the case law? Our book answers this question with respect to six discrete, if related, topics. Again, this book is not a work in political theory. It does not pursue any particular normative line. Any political conclusions drawn are a function of what the many actors in the vast domain of the South African education system have produced. Simply laying out that complex mosaic is justification enough for this work. (We lay out the constellation of players and the legal authority for their power in an organisational diagram found in Figure 1 at the conclusion of this chapter.)

The book is, to that end, grounded in the history of education in South Africa. This book traces, quite carefully, the historical, economic and political antecedents – and the intended and unintended consequences – that have led to the current constitutional and statutory framework for education. Fine-grained readings of the law – FC sections 29(1), 29(2), 29(3), and 29(4) and the three major pieces of education legislation, SASA, NEPA and the EEA – are brought to bear on specific issues such as school choice, school fees, language policy, basic education, independent schools and SGBs. Close readings of the basic law's commitment to education, to political rights, to association, to community rights, to dignity, to equality, to expression, to freedom of movement and to residence, to democracy and a range of other constitutional norms provide the framework for our careful characterisation of the meaning of our education enabling statutes.

It is this understanding and marriage of historical circumstance, extant practices and the governing law that gives the individual chapters and the book as a whole its force. One can get some sense

of how we deal with these topics by considering our approach to the four provisions found in FC section 29. FC section 29(1) is the starting point for chapter 5 of this book. The right to a basic education is unequivocally granted to all. And it is granted in a manner *unqualified* by standard socio-economic tropes such as 'available resources', 'progressive realisation' or 'reasonable legislative measures'. Thus, the commitment to basic education looks to be unswervingly egalitarian. Look again. Nowhere does FC section 29(1) indicate that 'basic education' means 'free education'. It doesn't. Basic education may contemplate the continued charging of fees – under the current statutory framework – in the top two or three quintiles of schools. Even then, the working poor, working class, and middle class schools in the top three quintiles receive manifestly unequal tutelage. They remain, however, better equipped than their much poorer brethren in the lowest two quintiles. The Constitution permits such inequality (at least for the moment). What the drafters appeared most interested in was the provision of an *adequate* basic education for all learners (the subject-matter of chapter 5), no matter how that was achieved. The drafters of the Constitution and the SASA also undertook a utilitarian and quasi-libertarian approach to basic education premised upon the view that allowing schools fees (the subject-matter of chapter 7 of this book) and school choice (the subject-matter of chapter 2 of this book) would not only keep previously privileged South Africans within the system, but that it would also allow for meaningful cross-subsidisation of poor learners by wealthy learners, and greater access of poorer learners to better schools. The complex political agenda does not end there. 'Basic education' and the devolution of powers to local SGBs – the subjects of chapters 5 and 6 – gives birth to what we contend is a fourth, albeit limited, tier of democratic governance: a form of governance, in many respects, unique to South Africa.

Now look at FC section 29(2). On its face, it promises all learners education in any of the 11 official languages of their choice – thus displacing the hegemony of English and Afrikaans. But effective delivery – let alone the overall welfare of the polity – could hardly be served by education in all 11 official languages. So the drafters, good rule-utilitarians too, qualified this right with the phrase 'reasonably practicable'. However, FC section 29(2) was also forged at a time when Afrikaner nationalists worried – with good reason – about having all their socio-political institutions taken over the by the majority of non-Afrikaans-speaking South Africans. So FC section 29(2) contains a tiny bit of wiggle room – not a right, exactly, more an entitlement to reasons – for those Afrikaans-speakers who wish to maintain the linguistic and cultural homogeneity of their single-medium public schools. As we shall see in chapter 3, this nod to communitarianism – in the face of both egalitarian and libertarian

concerns – has been the source of most of the litigation surrounding educational rights.

Chapter 4 takes these communitarian concerns even more seriously. To the extent that FC section 29(2) grants each learner the right to education in their mother tongue or their preferred official language to trump a majority's preference for single-medium public school instruction – in the name of equity, historical redress and practicability – *égalité* and *liberté* will trump *fraternité*. However, as we shall see in chapter 4, FC section 29(3) enables linguistic, cultural and religious communities to create *independent educational institutions* that advance a comprehensive, and sometimes exclusive, way of being in the world. Thus, where the state declines to support such a communitarian good as a single-medium public school, FC section 29(3) promises that space for single-medium institutions will continue to exist – to the extent that parents and learners are willing to pay for their preferred form of instruction.

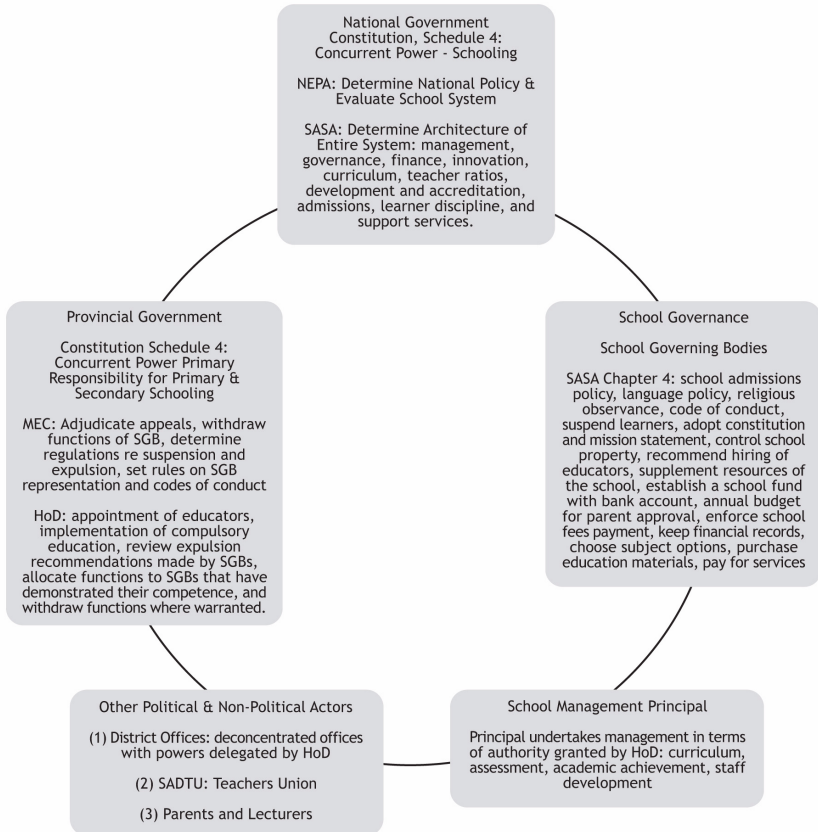
Chapter 6 goes chapter 4 one step better. A close and careful reading of the provisions governing SGBs demonstrates a clear commitment to the various forms of democracy – representative, participatory, direct – embedded in the Constitution and in SASA. If one wishes to understand our basic law's favourite catch-phrase – an 'open and democratic society based upon human dignity, equality and freedom' – then there may be no better place to start one's journey than through an understanding of how our law on education and SGBs creates the space for new forms of democratic action and the conditions for the creation of new stores of social capital.

So, as with most things that engage what Paul Tillich calls 'our ultimate concerns', the various provisions of the Constitution and statutes that regulate our system of primary and secondary school education are subject to a variety of interpretations. These competing interpretations of our basic law and our enabling legislation flow from the material interest and unique histories of the various communities, associations and movements that make up South African society. This book, then, is about the ways in which various groups have come to interpret the Constitution's core aspiration – the realisation of 'an open and democratic society based on dignity, equality and freedom' – with respect to schooling.

However, we would be remiss if we simply attempted to pass off our analysis as a description of schooling as contested terrain. We adopt normative positions on various legal questions throughout this work. These normative positions – dictated as they must be by the oft-conflicting tenets of our basic law – enable us to offer a coherent and consistent social democratic view of education law in South Africa. And it is this view of the South African Constitution that both

holds the book together and allows us to offer one perspective on how we ought to go about creating a school system that promises a better future for all of South Africa's learners.

Figure 1 Primary institutions and actors that determine education law and policy*



* In terms of Schedule 4 of the Constitution, Parliament and the provincial legislatures share concurrent legislative competence over primary and secondary school education. Two separate pieces of legislation, the National Education Policy Act (NEPA) and the South African Schools Act (SASA), specify the responsibilities of each sphere of government. In practice, Parliament enacts laws – primarily regulations – that delineate the overall structure of the South African educational system. Provincial legislatures promulgate annual appropriation acts that fund provincial departments of education. (Although the provisional funds themselves flow from the national fiscus and its annual Division of Revenue Act.) The National Education Policy Act grants authority to the national Minister to determine national policy and to monitor the system. In particular, it enables the Minister to articulate policy on a wide range of subjects: school organisation, management and governance; school facilities, finance and development; innovation and research in education; teacher to student ratios; professional

development and teacher accreditation; compulsory education, admissions, school calendar, minimum teaching time; policy on curriculum and assessment; policy on learner discipline, and support services. SASA and NEPA delegate the legal authority to deliver primary and secondary school education to each responsible Member of the Executive Council (MECs) in the nine provinces and their respective provincial education departments (DoE). In addition to requiring that provincial MECs ensure that every child who lives in his or her province can attend school and that public schools are appropriately funded, the provincial MEC retains the authority to hear appeals regarding school admissions, to withdraw the functions and the powers of a school governing body (SGB), to promulgate regulations related to suspension and to expulsion, and to issue general norms regarding school codes of conduct. The Head of Department (HoD) in each provincial department of education exercises power over: the implementation of compulsory education; the decision to refuse a child admission to a school; the expulsion recommendations made by SGBs; the appointment of educators and non-educator staff; the allocation of functions to SGBs that have demonstrated their competence; the withdrawal of these functions from GBs where warranted; and the administration of all financial matters. In terms of NEPA and SASA, the district offices do not possess original powers. They are best understood as deconcentrated units of the provincial DoE. The provincial HoD delegates specific powers to district officials to exercise functions on her behalf. Professional management of each individual school is undertaken by a principal. The principal acts in terms of the authority granted to him or her by the provincial HoD. The principal is held accountable to the HoD with respect to the curriculum, extra-curricula activities, assessment and the academic achievement of the school. School governance is primarily the domain of the SGBs: the majority of a school's SGB members are parents of learners in that given school. SGBs possess sweeping powers. They must determine and adopt: the admissions policy; the language policy; rules regarding any religious observance; a code of conduct; and a constitution. They have the power to: suspend learners; develop a mission statement; administer and control school property; recommend the appointment of educators and non-educator staff; supplement the resources of the school; establish a school fund; maintain a bank account; to charge fees and enforce the payment of those fees. They are obliged to: prepare an annual budget for parent approval; keep financial records; and appoint a registered auditor. Those SGBS allocated additional functions may undertake: the improvement of the school's property; the creation of extra-mural activities; the determination of subject options; the purchase textbooks, education materials and equipment; and pay for necessary services. Parents and learners constitute another set of powerful stakeholders. While parents are legally obliged to send their children to school, they also possess the right to participate in the election of school governors. Learners, through RLCs, are entitled to participate in school governance and have a right to be consulted on the contours and the content of a school code of conduct. SASA also recognises that community representatives may participate in school governing body activities.

1 Quasi-markets and *de facto* school choice

1.1 School choice as a product of actions by a constellation of different political and non-political actors wielding different constitutional and statutory powers

It might strike some as odd to open this work with a chapter about a social formation that is not a *direct* product of the Constitution or education enabling legislation. However, this chapter – perhaps more than any other in this work – demonstrates our thesis that any governing party in South Africa must simultaneously negotiate the complex egalitarian, utilitarian, democratic, democratic and communitarian terrain dictated by both the Constitution and our education enabling legislation. In South Africa, unlike any other jurisdiction of which we know, we have a system of *de facto* school choice that flows from such diverse constitutional sources as the right to equality, the freedom of movement and residence, and the principles of co-operative government, from all three major pieces of enabling education legislation, and from the differing interests of provincial governments, SGBs, principals, teachers, parents and learners.

1.2 Introduction to *de facto* school choice

During the 1970s and 1980s, conservative politicians around the world promoted school choice and markets in education as ‘answers’ to many of the ills afflicting public school systems. Schools became producers. Learners became consumers. Governments dreamed up entire inventories of educational goods as incentives: vouchers to entice schools to pursue learners; magnet schools to teach learners to vie with one another for admissions to more privileged institutions. Behind all such programmes lay the notion that generating competition within the public school system or between public

schools and private schools would produce better schools and better students.

Given the emphasis placed on equality and transformation in post-1994 South Africa, school choice ‘policy talk’ had little purchase in local debates about how the new government ought to overcome the deficits inherited from the apartheid state. But that did not stop markets or quasi-markets in schools from being created. While few South Africans have argued that market accountability would improve the system, others have suggested that the legislative framework, as well as important features of the new constitutional order, might have inadvertently created the environment for quasi-markets or, more accurately, niche markets in schools, to flourish.⁷ We pursue this *aperçu* and attempt to demonstrate how the current legal regime produces features characteristic of markets and thereby inadvertently creates the conditions for school choice.

We begin, in section 2 of this chapter, by tracing some of the historical, economic, political and constitutional antecedents that led to the existing *de facto* policy of school choice. In section 3, the heart of this exercise, we focus on three pieces of enabling legislation – the National Education Policy Act (NEPA), the South African Schools Act (SASA) and the Employment of Educators Act (EEA). We show how the enabling legislation and a raft of regulations (grounded in constitutional commitments to freedom of movement and residence (FC section 21), to the right to dignity (FC section 10) and the right to equality (FC section 9)) produce a market of schools from which learners can choose. For example, NEPA regulations manifest an express intent to ‘co-ordinate parental preferences’. SASA enables SGBs to charge fees and thereby creates an incentive to admit as many full fee-paying learners as the school can accommodate. The EEA – and Education Labour Relations Council (‘ERLC’) resolutions – creates additional incentives for principals to compete for bums in seats by tying promotion posts to the number of learners who attend the school. We then look, briefly, at the concurrent constitutional competency for education (FC Schedule 4) exercised by national government and provincial government and show how the principles of ‘co-operative government’ (FC Chapter 3) function as an additional enabling condition for the creation of markets. Viewed collectively, the provisions of NEPA, SASA and EEA – as well as the Constitution –

⁷ See B Fleisch *Managing educational change: the state and school reform in South Africa* (2002). For general accounts of the school choice movement, see: See D Tyack ‘Public school reform: policy talk and institutional practice’ (1991) 99 *American Journal of Education* 1; H Gintis ‘The political economy of school choice’ (1995) 96 *Teachers College Record* 493; P Peterson ‘What evaluation has to say about school choice’ (1999) 13 *Educational Policy* 191; JM Powers & PW Cookson Jr ‘The politics of school choice research: fact, fiction and statistics’ (1999) 13 *Educational Policy* 104.

create the conditions for a conventional, if not the most efficient, market in education. In section 4 of this chapter we describe four basic conditions required for a conventional market. We then explore the manner in which the law creates a variety of incentives for various actors – parents, teachers, learners, principals, SGBs and provincial governments – to behave in ways which fulfil these four conditions for market formation. In section 5 we assess the available data on how schools and parents respond to the variable spaces created by the law and suggest why markets are established in some South African communities and not in others. While statistics demonstrate that the majority of learners do not exercise meaningful school choice, a surprisingly large number do. Finally, in section 6, we track the state’s responses to the *de facto* policy of school choice. We note how the state ensures greater access to existing quasi-markets (thus promoting such markets), even as it asserts increasing control over (and imposes greater restrictions upon) the parties whose ‘legal’, and thus legitimate, practices conspire to form markets in the first place.

2 The history of the framework legislation

Despite the international prevalence of market-oriented ‘policy talk’, most analysts and policy makers concluded that the quasi-privatisation of the school system would only re-inscribe the radically inegalitarian patterns of apartheid-era education.⁸ Why, then, does the framework legislation passed in the first few years of our new democracy contain features consonant with a commitment to school choice: (1) open enrolment; (2) community participation; (3) per capita learner spending; (4) devolved school budgets; (5) parent-dominated school governance; (6) learner preference; and (7) compulsory school fees?

The answer is two-fold. First, the new ANC government possessed a genuine commitment to grassroots participation in local political institutions. That commitment underwrites the continued control that parents exercise over SGBs. Second, the fragility of the post-apartheid state necessitated the sharing of decision-making authority over various aspects of school governance with a wide variety of actors: parents, learners, teachers, unions, school governing bodies, principals and provincial bureaucracies. This diffusion of power

⁸ D Roithmayr ‘Access, adequacy and equality: the constitutionality of school fee financing in public education’ (2003) 19(3) *South African Journal on Human Rights* 382; J Pampallis ‘Education reform and school choice in South Africa’ in D Plank & G Sykes (eds) *Choosing choice: school choice in international perspective* (2003); K Porteus ‘Education financing: framing inclusion or exclusion’ (2002) 9 *Quarterly Review of Education and Training in South Africa* 13; D Roithmayr ‘The constitutionality of school fees in public education’ Education Rights Project, Centre for Applied Legal Studies, University of the Witwatersrand (2002).

enhances the ability of various stakeholders to make choices that advance their own particular interests. It is the manner in which the law channels the pursuit of these specific interests that gives rise to the competition amongst parents, learners, teachers, principals and school governing bodies that, in turn, creates quasi-markets in schools.

2.1 Open enrolment

For starters, open enrolment policies reflect the new Constitution's prohibition against unfair discrimination⁹ and its commitment to freedom of movement and residence.¹⁰ We can only assume that the architects of the new school system – in reliance on a burgeoning body of Constitutional Court decisions – came to the conclusion that compulsory zoning (hard district) regulations would prevent learners from predominantly African, Indian and Coloured communities from securing access to the better-resourced schools in predominantly white and privileged communities, and would thus constitute an impairment of their dignity (FC section 10) and a form of unfair

⁹ Constitution of the Republic of South Africa, 1996 ('Constitution' or 'FC') sec 9, Equality, reads, in relevant part: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law ... (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.' See C Albertyn & B Goldblatt 'Equality' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2006) chap 35. FC sec 10, Human Dignity, reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' See also S Woolman 'Dignity' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2005) chap 36. FC 29, Education, makes any denial of education benefits to a person or a group on the grounds of race presumptively unconstitutional. For example, FC sec 29(3) reads, in relevant part: 'Everyone has the right to establish and maintain, at their own expense, independent educational institutions that (a) do not discriminate on the basis of race.' See S Woolman & M Bishop 'Education' in Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2007) chap 57. See also I Currie & J de Waal (eds) *The Bill of Rights handbook* (5 edition, 2005) 621; D Davis 'Education' in Cheadle *et al* (eds) *The South African Constitution: the Bill of Rights* (2002) 533.

¹⁰ FC sec 21, Freedom of movement and residence, reads, in relevant part: '(1) Everyone has the right to freedom of movement. (2) Everyone has the right to leave the Republic. (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.' See J Klaaren 'Freedom of movement and residence' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, March 2007) chap 66. Freedom of association also serves to buttress claims that individuals have the right to join, or to become members of, public educational institutions. See S Woolman 'Freedom of Association' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2003) chap 44.

discrimination (FC section 9(3)).¹¹ The NEPA regulations framed the new state's 'bounded' policy of open enrolment in the following terms: 'a learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses.' Although learners from other zones were not guaranteed access, their parents understood that doors heretofore closed to their children were now inching open. Money remained a hurdle: in the form of transportation, uniforms, books and fees. But many poor and working class parents understood the meaning of this historical moment. And they continue to demonstrate this understanding by paying, in every conceivable way, for the privilege of securing entrance for their children to better schools.

2.2 Community participation

SGB autonomy has its roots in the very history of South Africa's liberation movements – and, in particular, the ANC. Many of the new government's early education initiatives were predicated on the assumption that sustained school improvements must develop organically out of community participation and that community participation is contingent upon stronger (read 'autonomous') school governance structures.¹² It is, amongst other things, testimony to the ANC's commitment to democracy that a party without a real opposition would divest itself of decision-making power based upon its belief that local schools and local communities would be best served by local political structures – in this case, SGBs. However, the ANC's belief in the need for a strong central government to effect transformation may have militated against giving too much power to the community (as opposed to the SGB) itself.

¹¹ The Constitutional Court set out its general approach to deciding equality challenges in *Harksen v Lane* 1998 1 SA 300 (CC) para 53. That approach has been repeatedly confirmed. See, eg, *Bhe v Magistrate, Khayelitsha & Others* 2005 1 SA 580 (CC), 2005 1 BCLR 1 (CC); *Satchwell v President of the Republic of South Africa* 2003 4 SA 266 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC). Our assumption is borne out by the comments of school officials simultaneously concerned with the rational and orderly management of schools and the twin imperatives of redress and transformation. See Affidavit of Margaret Webber, *Sunward Park High v MEC, Education, Province of Gauteng* (Case 05/2937, unreported, Witwatersrand Local Division, 6 June 2005) (on file with authors).

¹² See Gauteng Department of Education 'Gauteng school renovation programme implementation plan' (1994) ('Physical reconstruction and visible improvement in conditions at schools are tied to an incentive for strengthened school governance structures'). See also Gauteng Department of Education 'Circular No 2' (1995) ('The key to successful school development lies in the capacity of communities at all levels to guide and manage their own development ... [A] priority is ... the revitalisation of participatory structure[s] at the school governance level').

2.3 Devolved school budgets and *per capita* learner spending

The commitment to devolved school budgets and per capita learner spending emerged from two separate quarters. First, the state viewed per capita non-personnel funding as the most efficient means of redirecting state resources towards the most disadvantaged learners. Second, the privileged communities that housed the former Model C schools viewed redress in per capita learner spending on non-personnel items by the state and devolved school budgets (determined by semi-autonomous SGBs) as a formula that would allow them, simultaneously, to accede to the demands of a new legal order committed to equality and to secure a first-rate education for their children.

Non-personnel per capita spending had an unanticipated knock-on effect with respect to the formation and the control of individual school budgets. If the state was to use new school funding norms that weighted spending in favour of the most disadvantaged learners, then it needed the management at individual schools to create budgets that reflected the numbers and the needs of their learners. Policy makers assumed that greater control over school finances would result in substantial efficiency gains. As Fleisch found:

[S]chool officials who had never seen ‘electricity and water accounts ... became far more vigilant about conservation’ and monitored billing more closely. School officials who had never had to worry about the bottom line soon recognised that more learners meant more fees and more state support. Per capita spending and the devolution of school budgets created a class of managers – principals and school governing bodies – that now had the opportunity to reap benefits – professional and pecuniary – from their tacit knowledge of the environment.¹³

2.4 Concurrent political power, school governing bodies and parental authority

Again: the *de facto* policy of school choice that currently obtains is not an intentional consequence of state policy. However, it is a function of a series of related and intentional state acts.

The historical record suggests that the state was well aware of the unintended consequences that might attach to the variable legal spaces created by the enabling legislation (SASA, NEPA and EEA) (though not of the exact nature of such consequences). The state even went so far as to remind the current beneficiaries of these

¹³ Fleisch (n 7 above) 87.

variable legal spaces – that is, laws that led to the unintended creation of markets in schools – that such spaces – and their consequences – remained within the government’s control. Recall that, in the DoE’s *White Paper II*, then Minister of Education Bengu wrote that: ‘In this protracted transitional period, in which new policies for a democratic society are being developed and implemented, the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognised and corrected.’¹⁴

Thus, while the Minister acknowledges that the department’s various policy imperatives pulled in numerous directions and that no amount of analysis could anticipate the manner in which a complex set of policy initiatives would interact with a dynamic social environment, he also makes it clear that the state would revisit its experiments in education at some later date and revise them as circumstances required. The rest of *White Paper II* explains why the state felt obliged to take the provisional stance on public school governance and finance that it did.

First, the new government recognised that the ‘new’ dispensation under the interim Constitution was not a blank slate. IC section 247 demanded that the state negotiate with the existing SGBs before making any changes that might alter their rights, powers and functions.¹⁵

Second, SGBs were not the only major stakeholders that had to be consulted. Many changes in the national framework legislation for school organisation, governance and funding necessarily affected the interests of public school teachers. These changes would significantly alter their conditions of employment. As a result, the ELRC – and its

¹⁴ See Department of Education *White Paper II* (n 5 above) 6. See also S Woolman *The selfless constitution: experimentation and flourishing as the foundations of South Africa’s basic law* (forthcoming 2009).

¹⁵ Constitution of the Republic of South Africa Act 200 of 1993 (‘interim Constitution’ or ‘IC’) sec 247. Special provisions regarding existing educational institutions, read, in relevant part: ‘(1) The national government and the provincial governments as provided for in this Constitution shall not alter the rights, powers and functions of the governing bodies, management councils or similar authorities of departmental, community-managed or State-aided primary or secondary schools under laws existing immediately before the commencement of this Constitution unless an agreement resulting from *bona fide* negotiation has been reached with such bodies and reasonable notice of any proposed alteration has been given ... (3) Should agreement not be reached in terms of subsection (1) or (2), the national government and the provincial governments shall, subject to the other provisions of this Constitution, not be precluded from altering the rights, powers and functions of the governing bodies, management councils or similar authorities of departmental, community-managed or State-aided primary or secondary schools, as well as the controlling bodies of universities and technikons, provided that interested persons and bodies shall be entitled to challenge the validity of any such alteration in terms of this Constitution.’

collective bargaining process – shaped a significant amount of macro-educational policy.

Third, behind both the SGBs and the teachers lay another critical constituency – the white Afrikaans-speaking community. No other ethnic constituency's interests were addressed as directly; no other community was mollified in quite the same way. *White Paper II* addresses complex issues of language, culture, equitable funding of education, racial admissions criteria and redress measures through the prism of Afrikaner anxiety. Bengu refers explicitly to the numerous delegations that expressed the concern that 'a campaign is being waged to eliminate schools which teach only through the medium of the Afrikaans language'.¹⁶ To these delegations, Bengu writes:

It is because of our nation's bitter experience of political oppression and cultural domination by successive minority regimes, that this government is committed to creating sufficient legal, political, linguistic and cultural space for all our varied peoples to live in peace together. Non-racialism, democracy, the protection of fundamental rights, and redress, do not mean that the idea of cultural identity is denied, or that all cultural distinctiveness is to be obliterated, or that the cultural and linguistic heritage of any of our communities can be disparaged. Our Constitution forbids cultural exploitation and provides for the protection and advancement of all our cultures, and the development of all our languages ... We will not promote, under any circumstances, the use of only one of the official languages as the language of learning (medium of instruction) in all public schools. Language policy in education cannot thrive in an atmosphere of coercion. *No language community should have reason to fear that the education system will be used to suppress its mother tongue.*¹⁷

While *White Paper II* then pauses – briefly – to rehearse the department's basic commitment to addressing 'the legacies of underdevelopment and inequitable development', the remainder is primarily devoted to a justification for ceding power over education to a variety of parties beyond those we have already identified (SGBs, teachers, parents, learners, unions, provincial departments and the Afrikaans-speaking communities).

White Paper II notes that the national legislature and provincial legislatures share legislative competence on education. In addition, *White Paper II* recognises that the national government must hand over administrative responsibility to provincial executives. (Indeed, the Minister acknowledges the lack of unanimity among national and provincial ministers, and grudgingly concedes that the power the

¹⁶ See Department of Education *White Paper II* (n 5 above) 5.

¹⁷ See Department of Education *White Paper II* (n 5 above) 6.

provincial governments have been granted 'is based on intimate grassroots knowledge of schools in their provinces and the views of their constituents'.)

The most intriguing concessions, however, are those made to the parents of learners. It may go without saying that '[p]arents ... have the primary responsibility for the education of their children'. But does it follow that they have the 'inalienable right to choose the form of education which is best for their children'? Many states share this authority with parents.¹⁸ Many would deny that parents have a right to choose the linguistic, religious or cultural basis for their child's education.¹⁹ Of greater import for our analysis of choice is the Ministry's conclusion that since '[p]arents have the most at stake in

¹⁸ See *Christian Education of South Africa v Minister of Education* 2000 4 SA 757 (CC), 2000 10 BCLR 51 (CC) ('*Christian Education*') para 25 (The Court held that parents shared responsibility with the state for the upbringing of children: and so while corporal punishment might be countenanced in the home, it could not be practiced in schools – public or private. After engaging in this piece of sophistry, the Court wrote: 'It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening. Nevertheless, the interest protected by section 31 is not a statistical one dependent on a counterbalancing of numbers, but a qualitative one based on respect for diversity [and dignity]'). For criticism of *Christian Education*, see S Woolman 'Dignity' (n 9 above) chap 36 sec 4(c)(iii); P Lenta 'Religious liberty and cultural accommodation' (2005) 122 *South African Law Journal* 352. See also *KwaZulu-Natal MEC for Education & Others v Pillay* [2007] ZACC 21 (CC), 2008 1 SA 474 (CC) (Constitution protects expression of cultural practice by learner, even if that learner does not share that cultural practice with her parents. *Pillay* accepts Gutmann's and Woolman's warning that, even in the realm of discrimination, 'culture' must have meaningful boundaries; unfortunately, *Pillay* declines to describe the contours of those boundaries (above para 49). According to the Court, once the individual's identification with a 'culture' is established, the discrimination inquiry shifts to the centrality of that cultural identification to the individual. Chief Justice Langa notes, in support of this position, that cultures cannot be described from outside as uniform bodies of rules and practices but are instead 'living and contested formations' (above para 54). A cultural practice may have meaning for one member of a culture but not another. *Pillay* therefore requires that people receive protection from external sources of discrimination in a manner that turns on how the *individual* values cultural norms (above para 88)). See Woolman & Bishop 'Education' (n 9 above) 57 - 857. For criticism of this approach, see A Gutmann *Identity in democracy* (2003) 38; S Woolman 'Freedom of association' (n 10 above) chap 44 sec 3(c)(viii); S Woolman 'Community rights: religion, language and culture' in Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2007) chap 58. We think the position articulated in *Pillay* incoherent: Individual norms only secure their meaning through cultural practices and belief sets of identifiable and somewhat cohesive communities.

¹⁹ See Department of Education *White Paper II* (n 5 above) 21: 'Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by the state authorities with respect to the form that education should take and to take part in its governance ... The parents' right to choose includes choice of the language, cultural or religious basis of the child's education, with due regard to the rights of others and the rights of choice of the growing child.'

the education of their children ... this should be reflected in the composition of the governing body'.²⁰

As a result of the state's commitment to parental authority, the representatives of politically unaccountable parents – generally, parents themselves – are given a majority of the voting seats on each SGB. Any departure from that pattern of representation must be approved by the provincial government. More extraordinary still is the justification for this grant of authority over the governance of the school:

Because of the legal and financial decisions for which governing bodies would be responsible, elected representatives of parents and guardians should be in the majority on public school governing bodies.²¹

Who takes the major legal and financial decisions? Not the provincial department of education. Not the school administrators. Not the teachers. Not those individuals who possess both the training and the expertise to render such decisions. Parents take these decisions. Why would the national government vest such authority in this particular stakeholder? The benign view is that the state believed that parents, by acting in the best interests of their children, would act in the best interests of the school. That attribution of motive is intuitively plausible. But it does not quite explain the reach of parental power. Part of the explanation for this power grant lies in the amount of authority the state had been forced to cede to teachers, provincial governments and vocal minorities.

The other part of the explanation resides in an errant prediction about the capacity of parents to engage in collective action. Just as the national government had believed, incorrectly, that most middle-class parents would never demonstrate sufficient commitment to meet the statutory voting requirements for approval of school fees, so too did the national government view parents as the least dangerous interest group with which the state would have to contend with respect to school governance. We can, at this juncture, only surmise that the national government believed that parents would confront practically insurmountable problems of collective action: that is, parents would not be willing to commit significant time to school governance and would not be able to spend sufficient time to organise in opposition to the state's agenda. At a minimum, by placing power in the hands of a fairly atomised group, the national government ensured that neither apartheid-era bureaucrats nor new provincial governments, nor principals, nor teachers, nor the unions

²⁰ Department of Education *White Paper II* (n 5 above) 70; Department of Education 'Review Committee Report' (February 1995) 44.

²¹ Department of Education *White Paper II* (n 5 above) 13.

would be able to consolidate their power in a manner that would allow them to dominate the new education system.²²

In sum, the historical record reveals how the state's desire to maintain control over education drives it to divide authority among a variety of parties: SGBs, local communities, teachers, unions, provincial legislatures and executives, and, most importantly, parents. The historical record just as clearly suggests that the state was largely unaware that by ceding power to this broad array of interest groups that it was putting in place some of the conditions necessary for the formation of markets in schools.

2.5 School funding and school fees

Interest group dynamics around school governance provides only part of the historical explanation for the *de facto* policy of school choice. The other primary policy driver was funding.

The new school funding model had five objectives: (1) equity and redress; (2) reduction in unit costs; (3) increase productivity levels; (4) the elimination of an unsystematic pattern of user charges while meeting the commitment to free and compulsory education; and (5)

²² The diffusion of power and the variety of goals that led to *de facto* conditions of choice are reflected in the state's explanation of what the legal framework for the SGBs was designed to do: 'Both organisational structure and governance must be adequately uniform and coherent, but flexible enough to take into account the wide range of school contexts, the significant contrasts in the material conditions of South African schools, the availability or absence of management skills, parents' experience or inexperience in school governance, and the physical distance of many parents from their children's schools:

- (1) ensure both *national coherence* and the promotion of a sense of national common purpose in the public school system, while retaining flexibility and protecting diversity; ...
- (3) enable representatives of the main stakeholders of the school to take responsibility for school governance, within a framework of regulation and support by the provincial education authorities;
- (4) ensure that the involvement of government authorities in school governance is *at the minimum* required for legal accountability, and is based on participative management;
- (5) enable school governing bodies to determine the mission and character or ethos of their schools, within the framework of Constitutional provisions affecting schools, and national and *provincial* school law;
- (6) ensure that the decision-making authority assigned to school governing bodies is coupled with the allocation of an equitable share of public (budgetary) resources, and the right to raise additional resources, for them to manage; ...
- (8) ensure both *equity and redress* in funding from public (budgetary) resources, in order to achieve a fair distribution of public funds and the elimination of backlogs caused by past unequal treatment':

the creation of new funding partnerships for educational development. A difficult draw in the best of circumstances, the achievement of these objectives was made exponentially more complicated by apartheid's legacy of inequitable distribution of and unequal access to education facilities, radically unequal per capita spending, skewed teacher deployment, salary imbalances, and unconscionable learner:teacher ratios. Some of the disparities created by the apartheid regime – especially around the 4:3:2:1 per capita spending ratio – required immediate redress.²³

The question, of course, was how to source the money. The new government recognised early on that a sluggish economy made the likelihood of securing the funds for the massive recurrent expenditure required to right the ship rather small. The state's commitment to attracting foreign direct investment meant budgets were geared more towards fiscal austerity than towards social spending. Thus, despite the fact that South Africa's budgetary allocation for education was relatively high by international standards, and even assuming that optimal savings from efficiencies were realised, it could not expect to receive the five per cent per annum education budget increase necessary to meet 'requirements of restructuring, qualitative improvement, reducing construction backlogs, enrolling out-of-school learners, and absorbing net growth in the school-age population'.²⁴

Given that education's slice of the public fiscus was unlikely to increase substantially, the state had to decide how to redivide the existing pie to meet its various imperatives. On one shoal lay the Scylla of minimalist-gradualist redistribution. On the other shoal lay the Charybdis of immediate redistribution to effect a substantively equal outcome. The state charted a middle course. It decided to leverage private monies from well-off parents in a manner that would supplement already available public monies. The easiest mechanism for leveraging private monies entailed allowing parents and SGBs to 'decide on targets for raising revenue, to finance expenditure beyond what would be afforded from the provincial education department's allocation'.²⁵ By permitting middle-class parents and SGBs to determine how much they wished to spend and what quality of education they wished to procure, the state could concentrate its time, effort and resources on (a) rationalising the administration of public schools; (b) ensuring equal access to all schools (and especially middle-class schools through fee exemptions); and (c) allocating, progressively, existing funds to the schools in greatest need of

²³ Department of Education 'Review committee report' (n 20 above) 1.

²⁴ Department of Education 'Review committee report' (n 20 above) 65 - 67.

²⁵ Department of Education *White Paper II* (n 5 above) 12 - 13.

redress.²⁶ But the barn door was now open: schools (and the parents who ran them) were free to charge fees based upon the kind and the quality of service they offered learners.

2.6 Decentralisation of political authority and market formation in the absence of national government control

The drafting history discloses how the multiple constituencies with whom the state had to contend and the conflicting imperatives within the state's own agenda led to greater decentralisation of decision-making. We contend that it is the partial withdrawal of the state from the domain of public school education that allowed quasi-markets in schools to form.

Three points need to be made about this commitment to decentralisation. First, the partial decentralisation of decision making was primarily driven by the state's need to ensure that no one interest group would be able to use the law as a means of organising opposition to the state. Second, the partial decentralisation of decision making flows from inevitable conflicts between egalitarian, utilitarian, libertarian and communitarian commitments reflected in virtually any constitutional democracy. Third, while the *de facto* policy of choice that arose out of this conscious attempt to dismantle the old bureaucracy and to distribute power throughout the new educational system was not actually anticipated by the ANC, the new government did realise that this particular aspect of its agenda might have such unintended consequences. And as we have already noted the drafting history is thus replete with references to the provisional nature of the structures being created by the state.

²⁶ As we shall see in Chapter 7, the literature on fees in South Africa contains a lively debate about the extent to which concerns about white flight and the withdrawal of opinion-makers from the system led to the current regime of school fees. What seems clear, however, is that a school fees regime preserves the existing stock of good schools, ensures some access to well-resourced schools by members of historically disadvantaged communities and, most importantly, permits the state to divert funds away from schools in wealthier communities to schools in the greatest need without engendering a major political fight with black and white middle-class parents. See D Roithmayr 'Access, adequacy and equality: the constitutionality of school fee financing in public education' (2003) 19(3) *South African Journal on Human Rights* 382; B Fleisch & S Woolman 'On the constitutionality of school fees: a reply to Roithmayr' (2004) 22(1) *Perspectives in Education* 111; F Veriava & S Wilson 'A critique of the proposed amendments on school funding and school fees' (2005) 6(3) *ESR* 9; E Fiske & H Ladd 'Balancing public and private resources for basic education: school fees in post-apartheid South Africa' in L Chisholm (ed) *Changing class: education and social change in post-apartheid South Africa* (2004) 72; E Fiske & H Ladd *Elusive equity: education reform in post-apartheid South Africa* (2004).

3 The laws of choice

History tells us how we got here. The law tells us where we are. In this section, we address the phenomenon that lies at the heart of this chapter: how a concatenation of legislation and regulation establishes the enabling conditions for quasi-markets in schools. We describe in detail how each of the three major pieces of national legislation that govern primary and secondary school education – the National Education Policy Act 27 of 1996, the South African Schools Act 84 of 1996, and the Employment of Educators Act 76 of 1998 – contribute to this dynamic.

3.1 National Education Policy Act ('NEPA')

The NEPA grants provincial ministers the authority to determine policy with regard to the size and the shape of feeder zones that ostensibly constrain the ability of learners to choose the primary school or the secondary school they attend.²⁷ But these constraints are largely illusory. It is the absence of meaningful constraint on the schools that learners can attend that creates one of the primary conditions for quasi-markets and school choice.

The regulations issued in terms of NEPA state that the children of parents who live within the feeder zone or children of parents who live at their employer's domicile within the feeder zone have the right to attend a school within that zone. Notice the first quiet exception

²⁷ Department of Education 'NEPA admissions regulations' (1998). Regulations 33 and 34, School Zoning, read, in relevant part: '33. A Head of Department, after consultation with representatives of governing bodies, may determine feeder zones for ordinary public schools, in order to control the learner numbers of schools and co-ordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other.

34. If a feeder zone is created

- (a) preference must be given to a learner who lives in the feeder zone of a school or who resides with his or her parents at an employer's home in the feeder zone;
- (b) a learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses. However, access to a chosen school cannot be guaranteed;
- (c) a learner who lives within the feeder zone of a school A must be referred to the neighbouring school B. if school A is oversubscribed. If school B is oversubscribed, an alternative school within a reasonable distance must be found by the Head of Department. If that is not possible, school A must admit the learner;
- (d) the preference order of admission is:
 - (i) learners whose parents live in the feeder zone, in their own domicile or their employer's domicile;
 - (ii) learners whose parent's work address is in the feeder area; or
 - (iii) other learners: first come first served.'

to the domicile rule: domestic worker employment.²⁸ Children of parents who work and live within the zone – by dint of being the offspring of domestic workers – have rights equal to those of other children of parents who live within the zone. The second exception to the domicile rule is for the children of parents whose work address falls within the feeder zone. If schools have space for learners after the children of parents who reside in the feeder zone have been accommodated, then the children of parents whose work address falls within the feeder zone are entitled to admittance. (These children do not, it must be emphasised, have the same rights of access to the school as those children of parents who live within the feeder zone.) The final exception to the domicile rule is not so subtle. Once all the children of parents who live or work within the zone have been accommodated, any other child – irrespective of parental domicile or employment – may apply for admission to the school. The language of the regulation is instructive: ‘a learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses.’ If the school is not operating at capacity – and thus has space for these outsiders – then applicants *should* be admitted on a first come, first serve basis. In sum, while the NEPA regulations on feeder zones look like standard mechanisms to control learner numbers, the NEPA regulations simultaneously manifest an express intent to ‘co-ordinate parental preferences’ and anticipate that parents will *choose* to send their children to schools outside their own geographically determined feeder zone.

NEPA and the Regulations on Admission Policy for Ordinary Public Schools are largely silent, however, on the extent to which the admissions requirements for non-domicile applicants impose obligations on individual schools. Regulation 34 acknowledges that learners who live outside the feeder zones do not possess guaranteed access to a chosen school. But what are the true limits on access? At a minimum, regulation 34 must mean that if the schools in a given zone are filled to capacity, then non-domicile learners have absolutely no meaningful claim to access. But the language of the regulation could be given a stronger reading that enables schools to turn away non-domicile applicants whether or not the school has the capacity to enrol them. Recall that the regulation states that ‘a learner is not *precluded* from seeking admission at whatever school he

²⁸ See Basic Conditions of Employment Act 75 of 1997 (‘BCEA’) sec 1 (A domestic worker is ‘an employee who performs domestic work in the home of his or her employer and includes – (a) a gardener; (b) a person employed by a household as driver of a motor vehicle; and (c) a person who takes care of children, the aged, the sick, the frail or the disabled’). See also Department of Labour BCEA Sectoral Determination 7 GN R1068 GG 23732 (15 August 2002).

or she chooses'. A non-domicile learner apparently has no right to go to the school of her choice.²⁹

NEPA and the Regulations on Admission Policy for Ordinary Public Schools are also largely silent with respect to the party who possesses the ultimate power to determine the extent to which a school admissions policy must take the interests of non-domicile learners seriously. It tells us that the HoD has the responsibility for creating zones and finding alternative schools for domicile-based learners in zones in which schools are oversubscribed. But the HoD is not where the real power over non-domicile admissions ultimately lies. The NEPA regulations disclose that power over individual school admissions policies vests within the SGB of the individual school.³⁰

29 Attempts to clarify this issue have been made in various education department circulars. These circulars arrogate to the provincial DoE the power to declare a school 'full'. Until a school has been officially designated as full, it has an obligation to take children on the waiting lists. Whether a provincial DoE possesses such power has been the subject of litigation. See *Sunward Park High v MEC, Education, Province of Gauteng* (Case 05/2937, unreported, WLD, 6 June 2005) (High Court holds that a public school, though at capacity, must attempt to accommodate request by HoD to take on additional learners who have not been granted access elsewhere) (on file with authors). New 2008 norms and standards, *still in comment form at the time of writing*, discuss class sizes and the architecture of buildings and school cites in a manner that would appear to contemplate the state moving aggressively on this front.

30 See NEPA Admissions Regulations secs 6 - 10 and SASA, sec 5(5). NEPA Admissions Regulations, secs 6 - 10 read, in relevant part: '6. The Head of Department is responsible for the administration of the admission of learners to a public school. The Head of Department may delegate the responsibility for the admission of learners to a school to officials of the Department. 7. The admission policy of a public school is determined by the governing body of the school in terms of section 5(5) of the South African Schools Act ... The policy must be consistent with the Constitution of the Republic of South Africa, 1996 ..., the South African Schools Act ... and applicable provincial law. The governing body of a public school must make a copy of the school's admission policy available to the Head of Department. 8. The Head of Department must co-ordinate the provision of schools and the administration of admissions of learners to ordinary public schools with governing bodies to ensure that all eligible learners are suitably accommodated in terms of the South African Schools Act, 1996. 9. Subject to this policy, it is particularly important that all eligible learners of compulsory school going age are accommodated in public schools. The admission policy of a public school and the administration of admissions by an education department must not unfairly discriminate in any way against an applicant for admission.' The Constitution, SASA, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') and a raft of provincial legislation and regulations constrain the kinds of admissions policy that public schools may adopt. Most of these constitutional, statutory and regulatory provisions speak to issues of discrimination. For example, in Gauteng, public school admissions policies are subject to the PEPUDA, the South African Schools Act 84 of 1996 ('SASA'), the Gauteng School Education Act 6 of 1995 ('GSEA'), the Gauteng Education Policy Act 12 of 1998 ('GEP'), all regulations issued under the aforementioned acts and all relevant provisions of the Constitution. Standard canons of statutory interpretation dictate that PEPUDA provides the departure point for equality analysis. See S Woolman 'Defending discrimination: on the constitutionality of

3.2 South African Schools Act ('SASA')

One might expect that SGB power over admissions and enrolment would diminish the admissions prospects of non-domicile learners. However, SASA does not *only* allow the school governing body of each primary and secondary school to take most important managerial decisions. It also enables schools to charge fees to cover the costs of education – particularly additional disbursements to teachers, improvements to the physical plant and extramural activities – not borne by the state. Indeed, it goes so far as to require them to do so. This power to charge fees creates an incentive to admit as many full fee-paying learners as the school can accommodate. And where non-domicile learners seek admittance and can boost the school's numbers, some SGBs are happy to open their doors to fee-paying learners who contribute to the bottom line.

independent schools that promote a particular, if not comprehensive, vision of the good' (2007) 22 *Stellenbosch Law Review* 31. PEPUDA sets out the most stringent unfair discrimination test. See PEPUDA secs 1, 13, 14 (sec 1 reads: "discrimination" means "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds." ... "Prohibited grounds" [are] "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth"). PEPUDA secs 13 and 14 lay out the test for discrimination, which, in the case of discrimination on a prohibited ground, requires the party that engaged in discrimination to prove that such discrimination was fair. That requirement is not easily satisfied. PEPUDA's test largely tracks, but is not identical to, the constitutional test for unfair discrimination laid out in the basic law – FC secs 9(3), (4) and (5) – and amplified in the Court's jurisprudence. *Harksen v Lane* 1998 1 SA 300 (CC) para 53. See also: SASA sec 5(1) - (5). ('5. (1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.') See Gauteng Department of Education (2001) Regulations on 'Admission of Learners to Public Schools sec 3 ('3. Unfair discrimination: (1) Admission policies for schools must not unfairly discriminate against any learner in any way, ...; (b) a governing body of a school may not administer any test related to the admission of a learner to a school, or direct or authorise the principal or any other person to administer such test; and (c) no learner may be refused admission to a school or discriminated against in any way on the grounds that his or her parent - (i) is unable to pay or has not paid the school fees, ... (ii) does not subscribe to the mission statement of the school and code of conduct of the school'). If a school admissions policy adopted by an SGB complies with these various equity considerations, then the SGB will retain a significant degree of latitude with respect to admissions and enrolment. Indeed, the degree of authority that SGBs possess in terms of the framework legislation has been the subject of recent litigation. See *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* 2006 1 SA 1 (SCA), 2005 10 BCLR 973 (SCA) ('Mikro'). In *Mikro*, the Supreme Court of Appeal held that FC sec 29(2) did not encompass the right to receive such an education in a preferred medium of instruction at each and every public educational institution. It further held that SASA, sec 6(2), grants an SGB the authority to determine the language policy of a public school and that the provincial department of education has limited power to substitute its judgment regarding the appropriate language policy for the judgment of the SGB.

The admission of non-domicile learners and the need to raise fees to support school activities are imperatives not always easily reconciled. In a perfect world, the SGB would take all learners up to and through capacity. But not all learners can afford the fees that feed the bottom line. SASA recognises that a right to admission without a concomitant right to fee abatement is no right at all. SASA and the regulations issued in terms of the Act make provision for means-based fee exceptions.

The inevitable conflict between open enrolment, school fees and fee exemption generates the somewhat perverse, but expected, consequence that parents of children entitled to full or partial exemption from fee payment (because their family meets the statutory test for relief) are often coerced into paying fees. Whether a school is rich or poor, fees feed the bottom line and produce competition among schools to attract more, if not better, learners. As a result, SGBs have a vested interest in intimidating parents into paying fees beyond their means and in dissuading parents who cannot pay those fees from seeking admittance for their children. What is remarkable about this dynamic is that many parents who know full well that they are entitled to exemptions still choose to send their children to schools outside their domicile where admittance is contingent – in practice, but not in law – upon the ability to pay fees. The ability of parents to choose a better education for their children often overcomes their own short-term pecuniary interests and the more malignant motives of some SGBs.

The extent to which SGBs will be able to continue to contribute to a culture of choice depends, in large part, on their ability to exercise the power to charge fees and to control admissions. Some commentators suggest that SGBs do not, in terms of SASA, have meaningful autonomy and real authority. Beckmann, Potgieter and Visser all argue that SASA merely allocates – in a discretionary fashion – functions to SGBs to carry out various responsibilities.³¹ They suggest, without saying so directly, that this allocation of functions is merely a form of what Hans Weiler has called ‘compensatory legitimisation’. That is, the fragile state will cede authority to those who might otherwise contest its authority in order to consolidate power and to secure legitimacy.³²

Whatever the rationale for ceding authority was – and we have suggested that it had as much to do with a genuine commitment to

³¹ See H Visser ‘Some principles regarding the rights, duties and functions of parents in terms of the provisions of the South African Schools Act 84 of 1996’ in J de Groof & EHJ Malherbe (eds) *Human rights in South African education: from the constitutional drawing board to the chalkboard* (2004).

³² H Weiler ‘Comparative perspectives on educational decentralisation: an exercise in contradiction?’ (1990) 12 *Education Evaluation and Policy Analysis* 433.

participatory democracy as with fear of Afrikaner secessionist sentiment – the power SGBs exercise is quite real.³³ (See Chapter 6.) SGBs have, in fact, been successful in the vast majority of disputes litigated against the state. An institution that possesses only illusory powers does not win cases in court. Of course, the state can curb the powers of the SGBs – to determine fee and admissions policies – by rewriting the law. But until it does so, the state must contend with a powerful creature of statute that it has brought to life.

3.3 Employment of Educators Act ('EEA')

The aforementioned provisions of NEPA, SASA and the regulations issued in terms of these Acts alone would be enough to produce a dynamic, if not an efficient, market in schools. The EEA generates additional incentives to put more bums in seats by tying the number of promotion posts granted to a school to the number of learners who attend the school.

Under the EEA, and the regulations and the resolutions of the ELRC issued in terms thereof, the number of learners largely determines (within budget constraints) the number of teaching posts.³⁴ The number of teaching posts determines, in turn, the number of available promotion posts.³⁵ As a result, teachers have an interest in ensuring that a school secures the admission of the maximum number of learners. More learners equals more teachers. More teachers mean more promotion posts.

Of course, it's not the title that matters with respect to these promotion posts. It's the money. The more learners the staff bring in and retain, the more likely staff members will receive the pecuniary benefits that attach to promotion.

Given that the school principal often serves both a role in governance and a role in management, she has a set of interests in coordinating school admissions policies that do not align themselves with those of any of the previous constituencies that we have

³³ S Woolman & B Fleisch 'South Africa's education legislation, quasi-markets and school choice' (2006) 24(2) *Perspectives in Education* 1; S Woolman & B Fleisch 'Democracy, social capital and school governing bodies in South Africa' (2008) 20(1) *Education and the Law* 47.

³⁴ See Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to the Educational Institutions of Such a Department, promulgated in terms of the Employment of Educators Act, promulgated in GN 1676, GG 19627 (18 December 1998) and amended by GN 1451, GG 24077 (15 November 2002) ('EEA Educator Post Regulations').

³⁵ The formula for the distribution of posts is found in Post Distribution Model for the Allocation of Posts to Schools in Annexure 1 of the EEA Educator Post Regulations, amended by and substituted by GN 1451, GG 24077 (15 November 2002).

mentioned.³⁶ The principal's interest in choice flows, in part, from her need to keep the school financially viable.³⁷ Fees enable her to do so. Fees also enable the principal, in middle-class schools, to provide upward salary supplementation for the staff. The principal's interest in keeping her staff happy also means that she will want to see as many learners as possible fill the school – whether they pay fees or not. Of course, the SGB, made up predominantly of parents, may not have the exact same interest in operating at capacity. Parents may well wish to pay more in fees for smaller classes.

That said, principals are educators. Their commitment to the next generation means that, pecuniary and class interests aside, principals will also have an interest in ensuring that learners, regardless of their fee-paying capacity, have an opportunity to succeed. The commitment of public school educators to the production of the next generation of citizens in a democratic South Africa makes fees of instrumental importance. To the extent that fees actually impair the education of means-disadvantaged learners, the principal has a legal responsibility and a vocational interest in limiting their pernicious effects. A principal who takes exemptions seriously, and presses that view upon the SGB, may serve an important role in enhancing choice.

Principals are professionals. As professionals, principals will want their schools to succeed. Success is measured in a variety of ways. One measure is outcome-based: how well are their students doing? Fees, promotion posts, SGB-provided perks, well-motivated staff, and engaged parents all play a part in creating the conditions for such success. The formula employed by a principal to realise an optimal educational environment will vary from institution to institution. The need to keep different constituencies happy will mean that a principal will have an interest in maximising choice in a manner that will not be identical to the interests of SGBs, staff, learners, parents or provincial heads of department.

3.4 Concurrent competences

FC sections 44(1)(a)(ii) and 104(1)(b)(i) confer upon Parliament and provincial legislatures, respectively, concurrent legislative powers

³⁶ Understanding the character of these overlapping interests is critical for any account of how various lacuna in the law create such unintended consequences as the *de facto* policy of school choice. Compare J Beckmann 'The emergence of self-managing schools in South Africa: devolution of authority or disguised centralism?' (2002) 14(3) *Journal of Education and the Law* 153 159. Beckmann contends that the SGB governs and the principal manages. A decade's evidence regarding this arrangement suggests that SGBs and principals do both.

³⁷ Studies in the United Kingdom suggest that principals play exactly this role in environments where learners can migrate and where perceptions of 'good' or 'better' schools encourage such migration.

over matters contained in FC Schedule 4.³⁸ As a result, Parliament and the provincial legislatures possess the power to promulgate legislation and subordinate legislation with respect to primary and secondary public school education. Both possess the power to control and to execute policy.

The result of such shared competence is greater fluidity and less control over policy implementation than most national government actors would like.³⁹ In large part the diminished control flows from the tension between budget allocation and service delivery. National government controls the purse; provincial governments control the schools.

The bifurcation of responsibility often means that when novel problems present themselves – say an unanticipated budget crisis – government experiences a co-ordination problem that slows its response. With respect to school choice, we want to suggest that the bifurcation of responsibility (the decentralisation of power) often allows local constituencies to outflank the state. So, for example, large fluctuations in learner numbers in a given district place an enormous strain on provincial governments and schools. The dual constitutional commitments to freedom of movement and residence and equal access to educational resources place limits on what the state can do to limit such fluctuations. Our history, and the law to which that history has given birth, limit the ability of the state to prevent parents and learners from voting with their feet.

³⁸ Constitution of the Republic of South Africa Act, 1996, Schedule 4, Functional Areas of Concurrent National and Provincial Legislative Competence, states that concurrent competence embraces 'Education at all levels, excluding tertiary education'.

³⁹ Many commentators would prefer that the state allow less room for policy variation. The less variation, the easier it may be to affect more desirable overall outcomes. See Sayed (n 2 above) 148 - 149 (Sayed laments ability of the Western Cape – through the Western Cape Schools Bill – to undermine national imperatives. But as Christina Murray notes: why should we care about such variation if provinces such as the Western Cape are willing to spend more money on education and deliver appreciably better results for most learners?) Many of these same commentators demonstrate a palpable lack of care with respect to many of the legal issues that frame debates over fees, choice, admissions or tertiary institutions. Professor Sayed states that 'schooling is a provincial competency. In other words, the governance and the administration of schooling is a function of the nine provinces' (above 148). As a statement of the law under the Final Constitution, Professor Sayed's description is simply wrong. Given that his article appeared in 1999, two years after the certification of the Constitution by the Constitutional Court, and three years after its promulgation by the Constitutional Assembly, one would assume that Professor Sayed refers to the Final Constitution. However, even assuming that he has let time slide, he also misconstrues the position under the interim Constitution. The provisions dealing with conflicts under the interim Constitution did not privilege provincial legislation over national legislation. If they had, the text of the Final Constitution could not have been certified. (Provincial powers under the interim Constitution could not be substantially diminished under the final Constitution.)

While the link between concurrent legislative competence and the enabling conditions for a market in schools may not be as clear as it is with respect to various provisions in, and regulations issued in terms of, NEPA, SASA and EEA, we believe that the additional layer of political actors – or perhaps the conflicting imperatives of national government and provincial government officials – leads to greater attenuation of political power over individual schools. The brake that the Constitution places on the centralising tendencies of the state allows individual actors to exploit the other enabling conditions that give rise to the market in schools. These brakes on state power – and the concomitant space left for market forces – take a number of different forms: (a) principles of co-operative government;⁴⁰ (b) the absence of effective policy co-ordination mechanisms;⁴¹ (c) unfunded mandates;⁴² and (d) instances of provincial overspend.⁴³

4 Markets in schools

So far we have described how the legal framework establishes some of the necessary conditions for a market. But these conditions are insufficient to get a market off the ground. An efficient conventional market (not a monopoly and not an oligopoly) generally possesses four central features. First, it has many producers that supply an array of goods of variable quality. Second, buyers are able to assess the quality of the products available: the nature of the information they require in order to make informed decisions will vary from market to market. Often the price alone will have sufficient density to allow meaningful preferences to form. Third, this last observation anticipates the next feature of the conventional market: the available information enables buyers to generate ranked sets of preferences. Product variety, information symmetries, ranked consumer preferences establish the grounds for a market's defining feature: price variation. Multiple products, adequate information dissemination, rational consumer preferences enable the participants to set the price for a good. In an efficient market, consumer demand chases supply, driving up the price; higher prices attract more producers, generating greater supply and lowering the unit cost. Ultimately, in theory anyway, the market reaches an equilibrium point at which the unit price of a specific good reflects both the marginal cost of the last unit of production and the price at which consumers will buy the good.

⁴⁰ S Woolman & T Roux 'Co-operative government' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition OS, June 2004) chap 14.

⁴¹ n 40 above.

⁴² Fleisch (n 7 above) 88.

⁴³ n 42 above.

Does the South African system of primary and secondary school education satisfy these four basic criteria? The answer is: that depends.

While apartheid's legacy is complex, the brute fact that we have relatively entrenched patterns of inequality in primary and secondary schooling is not. Some public schools have cutting-edge computer labs and manicured cricket pitches. Other schools offer classes under trees. Most schools occupy a place on the continuum somewhere in between Pretoria Boys and a tree school. In urban and peri-urban areas, a sufficiently large number of schools of varying degrees of excellence exist within sufficient proximity of one another to satisfy the first desideratum of a market: product variation.

Almost every parent knows this variation exists. Many also know that the law ensures that a certain degree of equal access obtains with respect to the admission of any learner to any given school. Such knowledge meets the second condition for market formation: information dissemination.

Many parents act on the available knowledge about public schools in an attempt to secure the best possible education for their child. Some buy houses to secure admission in a good public school. Others seek employment in the desired zone. And still others commit well over half their disposable income – from aggregate family incomes well below the poverty line – to education-related expenses so that their child might travel to a good school in another town, and sometimes, another province. This ability of parents to rank schools and act on such assessments satisfies the third criterion: the lexical ordering of preferences by consumers and the exercise of choice in light of those preferences.

School variation, knowledge of such variation, and parental demand that correlates with such variation would not, alone, lead to a market in schools. A conventional efficient market also requires price variation that simultaneously captures information about the quality of the product and the demand for that product. The law as it stands permits SGBs to establish a (proxy for) price for attendance at their schools. Where the first three conditions for market formation obtain, SGBs can set a price – school fees – for their product that communicates both quality and demand. The SGBs' ability to set a price enables parents – the consumers – to respond to this price by deciding whether the product offered warrants the current price. The ability of SGBs to set a price and the ability of parents to respond to quality and price variation generates the final feature of a market: the ability of sellers and buyers to act in a manner that tends toward more and more efficient forms of exchange.

A critical rider attaches to this description: not all South Africans have access to the market in public school education. Although, in theory, the legal framework created by SASA, NEPA and EEA means that South Africa as a whole could constitute the market for educational goods, the market, in fact, is not that elastic. In most places, the necessary and the sufficient conditions for a market do not obtain. Most parents and most learners cannot exercise choice relative to the products offered in the South African market because the costs associated with entrance into the market are prohibitively high. On the demand side, deeply entrenched, if not ineradicable, features of the South African landscape – poverty, geographic isolation, limited housing stock, high levels of structural unemployment, the cost of travelling the enormous distance between home and school – conspire to lock the majority of South African learners out of the market. On the supply side, other deeply entrenched features – poor school infrastructure, the absence of multiple schools in many locations – effectively means that the product variation necessary for a market to form does not exist.

4.1 The shape and the limits of quasi-markets⁴⁴ in schools

In the previous section, we identified the four key features of conventional markets and how one would determine whether any markets in education exist in South Africa. In this section, we assess the available data on how schools and parents respond to the open spaces created by the law and why markets are established in some South African communities and not in others.

Not surprisingly, market formation occurs most readily in those urban areas with large variations in wealth and large learner populations. These urban areas have the resources necessary to produce a sizeable number of schools in relatively close proximity to one another. The majority of residents know about these schools, have the ability to make reasonably nuanced assessments regarding their relative quality and tend to act on this information. SGBs – who set the price for their schools – are likewise aware of other schools – the competition – and have the ability to make reasonably nuanced assessments of what the competition offers. They are then able to make informed judgements about the relative quality and exchange value of their school. The SGB acts on this information by setting a price – fees – that it believes the market will bear and that will enable it to provide a competitive product. From year to year, the

⁴⁴ 'Quasi-markets' refers to markets in which some elements of a market are missing. Markets in schools are, for example, notoriously inflexible in terms of the products offered and often highly asymmetric and inefficient when it comes to information dissemination.

price – fees – will vary, as parents respond to new information about schools and schools respond to the demand for their product.

As we move beyond the urban and peri-urban environment, the market for schools becomes increasingly attenuated. Multiple willing sellers do not exist in sufficiently close proximity to willing buyers for an efficient market to form.

It is true that many parents do overcome significant costs in order to move their children from one school in one part of South Africa to another, ostensibly better school, some distance away. Were such movements to occur on a grand scale, it might suggest that South Africa's market in public schools extends from Cape Town to Messina. As we shall see below, the existing evidence suggests that such a market does not exist because the costs that attend such moves are prohibitively high.

4.2 Empirical evidence in support of quasi-markets in schools

Systematic empirical work on the collective effect of these policy developments in creating quasi-markets is limited. But available studies support the hypothesis that open enrolment, parent preference, per capita spending, devolved budgets, compulsory school fees, school right-sizing, new post-provision norms, concurrent national and provincial competence over education and shared management responsibilities between the provincial executive and SGBs have all contributed to greater fluidity in the South African school system.⁴⁵ Sujee's research and Sekete's work on deracialisation provide additional, if partial, data on the extent of learner movement from historically African communities to schools in historically Indian, coloured and white areas.⁴⁶

⁴⁵ See T Bisschoff & C Koebe 'School choice: challenge to Sharpeville public school principals' (2005) 25(3) *South African Journal of Education* 156; S Maile 'School choice in South Africa' (2000) 37(1) *Education and Urban Society* 94; UK Hoadley 'For better or worse: school choice in a South African working class context' in L Chisholm (ed) *Critical perspectives on South African education: reconstituting the education realm* (1999); L Tikly & M Thabo 'Marketisation as a strategy for desegregation and redress: the case of historically white schools in South Africa' (1997) 43 *International Review of Education* 159; C Harber 'Markets, equity and democracy: structural adjustment and the tensions of educational change in South Africa' (1998) 18 *International Journal of Educational Development* 247.

⁴⁶ M Sujee 'Deracialisation of Gauteng schools – quantitative analysis' in M Nkomo, C McKinney & L Chisholm (eds) *Reflections on school integration: colloquium proceedings* (2004); P Sekete 'Learner migration and the impact on schools' in K Fieldgate, J Hofmeyr & H Perold (eds) *Education Africa Forum* (4th edition, 2000).

The standard *anecdotal* accounts of the quasi-market in public schools describe a mass exodus of black children from township schools to historically Indian, Coloured and white schools. In places such as Soweto, township schools were said to stand half-empty, abandoned by their traditional clientele. This exodus ostensibly mirrored a similar trend in historically white public schools. That white learners, so the story goes, migrated from former Model C schools to more exclusive independent schools certainly occurred. However, estimates of the extent of the abandonment of the public school system seem to be driven by the mutually reinforcing narratives of the privileged withdrawing to private spaces as the masses flowed into previously forbidden places. In fact, the African community has provided, by far, the better part of the rapid increase in independent school attendance. According to Jon Pampallis, African learners in Gauteng in 1998 accounted for a whopping 69.02 per cent of independent school learners. Whites, who made up 31.68 per cent of independent school learners in 1996, made up only 11.79 per cent of such learners two years later.⁴⁷ Though hard numbers are hard to come by, Pampallis believes that the vast majority of African independent school learners come from poor communities either without public schools or with poor-quality public schools.

Recent census statistics offer further information about both the extent and the location of learner movement, and thus the extent and the location of quasi-markets in schools. The 2001 Census shows that 'although the vast majority of schoolgoers (82,3 per cent) walked to school, this varied by province'.⁴⁸ That variation was enormous: 'In Limpopo, 93,9 per cent of schoolgoers walked to school, compared with 59,1 per cent in Gauteng.' But what is particularly interesting is the large numbers of learners who took buses, taxis and trains to school. Almost 1.2 million out of 12 million learners used these forms of transport. Even assuming that many learners had to travel large distances to get to the primary school or secondary school in their feeder zone, this statistic suggests that a large number travelled through feeder zones to a school of preference. This 'choice plus travel' option appears to have been exercised primarily in Gauteng and the Western Cape. This finding correlates with both the higher incidence of better schools in more privileged communities and better systems of transport in and about the major urban centres. Furthermore, transport statistics do not account for those parents and learners who exercise choice through movement of residence or movement of employment. The 2001 Census data suggests that large numbers of families with learners have moved to Gauteng and the

⁴⁷ J Pampallis 'Education reform and school choice in South Africa' in D Plank & G Sykes (eds) *Choosing choice: School choice in international perspective* (2003).

⁴⁸ Statistics South Africa *Census 2001: Achieving a better life for all* (2005) 104.

Western Cape from other provinces, and that they did so in search of better educational opportunities for their children.

4.3 Historical evidence in support of quasi-markets in schools

How did the quasi-market in South African schools actually develop? Some choice did exist within the apartheid state's Model C system. However, it was only after the 1994 elections, when historically white schools suddenly had a surplus of places, that the phenomenon of school choice became too obvious to ignore. Open enrolment and the elimination of race-based allocation of educational resources meant that black middle-class and working-class children now had access to better schools. However, as the historically white schools began to reach capacity, a large number of these schools exploited their various advantages to become far more selective. Some historically white schools, through the admissions policies promulgated by their SGBs, began to make use of concepts such as 'community' to constrain enrolment and simultaneously secure greater control over their market placement. This assertion of control had the effect of increasing the value of enrolment in the school and making it possible to 'increase' price – through fees – by limiting supply.⁴⁹

Where, as in the South African school system, demand at the 'upper' quality end of the market far outstrips supply, the public school selection/admission process concocted by some principals and SGBs may have exacerbated inequalities. But the South African education market was not, and is not, static. Players other than the SGBs exert significant influence over the shape of the market.

Fleisch has identified two significant 'mass' markets in schools that exist alongside elite niche markets.⁵⁰ A significant shift in the enrolment patterns in older townships can be attributed to changing residential patterns. South Africa's low-income housing policies have created one million new homes over the past six years. In the Benoni/Brakpan District, for example, between 1994 and 1999 the state created 12 new lower-income townships and constructed 30 000 new homes. Most of the new houses were built on inexpensive land adjacent to older townships. New housing developments spawned new schools.

In Benoni/Brakpan, 12 new suburbs required 12 new schools. Some of the learners in these new schools were transfers from outside the

⁴⁹ L Chisholm 'Change and continuity in South African education: the influence of policy' (1999) 58(1) *African Studies* 103.

⁵⁰ B Fleisch (n 7 above).

province. The vast majority, however, moved from nearby township schools. Many parents chose to enrol their children in the new schools closest to their new homes. In this mass market, open enrolments, parental preference and teacher redeployment made mass transfers possible. A Soweto principal, whose school experienced a dramatic decline in enrolment, identified changing residential patterns as the primary culprit: 'Young parents have moved to areas such as Protea and parents are reluctant to send [their] children to schools [too] far away.'⁵¹

The excess supply of places in old township schools created the conditions for competition. As these institutions squared up against one another, parents began acting as consumers interested in purchasing the best services for their children. Schools that demonstrated good matriculation results were consistently oversubscribed. As Pampallis notes, community perception of the 'best' institutions was tied to a complex array of characteristics.⁵² In addition to the actual performance of learners on matric exams, parents assessed schools in terms of the physical appearance of buildings, the reputation of the principal, school discipline and the existence of various amenities and extra-mural activities.

The primary facilitator of the market on the supply side was a post allocation model that enabled schools that attracted additional learners to command additional promotion posts. As we noted in our discussion of the EEA above, the possibility of promotion posts served as incentive for principal and staff alike to create a more attractive school environment. Fees, on the other hand, had only a marginal effect on the quasi-market in township schools. Fees certainly did not suppress competition. Schools that set fees at R100 would often attract more learners than schools that charged half that amount. Moreover, the alleged culture of non-payment in townships did not prove an insurmountable impediment in the collection of fees. Several schools with relatively high fee structures flourished.

Fleisch has shown that the new market in township schools offers a novel form of accountability. Schools perceived to be dysfunctional saw massive outflows of learners. The Gugulesizwe Primary School in Daveyton had long enjoyed a good reputation within the community. However, an acrimonious conflict between the new principal, a group of teachers and a group of parents deepened over a period of two years and led to regular negative reports in the media. By the end of this two-year period enrolment at the school had dropped by almost 50 per cent. Parents had removed their children from a place of

⁵¹ *Mail & Guardian* 2 February 1996.

⁵² J Pampallis (n 47 above).

conflict and moved them to the relative stability of alternative township schools. Open enrolment allowed parents to vote with their feet. In addition, the school experienced a significant redeployment of staff to other schools. Both learner movement and staff mobility led to a radical depreciation in value for the Gugulesizwe Primary School.

4.4 State responses to *de facto* school choice

How has the state reacted to these new and unintended quasi-markets in schools? The constitutional commitments to equality before the law, to equal access to schools and to freedom of movement and residence – reinforced by comparable statutory requirements in SASA, NEPA and EEA – meant that the government could exercise little direct control over parental preference. Official responses varied. Some officials recognised, and even appreciated, the relatively benign consequences of the marriage between a fragile state and a progressive Constitution. Others expressed frustration at the inability of the state to impose a grand plan for transformation on public school education. One Minister stated that:

[P]arents have the rights to take their children where they want to, but they won't contribute to good public schooling. They should be seeking solutions to the education crisis in their own schools. It's time for them to stop running away from the problem there and start helping to make sure that township schools are working. We have to turn them around.⁵³

The state is not without the resources required for a meaningful response to the kinds of market distortions in this quasi-market that appear to impede transformation. An early Gauteng Department of Education ('GDoE') circular barred the use of tests or other measures to exclude learners.⁵⁴ The GDoE even established special district committees to ensure fairness in the admissions process in former Model C schools. These committees also reviewed early admission processes in township schools. Many parents suspected that schools massaged waiting lists to secure admittance for the 'right' kind of children. District directors reported that some schools attempted to cap the proportion of black learners at around a quarter of the school's enrolment through admissions processes that used a mix of interviews and complex application forms.

Having accepted the reality of quasi-markets, the provincial departments took steps to mitigate their deleterious effects and to reshape the markets in manner that benefited learners from

⁵³ *Mail & Guardian* (n 51 above).

⁵⁴ Gauteng Department of Education 'Circular 8' (1995).

historically disadvantaged communities. As early as July 1999, the GDoE issued a flyer in four languages that informed parents about practices that constituted unfair discrimination and advised them of the available remedies. It produced circulars, and subsequent regulations, that echoed the school zoning requirements found in NEPA. These zoning requirements privileged the children of parents whose domicile lay within the zone and then gave priority to children whose parents were employed within the zone. Of course, these zoning requirements did not eliminate – and could not eliminate – the cohort of learners who sought admission to schools that fell outside their zone. The GDoE introduced two additional rules to level the playing field for such learners. The first rule compelled schools to create a standard ‘waiting list register’. The second rule required that schools provide a written explanation to parents whose children were refused admission.⁵⁵ In each successive version of the GDoE’s annual admissions circular, attempts have been made to ensure optimal fairness and equal access to state resources.⁵⁶

These circulars, along with the elimination of fees for the lowest two quintiles of schools and recent litigation around admissions, reflect the competing political commitments that drive our social democratic state. The circulars, the elimination of fees and litigation around admissions policies can be read primarily as efforts to ensure greater equity in the distribution of educational goods. But they can also be read through the prism of utilitarianism: these efforts ensure that greater numbers of learners from historically disadvantaged communities have access to better school facilities, thereby receiving a better education and thereby raising – the assumption goes – the overall productivity of our students. The willingness of the state to leave schooling in the hands of SGBs – after having tweaked the system to achieve greater equity and utility – reflects the state’s recognition that the abstract relationship of state to subject will sometimes have to bow before the imperatives of kin, clan and community. The state also understands that large stores of ‘social capital’ are to be found in public schools and that such capital can be shared, but never fully alienated.⁵⁷

⁵⁵ Gauteng Department of Education ‘Circular on the admission of learners in public schools’ (2000). The flyer, published in English, Afrikaans, Zulu and Sepedi, read, in relevant part: ‘If you want your child to go to a school away from where you live you may register your child at the school of your choice ... The school must give you a letter to say that you are on the waiting list and what number you are on the waiting list. The school must inform you by the end of October whether your child has been accepted at the school if the school has space for your child.’

⁵⁶ Gauteng Department of Education ‘Circular 36’ (2003); Gauteng Department of Education ‘Circular 38’ (2004) and Gauteng Department of Education ‘Circular 35’ (2005). The Western Cape Department of Education has issued a similar series of circulars.

⁵⁷ See S Woolman ‘Freedom of association’ in Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2003) chap 44.

The previous paragraph also suggests the manner in which our working assumptions explain the state's behaviour around *de facto* school choice. School choice as an unchosen condition of public school education in South Africa clearly rankles. The state recognises that the law – and its own communitarian and utilitarian commitments – has given rise to this phenomenon. The state has attempted to use the same body of law – through policy formation (circulars), regulation (the elimination of fees) and litigation (admissions) – to advance its concomitant egalitarian commitment to transformation.

5 Conclusion

The notion that quasi-markets in schools exist in South Africa – or parts of South Africa – is a descriptive matter: it is either true or false. We believe that the foregoing account establishes that a certain segment of South African society has access to quasi-markets in public primary schools and public secondary schools. We have also demonstrated that school choice, where it exists, is not a function of deliberate or conscious state policy to offer 'school choice' to learners so as to secure the ostensible benefits of markets in schools. We have shown, instead, that school choice, where it obtains, is an unintended consequence of a set of laws and regulations that constitute the enabling conditions for market formation. Those conditions are necessary – in this context – but not sufficient conditions for markets or quasi-markets to form. We have, within the limits of available data, revealed the economic and social conditions that must obtain for markets and quasi-markets in schools to exist.

Whether such quasi-markets should exist is a prescriptive matter. Here one's analysis will turn on a mix of both empirical claims about these quasi-markets in education and normative claims about why we value educational goods. For example, when one asks whether the market produces better schools, the obvious question is 'Better for what?' If one is predisposed to see schools primarily as institutions designed to create citizens who meet and treat one another as equals, then the desired outcome will be contingent upon the ability of a school to produce a given kind of ethos. Price-based competition between schools may or may not serve those ends. If one is predisposed to see schools primarily as institutions designed to create individuals whose skills will generate greater personal and societal wealth, then one will adopt an entirely different metric for assessing the value of price-sensitive and quality-based competition between schools. On these grand 'political' questions, we remain agnostic.

CHAPTER 3

ON THE CONSTITUTIONALITY OF SINGLE MEDIUM PUBLIC SCHOOLS

1 On the constitutionality of single-medium public schools

1.1 A constitutional compromise

As we noted in the introduction, the standard account of South African school history begins with the widely accepted story of how the National Party's belated attempts to decentralise control over public school education, and subsequent concerns about Afrikaner secession, resulted in the significant degree of constitutional and statutory autonomy granted to provincial government MECS and HoDS, principals, parents, learners and school governing bodies (SGBs). But as we were quick to point out, the fragility of the early ANC-led government and its decisions to cede authority to multiple groups is only part of the story. Our historical account demonstrates that SGB autonomy, for example, was driven to a very large extent by the fundamentally democratic commitments of the ANC to grassroots politics. And so it is with the constitutional provisions that speak to language policy in single-medium public schools. Despite the fact that the education clause nearly derailed the timely passage of the final Constitution, the two major players in the Constitutional Assembly (the NP and the ANC) were able to claim some form of victory with respect to the language of FC section 29, and in particular, FC section 29(2). Afrikaner desires to maintain single-medium public schools were largely accommodated by the *mere* mention of single-medium public schools as a legitimate option. Their interests were also partially catered for by the duty imposed upon the state – now subject to a standard of 'reasonable practicability' – to determine whether learners are best served by a single-medium, dual-medium or parallel-medium public school. ANC concerns about giving away the farm to historically privileged white schools were mollified by 'diversity' or 'accommodationist' language about mother tongue instruction. The primacy of place accorded mother tongue instruction in FC section 29(2) over any given SGB's preferred medium of choice

appeared such ANC hard-liners as Blade Nzimande. What each side to this important constitutional compromise *actually* walked away with animates the rest of this chapter.

1.2 Introduction to the history of language in South African schools

Conflict around the issue of language informs just about every stage of this Republic's history.⁵⁸ According to Giliomee, the language issue began to smoulder in the ashes of the South African War (1899 - 1902), when Britain introduced English as the sole official language in the ex-republics. While the principle of linguistic equality between English and Dutch was enshrined in the Union Constitution, the prevailing assumption amongst English speakers was that English would, ultimately, prevail. Indeed, in the 1920s, big business and the civil service were dominated by English speakers. While new appointees to the civil service were required to be bilingual, Afrikaners were vastly underrepresented: few Afrikaner children finished the seventh year of schooling required for state employment.⁵⁹

The political pressure for single-medium education breached the surface during the rise of Afrikaner nationalism in the late 1920s and early 1930s. The demands began when the Dutch Reformed Church made the connection between white poverty and education, and particularly the failure of poor Afrikaner children to master the dual mediums of instruction: English and Dutch. The Church and other members of civil society placed increasing pressure on provincial governments to make Afrikaans, rather than Dutch, the medium of instruction for Afrikaans-speaking children. At the same time as they sought to supplant Dutch with Afrikaans, they pressed for single-medium Afrikaans-speaking institutions. Between 1932 and 1958, single-medium Afrikaans schools rose, as a proportion of all white schools, from 28 per cent to 62 per cent.⁶⁰ Over time, Afrikaner nationalist teachers, committed to a very particular cultural, linguistic, religious and political project, came to form the core of single-medium Afrikaans school staffs.

Prior to the Second World War (1939 – 1945), South Africa possessed a complex network of language practices and an equally

⁵⁸ For the general contours of this history, see LM Thompson's *A history of South Africa* (2001); W Beinart *Twentieth century South Africa* (2001). For an understanding of the links between culture, language and racism, see S Dubow *Scientific racism in modern South Africa* (1995).

⁵⁹ See H Giliomee 'The rise and possible demise of Afrikaans as public language' (2004) 10(1) *Nationalism and Ethnic Politics* 25 - 58.

⁶⁰ See EG Malherbe *Education in South Africa: Volume 2* (1977). See also B Fleisch 'State formation and the origins of bantu education' in P Hallaway (ed) *The history of education under apartheid, 1948 - 1994* (2002) 39.

complex arrangement of single-medium, dual-medium and parallel-medium institutions.⁶¹ This surface complexity masked the increasingly strong shift, among the Afrikaner majority, towards a preference for the ‘purity’ of single-medium schools. After the outbreak of the Second World War, the gloves on education policy came off.⁶² The United Party articulated a vision of a unified *white* South Africa that could be achieved through a policy of compulsory bilingual education. The National Party hit the stumps on a campaign that emphasised a comprehensive, and exclusive, vision of Afrikaner cultural, linguistic, religious and political life. For the National Party, however, this ostensibly ‘authentic’ vision was primarily a vehicle for achieving political hegemony. Malherbe observes:

The United Party maintained that in a bilingual country like South Africa it was wrong to segregate Afrikaans and English-speaking children living in the same community. By keeping the children together in the same school they would learn to appreciate each other as persons by playing on the same school teams, and thus lay the foundation for a common loyalty as South Africans ... Against this the National Party contended that bilingualism was not the aim of education ... [T]he nationalists had no scruples about artificially segregating Afrikaans-speaking children in order to foster exclusive Afrikaner nationalism ... Both parties wanted to use the education system to achieve their political ends – the one to unite, the other to divide.⁶³

Despite the fact that both political parties clearly understood that language policy was both a powerful mechanism for galvanising their political bases and an effective instrument for social engineering, one essential difference between the two parties remained: the National Party, and Afrikaner nationalists generally, experienced a recurring anxiety that ‘one culture would be swamped by the other’.⁶⁴ The National Party exploited this anxiety – and the related fantasy that single-medium public schools would eliminate the source of the anxiety – to win the 1948 elections.

⁶¹ The diversity of language-medium types and the various effects of these language practices was the pretext for EG Malherbe’s famous study: *The bilingual school: a study of bilingualisms in South Africa* (1946).

⁶² For an account of the conflict over bilingual schooling, see B Fleisch ‘Social scientists as policy makers: EG Malherbe and the National Bureau for Social and Educational Research, 1929 - 1943’ (1995) 21(3) *Journal of Southern African Studies* 349.

⁶³ EG Malherbe (n 60 above) 39.

⁶⁴ While originally articulated in the 1930s, the theme has retained its currency. Rassie Malherbe has expressed this anxiety as follows: ‘Although in principle, dual and parallel medium institutions or instruction may, under suitable circumstances, be the appropriate option to fulfill the right to education in one’s preferred language, it ... may in practice lead to an institution eventually becoming single medium ... [T]he English component is numerically becoming progressively larger ... Many parallel medium schools will eventually become completely English medium’: R Malherbe *Submission to President Nelson Mandela on behalf of a group of Afrikaans organisations* (15 May 1996).

Apartheid ushered in a new set of linguistic, cultural and political imperatives. No objective was more important, perhaps, than the use of the state machinery to privilege Afrikaans in Afrikaner communities and to place Afrikaans on an equal footing with its historical rival, English.

The logic of apartheid led, almost inexorably, to the Eiselen Commission Report on Native Education.⁶⁵ The Eiselen Report made a strong case for compulsory *African* language instruction – for *African* learners – up to and through high school. While facially consistent with UNESCO’s best linguistic practices, the policy was opposed by missionaries and local African ‘pro-English’ elites. The National Party presupposed that African ‘language’ communities had a vision of themselves similar to the comprehensive vision of the good life offered by the Afrikaner, Christian, nationalist community.⁶⁶ The foundation for such a community for true believers and politicians alike was – and perhaps remains – the ‘single language school’.

To impose this comprehensive vision of the good and its requirement of single-medium schools upon a largely resistant populace required social engineering on an unprecedented scale.⁶⁷ Despite the logistical and political hurdles, the National Party had, by the 1970s, achieved its aim. Most primary school learners were initially educated in their mother tongue. Few children were schooled in the ‘wrong’ language. Although African learners switched to English, and in some instances Afrikaans, at the end of primary school, these learners were still confined, as far as possible, to ethnic schools in the townships and the homelands.⁶⁸

In 1976, apartheid in education began to fall apart. The resistance did not flow from the rejection of single-medium schooling. What African learners rejected was the imposition of *both* English and Afrikaans. The engineers of apartheid and Christian National

⁶⁵ Republic of South Africa Report of the Commission on Native Education: Chair: WNN Eiselen (Pretoria: Government Printers, 1951). See also LE Meyer ‘A report on South Africa’s black universities’ (1967) 4(3) *Issue: A Journal of Opinion of the African Studies Association* 12.

⁶⁶ For a fuller account of language issues in bantu education, and particularly WNN Eiselen’s role as one of the key architects of apartheid, see C Kros ‘Economic, political and intellectual origins of bantu education, 1926 - 1951’ unpublished PhD thesis, University of the Witwatersrand, 1994.

⁶⁷ See M Horrell *A decade of Bantu Education* (1964); P Kallaway (ed) *Apartheid and education* (1984). See also K Hartshorne *Crisis and challenge: black education 1910 - 1990*. (1992) 186 - 217; J Hyslop *The classroom struggle; policy and resistance in South Africa: 1940 - 1990* (1999).

⁶⁸ See Hartshorne (n 67 above) 203 - 207.

Education had overplayed their hand.⁶⁹

And yet the belief that single-medium schooling would serve as the glue that bound the unique linguistic, cultural and religious features of the Afrikaner people together remained very much alive. It survived the Multi-Party Negotiating Forum ('MPNF') at Kempton Park. The interim Constitution, section 32, continued to allow communities 'to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race'.⁷⁰

Negotiations in the Constitutional Assembly around the issue of single-medium schools under the final Constitution were even more protracted and led to a deadlock between the ANC and the NP.⁷¹ The ANC, which viewed single-medium Afrikaans public schools as vehicles for continued racial exclusion and the perpetuation of minority privilege, refused to sanction any reference to single-medium public

⁶⁹ For a contemporary account, see J Kane-Berman *Soweto: Black revolt, white reaction* (1979). See also C MacDonald *Crossing the threshold to Standard 3* (1991). MacDonald notes that within African schools, from 1977 onwards the debate shifted away from Afrikaans as a medium of instruction and focused on English as the medium of instruction. By the mid-1980s, most schools in the Department of Education and Training used mother-tongue instruction up until the end of Standard 2 (now Grade 4) and then switched to English as a medium of instruction. This practice became the focus of the HSRC Threshold Project in the late 1980s. This project traced the source of the high failure rate and subsequent drop-out problem to the abrupt shift from mother-tongue instruction to English instruction between Standards 2 and 3. Initially in some homelands, and then later on in some township schools in the 1990s, this shift to English started earlier and earlier. Within Afrikanerdom the period was marked by a shift, in some quarters, from using the state as a means for preserving cultural identity to a set of policies that linked the community's survival to a new, and not necessarily conducive, discourse of minority rights.

⁷⁰ Constitution of the Republic of South Africa Act 200 of 1993 ('interim Constitution' or 'IC').

⁷¹ On the history of the negotiations for the interim Constitution see LM du Plessis 'A background to drafting the chapter on fundamental rights' in B de Villiers (ed) *Birth of a Constitution* (1994) 89; H Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491; H Corder & L du Plessis *Understanding South Africa's transitional Bill of Rights* (1995); G Heald 'Learning amongst enemies: a phenomenological study of the South African Constitution negotiations from 1985 to 1998' unpublished PhD thesis, University of the Witwatersrand, 2007 (on file with authors). On the history of the negotiations for the final Constitution, S Woolman & J Swanepoel 'Constitutional history' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, June 2008) chap 2.

schools in the final Constitution.⁷² The NP, which viewed single-medium public schools as the last vestige of public power in the new dispensation, repeatedly pushed for their inclusion. The ANC, though assured of the passage of a national referendum on its version of the final Constitution should constitutional negotiations fail, believed that the goodwill derived from some compromise on this issue, and a final Constitution supported by all the major parties, outweighed the benefits to be secured from an outright victory on this issue. The NP knew that it could not win either in the Constitutional Assembly or at the polls. It therefore engaged in the kind of political brinkmanship that would satisfy its constituents, but ultimately capitulated when the ANC agreed to make some mention of single-medium public schools in the final Constitution. Here, then, is the result of that compromise – FC section 29(2):

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account – (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.⁷³

Does this passage secure – as some authors argue – continued state support for all single-medium public schools, and, in particular, single-medium Afrikaans public schools? Or does it – as other authors contend – eliminate any express entitlement for single-medium public schools except where such schools offer redress for communities whose mother tongues were repressed under English and Afrikaans rule? FC section 29(2) does not support either of these two readings, but rather raises the question of the extent to which the particularist demands of linguistic, cultural and religious communities with (relatively) comprehensive visions of the good can be accommo-

⁷² Then ANC spokesperson on education, Blade Nzimande, wrote: ‘The issue of single medium institutions is a mere red herring. What the NP wants the Constitution to guarantee is the right to have exclusive white Afrikaner schools, not single medium institutions’. B Nzimande ‘Address to the Constitutional Assembly – 7 May 1996’, available at www.polity.co.za. Evidence to support this supposition has emerged in recent work on school financing. Motala has recently shown that Afrikaans single-medium public schools continue to secure greater state funding well after the end of apartheid. S Motala ‘Education transformation in South Africa: finance equity reform in schooling after 1998’ (unpublished PhD dissertation, University of the Witwatersrand, 2007).

⁷³ Constitution of the Republic of South Africa, 1996 (‘Constitution’ or ‘FC’).

dated in our public schools.⁷⁴ FC section 29(2) also draws our attention, in the form of its sister clause FC section 29(3), to the space that the Constitution creates for the expression of the particularist claims of linguistic, cultural and religious communities and the ability of those claims to be (better) accommodated in independent schools.⁷⁵

There exists, after some 12 years of constitutional jurisprudence, a sizable body of case law that engages issues of language, culture and religion and their place in public schools and independent schools. The primary driver of this body of education litigation is the state's and the Afrikaans-speaking community's concern about the continued existence of single-medium Afrikaans public schools. Put another way, both the state and the Afrikaans-speaking community want to know the extent to which the Constitution vouchsafes the right of SGBs to determine and to retain their language policies in the face of opposition from provincial government and/or small groups of learners and their parents who wish to change the language policies in these institutions.

This chapter attempts to answer the following question: Does South Africa's legal regime guarantee existing single-medium Afrikaans-speaking public institutions the right to retain their language policies?

Section 2 of this chapter grounds the answer to that question in a particular reading of the history and the language of those constitutional provisions designed to promote and to protect religious, linguistic and cultural communities. This reading demonstrates that our social democratic order affords religious, linguistic and cultural communities significant latitude when it comes to the establishment and the maintenance of private or independent schools designed to further particular comprehensive visions of the good life and offers such communities far less solace when it come to the establishment and maintenance of single-medium public schools.

Section 3 takes a far more hard-nosed view of the law that governs admissions policies and language policies in public schools. After mapping the most critical bodies of law – the Constitution, the South African Schools Act ('SASA'), the Promotion of Equality and

⁷⁴ For more on the history of Afrikaans as a medium of instruction in our public schools, see P Plüddemann, D Braam, M October & Z Wababa 'Dual-medium and parallel-medium schooling in the Western Cape: from default to design' *PRAESA – Occasional Papers* 17 (2004); W Visser (2004) 'Coming to terms with the past and the present: Afrikaner experience of and reaction to the "New" South Africa' Seminar lecture presented at the Centre of African Studies, University of Copenhagen (30 September 2004).

⁷⁵ S Woolman 'Defending discrimination' (n 30 above).

Prevention of Unfair Discrimination Act ('PEPUDA') and our courts' nascent jurisprudence – onto the admissions policies and language policies of public schools, we come to the following conclusions. First, some real (but relatively small) constitutional space remains for single-medium public schools – and, therefore, for single-medium Afrikaans public schools. Second, the hard truth is this: the constitutional and statutory entitlement to such schools – under current historical conditions – is relatively weak. A recent line of cases in the High Court and the Supreme Court of Appeal suggests that (constitutional and statutory) rights regarding language and culture will not so readily permit SGBs to determine the admissions policies of a public school. They also suggest single-medium Afrikaans public schools are fighting a rear-guard, and potentially losing, battle with the state over transformation.⁷⁶ Third, the upshot of this legal analysis is that communities that wish to preserve their linguistic, cultural and religious ways of being in the world will find themselves on much more solid legal ground when they create independent schools – in terms of FC section 29(3) – designed to further their comprehensive visions of the good. Afrikaans-speaking communities, like any other linguistic, cultural or religious community, have no special status in our liberal democratic order and must be able to create independent schools if they wish to be assured of retaining their cultural and linguistic integrity.

2 A brief constitutional history of religious, linguistic and cultural rights

In this section, we examine the drafting history of the interim Constitution and the final Constitution and some of the jurisprudence generated during the brief period between these two founding documents. This history goes some distance towards explaining why political group rights – and rights to public institutions such as single-medium Afrikaans primary and secondary schools – were never enshrined in our basic law.

⁷⁶ This battle is not only being lost in the courts. Learners themselves are choosing English-medium (or at least parallel-medium public) schools over Afrikaans-medium public schools. Given that each secondary school draws on one or two primary schools, the fact that there are approximately 300 single-medium Afrikaans secondary schools means that the number of single-medium Afrikaans schools (primary, secondary and combined) falls somewhere between 600 and 850. Even the higher figure means that single-medium Afrikaans public schools constitute only two per cent of the estimated 30 000 public schools in the country. A colourable claim can be made that such a low figure warrants some degree of judicial solicitude. In short, Afrikaans, like any one of the other 10 official languages, has an entitlement to some state support. E-mail Communication with Christina Murray (11 November 2008). On the other hand, as Professor Murray notes, no number of schools, large or small, can be used to justify overt discrimination or radical inequity in the distribution of such an important public good as education.

For starters, before *our* velvet revolution of 1994, most political claims based on culture, language, ethnicity and religion were greeted with suspicion and, sometimes, outright hostility by the majority of South Africans.⁷⁷ From the passive resistance of Ghandi through worker movements of the early 20th century to the Freedom Charter, the preferred language of liberation was that of human rights discourse. The liberation movement's use of rights discourse reflected a considered rhetorical response to romantic assertions of white, Christian, English and Afrikaner supremacy.

The ANC's universalist orientation provides a partial explanation for the failure of most group-based claims during CODESA and the MPNF. The ANC rejected every attempt to entrench what it termed 'racial group rights'.⁷⁸ For Afrikaner nationalists, political power would have to be traded for a negotiated settlement. That peace, and the retention of economic privilege by the white minority, would be vouchsafed by a firm ANC commitment to a justiciable Bill of Rights.⁷⁹

⁷⁷ See A Sachs 'Opening remarks' KAS Multiculturalism Seminar (1999) 1 available at www.kas.org.za/Publications/SeminarReports/Multiculturalism; H Giliomee 'The majority, minorities and ex-nationalities in South Africa and the proposed Cultural Commission' KAS Multiculturalism Seminar (1999) 37 available at www.kas.org.za/Publications/SeminarReports/Multiculturalism.

⁷⁸ See S Woolman 'Community rights: religion, language and culture' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2007) chap 58; S Woolman & J Soweto-Aullo 'Commission for the Promotion and the Protection of the Rights of Religious, Linguistic and Cultural Communities' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, March 2005) chap 24F.

⁷⁹ The problem of accommodating, and protecting, ethnic, religious and linguistic communities in a democratic state dominated the political debates and the lengthy constitutional negotiations that preceded the enactment of the interim Constitution. Between 1986 and 1991, the South Africa Law Commission investigated various mechanisms for the protection of group rights. See South Africa Law Commission *Group and human rights*, Working Paper 25, Project 58 (1989). To this end, it solicited submissions from white right-wing intellectuals on the rights of minorities to seek recognition as distinct societies and to resist assimilation into a common national culture. See South African Law Commission *Group and human rights*, Interim Report (1991). Notwithstanding the contentiousness of white minority concerns, the language and cultural rights provision of the interim Constitution's Bill of Rights secured virtually universal consent from Multi-Party Negotiating Forum participants. See LM du Plessis 'A background to drafting the chapter on fundamental rights' in De Villiers (ed) (n 71 above) 89-93. IC sec 31 attracted near-universal assent because, although it echoed art 27 of the International Covenant on Civil and Political Rights, it avoided art 27's protection of discrete sets of rights holders. Both the ANC and the NP eschewed more substantial minority rights protection. However, community rights were not entirely anathema to the ANC or the NP. The latter believed that white minority interests would be better protected at the level of distribution of governmental power, rather than by judicial mechanisms. It proposed only non-discrimination guarantees and individual rights to speak a language or to participate in 'cultural life'. See Government of the Republic of South Africa Proposals on a charter of fundamental rights (2 February 1993) arts 6 and 34. We have already noted the degree to which the ANC was ill-disposed towards recognition of community, minority, collective or group rights. The most

However, the interim Constitution's and final Constitution's rejection of group political rights was at least partially compensated by the 'notable levels of constitutional significance' to which cultural, linguistic and religious matters were elevated. The final Constitution contains six different provisions concerned with culture, eight with language and four with religion.⁸⁰ As a liberal/social democratic political document, it carves out the 'private' space within which self-supporting cultural, linguistic and religious formations might flourish.⁸¹

the ANC would concede were rights to form 'cultural bodies', to religious freedom and, perhaps, to require that the state act positively to further the development of all 11 South African languages as official languages. See African National Congress *A Bill of Rights for a new South Africa: preliminary revised version* (1992) art 5(3) - (7). The ANC insisted that minority rights *qua* static, non-demographically representative levels of political representation were unacceptable. The Bill of Rights constitutes the ANC's compromise between unfettered majority rule, on the one hand, and structural guarantees for privileged, but now 'vulnerable', political minorities, on the other.

⁸⁰ Provisions of the Constitution dealing with culture, language and religion include, but are not limited to: (a) FC secs 9, 30, 31, 235 (culture); (b) FC secs 6, 29, 30, 31, 35, 235 (language); (c) FC secs 9, 15, 30, 31 (religion).

⁸¹ We can offer a three-fold, and relatively uncontroversial, explanation of the basic law's protection of such private space. First, every liberal democratic constitution is committed to zones of privacy, autonomy, self-governance and self-actualisation that lie somewhere beyond the reach of the state. Second, the fragility of the new South African government married to a deeply religious South African citizenry obliged the government to cede authority over the manner in which 'private' or 'independent' schools were permitted to serve rather narrow sectarian interests – even where the state could predict that privileged communities would use religion as a proxy for class so as to re-inscribe existing patterns of privilege. Third, the long history of school autonomy produced a reality, on the ground, that was simply impossible to ignore. The politically expedient motivations behind Afrikaner nationalism had ultimately created a genuine community – with a particular religious, cultural and linguistic vision of the good life – that sought to further the ends of the community through single-medium public schools. But this last conclusion is, of course, where the rubber meets the road. The extent to which the Constitution protects 'public' space and provides 'public' goods in the service of particularist ends is the question at hand. Liberal constitutional theory, with its dual commitments to 'equality of respect' (individual dignity) and 'equality of recognition' (communal pluralism), must often address competing, cognisable constitutional claims made by individuals and by communities regarding entitlements to state resources. See S Woolman 'Community rights: language, culture and religion' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2007) chap 58. See also C Taylor *The ethics of authenticity* (1991); I Benson 'The case for religious exclusivism: a response to Lenta' (2008) 1 *Constitutional Court Review* (forthcoming).

Justice Kriegler, in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* ('*Gauteng School Education Bill*'), offers a succinct account of the basis for and the extent of the basic law's protection of this private space in the educational domain.⁸² IC section 32(c), (and soon thereafter FC section 29(3)) and then extant national and provincial education legislation and subordinate legislation, he writes, collectively constitute a bulwark against the swamping of any minority's common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion ... There are, however, two important qualifications. Firstly, ... there must be no discrimination on the ground of race ... A common culture, language or religion having racism as an essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly, ... [the Constitution] ... keeps the door open for those for whom the state's educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.⁸³

Justice Kriegler offers no comment on, and certainly no support for, the contention that communities bound by common culture, language or religion have some entitlement to state support. Quite the opposite. While sympathetic to the belief that communities bound by common culture, language or religion are an important source of meaning for many South Africans, Justice Kriegler seems to suggest that the post-apartheid state will no longer support public institutions that privilege one way of being in the world over another.

But the truth about the existence of continued public support within public institutions for particularistic, comprehensive visions of the good in our post-apartheid constitutional order is more complex, more nuanced than one quote from a single judgment allows. Here, at least, is one place where the Constitutional Court's jurisprudence is not so radically under-theorised that it leaves us with no useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that make up the state and how those communities ought to engage one another.

⁸² *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC), 1996 4 BCLR 537 (CC) ('*Gauteng School Education Bill*').

⁸³ n 82 above, paras 39 - 42 (Kriegler J).

For example, in *Fourie*, the Constitutional Court found that the state could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly sanctioned marriages and that denied same-sex life partners the status, the responsibilities and the duties enjoyed by opposite-sex life partners.⁸⁴ State-sponsored discrimination would not be tolerated. The *Fourie II* Court did not make the same demands of religious dominations or religious officials. It held that the final Constitution had nothing to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership. So long as religious communities do not distribute public goods – or are not the sole distributors of such goods – the state, on the *Fourie* Court’s account, cannot justifiably coerce a religious community into altering its basic beliefs and practices.⁸⁵ But therein

⁸⁴ *Minister of Home Affairs v Fourie (Doctors for Life International & Others, amici curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 354 (CC) (*‘Fourie II’*). See also *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA), 2005 3 BCLR 241 (SCA) (*‘Fourie I’*).

⁸⁵ The *Fourie II* Court wrote: ‘For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth ... They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a people’s temper and culture, and for many believers a significant part of their way of life ... The test ... must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom ... The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.’ *Fourie II* (n 84 above) paras 90 - 96. The *Fourie II* Court commits itself to *five* propositions that are fundamental for associational rights, generally, and for religious, cultural and linguistic community rights, in particular. First, religious, cultural and linguistic communities are a critical source of meaning for the majority of South Africans. Second, religious, cultural and linguistic communities create institutions that support the material, intellectual, ethical and spiritual well-being of many South Africans. Third, religious, cultural and linguistic associations, as part of civil society, play an essential role in mediating the relationship between the state and its citizens. Fourth, while religious, cultural and linguistic associations are entitled to articulate – and make manifest through action – their ‘intensely held world views’, they may *not* do so in a manner that *unfairly* discriminates against other members of South African society. Fifth, although the ‘intensely held world views’ and practices of various religious, cultural and linguistic associations must, by necessity, exclude other members of South African society from some forms of membership and of participation, such exclusion does necessarily constitute unfair discrimination. Indeed, the *Fourie* Court’s decision makes it patently clear that to the extent that exclusionary practices are designed to further the legitimate constitutional ends of religious, cultural and linguistic associations, and do not have as their aim the denial of access to essential primary goods, then our constitution’s express recognition of religious, cultural and linguistic pluralism commits us to a range of

lies the rub for advocates of single-medium public schools. Public schools *are* public, not private entities, and the state has an overriding obligation to ensure equal treatment of *all* of its citizens by *all* of its state officials (including teachers and principals). Single-medium public schools that engage in exclusive and discriminatory linguistic admissions practices would appear to constitute, on their face, a departure from the constitutional norms of equality and dignity.⁸⁶

Is there space within our liberal constitutional framework for public institutions that service the (exclusive and discriminatory) ends of religious, cultural and linguistic communities with relatively comprehensive visions of the good? A significant number of constitutional structures and justiciable rights in the Constitution, as well as our Constitutional Court's gloss on the basic law, support the proposition that such space exists.

For example, the Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC') does not merely regulate disputes between the state and various communities or resolve conflicts between communities themselves. The CRLC is charged with the active promotion of such communities through the creation of cultural councils. Moreover, it possesses a clear mandate to build a constitutional democracy predicated on ethnic diversity and value pluralism.⁸⁷

FC section 15(2) offers another clear example of state accommodation of comprehensive visions of the good within existing state structures. It reads: 'Religious observances may be conducted at state or state aided institutions provided that (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.' Assume one religion represents all learners in a public school: the public school is well within its rights to hold religious

practices that the Constitutional Court will deem fair discrimination. The refusal of some religious officials to consecrate same-sex life partnerships as marriages under religious law is but one form of *fair* discrimination.

⁸⁶ See S Woolman 'Dignity' in Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2005) chap 36. See also N Haysom 'Dignity' in Cheadle *et al* (eds) *South African constitutional law: the Bill of Rights* (2002) 123.

⁸⁷ See S Woolman & J Soweto-Aullo 'Commission for the Promotion and the Protection of the Rights of Religious, Linguistic and Cultural Communities' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, March 2005) chap 24F.

observances. Assume learners from several different religions attend a given public school: the public school may legitimately observe multiple religious rituals for its different constituencies. In either case, public space is being used to advance the ends of specific religious communities.⁸⁸

The same must be said of the extent to which our constitutional order takes customary law and traditional leaders seriously. Traditional leaders have an entire chapter of the Constitution and a significant amount of normal legislation devoted to the exercise of their customary authority within a constitutional democracy. And here it is not a matter of two systems operating in parallel or the traditional within the constitutional.⁸⁹ Traditional leaders often exercise direct political authority over their constituents – and it is often the case that constituents turn to such leaders when municipal or provincial authorities fail to deliver services or resolve disputes. Traditional leaders exercise public power in public spaces.

The Constitution also places customary law on an equal footing with legislation, subordinate legislation, regulations and the common law. FC section 39(2) reads: ‘When interpreting any legislation, and when developing the common law or customary, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’ This section says nothing about two bodies of law – one public and one private. Indeed, as the *Pharmaceutical Manufacturers* Court famously put it: ‘There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.’⁹⁰ Indeed, the Constitutional Court has mediated conflicts between individual traditional interests and community traditional interests governed by both traditional bodies of law and statutory bodies of law as if there is but one system of law shared by multiple groups, associations and social formations. In *Bhe v Magistrate, Khayelitsha & Others*, the Constitutional Court found that the customary-law rule of male primogeniture – and several statutory provisions that reinforced the rule – impaired the dignity of and unfairly discriminated against the deceased’s two female children because the rule and the other impugned provisions prevented the children from inheriting the deceased’s estate.⁹¹ However, it is the

⁸⁸ See P Farlam ‘Freedom of religion, conscience, thought & belief’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2003) chap 41. See also Currie & De Waal (n 9 above) 336.

⁸⁹ See TW Bennett & C Murray ‘Traditional leaders’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2005) chap 26.

⁹⁰ *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* (2000) 2 SA 674 (CC), 2000 3 BCLR 241 (CC) para 44.

⁹¹ *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 1 SA 580 (CC), 2005 1 BCLR 1 (CC) (‘Bhe’).

manner in which the *Bhe* Court negotiates two different kinds of claim for equal respect – from within the traditional community and from the perspective of Western constitutional norms – that is most instructive for our current purposes. The *Bhe* Court characterises the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. By having shown that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that the ‘distorted’ rules of customary law are frozen in statute and case law that ‘emphasises . . . patriarchal features and minimises its communitarian ones’, the *Bhe* Court closes the gap between constitutional imperative and customary obligation.⁹² Had customary law been permitted to develop in an ‘active and dynamic manner’ – and not manipulated or perverted by apartheid – it would have already reflected the *Bhe* Court’s conclusion that ‘the exclusion of women from inheritance on the grounds of gender is a clear violation of . . . [FC s] 9(3)’.⁹³ Had customary law not been allowed to ossify, traditional communities would have noted how male primogeniture entrenched ‘past patterns of disadvantage among a vulnerable group’ and endorsed the *Bhe* Court’s reworking of customary understandings of the competence ‘to own and administer property’ in a manner that vindicates a woman’s right to dignity under FC section 10.⁹⁴ The *Bhe* Court is able, therefore, to assert that traditional communities have conceptions of dignity worth protecting without being obliged to endorse a rule that quite clearly offends the dignity interests of many women and female children within those communities.⁹⁵ And so, again, there are not two bodies of law – one public, one private. There is but one body of law: the basic, the constitutional.

This brief constitutional history of community rights – and especially the rights of religious, cultural and linguistic communities – captures the terrain upon which schools – public and private – based upon a particular comprehensive vision of the good can operate. No iron wall exists between the public and the private, or the sacred and the profane, in South African politics. That said, the Constitution’s active encouragement of diversity and pluralism in the

⁹² n 91 above, para 89.

⁹³ n 91 above, para 83.

⁹⁴ n 91 above, para 84.

⁹⁵ Judge Hlophe employs a similar disabling strategy in *Mabuza v Mbatha* 2003 4 SA 218 (C), 2003 7 BCLR 743 (C). He recognises the supremacy of the final Constitution at the same time as he asserts that the protean nature of customary law should enable it to conform, as necessary, to the dictates of the Bill of Rights. His nuanced assessment of the role of *ukumekeza* reconfigures siSwati marriage conventions in a manner that (a) refuses to allow *ukumekeza* to be used by the groom’s family as a means of control over the bride and (b) consciously places the husband and wife on an equal footing with respect to subsequent determinations of whether a valid marriage under siSwati customary law has taken place. See S Woolman & M Bishop ‘Slavery, servitude and forced labour’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, March 2005) chap 64.

public realm does not diminish its equally aggressive commitment to the rooting out of discriminatory practices. As a result, the ability of communities to maintain institutions that rely upon exclusionary admissions or membership practices, and still receive state support, is, as a constitutional matter, quite limited. The egalitarian commitments of our basic law also suggest that community-based institutions that rely upon exclusionary practices, but which do not receive a penny of state support, must likewise ensure that they do not offend constitutional and statutory norms designed to promote the dignity of all South Africans.

3 The legal framework for admissions policies and language policies at public schools

As we noted at the conclusion of the last section of this chapter, the public space afforded for the advancement of sectarian interests is quite limited. The importance of education as a public good in the modern nation state – for instrumental reasons associated with the future success of learners in the market or for intrinsic reasons that turn on every republic’s need for citizens capable of making informed and just political decisions – means that the use of public schools for sectarian ends is even more tightly circumscribed. Thus, while independent schools benefit from the clear commitment of FC section 29(3) to the creation of schools that further the ends of particular linguistic, cultural or religious communities – and permit exclusionary practices intended to further those ends – *no* public school is granted such autonomy.⁹⁶

3.1 The constitutional framework

In section 2 of this chapter, we noted that the Constitutional Court’s (and other commentators’) gloss on IC section 32(c) was quite generous. Recall that IC section 32(c) reads, in relevant part: ‘educational institutions based on a common culture, language or religion’ can be established, ‘provided that there shall be no discrimination on the ground of race’. Justice Kriegler, writing for the Court in *Gauteng School Education Bill*, characterised the entitlements under IC section 32 as follows:

[the Constitution] keeps the door open for those for whom the State’s educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children.

⁹⁶ See S Woolman ‘Defending discrimination’ (n 30 above) 31.

But there is a price, namely that such a population group will have to dig into its own pocket.⁹⁷

Again our social democratic constitution permits communities to establish institutions – such as schools – designed to further their preferred way of being in the world. However, no concomitant commitment is made by the interim Constitution to state funding for such ‘parochial’ schools. As Matthew Chaskalson points out:

The placing of a positive obligation on the state to fund cultural and religious schools is not commonplace in comparative constitutional and public international law. Had this been the purpose of IC s 32(c), one might have expected it to have been expressed in unambiguous language. This is certainly what one finds in the few constitutions which do oblige the state to fund school based upon a common culture. Thus s 23 of the Canadian Constitution confers under subsection (1) a right on English and French speaking minority populations of any province to receive primary and secondary school instruction in their own language and then states categorically:

(3) The rights of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or the French minority population of a province ... (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority educational facilities provided out of public funds.

... The absence in [IC] s 32(c) of any explicit provision for state funding of schools based upon a common language, religion, or culture therefore suggests that there is no constitutional obligation on the state to provide such funding.⁹⁸

Chaskalson does note, however, that his findings are limited to the text of the interim Constitution and that no conclusions can be drawn from his analysis regarding IC section 32(c) and be applied to the text of FC section 29.

FC section 29 is both more and less expansive with respect to the latitude afforded parents of learners in independent schools and public schools.

FC section 29(3) reads: ‘Everyone has the right to establish and maintain, at their own expense, *independent* educational institutions that (a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions.’ FC section

⁹⁷ *Gauteng School Education Bill* (note 82 above) para 42.

⁹⁸ M Chaskalson ‘Constitutional issues relevant to school ownership, governance and finance’ Paper presented at the Durban Education Conference, 1995 (manuscript on file with authors).

29(3) is on all fours, it would seem, with the gloss placed upon IC 32(c) by Justice Krieger in *Gauteng Education Bill* and Advocate Chaskalson in his memorandum.

The real action, in so far as public schools are concerned, revolves around FC section 29(2). This complex provision reads:

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account: (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.

It is possible to identify two interpretive poles for this passage. Some commentators contend that FC section 29(2) eliminates any express entitlement for single-medium public schools except where such schools offer redress for communities whose mother tongues were repressed under English and Afrikaner rule. At the other end of the spectrum, some analysts maintain that FC section 29(2) vouchsafes continued state support for all single-medium public schools and, in particular, single-medium Afrikaans schools.

FC section 29(2) does not support either of these two readings.

Let's begin with the uncompromisingly egalitarian position defended by Blade Nzimande.⁹⁹ Nzimande construes the second sentence requirements of FC section 29(2) as matters of administration and policy, and not constitutional law. Though the second sentence may provide a rather weak test for justification, it does not turn the choice of medium of instruction into a matter of mere policy preference. Moreover, FC section 29(2) does not, as Advocate Chaskalson suggested of IC section 32, possess the structure of an affirmative action provision. FC section 9(2) provides the perfect example of a constitutional norm whose aim is restitutionary justice.¹⁰⁰ Whereas FC section 9(2) differentiates between groups that have been historically disadvantaged and those that have not, FC section 29(2) does not do so. Single-medium public schools could be approved for any preferred language of instruction so long as instruction in a preferred language is reasonably practicable and the single-medium public school, as the best means of accommodating such instruction, satisfies the three threshold criteria of equity, practicability and redress. As we pointed out in section 2 above, the

⁹⁹ See B Nzimande (n 72 above).

¹⁰⁰ See, eg, *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC), 2004 11 BCLR 1125 (CC).

final Constitution, as a social democratic political document, does not view all legal and economic arrangements solely through the prism of equality and reparations.

Commentators such as our colleague Rassic Malherbe occupy a different place on the interpretive spectrum. In 'Constitutional Framework', Professor Malherbe contends that FC section 29(2) provides a strong guarantee – a rebuttable presumption – that linguistic communities can create and maintain publicly funded single-medium schools.¹⁰¹ With respect, Malherbe misreads FC section 29(2). He collapses, on several occasions, the distinction between the individual right to instruction in a mother tongue or preferred language (where practicable) and the obligation imposed upon the state to consider a range of options as to how to offer such instruction. Malherbe privileges single-medium public schools.¹⁰² FC section 29(2) does not. It mentions single-medium public schools as only one in a range of alternatives that the state has an obligation to consider. Moreover, any option considered by the state for delivering mother-tongue instruction – *one* of which is single-medium public schooling – must satisfy, to some degree, the three criteria of equity, practicability and historical redress. Malherbe characterises the three FC section 29(2) criteria (a) through (c) as mere factors to be considered in some global proportionality assessment. This characterisation of the three criteria seems far too weak. For a single-medium public school to be preferred to another reasonably practicable institutional arrangement – say dual-medium instruction or parallel-medium instruction – its advocates must demonstrate that a single-medium public school is more likely to advance or to satisfy the three criteria. Malherbe further claims that because the Constitution specifically refers to 'single medium institutions' that 'whenever they [single-medium institutions] are found to be the most effective way to fulfill the right to education in one's preferred language, single medium institutions should be the first option'.¹⁰³ Once again, because Malherbe collapses the distinction between a right to mother-tongue instruction and a state duty to consider single-medium public schools, he fails to recognise that the right to the former – mother-tongue instruction – is subject to 'practicability', and that the derivative or secondary 'privilege' with respect to the latter – a single-medium public school – can be a 'first option' for mother-tongue instruction only if it meets the three threshold criteria of equity, practicability and redress. Finally, that Malherbe's interest

¹⁰¹ See R Malherbe 'The constitutional framework for pursuing equal opportunities in education' (2004) 22(3) *Perspectives in Education* 9 ('Constitutional framework'); R Malherbe 'A fresh start: education rights in South Africa' (2001) 4(1) *European Journal for Education Law and Policy* 49.

¹⁰² Malherbe 'Constitutional framework' (n 101 above) 21.

¹⁰³ n 101 above, 22.

in protecting single-medium public schools leads him to misread FC section 29(2) seems, on our reading, rather clear from his final claim that the ‘right to education in one’s preferred language is guaranteed unequivocally in the South African Bill of Rights’.¹⁰⁴ This statement is false. As the above language of FC section 29(2) indicates, ‘the right to receive education in the official language or languages of [one’s] choice in public educational institutions’ is subject to a powerful internal modifier – namely, the right exists only where the provision of ‘that education is reasonably practicable’.¹⁰⁵

Given the foregoing analysis, we believe that FC section 29(2) is best parsed as follows.

(1) FC section 29(2) grants all learners ‘the right to receive education in the official language or languages of their choice in

¹⁰⁴ n 101 above, 22.

¹⁰⁵ For another reading of FC sec 29(2) that falls somewhere between the Nzimande position and the Malherbe position, see G Bekker ‘The right to education in the South African Constitution’ Centre for Human Rights Occasional Papers, available at http://www.chr.up.ac.za/centre_projects/socio/compilation2part1.html. Bekker writes: ‘The Constitution does not guarantee mother-tongue education for minorities, as does for example section 23 the Canadian Charter of Rights and Freedoms. The ... right in public institutions to education in the language of one’s choice ... is limited to education in an official language or languages and is further limited by the proviso – “where reasonably practicable” ... With regard to what would be “reasonably practicable”, the Department of Education’s Language in Education Policy provides that: ‘it is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in Grades 1 to 6 or 35 in Grades 7 to 12 learners in a particular grade request it ... Furthermore, the ... Policy provides that where there are fewer than the requisite number of learners that request to be taught in a particular language not already offered by a school in a particular school district, the head of the provincial department of education will determine how the needs of those learners will be met, taking into consideration the duty of the state and the right of the learners as spelled out in the Constitution ... The second part of section 29(2) provides that the state has to ensure effective access to and implementation of the right to education ... [T]he State must consider all reasonable alternatives including single medium education, taking into account equity, practicability, and the need to redress the imbalances of the past ... [W]here, for example, there are equal numbers of learners seeking education in two different languages, a dual-medium school might be the most equitable. Conversely, the most equitable solution might be a single medium school in cases where the majority of learners wish to be educated in one particular language. However, equitability is not the only deciding factor – practicability will also have to be taken into account. Finally ... anything that will have the effect of denying or impeding the right to education of previously disadvantaged communities will also have to be taken into account’ (emphasis added). It is not clear why, on Bekker’s account, a majority of learners ought to be able to determine that a single-medium public school remains a single-medium public school. That position is not consistent with the DoE’s language policy, international practice or the text of FC sec 29(2). A single-medium public school is simply one available means to ensure preferred language instruction: it is not a right possessed by all language speakers. For a more trenchant analysis of Malherbe’s position, see J Jansen ‘Race and restitution in education law and policy in South Africa and the United States’ in C Russo, J Beckmann & J Jansen (eds) *Equal education opportunities: comparative perspectives in educational law* (2006) 284 - 285.

public educational institutions where that education is reasonably practicable'. First note that the right to receive education in the official language or languages of one's choice is not, as the Supreme Court of Appeal in *Mikro* noted, an unqualified right. The right is subject to a standard of reasonable practicability. How should this internal limitation of the right be read?¹⁰⁶ We suggest that where sufficient numbers of learners request instruction in a preferred language – and we do possess regulations, as well as standards and norms, that make clear what those numbers are – and no *adequate alternative* school exists to provide such instruction, then a public school is under an obligation – with assistance from the state – to provide instruction in the language of choice.

(2) Before we proceed to the second sentence in FC section 29(2), it is worth taking another look at the meaning of 'reasonably practicable'. As an evidentiary matter, the learners or the state must be able to show that instruction in the language of choice is 'reasonably practicable' at the institution where the learners have applied for admission. So, for example, a single learner who requests instruction in Sepedi in a single-medium Zulu-speaking public school may be hard pressed to demonstrate that it is reasonably practicable to accommodate her at a single-medium Zulu-speaking public school. An inability to establish reasonable practicability would be even more pronounced where the learner who preferred instruction in Sepedi had access to an adequate school that offered Sepedi instruction. The failure to demonstrate that a request for instruction is 'reasonably practicable' ends, as the *Mikro* Court found, the FC section 29(2) inquiry.

(3) Assume, however, that the learner has shown that instruction in the language of choice is reasonably practicable at the institution where she has applied for admission. Only then do we consider the import of the second sentence of FC section 29(2).¹⁰⁷

(4) The second sentence of FC section 29(2) states that '[i]n order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account: (a) equity;

¹⁰⁶ For more on how internal limitations clauses function in various substantive provisions in the Bill of Rights, see S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2006) chap 34.

¹⁰⁷ It is worth drawing attention, again, to the basic structure of FC sec 29(2). FC sec 29(2)'s first sentence bestows upon individual learners a right to instruction in a language of their choice. FC sec 29(2)'s second sentence sets out the state's obligations vis-à-vis the decision-making process for deciding whether schools ought to be single-medium, parallel-medium, dual-medium or something else entirely. Neither sentence in FC sec 29(2) affords individual schools any rights with respect to determining a public school's medium of instruction.

(b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.’

(5) The second sentence of FC section 29(2) can only be read to mean that single-medium public institutions are but one way of accommodating the right of a learner to instruction in the language of choice. Moreover, the mere mention of single-medium public schools in no way privileges such institutions over dual-medium public schools, parallel-medium public schools, or public schools that accommodate the multilingualism of the student body in some other way. All that this portion of FC section 29(2) requires is that the state consider ‘all reasonable educational alternatives’ that would make mother-tongue or preferred-language instruction possible.

(6) However, even if single-medium public schools are found to be one of the reasonable alternatives for preferred language instruction, the single-medium public school must be able to satisfy a three-factor test. That is, for a single-medium public school to be preferred to another reasonably practicable institutional arrangement – say dual-medium instruction or parallel-medium instruction – it must demonstrate that it is more likely to advance or to satisfy the three listed criteria of equity, practicability and historical redress.

(7) The concession to single-medium public schools in FC section 29(2) constitutes a very weak right indeed. It is, perhaps, best described as right to have reasons or an entitlement to justification. That said, it is not without value for proponents of single-medium public schools. What the second sentence of FC section 29(2) ultimately requires is that the state be able to justify its preference for one form of school over another. Given the Constitution’s recognition of single-medium public schools as a legitimate means of providing preferred language education, the state will find itself under an obligation to demonstrate why another form of instruction – dual-medium, parallel-medium, special tutoring – will better serve the learners in question. Moreover, the recognition in the Constitution of community rights, associational rights, religious rights, cultural rights and linguistic rights creates a set of background conditions against which claims for single-medium schools public must be taken seriously. For where preferred language instruction is reasonably practicable, and where single-medium public schools satisfy the desiderata of equity, practicability and historical redress, the state cannot simply invoke an overriding commitment to ‘equality’ or ‘transformation’ in order to dismantle single-medium institutions. The Constitution is, ultimately, a post-apartheid constitution. Thus, at the same time as it sets its face against exclusion and discrimination, it rejects the kind of totalising view of the state that marked apartheid. Space remains – within both the private realm and the public realm – for the accommodation of multiple ways of being

in the world. That public space, as we have seen, is extremely narrow for single-medium public schools.¹⁰⁸ But however narrow it may be, it cannot be entirely wished away.

Where does this analysis leave us? FC section 29(2) provides no right to single-medium public schools. At best, it recognises such schools as one option to be considered amongst a range of other institutional arrangements designed to further the instruction of learners. And at best, it places an obligation on the state to justify any refusal to recognise and to support single-medium public schools. Advocates of single-medium public schools must recognise that when it comes to equity and historical redress, they are batting on a sticky wicket.

3.2 Statutory and regulatory framework

The apposite pieces of legislation governing this area seem of a piece. They suggest that few exceptions to the egalitarian commitments of these documents will be countenanced. The South African Schools Act (SASA) rejects unfair discrimination on any grounds. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) and regulations passed under the Gauteng School Education Act (GSEA) subject admissions requirements at public schools to even stricter scrutiny than the enabling legislation.¹⁰⁹ While these regulations expand – in line with FC section 9 – the grounds for a finding of unfair discrimination with respect to admissions policies, they do not make it *absolutely* impossible for an SGB to run a public school with a particular comprehensive vision of the good in mind. That said, FC section 29(2), when read with PEPUDA, SASA and GSEA, dramatically restricts the conditions under which single-medium public schools can claim the right to exclude learners who are ‘non-speakers’ of the single-medium of instruction.

A raft of other statutory provisions, regulations and policies works to further restrict the space within which single-medium public institutions can operate. For example, SASA section 5(3) states that ‘no learner may be refused admission to a public school on the grounds that his or her parent ... (b) does not subscribe to the mission

¹⁰⁸ Under what circumstances the state would be justified in creating a separate single-medium public school rather than a parallel-medium school or a dual-medium school? Presumably, one could argue that a Khoisan-medium public school is necessary because of the historical disadvantage experienced by the Khoisan people. FC sec 29(2) expressly recognises equity and historical redress as appropriate grounds for the creation of single-medium public schools – as well as parallel-medium or dual-medium schools.

¹⁰⁹ Regulations passed under the GSEA sec 11(1) and the Gauteng Education Policy Act 12 of 1998 (‘GEP’) sec 4(a)(i), entitled ‘Admission of learners to public schools’, GN 4138 of 2001 (PG 129 of 13 July 2001).

statement of the school'. One can't overemphasise the importance of this provision. Some SGBs have, under existing law, arrogated to themselves sweeping powers of control over the governance and the management of public schools. One mechanism of governance that such SGBs have employed in order to exclude unwanted learners is the school mission statement: such statements about a school's ethos cause many learners and their parents to self-select out of applying to given schools. This not-so-subtle form of exclusion occurs despite the fact that, according to SASA section 5(3)(b), a mission statement which proclaims that the school environment and curriculum must advance the interests of the Zulu nation cannot be used to exclude learners who are not Zulu or committed to the furtherance of Zulu tradition, language and culture.

Another source of support for the argument that single-medium public schools, and their SGBs, cannot dictate school language policy in a manner that inhibits multilingualism can be found in the Norms and Standards for Language Policy in Public Schools promulgated in terms of SASA and NEPA. These norms and standards place significant constraints on the ability of single-medium public schools to turn away learners who prefer, and will benefit from, instruction in another language. The Norms and Standards for Language Policy in Public Schools, promulgated in terms of SASA section 6(1) read, in relevant part:

C. The rights and duties of the school

(1) Subject to any law dealing with language in education and the Constitutional rights of learners, in determining the language policy of the school, *the governing body must stipulate how the school will promote multilingualism through using more than one language of learning and teaching, and/or by offering additional languages as full-fledged subjects ... or through other means approved by the head of the provincial education department.* (Emphasis added.)

(2) Where there are less than 40 requests in Grades 1 to 6, or even less than 35 requests in Grades 7 to 12 for instruction in a language in a given grade not already offered in a particular school district, the head of the provincial department will determine how the needs of those learners will be met, taking into account: (a) the duty of the state and the rights of learners in terms of the Constitution; (b) the need to achieve equity; (c) the need to redress the results of past racially discriminatory laws and practices; (d) practicability; (e) the advice of the governing bodies and principals of the public schools concerned.

D. The rights and duties of the Provincial Education Departments

(3) It is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in Grades 1 to 6 or 35 in Grade 7 to 12 learners in a particular grade request it in a particular school. (4) The provincial head of department must explore ways and means of sharing scarce human resources ... and providing alternative

language maintenance programmes in schools ... that cannot be provided with ... additional languages of teaching.¹¹⁰

These norms and standards contain a number of notable features. The norms make it clear that a group of 40 learners (Grades 1 to 6) or a group of 35 learners (Grades 7 to 12) constitute a sufficiently largely cohort to demand instruction in a preferred language. A bar for linguistic accommodation has been set against which all schools may be measured. That said, these threshold requirements are not obligatory: they remain guidelines. What these norms tell us then is that the new South African state is not, unlike the apartheid state, a totalising entity. It will not subordinate the plural, comprehensive visions of the good of its citizenry to an ideological commitment to equality. So while the state will apply pressure – through the law – on single-medium public schools to accept learners who prefer instruction in another language, it cannot use the mechanisms of a totalising state to achieve such ends. The somewhat ironic result of the norms and standards' commitment to linguistic pluralism and the status of the norms and standards as mere guidelines is that single-medium public schools are 'encouraged' to maintain their current cramped sense of identity.

3.3 Case law

Some may find the proposition that single-medium public schools are 'encouraged' to maintain their identity and retain their integrity hard to swallow. When viewed through the prism of single-medium public school advocacy, the statutes, the regulations and the policy circulars that articulate equity requirements at public schools and the body of case law built up over the past ten years may appear to evince nothing more than the state's desire to rid itself of single-medium Afrikaans-speaking public schools.¹¹¹ And, in fact, the case law demonstrates that the primary fault line in (reported) public school admissions litigation occurs primarily around the use of Afrikaans as the sole medium of instruction.

¹¹⁰ These language policy statements are drawn from sec 3(4)(m) of NEPA, 1996 (Act 27 of 1996), and the Norms and Standards Regarding Language Policy published in terms of Section 6(1) of the South African Schools Act, 1996 (GN 383, volume 17997 (9 May 1997)).

¹¹¹ See Address by Naledi Pandor, MP, Minister of Education, Introducing the debate on the Education Budget Vote 15, National Assembly (17 May 2005), available at <http://www.pmg.org.za/briefings/briefings.php?id=208>: 'On Sunday I read reports in the press that English was to be made optional in schools. The report suggested that children will no longer learn English. That is not the intention of the policy. It opens up the possibility of developing the other official languages into languages of learning and teaching. Clearly while we work to achieve this noble objective, the current choice of English and Afrikaans as the languages of learning and teaching will remain.'

Two features of this body of case law are worth noting at the outset. First, the courts have charted a course largely consistent with the analysis offered above – even if the cases themselves do not offer especially close readings of FC section 29(2) or other applicable laws.¹¹² The five cases discussed below reflect the extent of the state’s power in determining public school admissions requirements. They also reflect the sectarian interests that secure continued judicial solicitude – even in the face of the state’s pursuit of increasingly egalitarian arrangements. Second, this quick survey of the cases litigated over language policy in public schools allows us to contrast, meaningfully, the space that various forms of community life – religion, language, culture – are afforded in the public realm with the space afforded various forms of community life in the private realm. It should come as no surprise that the Constitution and our courts refuse to endorse an arrangement of public institutions that distribute public goods in a manner that perpetuates the systemic discrimination, exclusion and oppression associated with apartheid. However, the Constitutional Court still recognises that the majority of South Africans draw the better part of the meaning in their lives from the religious, linguistic and cultural communities of which they are a part. Thus, while the state may be entitled to set limits on the extent to which state resources can be used to advance sectarian ends, the Constitution vouchsafes significant amounts of private space within which various comprehensive visions of the good can be pursued.

3.3.1 *Matukane*¹¹³

As one might have predicted, the state has weighed in on the side of black learners who wish to receive instruction in English but found themselves excluded from Afrikaans-medium, or predominantly Afrikaans-medium, schools. At issue in *Matukane & Others v Laerskool*

¹¹² While these five cases ‘fit’ within the analytical rubric supplied by FC sec 29(2) and the gloss we place on FC sec 29(2), the judgments often turn on other grounds. South African courts prefer technical textual solutions to resolutions that require that they answer vexed questions about the content of fundamental rights. See *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as amici curiae) (No 2)* 2003 1 SA 495 (CC) (Legislation found invalid because the government failed to pass the Act in the timeframe required by the Constitution, and not because it was inconsistent with FC sec 19.) Our courts have likely avoided addressing the extent to which FC sec 29(2) vouchsafes single-medium public schools because the matter is so politically charged. The *Mikro* Court opts to resolve the dispute over single-medium public schools in terms of SASA and the *Laerskool Middleburg* Court ultimately turns to FC sec 28(2) and the ostensibly unassailable proposition that the rights of the child are always paramount. However, all close and meaningful readings of legal texts go beyond the express language of a decision. The internal logic of the five judgments speaks directly to the appropriate contours of FC sec 29(2).

¹¹³ *Matukane & Others v Laerskool Potgietersrus* 1996 3 SA 223 (T).

Potgietersrus was the attempt by the parent of three learners, Mr Matukane, to enrol his three children (13, 13 and 8) at the Laerskool Potgietersrus. The Laerskool Potgietersrus was then, and remains still, a state-aided *parallel-medium* primary school.

Mr Matukane, a black resident of Potgietersrus, spoke to the principal on 11 January 1996. The principal informed Mr Matukane that Mr Matukane would have to wait until 25 January 1996 for a determination as to whether there was space available at the school. Mr Matukane was not convinced that any such delay was warranted. He approached the provincial Department of Education ('DoE'). The DoE informed Mr Matukane that his children could be enrolled in the school. Mr Matukane arrived at the school on 22 January 1996, completed the necessary application forms and bought the school uniforms as directed. The application form included a section requiring that parents and children agree to adhere to the rules and the objectives of the school. The stated objective on the application form read: 'the provision of excellent and relevant education with a Christian national character in mother-tongue medium Afrikaans or English.' Mr Matukane returned the next day with his children for their first day at school. The entrance of the school was blocked by a group of white parents who refused to allow Mr Matukane or his children to enter the school. Mr Matukane returned to the school again the following day. A standoff between group a group of black parents and learners and white parents and learners ensued. Once again the Matukane children were denied access to the school. After being rebuffed this second time, Mr Matukane managed to secure a temporary place for his children at the already overcrowded Akasia School, the only English-medium public school in the town.

Other black parents had experienced less dramatic rejections by the school. They were told that their children could not be accommodated because the school was full: at least 55 black children had been refused admission to the school in this manner. No black child had ever been admitted to the school. No black children appeared on the current waiting list. On top of these indignities, the school bussed in white children from Zebediela, a neighbouring town – despite the fact that a school catering to Afrikaans-speaking learners in Zebediela had space available. After Mr Matukane's experience of overt racial discrimination, a group of black parents decided to approach the High Court for an order requiring the Laerskool Potgietersrus to accept their children.

In the High Court, Laerskool Potgietersrus argued that it was unable to accommodate more children and that it had not rejected the children on racial grounds. At the time of the hearing, Laerskool Potgietersrus had 580 Afrikaans-speaking learners and 89 English-speaking learners. The Laerskool Potgietersrus expressed concern

that if it admitted these children, it would be swamped by English-speaking children who would destroy the Afrikaans ethos of the school. The school contended that IC sec 32(c) vouchsafed the right 'to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race' and entitled the school to adopt admissions requirements designed to maintain the existing 'culture' and 'ethos' of the school. The Laerskool Potgietersrus also asserted that a DoE directive gave the SGB the sole power to determine its criteria for admission.

Despite the school's assertion that the refusals were based on overcrowding, not race, the facts clearly painted a different picture. No black children had been admitted to the school. There were no black children on the waiting list. White English speaking learners had already been admitted. Afrikaans-speaking learners were being bussed in. Room existed to accommodate *more* English-speaking children. Little danger existed of the school's Afrikaans culture and ethos being destroyed even if every black English-speaking learner were to be accepted. The ratio of Afrikaans-speaking learners to English-speaking learners would remain 5:1. Given these facts, the *Matukane* Court held that it could draw no other inference as to actual intent of the school's admissions policy other than that it discriminated directly on the basis of race, ethnic and social origin, culture and language. Given that the discrimination took place on one or more of the grounds listed in IC sec 8, unfairness was presumed. The burden shifted to the school to show that the discrimination was fair.

As *Gauteng Education Bill* clearly holds, the respondents had the right, under IC section 32(c), to establish an independent educational institution designed to promote Afrikaans language and culture so long as they did not discriminate on the basis of race. The school had no right to exclude learners from a public institution based upon culture, and it certainly had no right to exclude any learner from a public institution or a private institution based upon race. (Moreover, while the Laerskool Potgietersrus might have been justified in its desire to privilege Afrikaans over English, the school failed to demonstrate why a modest increase in black English-speaking learners would deleteriously affect the school's promotion of Afrikaans language and culture.) The *Matukane* Court concluded that 'language and culture' were operating as surrogates for 'race', that the school had discriminated intentionally against the *Matukane* children and other black learners on the grounds of race and that the respondent could not, therefore, discharge its burden of proving the fairness of its (racist) admissions policies.

3.3.2 Laerskool Middelburg¹¹⁴

Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere extends the holding in *Matukane* from parallel-medium to single-medium public schools. However, in *Laerskool Middelburg*, the High Court was clearly more troubled by the conflict between the right to a single-medium public school and the right to be educated in the official language of one's choice.

At the level of rhetoric, the *Laerskool Middelburg* Court initially rebuffed the provincial DoE's attempt to turn the single-medium public school into a parallel-medium public school. It held that neither SASA nor the regulations issued under it authorised the provincial HoD to instruct a school to change from single-medium instruction to parallel-medium instruction and declared that the Head's administrative conduct was *prima facie* unfair.¹¹⁵ The *Laerskool Middelburg* Court then rejected the department's argument that the applicant school's admissions policy discriminated unfairly against English learners. The High Court held that in circumstances in which the English learners could be accommodated elsewhere, the DoE's actions simultaneously violated the FC section 29(2) right of Afrikaans-speaking learners to single-medium schools and the FC section 29(2) right of English-speaking learners to an education in the official language of their choice in public educational institutions.¹¹⁶

Having notified the state that it had failed to take cognisance of the commitment to linguistic diversity in FC section 29, the *Laerskool Middelburg* Court conceded that any entitlement to a single-medium school was subordinate to the right of every South African to a basic education, the right to be educated in a language of choice and the palpable need of all South Africans to share education facilities with other linguistic and cultural communities. The *Laerskool Middelburg* Court was unwilling to allow the needs of 40 English-speaking – and largely black – learners to be prejudiced by the state's failure to play by the rules and by the school's intransigence on the issue of parallel-medium education. FC section 28(2)'s guarantee that 'the best interests of the child' are always of 'paramount importance' was held by the *Laerskool Middelburg* Court to trump the linguistic and cultural

¹¹⁴ *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T).

¹¹⁵ n 114 above, 171 - 172, 176.

¹¹⁶ n 114 above, 173 175.

rights of the school's Afrikaans-speaking learners.¹¹⁷ So while the state's actions had, in fact, been *mala fide*, it was still able to secure a victory for educational equity by getting the proper parties – namely the children – before the High Court.

Although the outcome was certainly correct, the Laerskool Middelburg Court's route in arriving at its conclusion cannot pass without comment. If our reading of FC section 29(2) offered above is correct, then the Laerskool Middelburg Court should never had had to rely on FC section 28(2). In terms of FC section 29(2), the High Court should have first determined whether it was 'reasonably practicable' to accommodate English-speaking learners in Laerskool Middelburg. The High Court's conclusion – that the only public school in the area had to take in 40 local learners – suggests that it was 'reasonably practicable'. That should, or could, have been enough. But further support for the Laerskool Middelburg Court's conclusion can be found in the second sentence of FC section 29(2):

In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account: (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.

The *Laerskool Middelburg* Court's conclusion that a single-medium public school must, in order to accommodate these 40 learners, become a parallel-medium school is consistent with reading FC section 29(2) to stand for the proposition that single-medium institutions are but one way of accommodating the right of a learner to instruction in the language of choice. Moreover, the mere mention of single-medium public schools in no way privileges such institutions over parallel-medium public schools or dual-medium public schools. The second sentence of FC section 29(2) – and its commitment to

¹¹⁷ The *Laerskool Middelburg* Court correctly concludes that the rather weak entitlement to a single-medium public educational institution is clearly subordinate to the right of every South African learner to an education in a preferred language. Different cultural communities must learn to share our limited stock of good schools. The *Laerskool Middelburg* Court seems to be on far shakier grounds when it suggests that it was an open question as to whether the exercise of own language and culture was better furthered where provision was made in a school for the exclusion of other languages. Moreover, the Court's claim that a single-medium institution is probably best defined as a claim to emotional, cultural, religious and social-psychological security trivialises the desire to maintain basic, constitutive attachments. The desire to sustain a given culture – especially a minority culture, such as Afrikaner culture – is best served by single-medium institutions that reinforce implicitly and expressly the importance of sustaining the integrity of that community. The *Laerskool Middelburg* Court must also be wrong when it claims that the conversion of a single-medium public institution to a dual-medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic communities claim to a school organised around its language and culture. That is, with respect, exactly what the conversion *per se* does.

equity, practicability and historical redress – provides further justification for the *Laerskool Middelburg* Court’s conclusion that a single-medium public institution was obliged, under the circumstances, to become a parallel-medium public institution.

3.3.3 *Mikro*¹¹⁸

At issue in *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* was the refusal of an Afrikaans medium public school to accede to a request by the Western Cape Department of Education (‘WCDoE’) to change the language policy of the school so as to convert it into a parallel-medium school. Acting on behalf of 21 learners, the WCDoE had directed the primary school to offer instruction in their preferred medium: English. The WCDoE had interpreted the Norms and Standards issued by the national DoE under SASA as requiring all primary schools with 40 learners who preferred a particular language of learning and teaching to offer instruction in that language.

The Supreme Court of Appeal summarily rejected both the WCDoE’s reading of the Norms and Standards and its gloss on FC section 29(2). It did so on three primary grounds.

First, the Supreme Court of Appeal overturned Bertelsmann J’s finding in *Laerskool Middelburg* that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. At best, the Supreme Court of Appeal said, the Norms and Standards constituted guidelines for members of the department and those parties responsible for the governance of public schools. Second, the Supreme Court of Appeal held that SASA section 6(1) granted neither the national Minister of Education nor the provincial MEC or HoD the authority to determine the ‘language policy of a particular school, nor does it authorise him or her to authorise any other person or body to do so’. The power to determine language policy vests solely with the SGB of a given public school and is subject only to the final Constitution, SASA and any applicable provincial law. Third, the Supreme Court of Appeal rejected the applicant’s contention that FC section 29(2) could be ‘interpreted to mean that everyone had the right to receive education in the official language of his or her choice at *each and every* public educational institution where this was reasonably practicable’.¹¹⁹ Such a reading, the *Mikro* Court held, would mean that any significant cohort of learners could demand instruction in their preferred language if it was conceivably

¹¹⁸ *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* 2006 1 SA 1 (SCA), 2005 10 BCLR 973 (SCA) (‘*Mikro*’).

¹¹⁹ n 118 above, para 30.

possible to do so. The *Mikro* Court noted that such a reading would lead to the absurd consequence that ‘a group of Afrikaans learners would be entitled to claim [a right] to be taught in Afrikaans at an English medium school immediately adjacent to an Afrikaans medium school which has vacant capacity provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school’.¹²⁰ The Supreme Court of Appeal held that the correct reading of FC section 29(2) affords the state significant latitude in deciding how best to implement this right and that FC section 29(2) grants everyone a right to be educated in an official language of his or her choice at a public educational institution if, in the totality of circumstances, it is reasonably practicable to do so. That means, of course, that the right is only to language instruction, generally, and, thus to instruction at some school within an accessible geographical domain, and not, as the applicants had claimed, to language instruction at each and every public educational institution and thus to any school the applicants wished to attend.

The decision is notable in two important respects. First, it curbs the state’s power to determine – exclusively – public school admissions policies and language policies. Such power continues to be shared – to some degree – with each existing SGB. Second, while affirming the rights of learners to instruction in a preferred language, it simultaneously confirmed that some public schools were entitled to offer instruction in a single medium.

The effect of the Supreme Court of Appeal’s decision in *Mikro* is to reverse, partially, the spin of *Laerskool Middelburg*. Neither parallel-medium instruction nor dual-medium instruction are automatic default positions for public school language policy. The *Mikro* Court takes the language of FC section 29(2) seriously. It places the state under an obligation to show that its language policy – designed to give learners instruction in their preferred language – is reasonably practicable. Thus, where, as in *Mikro*, it is not reasonably practicable to give English-speaking students instruction at a single-medium Afrikaans-speaking public institution, because other adequate alternatives exist, then the state cannot force a single-medium Afrikaans-speaking institution to offer parallel instruction. Although the *Mikro* Court does not engage the second sentence of FC section 29(2), one can easily draw the inference that the state would have failed to discharge the burden of showing that it had considered all reasonable alternatives for accommodating the English-speaking learners in question and that it had also failed to demonstrate that maintaining a single-medium Afrikaans-speaking public school – in circumstances where adequate English medium instruction was

¹²⁰ n 118 above.

available elsewhere – offended the constitutional commitment to equity and to historical redress. It is impossible to read *Mikro* and not come away with the impression that a community's interest in maintaining its linguistic and cultural integrity may – under a narrow set of conditions – legitimately trump purely ideological considerations of equity.

3.3.4 *Seodin*¹²¹

Seodin reinforces the holdings in *Matukane* and in *Laerskool Middelburg* and appears to confirm the impression that *Mikro* only protects single-medium public schools under a relatively narrow set of circumstances. In *Seodin Primary School v MEC Education, Northern Cape*, the High Court held that the SGBs of three Afrikaans medium public schools could not use language preference alone to exclude black, English-speaking learners from admittance where the provision of English language instruction was 'reasonably practicable'. In addition, in all three cases heard in *Seodin*, the single-medium Afrikaans public schools were undersubscribed. Finally, the High Court found that public pronouncements by the MEC for Education on the need for greater integration in the public schools system could not be interpreted as an *ultra vires* act aimed at the elimination of single-medium – read Afrikaans – public schools. Where public schools are concerned, *Seodin* makes it clear that the Constitution will not tolerate racist and discriminatory admissions criteria masquerading as policies that claim to be about the need to maintain the linguistic and the cultural integrity of a given community. As Northern Cape Judge President Frans Kgomo noted in his judgment: 'It would be a sad day in the South African historical annals that hundreds of children remained illiterate or dropped out of school because they were excluded from under-utilised schools purportedly to protect and preserve the status of certain schools as single-medium Afrikaans schools.'

3.3.5 *Hoërskool Ermelo I*¹²² and *Hoërskool Ermelo II*¹²³

Hoërskool Ermelo offers perhaps the best set of circumstances under which to assess – in terms of FC section 29(2) – the respective rights of learners to choose their preferred language of instruction, the ability of SGBs to determine public school language policy and the

¹²¹ *Seodin Primary School v MEC Education, Northern Cape* 2006 1 All SA 154 (NC).

¹²² *Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga* [2007] ZAGPHC 4 (2 February 2007) ('*Hoërskool Ermelo I*').

¹²³ *Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga* [2007] ZAGPHC 232 (12 October 2007) ('*Hoërskool Ermelo II*').

power of the state to alter language policy where the needs of learners so warrant.

In *Hoërskool Ermelo I*, Judge Prinsloo, of the Pretoria High Court, suspended a decision of the Mpumalanga education department to dissolve the school's governing body and to replace it with a departmentally appointed committee. The dissolution would have enabled the Mpumalanga education department to alter the school's language policy and allowed 113 English-speaking pupils to receive instruction in English.¹²⁴

On appeal, Transvaal Judge President Ngoepe, and Judges Seriti and Ranchod set aside the High Court ruling in *Hoërskool Ermelo I*. The *Hoërskool Ermelo II* Court found that the Afrikaans-medium public school must admit English-speaking pupils. Of particular moment for the *Hoërskool Ermelo II* Court was the under-subscription of Hoërskool Ermelo. Given that Hoërskool Ermelo was operating at only half-capacity, the Full Bench found that it was 'reasonably practicable' – as contemplated by FC section 29(2) – for the high school to accommodate the 113 Grade 8 learners. The mere fact that all the classrooms were being employed and that the existing curriculum turned on the current availability of classrooms did not constitute sufficient grounds for excluding English learners and maintaining Hoërskool Ermelo as a single-medium Afrikaans-speaking public school. Equity, practicability and historical redress – the three express grounds for assessment of existing language policy in terms of FC section 29(2) – justified the transformation of Hoërskool Ermelo from a single-medium public school into a parallel-medium public school.

4 Conclusion

The foregoing account supports a number of relatively uncontroversial conclusions. The Constitution – and a broad array of statutes – recognises that for religious, cultural and linguistic communities to survive and to flourish in South Africa, these communities must be able to establish educational institutions that cater for their specific 'ethos'. Such institutions must, by their very nature, enforce admissions policies that discriminate between learners who wish to participate in affairs of a given religious, linguistic and cultural

¹²⁴ Judge Prinsloo's interim order froze Mpumalanga Education MEC Siphosezwe Masango's instruction that Ermelo High School enrol 113 children that the provincial government claimed could not be placed in other schools. The DoE decided not to wait for the full hearing. In their papers, the DoE and the parents of the learners claimed that right to education in the language of choice was impaired by the school's language policy and its refusal to admit children who were not prepared to be taught in Afrikaans.

community, and those learners who do not wish to participate in or advance the ways of being of a given community. The Constitution, PEPUDA, SASA, NEPA and a raft of regulations certainly allow *independent schools or private schools* to employ admissions policies that discriminate between learners in a manner carefully designed to advance legitimate constitutional ends.¹²⁵ However, when it comes to public schools, the state's tolerance for discrimination of any kind – even via means narrowly tailored to realise otherwise legitimate constitutional objectives – ought to be tightly circumscribed and rightly inclines in favour of learners from historically disadvantaged communities. As we have seen in our analysis of FC section 29(2), where sufficient resources exist to ensure that all South African learners receive an adequate, and for all intents equal, education in their preferred language of instruction, then the state ought to do everything it can to accommodate linguistic and cultural diversity and operate in a manner that enables single-medium public schools to continue to exist. However, the Constitution's commitment to meaningful transformation means that the right of all learners to a basic education in their preferred language of instruction at public schools generally trumps more particularistic claims on public resources. The Constitution's answer to those parents who wish to school their children in the language, culture or religion of their choice is straightforward: you may 'dig into your own pocket' and build an 'independent school' in your own time.

Thus, when we ask whether a public school that wishes to provide an education in Afrikaans for Afrikaans children can employ an admissions policy that discriminates between applicants on the basis of their willingness to adhere to a curriculum that requires that all classes be taken in Afrikaans, the answer must be 'that depends'. The Constitution, SASA, PEPUDA and cases such as *Matukane*, *Laerskool Middelburg*, *Seodin* and *Ermelo* all buttress the rather unassailable proposition that discrimination on the basis of language or culture cannot be used as a proxy for discrimination on the basis of race. A proper analysis of FC section 29(2) reinforces the proposition – at

¹²⁵ See *Taylor v Kurtstag* [2004] 4 All SA 317 (W) (FC sec 18 – freedom of association – 'guarantees an individual the right to choose his or her associates and a group of individuals the right to choose their associates'. The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform); *Wittmann v Deutsche Schulverein*, Pretoria 1998 4 SA 423 (T) 451, 1999 1 BCLR 92 (T) ('Does this mean that private parochial schools which do not receive state aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative. Section ... 18 of the Constitution recognise[s] ... freedom of association. Section 15(1) recognise[s] the freedom of religion, which includes the right to join others in [the] propagation of the faith ... Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules').

least implicitly accepted by the *Matukane*, *Laerskool Middelburg*, *Mikro*, *Ermelo* and *Seodin* Courts – that where learners do not have ready access to a public school that offers them adequate instruction in their preferred medium of instruction, then neither an SGB nor a principal can exclude learners in terms of an admissions policy that seeks to privilege a particular language. The lesson of the Supreme Court of Appeal’s decision in *Mikro* is that the window for exclusion on the basis of language and culture is rather small indeed: only where the learners in question already have easy access to a school that offers them adequate instruction in their preferred medium of instruction, can the single-medium school in question claim, with some force, that neither the learners nor the state has any business forcing a single-medium institution into becoming a parallel-medium institution.¹²⁶

Let us be clear. The Constitution neither provides a guaranteed right to single-medium public schools nor does it prohibit the existence of such institutions. The Constitution sets its face against the kind of cultural and linguistic hegemony that marked apartheid and, at the same time, recognises the need for a multiplicity of patterns of school language policy. The constitutional norms that bracket language policy do not entail some ideological pre-commitment to any particular language practice: say English over Afrikaans, or Zulu over Xhosa. Instead these norms require that any language policy meet such fixed, yet fluid, desiderata as equity, practicability and historical redress. In some instances, this set of constitutional desiderata will allow for the continued existence of single-medium Afrikaans (or English) public institutions. In other instances, circumstances will dictate that such schools change their language policy. In either case, the state must be in a position to offer a compelling evidentiary basis for its conclusion regarding the change or the maintenance of a single-medium public schools’ language policy. In the absence of such reasons, our courts will view state-

¹²⁶ The willful misconstruction of the constitutional space that exists for single-medium public schools is evident from the following press release: ‘The Federation of Afrikaans Cultural Associations, the FAK, welcomes the Supreme Court of Appeal’s rejection of an appeal by the Western Cape MEC for Education to try and force Laerskool Mikro to change its language policy. This judgment is a victory for the autonomy of communities and in fact represents a small step closer to the application of the National Department’s policy of mother-tongue instruction for all South African children. The FAK hopes that the continuing pressure by provincial education departments on Afrikaans schools to anglicise in the name of greater access will cease ... The FAK appeals to provincial education departments to stop playing off the right to access against mother-tongue instruction, and to alleviate the crisis of access to quality education for all by applying themselves to make mother-tongue instruction a reality for all South African children.’ Federation of Afrikaans Cultural Associations ‘FAK welcomes the *Mikro* judgment’ (27 June 2005), available at <http://vryeafrikaan.co.za/lees.php?id=272> (accessed 24 January 2007).

sponsored changes in policy as arbitrary exercises of state authority and violations of the apposite constitutional and statutory provisions.

For many, the constitutional obligation placed upon the state to justify its actions may not provide sufficient solace. For those learners and their parents for whom the window provided by FC section 29(2) is too small and for whom a single-medium school designed to further a particular linguistic, cultural or religious vision of the world is an absolute necessity, the Constitution again has 'an' answer. Under FC section 29(3), they may 'dig into their own pocket' and build the school on their own time and in their own fashion.¹²⁷

¹²⁷ See *Gauteng School Education Bill* (n 82 above) para 42.

1 Introduction

1.1 Communitarianism and the Constitution

Given the conclusions we reached in the last chapter, it should not be surprising that the constitutional and statutory protection afforded independent schools that promote a comprehensive vision of the good are the least fraught subject assayed in this book. The communitarian commitment to such schools does not threaten, in any pronounced fashion, the egalitarian and the democratic rights, values and principles enshrined in our Constitution. Indeed, we suggest, towards the end of this chapter, that the social capital produced by such ostensibly exclusive institutions – independent schools – ultimately redounds to the benefit of society as a whole. In sum, exclusivist institutions often advance, directly and indirectly, the egalitarian aims of our basic law.¹²⁸

1.2 Autonomy and discrimination: Community and exclusion

This chapter attempts to answer the following two linked, but distinct, questions. First, to what extent does our current legal regime tolerate independent schools that advance particular and often comprehensive visions of the good? Second, to what extent may such independent schools discriminate between learners in order to further their legitimate, constitutional-sanctioned religious, cultural or linguistic ways of being in the world?

¹²⁸ See I Benson ‘The case for religious inclusivism: A response to Lenta’ (2008) 1 *Constitutional Court Review* (forthcoming)(notes that we tend to forget that ‘public charities’ – such as hospitals and health clinics, food centres and shelters, primary schools and public schools – are often underwritten by religious institutions.)

These questions are particularly piquant because, when it comes to public schools, the state's tolerance for discriminatory religious, cultural and linguistic admissions policies or expulsion procedures is extremely limited and rightly inclines in favour of learners from historically disadvantaged communities. As we have argued above, the Constitution does not guarantee a right to single-medium public schools, faith-based public schools or culturally homogenous public schools. For those learners and their parents who want to know whether they are entitled to create and to maintain a school that further a particular linguistic, cultural or religious way of being in the world, the Constitution has a much more sanguine response. Under FC sec 29(3), learners and their parents may, using their own resources, build an independent school that offers their preferred medium of instruction, that reinforces a specific cultural ethos, or that promotes a comprehensive religious or cultural vision of the good.¹²⁹

In the last chapter, we showed that, as a statutory matter, the significant autonomy exercised by public schools were subject to a number of critical checks: (1) no public school SGB decision may block – on the basis of race or another ascriptive characteristic – the ability of learners and parents from historically disadvantaged communities to become members of a school's community should they meet all of the accepted statutory and regulatory criteria; (2) codes of conduct must be designed in a manner that enhances inclusion and diversity and does not unfairly limit the expressive, religious, cultural or linguistic rights of learners. The SGBs of independent schools that further a particular linguistic, cultural or religious way of being in the world can not possibly be subject to the same restrictions: such restrictions would make them impossible to create and to sustain. The exact nature of the restrictions imposed

¹²⁹ It is essential for any party engaged in this debate not to participate in 'molehill politics' – a political term of art which means exactly what it suggests. Learners at independent schools constitute only 2.4% of the national total. Independent schools make up approximately 3% of the total number of primary and secondary schools in South Africa. See KM Lewin & Y Sayed *Non-government secondary schooling in sub-Saharan Africa: exploring the evidence in South Africa and Malawi* (2005) 51 - 52. We are, in this chapter, concerned with an even smaller cohort of learners and schools. Learners at non-state-aided independent schools – or non-subsidised independent schools – in Gauteng make up only 14% of learners in independent schools. In other words, learners in independent schools that are subject to greater strictures than those that apply in public schools – in terms of curricula devoted to a particular religion, language or culture – constitute roughly 0.4% of all learners in Gauteng schools in Grades 8 - 12: Lewin & Sayed (above) 54. The remaining learners in subsidised independent schools increasingly draw clientele from across the social classes and ethnic communities: Lewin & Sayed (above) 43, citing L Hofmeyr & S Lee 'The new face of private schooling' in Chisholm (n 26 above). See, generally, R Gotkin *Fiscal and regulatory state policy for private schools in South Africa* (unpublished master's dissertation, University of Cape Town, 1993); V Dieltiens *Private education in South Africa: a literature review* University of the Witwatersrand (EPU) (2002).

upon them by the Constitution and by statute is the subject matter of this chapter.

2 Community rights and the Constitution

As we have noted above, the Constitution, as a social democratic document, carves out significant ‘private’ space within which self-supporting cultural, linguistic and religious formations might flourish. The Constitutional Court has recognised the sanctity of that space. In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* (‘*Gauteng School Education Bill*’), Kriegler J wrote that IC sec 32(c) and then extant national and provincial education legislation and subordinate legislation, collectively constitute

a bulwark against the swamping of any minority’s common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion ... There are, however, two important qualifications. Firstly, ... there must be no discrimination on the ground of race ... A common culture, language or religion having racism as an essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly, ... [the Constitution] ... keeps the door open for those for whom the state’s educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.¹³⁰

More recently, in *Minister of Home Affairs v Fourie (Doctors for Life International & Others amici curiae); Lesbian & Gay Equality Project v Minister of Home Affairs*, the Constitutional Court found that the state could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly-sanctioned marriages and that denied same-sex life partners the status, the responsibilities and the duties enjoyed by opposite-sex life partners.¹³¹ State-sponsored discrimination would not be tolerated. The Court did not make the same demands of religious dominations or religious officers. It held that the Constitution had nothing to say

¹³⁰ 1996 3 SA 165 (CC), 1996 4 BCLR 537 (CC) paras 39 - 42.

¹³¹ *Minister of Home Affairs v Fourie (Doctors for Life International & Others, amici curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC) paras 90 - 98. See also *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA), 2005 3 BCLR 241 (SCA) paras 36 - 37 (no religious denomination would be compelled to marry gay or lesbian couples).

about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership. So long as religious communities do not distribute public goods – or are not the sole distributors of such goods – the state, according to the Court, cannot justifiably coerce a religious community into altering its basic beliefs and practices:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom. The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.¹³²

Indeed, *Fourie* stands for the proposition that to the extent that exclusionary practices are designed to further the legitimate constitutional ends of religious, cultural and linguistic associations, and do not have as their aim the denial of access to essential primary goods, then our Constitution's express recognition of religious, cultural and linguistic pluralism commits us to a range of practices that the Constitutional Court will deem *fair discrimination*. The refusal of some religious officials to consecrate same-sex life partnerships as marriages under religious law is but one form of *fair discrimination*. No form of meaningful human association – marriages, nuclear families, extended families, friendships, burial societies, trade unions, neighbours, neighbourhood security watches, political parties, bowling clubs, political action groups, *stokvels*, corporations, non-governmental organisations, professional regulatory bodies, charities, guilds, churches, synagogues, mosques, temples, schools, parent-teacher committees, school governing

¹³² *Fourie* (n 131 above) para 96.

bodies, co-op boards, landless people's movements, internet forums, foundations, trusts – is possible without some form of discrimination. The *hard* question is whether such discrimination rises to the level of an unjustifiable impairment of the right to dignity of some of our fellow-South Africans.¹³³

Again, this question turns on the access to the kind of goods that enable us to lead lives that allow us to flourish. It is easy to find that golf clubs that have been the bastion of white male Christian privilege must open their doors to persons of all colours, all sexes and all religions. What of *stokvels* that provide access to capital to members of a community – but not to outsiders? What of religious secondary schools that *do* discriminate on the basis of religion and, at the same time, offer a better education than that generally on offer in our public schools? One would be foolish to dismantle such institutions solely on the grounds that either some form of exclusion takes place or that some re-inscription of privilege occurs. Human beings work, and make meaning in the world, through social networks of various kinds. Taking a sledgehammer to social institutions that create and maintain large stores of real and figurative capital is a recipe for a terribly impoverished state. The *hard* question challenges us to determine the extent to which religious, cultural and linguistic communities can engage in justifiable forms of discrimination in the furtherance of constitutionally legitimate ends and the extent to which the state and other social actors can make equally legitimate claims on the kinds of goods made available in these communal formations that cannot be easily accessed elsewhere.

This brief foray into the constitutional history of community rights – and especially the rights of religious, cultural and linguistic communities – captures the general terrain upon which independent schools based upon a comprehensive vision of the good currently operate. This history suggests that community-based institutions that do not receive state support can rely upon exclusionary practices to further their constitutionally legitimate objectives so long as they do not offend, unjustifiably, the basic law's commitment to the protection of the dignity and the equality of all South Africans.

3 State attempts to control independent schools

Over the past several years, the ANC government, emboldened by ten years of democracy and majority rule, has started to flex its muscle. Concerns about consolidating power through reconciliation have

¹³³ See Woolman 'Freedom of association' (n 7 above); Woolman 'Dignity' (n 10 above); G Pienaar 'The effect of equality & human dignity on the right to religious freedom' (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 579.

receded. The state is now in a better position to consolidate its power through policy initiatives closer to its heart and to challenge existing patterns of privilege. The open textured character of the law in this area (of admissions policy, language policy and equity requirements) creates the necessary terrain for political contestation.

As we have already argued above with respect to school fees, school choice and single-medium public schools, the lacuna in the law must, at some level, be viewed as intentional. Whether the issue is school choice, school fees, the medium of instruction, teacher hiring, or language policies, the fragile post-apartheid state of the mid-1990s crafted legislation and regulation that divided management, governance and policy-making responsibilities between national government, provincial government, provincial Heads of Department (HoDs), teachers, principals, unions, SGBs, parents and learners without establishing clear hierarchies of authority. The result was that private actors in the mid-1990s were able to assert their interests through legal channels without having to worry about being rebuffed by the state. The price the state paid for such assertions of private power was small by comparison to the compensatory legitimisation that it secured through *de jure* and *de facto* decentralisation.

By the *fin de siècle*, however, the state's concerns had shifted from anxiety about its quiescence to apprehension about the speed of transformation. A good example of this shift is on display in the state's efforts to bring independent schools to heel by attempting to control their age of admittance. This contrivance benefited from the fact that age – unlike religion, culture or language – appears to be a neutral identifier. The state believed that it could go after independent schools in this manner without having to worry about alienating a particular constituency – a constituency that would mobilise around other ascriptive identifiers such as language, religion or culture. What the state failed to take sufficiently seriously was the ability of individual couples to mobilise around the interests of their own children.

In *Harris v Minister of Education* the High Court found that the state's age restrictions on admission to Grade 1 constituted an

unjustifiable impairment of Talya Harris's right to equality.¹³⁴ While the *Harris* Court did not doubt that the state had the authority to pass such regulations with regard to independent schools, it found that the state had failed to tender any adequate justification for its policy.¹³⁵ *Harris* stands for two propositions. It reinforces this chapter's basic contention that the Constitution creates significant space within which independent schools may flourish. It also underwrites the argument that the state will have to meet a fairly high evidentiary threshold should it wish to alter the admissions policies of independent schools.

4 Legal framework for admissions policies at independent schools

As we noted at the outset, one purpose of this chapter is to assess the extent to which the laws governing admissions policies (and expulsion procedures) at independent schools permit such schools to discriminate in the pursuit of legitimate constitutional and statutory objectives: namely the furtherance of particular religious, cultural and linguistic ways of being in the world. This section's exercise in constitutional and statutory interpretation attempts to set out the

¹³⁴ 2001 8 BCLR 796 (T). The King David School refused to admit Talya to Grade 1 in 2001 – even though her parents believed she was ready. The refusal to admit Talya was based upon a notice issued by the Minister of Education stating that independent schools could only admit learners to Grade 1 at the age of seven. Unwilling to take the risk that Talya might experience a developmental deficit after being held back a year, Talya's parents decided to challenge the constitutionality of the notice so that their daughter could be admitted to Grade 1 in 2001.

¹³⁵ The Minister was afforded an opportunity to rebut the presumption of unfair discrimination. First, the Minister argued that six-year-old children were more likely to fail than seven-year-old children and such failure rates had serious financial consequences for the state. Second, the Minister argued that the diversity of cultures and languages within South Africa produced insuperable difficulties for the creation of a school readiness test. Third, the Minister argued that there are sound pedagogical reasons for starting formal education at age 7. The High Court rejected all three arguments tendered by the Minister because the state had failed to adduce any evidence. As a result, the state failed to rebut the presumption that unfair discrimination on the grounds of age had taken place. More importantly, the result thwarted state efforts, on apparently neutral grounds, to control private power exercised through private institutions. The age requirements themselves were not especially important to the state. What was important to the state was to control the manner in which privileged parents and schools created educational opportunities for their children. *Harris* stands for the proposition that the state may not assert control over independent schools simply because they are privileged. The associational rights of the parents who send their children to independent schools trump state interests in equality where the equality interest asserted cannot be backed up by any compelling pedagogical reason. See: *Minister of Education v Harris* 2001 4 SA 1297 (CC), 2001 11 BCLR 1157 (CC) (Court found that Minister lacked the requisite authority under NEPA sec 3(4) to create a rule that obliged independent schools to admit learners to Grade 1 only after they turned seven. NEPA sec 3(4) only empowered the Minister to create non-binding policy (above paras 13 - 14).)

correct legal framework for understanding the limits of exclusionary admissions policies designed to promote comprehensive visions of the good in independent schools. With respect to the admissions policies of independent schools, this section pays particular attention to the circumstances in which associational interests, or community rights, trump considerations of equality. In short, those exclusionary admissions policies in independent schools that can be closely tied to the furtherance of constitutional legitimate objectives – say an academic curriculum that makes religious instruction mandatory in order to instill a deeper sense of faith within the broader religious community – will likely pass constitutional muster.

4.1 The Constitution

The language of FC section 29(3) reflects both the initial fragility of the post-apartheid state and the basic law's commitment to carving our 'private' space for the establishment of institutions designed to further the legitimate constitutional objectives of religious, cultural and linguistic communities:

Everyone has the right to establish and maintain, at their own expense, independent educational institutions that (a) do not discriminate on the basis of race; (b) are registered with the State; and (c) maintain standards that are not inferior to standards at comparable public educational institutions.¹³⁶

The language of FC section 29(3) also suggests that independent schools possess substantially more latitude than public schools with respect to their admissions requirements (and their expulsion procedures).

4.2 Statutory framework and statutory interpretation

4.2.1 *South African Schools Act and the Promotion of Equality and Prevention of Unfair Discrimination Act*

Statutory interpretation may appear to be a rather dry, academic exercise. In historical circumstances such as ours, however, the stakes can be quite high. A state that is cognisant of the canons of statutory interpretation can use them to great advantage without actually announcing to the general public what advantage it seeks. In the case of admissions policies in independent schools, we want to suggest that

¹³⁶ IC sec 32(c) read, in pertinent part: '[e]very person shall have the right ... to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.'

a South African state growing in confidence, and moving from a reconciliatory politics to a politics of redress, has been able to use accepted canons of statutory interpretation to narrow the space within which privileged communities can continue to exclude persons from historically disadvantaged communities from independent, and often exclusive, educational institutions.

The statutory language around admissions policies at independent schools is quite permissive. Section 46(3)(b) of the South African Schools Act (SASA) engages independent school admissions policies as follows: '[A provincial] Head of Department *must* register an independent school if he or she is satisfied that – ... the admission policy of the school does not discriminate on the grounds of race.'¹³⁷

To understand just how permissive the constitutional, statutory and regulatory framework for admissions at independent schools 'appears' to be, one need only look at how admissions policies at public schools are treated in SASA. The SASA test for unfair discrimination with respect to admissions requirements at public schools tracks the test for unfair discrimination found in FC section 9.¹³⁸ Indeed, it would appear to encompass just about any imaginable ground for unfair discrimination. According to section 5(1) of SASA: 'A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.' Section 5(2) and (3) of SASA also bars the use of tests, fees, mission statements or a refusal to sign a waiver for damages as grounds for refusing admission to any learner.¹³⁹

¹³⁷ While no mention of admissions policies is made in these regulations, the enabling provision for these regulations, in SASA sec 46(3)(b), states that a provincial 'Head of Department *must* register an independent school if he or she is satisfied that – ... the admission policy of the school does not discriminate on the grounds of race'. The language of the Gauteng School Education Act 6 of 1995 ('GSEA') and the regulations issued pursuant to the Act, appear equally permissive. See GSEA Chap 8 Discrimination at Private Schools sec 68: 'Admissions requirements for private schools shall not directly or indirectly discriminate unfairly on grounds of race.' Regulations passed by Gauteng under SASA, entitled 'Notice Regarding the Registration and Withdrawal of Registration of Independent Schools', do *not* make the registration – and the continued accreditation – of independent schools contingent upon the conformation of admissions policies with specific equity requirements.

¹³⁸ PEPUDA analysis largely tracks sec 9 of the Constitution. According to the Constitution sec 9(5): 'Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

¹³⁹ According to GSEA Chap 3 'Admission to Public Schools' sec 11: 'Admission requirements for public schools shall not unfairly discriminate on grounds of race, ethnic or social origin, colour, gender, sex, disability, sexual orientation, religion, conscience, belief, culture or language.' Regulations passed under GSEA, entitled 'Admission of Learners to Public Schools', subject admissions requirements at public schools to even stricter scrutiny than the enabling legislation. See regulations passed under GSEA sec 11(1) and the Gauteng Education Policy Act 12 of 1998 ('GEPA') sec 4(a)(i), entitled 'Admission of Learners to Public Schools', GN

These statutory provisions suggest that a significant gap exists between the equity requirements for admissions at independent schools and at public schools. Permitting such a significant disjunction to occur between the law governing public institutions and the law governing private institutions might appear consistent with the imperatives of both a fragile and a liberal state. Indeed, were one to read – today – only those constitutional and statutory provisions that engage educational institutions directly, the change in the legal landscape might pass unnoticed.

The enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁴⁰ ('PEPUDA') – in 2000 – demonstrates both the increased power of the state and its willingness to use the law to challenge privilege and to further redress. For starters, PEPUDA applies to private parties.¹⁴¹ An independent school, as a juristic person, is thus bound by PEPUDA.

More importantly, the tests for unfair discrimination set out in PEPUDA and SASA that engage expressly admissions policies at independent schools are not identical. The tests set out in the sectoral legislation governing admissions policies at independent schools limit the grounds for a finding of unfair discrimination to race. The tests set out in PEPUDA are demonstrably broader in scope. Resort must be had to standard canons of statutory interpretation in order to determine which law applies to admissions policies at independent schools.¹⁴²

4138 of 2001 (PG 129 of 13 July 2001). The regulations expand – in line with sec 9 of the Constitution – the grounds for a finding of unfair discrimination with respect to admissions policies. Express grounds now embrace ethnic or social origin, pregnancy, HIV/AIDS status, or any other illness. Indeed, the regulations – in line with sec 9 and SASA – leave the list of grounds open-ended so as to encompass 'unfair discrimination against a learner in any way'. They likewise bar the use of admissions tests or fees to exclude a learner. The regulations' only open window for disparate treatment enables a gender specific school to refuse admission on the grounds of gender.

¹⁴⁰ Act 4 of 2000.

¹⁴¹ See PEPUDA sec 5(1): 'the State and all persons are bound by the Act.' See also PEPUDA sec 6: 'Neither the State nor any person may unfairly discriminate against any person.'

¹⁴² The supremacy clause of the Constitution, sec 2, requires that all law be consistent with its provisions. However, where no inconsistency exists, and where provisions of a statute or subordinate legislation or a rule of common law afford an applicant an adequate remedy and enable a Court to decide the case before it, it is now trite law that the Courts ought not to analyse the matter in terms of the provisions of the Constitution. See *S v Mhlungu* 1995 3 SA 867 (CC), 1995 2 SACR 277, 1995 7 BCLR 793 para 59 ('[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'). See also *Zantsi v Council of State, Ciskei* 1995 4 SA 615 (CC), 1995 10 BCLR 1424 (CC) para 8. For the purposes of this chapter, we assume that the apposite provisions of PEPUDA and SASA – and all subordinate legislation – are

Accepted canons of statutory interpretation tell us to look first to the language of the apposite pieces of legislation when attempting to determine which law has primacy of place.¹⁴³ PEPUDA makes it clear that its provisions prevail over all other law – save where an Act expressly amends PEPUDA or the Employment Equity Act¹⁴⁴ applies. Section 5 of PEPUDA reads, in relevant part:

Application of Act: ... (2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail. (3) This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies.

A second canon of statutory interpretation tells us that more recent legislation ought to prevail. PEPUDA postdates SASA. Finally, although canons of statutory interpretation state that, *ceteris paribus*, more specific sectoral legislation or subordinate legislation ought to trump more general legislation, SASA does not contain any language that would suggest that in the event of a conflict between SASA (as a piece of sectoral specific legislation) and another more general piece of legislation, SASA ought to prevail.¹⁴⁵ PEPUDA, both as a piece of ordinary legislation, and as a piece of super-ordinate legislation that gives effect to the equality provision of the Constitution,¹⁴⁶ would appear to prevail over all other pieces of legislation that engage equality considerations in independent schools.

This result might come as a bit of a surprise to those persons *au fait* with the regulation of school admissions by sector specific education legislation. Certainly, nothing in the express wording of PEPUDA would tell a reader that this legislation displaces SASA. No amendments have been made to various pieces of education specific legislation that would suggest a sea-change in the state's approach to

consistent with any and all provisions of the Constitution. That does not mean that provisions of PEPUDA or SASA cannot be found to be constitutionally infirm. It only means that an analysis of their susceptibility to a constitutional challenge is not germane to an analysis of the subject matter of this chapter. A Court is also apt to take into account the fact that PEPUDA is super-ordinate legislation contemplated by sec 9(2) of the Constitution '[t]o promote the achievement of equality, ... [and] to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination ...'. At a minimum, a Court will attempt to read down the provisions of PEPUDA in order to save them from a finding of invalidity. See, eg, *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC), 2002 5 BCLR 433 (CC).

¹⁴³ See, generally, LM du Plessis *The re-interpretation of statutes* (5 edition, 2002).

¹⁴⁴ Act 55 of 1998.

¹⁴⁵ SASA sec 2 reads, in relevant part: '(1) This Act applies to school education in the Republic of South Africa ... (3) Nothing in this Act prevents a provincial legislature from enacting legislation for school education in a province in accordance with the Constitution and this Act.'

¹⁴⁶ FC sec 9(4).

the admissions policies of independent schools. And yet the law is clear. The state has quietly shifted the goal-posts.

4.2.2 *PEPUDA and admissions policies at independent schools*

Neither the application provisions of PEPUDA nor the date of its passage tell us how the provisions of that statute – or at least the test for unfair discrimination – ought to be applied to admissions policies in independent schools.¹⁴⁷ How, then, should PEPUDA be construed in this context?

Neither SASA nor apposite provincial legislation dictates how the general terms of PEPUDA ought to be applied to the sector-specific context of admissions policies in independent schools. A court will, generally, take into account the distinctions made in such sector-specific education legislation.¹⁴⁸

Of course, it is also possible that both the national government and various provincial governments believe that the admissions policies of public schools and independent schools ought to be treated differently. The content of that differential treatment is that, in the furtherance of legitimate constitutional objectives, an independent school may adopt admissions policies that have a discriminatory effect so long as there is no intent to discriminate on the basis of race. The rationale for this differential treatment is to be found in the Constitution itself. Independent schools may be set up in order to further a particular religious or cultural vision of the good so long as the policies of the independent school pursuit ‘do not discriminate on the basis of race’. What explains the permissive attitude of our basic law with respect to the admissions, membership and expulsion practices of private religious or cultural or linguistic associations? As

¹⁴⁷ The only mention of education in PEPUDA occurs in the ‘Illustrative List of Unfair Practices in Certain Sectors’ that appears as a Schedule to the Act. Section 2 of the Schedule reads, in relevant part: ‘Education – (a) Unfairly excluding learners from educational institutions, including learners with special needs. (b) Unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds.’ The list does not purport to distinguish between public, state-aided independent schools and non-state-aided independent schools.

¹⁴⁸ As we have already seen, the national government and the Gauteng provincial government subject the admissions policies at public schools and independent schools to fundamentally different tests for unfair discrimination. The prohibited grounds for unfair discrimination in GSEA and in the regulations for admissions in public schools passed under GSEA and GEPA track closely the prohibited grounds found in PEPUDA. The prohibited grounds for unfair discrimination in GSEA and SASA for independent schools are limited to race. In addition, the Gauteng provincial government has not seen fit to pass regulations governing admissions policies at independent schools. One implication of these distinctions is inescapable. If the Gauteng provincial government is aware of the shift in the legal landscape wrought by PEPUDA, then it has decided not to announce its awareness of that shift.

Van Dijkhorst J wrote in *Wittmann v Deutsche Schulverein, Pretoria*, the right to create and to maintain these independent schools must, to be meaningful, embrace ‘the right ... to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity’.¹⁴⁹

How, then, should we read the provisions of PEPUDA – and the apposite provisions of SASA, the Constitution, as well as our extant body of common law – when attempting to determine when, or even whether, independent schools may exclude learners? The following account delineates the appropriate form of legal analysis for educators, schools and courts faced with such a question.

4.2.3 *PEPUDA’s test for admissions policies at independent schools*

According to PEPUDA, no person – public or private – may discriminate in a manner that imposes, directly or indirectly, burdens upon and withholds, directly or indirectly, benefits from any person on prohibited grounds.¹⁵⁰ According to PEPUDA, *prima facie* demonstration of discrimination on a prohibited ground shifts the burden to the respondent to show that the discriminatory law, rule or conduct is fair.¹⁵¹ In the case of independent schools that discriminate against – or exclude – learners on the basis of religion, culture or language, the burden of proof shifts to the schools to show that the discrimination manifest in their admissions policies is fair, given the purpose or the nature of the school.

An Equality Court hearing a PEPUDA challenge to admissions policies at an independent school will likely find a school’s rejection of a learner, because she refused to take religion, language or culture classes, to constitute ‘discrimination’. That initial finding does not, of course, mean that the Equality Court is obliged to find that the practice constitutes unfair discrimination. PEPUDA anticipates expressly the requisite grounds for justification of discrimination: section 14(3) states that fair discrimination may occur where the respondent can demonstrate that: ‘(f) ... the discrimination has a

¹⁴⁹ 1998 4 SA 423 (T).

¹⁵⁰ See PEPUDA sec 1: ‘Discrimination’ means ‘any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds’. ‘Prohibited grounds’ are ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, *religion*, conscience, belief, culture, language and birth’ (emphasis added).

¹⁵¹ See PEPUDA sec 13: ‘if the discrimination did take place on a ground in paragraph (a) of the definition of “prohibited grounds”, then it is unfair, unless the respondent proves that the discrimination is fair.’

legitimate purpose; [and] (g) ... the ... discrimination achieves its purpose’.

An independent school will first have to show that the set of religious, linguistic or cultural practices that form the basis for its restrictive admissions policies offer a coherent account of the religion, language or culture ostensibly being advanced. Most independent schools that pursue the furtherance of a specific religion, culture or language should be able to meet this test for ‘legitimate purpose’.

The next leg of the test is somewhat more onerous. Once a legitimate purpose is established, the question becomes whether the discriminatory admissions policy is necessary to achieve the school’s purpose of offering an education grounded in a particular faith, language or culture. One argument is that an independent school committed to the furtherance of a particular religion, language or culture needs to be able to control its message and that such control requires it to have relatively unfettered control over admissions practices. How strict can such exclusionary admissions policies be?

At a minimum, any learner must agree to adhere to the curriculum of the school – at least in so far as it requires specific forms of religious, linguistic or cultural instruction. After all, if the purpose of the school is to further a given religion, language or culture, then the curriculum must be designed to advance that religion, language or culture. If the curriculum is essential for the achievement of the school’s legitimate purpose, then the exclusionary rule based upon a learner’s refusal to follow the curriculum must be viewed as a measure that – while discriminatory – is narrowly tailored to meet the legitimate purpose.

Can a school adopt exclusionary criteria (and expulsion procedures) that go beyond adherence to the school’s curriculum? That depends. The school would be obliged to show that something more than the education itself is necessary to sustain a religion, a language or a culture. The fluidity of language and the permeability of culture suggest that pre-existing membership in the linguistic or cultural community ought not to be, as a general matter, a basis for exclusion.¹⁵² Anyone can speak Afrikaans or Zulu; anyone, over time, can become a South African.

¹⁵² One cannot speak of religious, linguistic and cultural communities as if they all took the same form and were therefore subject to identical treatment under the Constitution. At a gut level, one would like to be able to say that there is, however, a sliding scale of constitutional solicitude for these communities: a scale that runs from fairly weak in so far as linguistic communities are concerned, to

But what of smaller cultural groups and linguistic communities? Could a colourable claim be made that because the KhoiSan community in South Africa is small and has such limited resources, an independent school must be able to direct its limited funds to the

medium strength with respect to cultural communities, to very strong with regard to religious communities. This intuition is driven primarily by the varying degrees of permeability of linguistic communities, cultural communities and religious communities. Anyone can learn to speak a language and thereby join a community of fellow-conversants. Religious communities, on the other hand, can make admission almost impossible. Cultural communities possess an 'I know it when I see it' character, and thus make any talk about ease of entrance (and potential membership) rather elusive: Is it easier to become American or French? Is it easier to become Zulu or Sotho? There are two primary difficulties with trying to squeeze any further analytical precision out of the terms 'religious community', 'linguistic community' and 'cultural community' as they appear in the Constitution. The first difficulty flows from the lack of consensus as to how terms like 'cultural community', 'religious community' or 'linguistic community' are to be used. The second related difficulty stems from the fact that many of the specific social formations or entities that fall within the protective ambit of sections 30 and 31 of the Constitution can often be described in all three terms – religion, language and culture. This descriptive over-determination could complicate our analysis of the constitutional claim being made. Is an independent Jewish day school promoting a religion, a culture, a people, a nation, or just the Hebrew language? Is an independent German day school promoting a culture, a people, a nation, a language, or a religion? With respect to the first difficulty, Amy Gutmann (n 18 above, 38) notes: 'When the term culture is loosely used, cultural identity subsumes the entire universe of identity groups, and every social marker around which people identify with one another is called cultural. Culture, so considered, is the universal glue that unites people into identity groups, and the category becomes so broad as to be rather useless for understanding differences.' See also IM Young *Justice and the politics of difference* (1990) 22 - 23, 152 - 155. Other theorists take a tougher line. For Raz and Margalit, 'National self-determination' in Raz (ed) *Ethics in the public domain: essays in the morality of law and politics* (1994) 119, the only legitimate candidates for treatment as cultural communities are those communities which provide an 'all-encompassing' or a 'comprehensive' way of being in the world. See also S Benhabib *The claims of culture: equality and diversity in the global era* (2002); Shachar *Multicultural jurisdictions: cultural differences and women's rights* (2001); S Macedo (ed) *Deliberative politics: essays on democracy and disagreement* (1999); A Gutmann & D Thompson *Democracy and disagreement* (1996); W Kymlicka *Multicultural citizenship: a liberal theory of minority rights* (1995). In addition, Raz and Margalit write that such communities provide both an 'anchor for self-determination and the safety of effortless, secure belonging' (above, 118). Belonging, in turn, is a function of membership: 'Although accomplishments play their role in people's sense of their own identity, it would seem that at the most fundamental level our sense of our own identity depends upon criteria of belonging rather than on those of accomplishment. Secure identification at that level is particularly important to one's well-being (at 117). What Raz and Margalit fail to make fully explicit is the connection between a community that provides a comprehensive way of being in the world and a community that provides a secure sense of belonging. A community that provides a comprehensive way of being in the world generally provides a host of rules that govern most aspects of daily life. The benefits of belonging – of membership – flow to those who follow the rules. Follow the rules and one belongs. Flout the rules and one can find oneself on the outside of the community looking in. (Comprehensiveness, then, is a feature of communities with very strict codes of behaviour and harsh penalties – shunning or ex-communication – for rule non-compliance.) Although Raz and Margalit's definition of 'cultural community' certainly provides greater traction than looser definitions, it would seem to exclude too many social formations that we would intuitively describe as cultural communities. Amish Americans constitute a

education of children of KhoiSan descent? In the abstract, that claim seems plausible enough. Moreover, the argument from equity might support measures designed to advance a previously disadvantaged group – even if such measures come at the expense of another previously disadvantaged group. This argument secures somewhat greater support in the context of schools designed to advance religion. It seems credible, if perhaps disturbing to non-adherents, to suggest that a religious education requires a religious environment. But the effective promotion of a faith may require that a learner be taught in an environment where others take their faith seriously and do not merely put up with curriculum requirements because of other educational advantages afforded by the institution. Whether this claim about the need for a homogeneous religious environment supports a strict policy of exclusion – or only the more lenient curriculum-based policy – is a very close question.

What is interesting about this ‘close’ question is that the state – through PEPUDA – is able to force a private actor to look to the Constitution to support its position. Given that the Constitution is always the last port of call (not the first), and that its generally stated precepts admit to any number of different constructions, the state, through PEPUDA, has succeeded in putting independent schools on their back foot.

But being on one’s back foot is not the same as being underfoot. In crafting their justifications for exclusionary admissions policies and expulsion procedures, independent schools can rely upon various

community that fits the rule-following, comprehensive vision of the good model that Raz and Margalit’s definition is meant to capture. But the Amish community in America does not fit commonplace understandings of cultural communities. Thus, Raz and Margalit’s definition of ‘cultural community’ confirms our first difficulty: locating precise definitions for the entities protected by secs 15, 29, 30 and 31. But they also tell us something important about our second difficulty – that of descriptive over-determination. It would seem to us that descriptive over-determination – though a fact about many communities – is not a constitutional problem. What matters, for the purposes of constitutional analysis, are membership and rule-following. Issues of membership and rule-following come up much more frequently in religious communities than in cultural communities or linguistic communities because many religious communities offer quite comprehensive visions of the good. What then are we to do in cases of descriptive over-determination where religion, language and culture all serve to define a particular community and the institutions upon which members have built that community? Since community appropriate rule-following behaviour determines continued membership within the community, then the conflict that confronts the Court will often be whether a person’s behaviour (or state action) conforms to the community’s accepted canon of rules. The primary kind of community practice at issue – religious, linguistic, cultural – will reveal itself in the very terms of the dispute. That is, the dispute will reveal itself to be about religion, language or culture.

general provisions in the Constitution: FC sections 15, 18, 29, 30 and 31 protect religious belief, practice, tradition, association and community; FC section 29(3) enables – and protects – that wish to create independent educational institutions. Independent schools can therefore argue that they exist in order to advance the basic law’s general commitment to the protection a variety of religious, cultural or linguistic ways of life. Moreover, as Van Dijkhorst J noted in *Deutsche Schulverein*,¹⁵³ the right to education guarantees that members of a religious, linguistic or cultural community may ‘establish their own [private] educational institutions based on their own values’. It was held that the right to create these independent schools is parasitic upon ‘the right . . . to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity’.¹⁵⁴ In sum, the constitutional right to run an independent school grounded in culture, language or religion inevitably entails a concomitant right to exclude learners who do not wish to adhere to curriculum requirements grounded in a given language, culture or religion. The only thing an independent school may not do – under PEPUDA or SASA – is exclude a learner on the ground of race.¹⁵⁵

The last point we want to make in this section is that while the state – through PEPUDA – has narrowed the space within which independent educational institutions can exercise their discretion over admissions policies, our state remains a constitutional democracy that must work within a framework of basic rights and freedoms. That means that an ever more powerful state cannot assume that ‘redress’ legitimates each and every policy initiative it undertakes. So while the burden of justification for the discriminatory admissions policies may fall on independent schools, the factors in section 14(3) of PEPUDA place an equally compelling onus on the complainant (and the state) to demonstrate that the exclusionary admissions policies or expulsion procedures in question do, in fact,

¹⁵³ 1998 4 SA 423 (T) 454.

¹⁵⁴ n 153 above, 454.

¹⁵⁵ The opposite language of SASA mirrors that of sec 29(3) of the Constitution. SASA sec 46(3)(b) reads: ‘the admission policy of the school may not discriminate on the grounds of race.’

deleteriously affect the complainant.¹⁵⁶

4.3 Constitutional constraints, PEPUDA and independent schools' admissions policies

4.3.1 Rule-following as a condition of membership

Recent constitutional case law supports the contention that independent religious associations and independent culture-specific schools have the right to expel members who agree to follow the rules or decisions of the association's governing body and subsequently refuse to do so. In *Taylor v Kurtstag*,¹⁵⁷ the Witwatersrand High Court upheld the right of the Beth Din to issue a *cherem* – an excommunication edict – against a member of the Jewish community who had agreed to follow its ruling with regard to an order for child maintenance. In *Wittmann v Deutsche Schulverein, Pretoria*,¹⁵⁸ the Pretoria High Court upheld the right of a school governing body to expel a student who knew that she was obliged to attend language and religious instruction classes and who subsequently refused to attend these classes. Both cases underwrite the proposition that in order for a religious association or cultural association to remain committed to the practice of certain beliefs, it must control the voice of, the entrance to and the exit from the association. Thus, to the extent that a learner has agreed to abide by a curriculum policy in order to secure entrance into an independent school, such an independent school would be well within its constitutional rights to expel that pupil for failure to adhere to those requirements.

¹⁵⁶ PEPUDA sec 14(3)(b) states that the trier of fact must take into account 'the impact or likely impact of the discrimination on the complainant'. Assume that an independent Jewish secondary school in Johannesburg requires all matriculants to consent to a curriculum that includes Hebrew and Talmudic study. One can safely assume that most, if not all, non-Jewish learners will experience the most minimal impairment of their dignity if they are turned away from the school based upon their refusal to accept the curriculum. The reason the impairment is minimal is that a non-Jewish learner (or even a Jewish learner) who does not wish to follow such a curriculum has a significant amount of choice with respect to school matriculation in an urban area such as Johannesburg. Moreover, any child in a position to afford private school fees has an even greater array of options. The contention that the educational opportunities of a non-Jewish learner with such resources will be significantly diminished by being denied admission to an independent Jewish school in an urban or a peri-urban area lacks purchase.

¹⁵⁷ 2004 4 All SA 317 (W) para 38: FC sec 18 – freedom of association – 'guarantees an individual the right to choose his or her associates and a group of individuals the right to choose their associates'.

¹⁵⁸ 1998 4 SA 423 (T) 451: 'Does this mean that private parochial schools which do not receive state aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative ... Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.'

4.3.2 Expulsion, rule-following and fair hearings

An independent school's right to expel a student who fails to adhere to the rules is subject to two provisos. The first proviso is that the independent primary and secondary school must make clear what curriculum requirements are to be followed by the learner prior to her admission. The second proviso is that a learner (or family) facing expulsion must receive a fair hearing from the independent school in question.¹⁵⁹

4.3.3 Capture

The existing case law begs some important questions. In general, however, they reduce to a single query: Why should we allow any association – including an independent school – to exclude anyone who wishes to join? One answer is the argument from 'capture'.

¹⁵⁹ South African courts have engaged associational rights and fair hearings in four relatively recent cases. See *Taylor v Kurtstag* [2004] 4 All SA 317 (W); *Cronje v United Cricket Board of South Africa* 2001 4 SA 1361 (T); *Ward v Cape Peninsula Ice Skating Club* 1998 3 SA 487 (C); *Wittmann v Deutsche Schulverein, Pretoria* 1998 4 SA 423 (T), 1999 1 BCLR 92 (T). The courts have upheld the rights of associations to control the grounds for expulsion so long as they met basic standards of procedural fairness. In *Cronje*, the High Court deferred to the United Cricket Board when it came to deciding how and whether to deal with Hansie Cronje once he had been expelled from the association.

In *Kurtstag*, the Court deferred to the Beth Din with respect to the excommunication of a member of the Jewish community who had voluntarily submitted himself to the jurisdiction of the Beth Din and had subsequently violated the edicts of the Beth Din. The High Court found that the Beth Din's procedures met the requirements of a fair hearing for a member of the community who had agreed expressly to follow the Beth Din's recommendations and that the grounds for the expulsion were consistent with the parties' agreement to enter into arbitration with regard to a maintenance order. I

In the *Ward* and *Wittmann*, the High Courts reversed the expulsion. But they did not do so on the ground that the expulsion occurred for some politically or morally reprehensible reason. Indeed, to the extent that the Court in *Wittmann* weighs in on the power of an association to terminate membership when the member acts in a manner contrary to the decisions of the association's board and engages in expressive conduct that leads to criticism of the association, the Court decides that the association does possess such power. All four cases can be read as standing for the proposition that a member has vested interests in the association that, at a minimum, require a fair termination hearing. A non-member, on the other hand, possesses no such rights.

Read this way, *Kurtstag*, *Wittmann*, *Ward* and *Cronje* are of a piece. What ties them together at a theoretical level is the notion that once a person has been granted entry into an association, he or she accepts the basic principles upon which the association operates and thus the principles that may lead to his or her exclusion. The potential for exclusion is part of the consideration the member offers in return for admittance. As the High Court in *Kurtstag* notes, 'the potential for exclusion is part of the consideration the member offers in return for admittance' (para 37).

The argument from capture, broadly speaking, runs as follows. Capture is a function of – one might even say a necessary and logical consequence of – the very structure of associational or community life. In short, capture justifies the ability of associations and communities to control their association or community through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership and expulsion policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current *raison d'être* of the association matters to the extant members of the association, the association must possess ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, character and function of the association. Second, and for similar reasons, an association's very existence could be at risk. Individuals, other groups, or a state inimical to the values of a given association could use ease of entrance into an association to put that same association out of business.

In a world without high transaction costs for the creation of associations, the risk of such penetration and alteration might be a tolerable state of affairs. But in the real world, the costs of creating and of maintaining associations are quite high. Just starting an association – be it religious, cultural, economic, political or intimate – takes enormous effort. To fail to take such efforts seriously, by failing to give individuals 'ownership' over the fruits of their continued labour, is to risk creating significant disincentives to form, to build and to maintain their relationships. To fail to permit an independent school, a marriage, a corporation, a church, a golf club or a law society to govern its boundaries and its members in appropriate ways, would make these arrangements impossible to maintain. It would, in some respects, be equivalent to saying that anyone and everyone owns these associations – which is, of course, tantamount to saying that no one owns them. It is the purpose of freedom of association, freedom of religion and other community rights to ensure that both literal forms and figurative forms of property are protected from capture by those who would use them for ends at a variance with the existing and rightful members of the

association.¹⁶⁰

4.3.4 Constitutive attachments

Associational freedom is often justified on the ground that it enables individuals to exercise relatively unfettered control over the various relationships and practices deemed critical to their self-understanding. But individual autonomy as the basis for associational freedom overemphasises dramatically the actual space for self-defining choices.

As we have maintained elsewhere, each self is best understood as a centre of narrative gravity that unifies a set of dispositional states that are determined by the practices of the various communities – religious, cultural, linguistic, national, familial, ethnic, economic, sexual, racial, social (and so on) – into which that self is born.¹⁶¹ This determined, conditioned theory of the self supports some pretty straightforward conclusions about associational freedom and community rights in the context of independent schools.¹⁶²

Freedom of association, freedom of religion and community rights, correctly understood, force us to attend to the *arationality* of our most basic attachments and to think twice before we accord *our*

¹⁶⁰ How much control do we cede to the existing members of an association to determine who is entitled to membership? It depends. We tend to cede a great deal of control over entrance to marriages and over membership in religious institutions. However, when we move on to more public institutions such as trade unions or universities or law societies, then we may want such institutions to bear some sort of burden for demonstrating that the grounds for exclusion are reasonably or even inextricably linked with the purposes of the institution. The basis for the distinction between the two groups of associations should be obvious. It is not clear what, if anything, the state would gain through interference in entrance criteria for marriages and religions. It is, however, clear that issues of power, participation and opportunity in a social democratic society ought to require that institutions designed to deliver public goods – trade unions, political parties, universities – must do so in a fair manner. In South African terms, such institutions must conform to the core values that animate our basic law – openness, democracy, human dignity equality and freedom. See N Rosenblum ‘Compelled association, public standing, self-respect and the dynamic of exclusion’ in A Gutmann (ed) *Freedom of association* (1998) 75; Woolman *Selfless constitution* (n 14 above).

¹⁶¹ See Woolman ‘Freedom of association’ (above n 10) sec 44.1(b).

¹⁶² At the same time, this account of the self demonstrates the extent to which associations and communities are constitutive of the self. It dispels the notion that individuals are best understood as ‘rational choosers’ of the ends they seek. The self should be seen as the inheritor and the executor of a rather heterogeneous set of practices – of ways of responding to or acting in the world. The centrality of inherited practices or social endowments for both the creation and the maintenance of identity introduces an ineradicable element of *arationality* into the domain of individual decision-making. That is, despite the dominance of the enlightenment vision of the self as a rational agent, the truth of the matter is that the majority of our responses to the world are *arational*. Woolman *Selfless constitution* (n 14 above).

arational attachments preferred status to the *arational* attachments of *others*.¹⁶³ These observations regarding constitutive attachments buttress our contention that independent educational institutions that pursue a particular way of being in the world ought to be able to exclude from the institution those learners who do not derive meaning from that way of being in the world, and whose presence, in significant numbers, would make the institution, *qua* religious, linguistic or cultural school, impossible to sustain.

4.3.5 *Associational rights, self-governance and pluralism*

If we accept that the practice of religion, the use of a language and the participation in cultural life are legitimate, constitutionally sanctioned objectives, then discrimination narrowly tailored to meet those objectives must be able to pass constitutional muster. The alternative proposition – that no educational institution may discriminate on the basis of religion, language and culture – makes the possibility of sustaining, in South Africa, a diverse array of religious, linguistic and cultural communities a logical and an empirical impossibility.

4.3.6 *Common-law norms and the proper construction of PEPUDA in the context of the admissions policies of independent schools*

The extant common law on association reinforces more general jurisprudential considerations in support of the proposition that independent schools intended to support a religion, a culture or a language, possess a significant degree of latitude with respect to

¹⁶³ The constitutive nature of our attachments also forces us to attend to another often overlooked feature of associations. We often speak of the associations that make up our lives as if we were largely free to choose them or make them up as we go along. We have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. See M Walzer 'On involuntary association' in Gutmann (ed) (n 160 above) 64 at 67. As Walzer has convincingly argued, there is a 'radical givenness to our associational life'. What he means, in short, is that most of the associations that make up our associational life are *involuntary* associations. We don't choose our family. We generally don't choose our race or religion or ethnicity or nationality or class or citizenship. They choose us. Moreover, to the extent that these involuntary associations provide our life with meaning, we must draw the conclusion that over a very large domain of our lives 'meaning makes us' – we, as individuals, do not make that meaning. A reasonably equal and democratic society must mediate the givenness of our associational life and the aspirations of all of us to have the ability to discriminate (and sometimes choose) between those associational forms which still fit and those which do not. It is often the case that not choosing to leave an association, but choosing to stay, is what we truly cherish as freedom. As Walzer suggests, we ought to call such decisions to reaffirm our commitments 'freedom simply, without qualification': M Walzer 'On involuntary association' (above) 73.

admissions policies that differentiate between adherents and non-adherents. One old and venerable strand of the common law on association tolerates little internal or external interference with the critical purposes – or voice – of an association.¹⁶⁴ Another equally important line of cases is designed to prevent insiders and outsiders from altering the fundamental purposes of an association.¹⁶⁵ Although both lines of case law might have to yield to constitutional and statutory dictates, the courts ought to consider the learning in these cases as they attempt to vouchsafe the Constitution's commitment to equality, on the one hand, and the Constitution's equally powerful commitment to association, religious freedom and community rights, on the other.

¹⁶⁴ See *Mitchells Plain Town Centre Merchants Association v Mcleod* 1996 4 SA 159 (A) 166, citing *Total South Africa (Pty) Ltd v Bekker* 1992 10 SA 617 (A) 624 (emphasis added).

¹⁶⁵ A well-established body of common-law precedent supports the contention that any proposed alteration of the fundamental objectives of an association requires the unanimous support of the association's members. This body of case law also underwrites the general proposition that courts ought to be loath to disturb associational relations on the basis of general assertions of equity or fairness. See, generally, B Bamford *The law of partnership and voluntary association in South Africa* (3 edition, 1982); *Murray v SA Tattersall's Subscription Rooms* 1910 TH 35 41 (Curlewis J wrote: 'if I be right in the view which I have taken of the object and purpose of the association, then the applicant cannot be compelled by a majority of the members – *no matter how great* – to become a member of an association or a club having a different object; he joined a betting club and cannot now be forced by a majority to become a member of a social club'). At the same time as this line of cases applies to the internal affairs of associations, it also offers insight into the extent to which parties outside an association ought to be allowed to transform that association. A very recent, and perhaps even more apposite, judgment is *Nederduitse Gereformeerde Kerk in Afrika (OVS) v Verenigende Gereformeerde Kerk in Suider-Afrika* 1999 3 SA 156 (SCA). The Dutch Reformed Church in Africa ('NGKA') attempted to merge with the Dutch Reformed Mission Church in South Africa ('NGSK'). However, several individual churches and regional synods of the NGKA refused to accept the general synod's decisions. They asserted that the manner in which the NGKA general synod altered the constitution was *ultra vires*. They sought to have the amendments to the NGKA constitution and the consequent merger with the NGSK declared invalid. The Supreme Court of Appeal agreed. It held that the decision of the general synod of the NGKA to merge with the NGSK and the intermediate steps leading up to the merger conflicted with the clear and unambiguous wording of the constitution and vitiated, without the requisite authority (unanimity of the regional synods), the fundamental objectives of the association; all of the alterations to the NGKA constitution without the requisite authority were therefore *ultra vires* and invalid (168 - 175). The Supreme Court of Appeal's decision in *Nederduitse Gereformeerde Kerk in Afrika* provides exceptionally strong support for the proposition that independent schools designed to promote a particular religion, language or culture cannot be changed from an association acting to further those interests into an association that simply furthers the educational interests of any South African learner.

4.3.7 *Conclusions about constitutional and common-law constraints on the PEPUDA test for admissions policies of independent schools*

This brief foray into constitutional law and common law services the following set of conclusions. While the ends pursued by PEPUDA are largely egalitarian, a panoply of rights in the Constitution secures objectives that cannot be reduced to equality without doing substantial violence to the meaning of those objectives or to the heterogeneous society in which we live. Indeed, to put the matter more bluntly, the Constitution does not commit us to a society solely based upon equality. It commits us to ‘an open and democratic society based upon human dignity, equality and freedom’. The Constitution recognises that great stores of social capital (that can be used for transformative ends) will be lost unless we leave many extant (and some very ‘conservative’) institutions just as they are.

5 Conclusion

The foregoing account allows us to reach at least one simple conclusion: the fact that PEPUDA applies to admissions policies at independent schools does not undermine the ability of independent schools to advance cultural and religious understandings of the good. The reason PEPUDA does not, necessarily, undermine the ability of independent schools to advance cultural and religious understandings of the good is that although discrimination in the admissions process may occur, any discrimination that advances the *legitimate* cultural or religious objectives of the independent school and does so in terms of means narrowly tailored to meet those objectives, ought to survive PEPUDA analysis.

We are now ready to answer the questions we set for ourselves at the outset of this chapter.

First. The Constitution’s undeniable commitment to transformation does not mean that every egalitarian claim will trump a more particularistic claim. The Constitution’s answer to those parents who wish to school their children in the language, culture or religion of their choice is unequivocal. FC section 29(3) grants learners and their parents the right to ‘dig into their own pocket’ in order to build an independent school that offers their preferred medium of instruction, that reinforces a specific cultural ethos, or that promotes a comprehensive religious vision of the good life. Parents and learners may create and maintain privately funded independent schools that advance linguistic, cultural and religious understandings of the good provided that they do not employ admissions policies or expulsion procedures that serve as proxies for discrimination based upon race.

Second. The extent to which FC section 29(3) independent schools may discriminate turns on a close analysis of PEPUDA. Rightly construed, PEPUDA contemplates the ability of independent schools to advance cultural and religious understandings of the good that are facially discriminatory. However, the admissions policies or expulsion procedures employed by independent schools may discriminate between learners so long as the discrimination (a) advances the *legitimate* linguistic, cultural or religious objectives of the independent school; (b) does so in terms of means narrowly tailored to meet those objectives; and (c) does not impair the dignity of the learner.

CHAPTER 5

ON THE RIGHT TO AN 'ADEQUATE' BASIC EDUCATION

1 Introduction

1.1 A confluence of competing interests

In the preceding chapters, much as been made of the manner in which competing interests in our polity – those asserted by national government, provincial government, SGBs, unions, principals, parents and learners – and divergent values in our basic law – dignity, equality, freedom, democracy and community – produce unexpected outcomes and uneasy compromises. The subject matter of this chapter is different in profound respects. First, nobody – no interest group or political institution – is going to deny that all learners in South Africa are entitled to an adequate basic education. Second, the rights and the values enshrined in our Constitution all ought to conduce toward the provision of an adequate basic education for all learners. We all believe that a sound education should produce citizens who are fundamentally equal and active participants in our constitutional democracy.

It is, therefore, somewhat ironic, that in the one domain where most interest groups (and basic values) should pull in largely the same direction that we experience the least amount of success in the delivery of this most basic of rights. We live in country that has recently finished 45th out of 45 *developing* countries whose primary school learners have been tested for numeracy and literacy. Indeed, it is fair to say that our school system is producing large numbers of functionally innumerate and illiterate graduates. The government knows it. We know it. You (now) know it. We also know that our society has inherited a radically unequal system of education that long preserved seats in schools, places in the economy and jobs in government for a white elite, while it denied the vast majority of black South Africans the training to be anything more than hewers of wood and drawers of water.

Lenin's question, 'What is to be done?' cannot be the subject of a book on law and education, especially a book that concentrates on the nexus between constitutional law and education. However, it is within the parameters of our self-appointed brief to suggest what constitutional standard ought to be employed when determining whether the state has discharged its obligation to provide an adequate basic education to all our learners. We can also, without straying beyond this book's boundaries, propose how best the state and other interested parties can meet the constitutional standard for an adequate basic education.

In some sense, we have shown our hand. We do not think that the state has discharged its responsibility to provide an adequate (our standard) basic education for all. But the question of the effective discharge of that obligation – a responsibility shared by the state (in its many guises), SGBs, principals, parents and learners – is closer than one might think from our introduction. Over the remainder of this chapter, we adumbrate the steps the state has taken to make good on this constitutionally imposed promise. We also suggest – consistent with our commitment to experimental constitutionalism – that courts are actually in a position to assist government in achieving an adequate basic education for all. In short, experimental constitutionalism places courts in the position of setting rather open-ended norms at the same time as they invite multiple stakeholders (in the educational system) to assist the court in the construction of those norms. This initial commitment possesses the dual virtue of illiciting greater information from stakeholders in the educational system about how wrongs can be made right and securing greater legitimacy for the norms the court chooses to impose by having as many stakeholders as possible participate in the court-supervised construction of those norms. Experimental constitutionalism's commitment to open-ended or rolling norms flows from the belief that greater experience with the interaction between constitutional norms and extant institutions will reveal 'best practices' over time and gives the courts, as well as other actors, a better sense of which norms and practices work, and why. Hints of an experimentalist approach are already on offer in government white papers, the case law and various reforms of education law and policy. It is this commitment to experimentalism (however nascent in our politics and in our jurisprudence) that leads us to the conclusion that government efforts to provide an adequate, basic education cannot be fairly described as mere kabuki theatre or hand-waiving. Government schemes to transform our educational system constitute partial, if not entirely successful, efforts to discharge FC s 29(1)'s constitutional desiderata. More must be done. In particular, more must be done by government to extract information, and social capital, embedded in existing educational networks so as to create a school system that produces numerate and literate graduates.

1.2 Historical background

Since 1994, popular struggles in the education sector have taken forms distinctly different from social movements in other sectors. With respect to the adequate access to health care, the Treatment Action Campaign and the AIDS Law Project effectively combine grassroots mobilisation with a national litigation strategy designed to secure essential medicines for those persons living with HIV/AIDS.¹⁶⁶ With respect to women's equality, the Women's Law Centre and the Centre for Applied Legal Studies' Gender Unit have designed programmes to apprise women of their rights, have pressed for legislation that make those rights real and have successfully litigated a number of landmark cases in the Constitutional Court.¹⁶⁷

During the 1980s, the education sector was represented by a strong grassroots movement: the National Education Coordinating Committee ('NECC'). The NECC effectively connected community activists, who worked through local structures, with a network of national intellectuals. Between 1990 and 1994 the major focus of the NECC shifted from community struggles to policy development. In the post-1994 period, both grassroots social mobilisation in education and organised oppositional intellectual work virtually disappeared. This disappearance was not unique to the education sector. Many institutions and spheres within civil society became palpably thinner as grassroots activists and education academics became part of the new state apparatus.

The struggle over schooling – and the contests in the courtroom – between 1994 and 2008 reflect that dissipation. What we currently see is a fragmented set of actors in civil society pressing different specific agendas at the same time that a number of ANC-led government departments attempt to articulate – through law and policy – the party's basic agenda. As we discussed in chapters 3 and 4, one group in civil society that has largely succeeded in realising its

¹⁶⁶ See, eg, *Minister of Health & Others v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC), 2002 10 BCLR 1023 (CC) ('TAC'); E Cameron *Witness to Aids* (2005). See also D Bilchitz 'Health' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2005) chap 56A.

¹⁶⁷ See, generally, *Jordan & Others v The State (Sex Workers Education and Advocacy Task Force & Others as amici curiae)* 2002 6 SA 642 (CC), 2002 11 BCLR 1117 (CC); *Bhe & Others v Magistrate, Khayelitsha & Others*; *Shibi v Sithole & Others*; *SAHRC & Another v President of the Republic of South Africa & Another* 2005 1 SA 580 (CC), 2005 1 BCLR 1 (CC); *Brink v Kitshoff* 1996 4 SA 197 (CC), 1996 6 BCLR 752 (CC) and *Prinsloo v Van der Linde & Another* 1997 3 SA 1012 (CC), 1997 6 BCLR 759 (CC); *Fraser v Children's Court, Pretoria North & Others* 1997 3 SA 218 (CC), 1997 2 BCLR 153 (CC); *Volks NO v Robinson & Others* 2005 5 BCLR 446 (CC); *S v Baloyi* 2000 2 SA 425 (CC), 2000 1 BCLR 86 (CC); *Moseneke & Others v Master of the High Court* 2001 2 SA 18 (CC), 2001 3 BCLR 103 (CC). See also C Albertyn & B Goldblatt 'Equality' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2007) chap 35.

goals represents the interests of a part of the Afrikaaner community. They secured constitutional protection for independent schools in FC section 29(3) and a much more limited degree of protection for Afrikaans single-medium public schools through FC section 29(2). This particular constituency also succeeded in shaping substantial portions of SASA to their liking. When this constituency has felt only partially vindicated by the basic law and the major pieces of education enabling statutes, and have perceived the state as regularly overstepping its legitimate authority, they have consistently turned to the courts.

The second significant struggle has been waged by a tiny cluster of groups on the left. These groups – ideologically linked by a shared critique of the Washington Consensus and a full frontal attack on the World Bank’s 1990s position on cost-recovery programmes – the Anti-Privatisation Forum, the Education Rights Project and the South African branch of the Global Campaign for Education have channelled their struggle into an attack on school fees. Unlike the Afrikaans-speaking constituency, they have not developed a strong grassroots base. They have, instead, attempted to work through the policy community and influence the state directly. They wage their battles on two primary fronts: (1) the elimination of school fees for poor and working class communities and (2) the elimination of school fees across the board. The later objective emanates from their analysis of the impact to fees for the richest quintile. They contend that allowing unrestricted fees preserves apartheid-like patterns of economic inequality. As we note in chapter 7, the fees movement or ‘lobby’ has had success in eliminating fees for the lowest two quintiles of schools and may soon succeed in having fees eliminated in the lowest three quintiles of schools. Moreover, they have shown demonstrable success in strengthening state policy with regard to the enforcement of fee exemptions. They have not, as yet, succeeded on their second front: the elimination of all school fees.¹⁶⁸

The third lobby or social movement takes a much more amorphous shape. Caretakers of predominantly middle class English-speaking medium schools have used the threat of legal action, and in a small number of cases, actual litigation, to prevent what they view as unwarranted and counterproductive interference by the state. The School Governing Body Association has initiated legal challenges and extra-legal challenges to what it perceives as the unfair restrictions recently placed upon the supplementing of teacher salaries and the unreasonable pressure placed by provincial DoEs on middle-class schools to admit additional learners.

¹⁶⁸ For a critical assessment of the ‘lobbying’ success of this movement, see S Wilson ‘Taming the Constitution: rights and reform in the South African education system’ (2004) 20 *South African Journal on Human Rights* 418.

While each of these social movements articulates a meaningful grievance or concern, they tend to miss the most significant constitutional debacle of all: the failure to provide an *adequate* basic education for all. Despite regular attendance for seven years or more, the vast majority of South African children do not acquire a meaningful basic education. They lack, in short, the minimum levels of literacy, numeracy and essential life skills necessary to do more than menial work in a complex society.¹⁶⁹

1.3 The hard question

The hard question is: What can be done about such a vast problem? While challenges to fees, language policy and SGB autonomy engage discrete constitutional and statutory provisions that are relatively amenable to a standard binary legal solution by an ordinary court of law, the problem of inadequacy is, for obvious reasons, not.

But that does not mean it is not susceptible to a court-initiated form of problem-solving. We shall argue that the realisation of this right requires collaboration, cooperation and partnerships between the state, agents of the state (teachers), parents and learners, provincial departments and the local communities. In our scheme of shared constitutional interpretation, underwritten by a more basic commitment to experimental constitutionalism, the courts play three distinct roles.

The first role is fairly conventional: they determine the contours of the general norm. In short, courts determine what the right to a basic education means and the set of entitlements that flow to the right's beneficiaries: learners.

Second, the courts determine, with the assistance of multiple interested parties (the state, agents of the state (teachers), parents and learners, provincial departments, the local communities and experts), whether the prerequisites or the preconditions for the realisation of the right to a basic education are in place. So, for example, if the evidence consistently shows that achieving competency in reading and mathematics is difficult, if not impossible, in the context of class sizes above 50, the courts could instruct the state to provide resources to ensure that classes are of the appropriate size to meet minimum adequacy standards.

¹⁶⁹ Education Quality Accountability Office, Ontario *Trends in international mathematics and science study: 2003* (2004); UNESCO *Education for all: goal six* (2003).

The third role is related to the second. It assumes that a court which adopts an experimental constitutionalist approach to problem-solving will be in a unique position to create a space for a sustained conversation, of a relatively high order, over those practices which work best when it comes to the realisation of an adequate education. As we shall see, by setting very general, but enforceable, norms (role one), the courts can free the parties to reach an initial consensus about the best strategies for the realisation of the right (role two) and can, over time and with sufficient evidence, assess which practices work best when it comes to realising the constitutional norm of an adequate basic education (role three).

The structure of the chapter takes the following form. In section 2 we set out the very general normative framework for FC section 29(1)'s right to a basic education. In large part, we rely on the notion of adequacy – a term that appears frequently in both the international literature and the foreign case law. It captures the degree of fiscal equity that a basic education requires and the criteria for assessing whether learners receive the kind of education that delivers adequate levels of literacy, numeracy and other skills that will enable them to flourish as individuals and to participate as citizens in the governance of the various communities of which they are a part.

In section 3, we look at the evidence. We find that while the country meets formal criteria for access, it fails dismally when it comes to the provision of an adequate basic education. South Africa has recently participated in two cross-country comparative studies: Progress in International Reading Literacy (PIRLS) (Grade 4 and Grade 5 reading),¹⁷⁰ and Southern and Eastern Africa Consortium for Monitoring Education Quality (SACMEQ) (Grade 6 reading and maths).¹⁷¹ The results are unambiguous: the country performs poorly compared with many of its more impoverished neighbours, and very poorly in relation to developing countries in other parts of the world. More importantly, all of the studies introduce basic benchmarks that clearly show that the vast majority of children have not satisfied minimal acceptable levels in literacy and numeracy. Hard as it may seem to believe, this rich nation often finishes last when 45 to 50 developing nations are compared with one another. We stand very much at risk of losing a second generation of learners.

¹⁷⁰ I Mullis, M Martin, A Kennedy & P Foy *IEA's progress in international reading literacy study in primary school in 40 countries* TIMSS & PIRLS International Study Center (2007).

¹⁷¹ M Moloi & J Strauss *The SACMEQ II project in South Africa: a study of the conditions of schooling and the quality of education*, available at <http://www.sacmeq.org/links.htm>.

The state is not unaware of the problems it faces in delivering an adequate basic education for all. Indeed, as we shall see in section 4, one can go so far as to claim that it is aware that most learners do not receive an adequate basic education. Another hard question is whether its efforts amount to a genuine attempt at redress, or constitute a very sophisticated law and policy puppet-show? If we employ the adequacy framework developed in section 3 of this chapter, then we see that the state has begun to take some steps towards redress. The Education Laws Amendment Act of 2007 provides for a minimum package of resources per learner, creates amendments to SASA that require improvements in infrastructure and set out identifiable standards for learner achievement. The department's 'new' legislative or regulatory activism addresses infrastructure backlogs, holds principals accountable for performance, increases funding for fee free poor schools and demonstrates increased concern about teacher development and teacher remuneration. So while the three social movements we identified at the outset are engaged in rather narrow struggles over very specific schooling policies, the struggle for genuine improvement in our schools has – on its face – been taken up by the state itself. That said, a plausible claim can be made that the state's legislative, regulatory and budgetary activism amount to little more than 'hand-waiving'. Indeed, in the Foundations for Learning Campaign notice issued by the DoE, the Minister writes:

The campaign is a national response to national, regional and international studies that have shown over a number of years that South African children are not able to read, write and count at expected levels, and are unable to execute tasks that demonstrate key skills associated with Literacy and Numeracy.¹⁷²

One might expect the state to then announce a concrete set of proposals designed to provide an immediate response to the problems our schools face. The Notice does nothing of the sort. It sets out, instead, in the thinnest possible form, suggestions for how teachers and principals should arrange the curriculum and along with a few minimum standards that ought to be met. If this notice constitutes a foundation for learning, then our gods have feet of clay.

In section 5 we suggest how the state, the courts and other interested parties might work in concert with one another in order to provide a remedy for this failure to provide an adequate basic education. This approach to appropriate constitutional remedies for constitutional violations is grounded in what one of the authors has elsewhere described as a theory of experimental constitutionalism.

¹⁷² Department of Education 'Foundations of learning campaign' GN 306, GG 30880 (14 March 2008).

Experimental constitutionalism integrates four primary concepts. The first is ethical empiricism. We should evaluate social norms and institutional arrangements against our practical experience instead of *a priori* norms or mere intuition. The second is reciprocal effect. Social norms and institutional arrangements are both constitutive of and dependent upon the legal framework. The third is reflexivity. We should examine, critically, the process of social change and our own self-understanding. The fourth is destabilisation. Destabilisation recognises that social formations invariably create structures intended to promote their own continued existence and that such structures may block meaningful individual efforts at change. Destabilisation therefore places a premium on shaking up existing hierarchies in a manner that might enable members of a political community to pursue new ways of being in the world. Through combining those four concepts, experimental constitutionalism seeks to achieve two goals: (1) social norms and institutional arrangements made more flexible and open to revision; and (2) the revision of those norms and institutions in light of the ‘best-practices’ revealed by well-designed studies of various policy initiatives.

It achieves these two goals through two different approaches to the creation of constitutional norms: (1) shared constitutional interpretation – in which all public actors and private actors with a stake in education help the courts and the state set normatively and experientially desirable constitutional norms; (2) participatory bubbles – in which the courts and other political institutions create spaces within which all interested stakeholders can participate in the solution of very specific kinds of educational problems. The kinds of solutions arrived at in participatory bubbles will invariably inform the kinds of norm – for an adequate education – that the courts and other state actors arrive at over time. In our conclusion (section 6), we suggest how experimental constitutionalism might work to mitigate the damage our school system has wrecked on what is tantamount to a second lost generation of learners.

2 FC section 29(1)(a): nature and content of the right

2.1 Nature of the right to a basic education

2.1.1 Education and empowerment

In General Comment 13, the Committee on Social, Economic and Cultural Rights’ General Comment on the Right to Education captures the essence of the right to a basic education:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments states can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.¹⁷³

Empowerment rights, such as education, serve two purposes that are not fulfilled by the many of other rights found in Chapter 2 of the Constitution.¹⁷⁴ They ensure that citizens are able 'to set the rules of the game, and not merely be assured that the rules are applied as written'.¹⁷⁵ Second, 'they allow the individual to determine the shape and direction of his or her life.' Empowerment rights – such as education, expression, association, equality and socio-economic rights – thereby facilitate the enjoyment of other constitutional

¹⁷³ General Comment 13 (21st session, 1999) 'The right to education (art 13)' UN Doc E/C12/1999/10 para 1. See also *Brown v Board of Education of Topeka* 347 US 483 (1954) at 493: 'Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' Article 1(4) of the World Declaration on Education for All recognises that 'Basic education is more than an end in itself. It is the foundation for lifelong learning and human development on which countries may build, systematically, further levels and types of education and training'.

¹⁷⁴ J Donnelly & R Howard 'Assessing national human rights performance: a theoretical framework' (1988) 10 *Human Rights Quarterly* 214 (The pair identify four categories of rights and ten essential rights which can effectively represent all human rights: 'survival rights' (life, food and healthcare); 'membership rights' (family rights and equality); 'protection rights' (*habeas corpus* and an independent judiciary) and 'empowerment rights' (education, expression and association). While one may quibble with the content of their categories, the mere identification of a category of empowerment rights proves both analytically sound and rhetorically useful.)

¹⁷⁵ n 174 above, 234.

rights.¹⁷⁶

Beiter identifies four ways in which the right to education serves as an empowerment right.¹⁷⁷ First, education possesses the potential to liberate people from oppression. An educated populace is, allegedly, more willing to oppose political domination than an uneducated citizenry. Second, education permits people to participate in political life. Meaningful political participation requires both an understanding of the structures of a given polity and the capacity to exploit what one knows about the world in order to effect political change. Education is deemed essential for ‘socio-economic development’: only educated individuals possess the ability to secure both the basic necessities for survival and the other material goods required for flourishing. Finally, education enhances a person’s ability to participate in the governance of a given linguistic, cultural or religious community – and that ability, in turn, enables the community to maintain its preferred way of being in the world.

Education’s status as an empowerment right might well explain why it receives, on its face, greater protection than other socio-economic rights: housing, healthcare, food, water and social security.¹⁷⁸ It also seems reasonable to conclude that the Constitutional Assembly believed that the quickest route to the provision of the minimum material conditions for all South Africa’s residents to live a meaningful life is through the creation of a population of educated ‘autonomous’ agents, rather than through a citizenry dependent upon state largesse.

2.1.2 Negative dimensions and positive dimensions of the right

FC sections 26 and 27 – the rights to housing, healthcare, food, water and social security – contain separate positive rights and negative rights. FC section 29(1)(a) and (b) do not draw a specific distinction

¹⁷⁶ F Coomans ‘In search of the core content of the right to education’ in D Brand & S Russel (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 160 - 161; K Tomasevski *Education denied* (2003) 1 (Tomasevski, a former special Rapporteur for Education of the UN Human Rights Commission, writes: ‘Leaving seven-year-olds to fend for themselves routinely drives them into child labour, child marriage or child soldiering. The right to education operates as a multiplier. It enhances all other human rights when guaranteed and forecloses most, if not all, when denied’).

¹⁷⁷ See K Bieter *The protection of the right to education by international law* (2006) 28. See also Coomans (n 176 above) 160.

¹⁷⁸ On the rights to health, food, water and social security, see D Bilchitz ‘Health’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2005) chap 56A; D Brand ‘Food’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, February 2005) chap 56B; A Kok & M Langford ‘Water’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, June 2004) chap 56C; M Swart ‘Social Security’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2006) chap 56D.

between positive entitlements and negative entitlements. However, in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill of 1995*, the Constitutional Court held that IC section 32(a),¹⁷⁹ the precursor of FC section 29(1)(a), created 'a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education'.¹⁸⁰ Given the virtually identical wording of the two sections, the Constitutional Court would likely find that FC section 29(1)(a) confers both positive entitlements and negative rights.

2.1.3 Negative dimension

By ensuring that people are not denied or prevented from securing access to existing educational resources, FC section 29 operates like an ordinary civil and political right. Any interference with the legitimate exercise of the right can be justified only in terms that meet the test set out in FC section 36(1).¹⁸¹ Schools may not refuse to admit learners of a particular race,¹⁸² or expel learners for trivial non-compliance with dress codes.¹⁸³

This negative dimension may well have horizontal application. Private or independent schools will, in terms of FC section 8(2), be bound by a right 'to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.¹⁸⁴ FC section 29(3), when read with FC section 9(4) (the right to equality as applied to private parties) and statutory provisions governing both independent schools and the promotion of equality, narrows dramatically the space for the denial of access to educational goods.¹⁸⁵

¹⁷⁹ IC sec 32(a) read: 'Every person shall have the right – (a) to basic education and to equal access to educational institutions.'

¹⁸⁰ 1996 3 SA 165 (CC), 1996 4 BCLR 537 (CC) para 9. The Constitutional Court has identified a similar negative dimension in FC sec 26(1)'s right to access to adequate housing: see *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 2 SA 140 (CC), 2005 1 BCLR 78 (CC) para 34.

¹⁸¹ See, further, S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2006) sec 34.8.

¹⁸² *Matukane & Others v Laerskool Potgietersrus* 1996 2 SA 223 (T) ('*Matukane*').

¹⁸³ *Antonie v Governing Body, Settlers High School & Others* 2002 4 SA 738 (C); *KwaZulu-Natal MEC for Education & Others v Pillay* [2007] ZACC 21 (CC) 2008 1 SA 474 (CC).

¹⁸⁴ For a detailed discussion of FC sec 8(2), see S Woolman 'Application' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, March 2005) chap 31, sec 31.4(a).

¹⁸⁵ See S Woolman 'Defending discrimination' (n 30 above); Fleisch & Woolman (n 130 above). See also: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; SASA 84 of 1996. For more on the limits of justifiable discrimination, see chaps 3 and 4 of this work.

2.1.4 Positive dimension

The positive right to basic education must be regarded as a socio-economic right. However, not all socio-economic rights function in the same manner. Some commentators speak of ‘strong’ and ‘weak’ positive rights. Others refer to ‘qualified’ and ‘unqualified’ rights.¹⁸⁶ Whatever the nomenclature, the phrasing of FC section 29(1)(a) reflects a ‘strong’ right, ‘unqualified’ by any of the ‘promises’ or ‘aspirational language’ found in FC sections 26 and 27.¹⁸⁷ The strong, unqualified character of FC section 29(1)(a) is reflected in four distinct linguistic tropes.

First, everyone has the right to basic education itself, not, as is the case with respect to FC section 26 or 27, to ‘access’ to basic education. Recall that in *Grootboom* the Constitutional Court interpreted the inclusion of the word ‘access’ in the FC section 26 right to housing to mean that the state could fulfil its constitutional obligations by ‘enabling’ people to provide their own housing.¹⁸⁸ The corollary must be that the absence of ‘access’ in FC section 29(1)(a) means that the state itself must provide a basic education to everybody.¹⁸⁹

¹⁸⁶ Sandra Liebenberg distinguishes between three categories of socio-economic rights in the final Constitution. First, some rights are qualified by: (a) ‘access’ to the thing; (b) reasonable measures; (c) progressive realisation; and (d) available resources. These rights are found in FC secs 26(1) and 27(1) and are qualified by FC secs 26(2) and 27(2) respectively. They are housing, health, food, water and social security. Second, unqualified positive rights encompass basic education (FC sec 29(1)(a)), rights of children (FC sec 28(1)(c)) and rights of prisoners (FC sec 35(3)(e)). Third, other rights afford solely negative protection: FC secs 26(3) and 27(3): S Liebenberg ‘Interpretation of socio-economic rights’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2003) chap 33.

¹⁸⁷ Berger asks whether the qualification in the second part of FC sec 29(1)(b) is meant to apply to FC sec 29(1)(a) as well: E Berger ‘The right to education under the South African Constitution’ (2003) 103 *Columbia Law Review* 614 638 – 639 n139. This argument is, as Berger notes, entirely unconvincing. The grammar of FC sec 29(1) separates the qualification in FC sec 29(1)(b) from FC sec 29(1)(a) with both an ‘and’ and a semicolon. This formal distinction clearly suggests that the qualifications are not meant to apply to FC sec 29(1)(a). In addition, FC secs 26 and 27, which include similar limitation clauses in their respective subsection (2)’s, contain specific references back to the rights in FC secs 26 and 27(1). That the Constitutional Assembly chose such a palpably different structure for FC sec 29(1) clearly suggests that the drafters did not intend FC sec 29(1)(b)’s internal limitations to apply to FC sec 29(1)(a).

¹⁸⁸ *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) paras 35 - 36 (‘A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society’).

¹⁸⁹ See M Seleane ‘The right to education: lessons from *Grootboom*’ (2003) 7(1) *Law, Democracy and Development* 137 140 - 142.

Second, the right to education is not subject to a standard socio-economic rights limitation such as 'reasonable legislative measures'. This internal limitation lies at the core of the Constitutional Court's textual argument for adopting a 'reasonableness' standard for the socio-economic rights to housing and to health in *Grootboom* and *TAC*. Accordingly, FC section 29(1)(a) cannot be satisfied unless everyone receives a basic education. The state's 'reasonable' measures to achieve its provision cannot justify a failure to provide this good. FC section 29(1)(a)'s obligations can only be fulfilled by the provision of classrooms, teachers and textbooks.

Third, FC section 29(1)(a) is not contingent on the availability of resources.¹⁹⁰ As Seloane notes, whether the state has enough resources to fulfil its constitutional obligations does not obviate the duty imposed upon the state to meet them.¹⁹¹ We argue below that the most effective manner to deal with a lack of resources in the domain of educational rights is by constructing creative remedies to meet the state's constitutional obligations: it makes little sense, as an *interpretive* matter, to read an internal limitation into FC section 29(1) that simply is not there.

Finally, the right is not subject to progressive realisation. In *Grootboom*, Yacoob J described progressive realisation in the following terms:

It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.¹⁹²

Basic education is not a good that can be made gradually available to more people 'over time'.

In sum, the text of FC section 29(1)(a) indicates that, unlike the 'traditional' socio-economic rights, the right to basic education is: (a) not subject to a reasonableness standard; (b) not dependant on the availability of resources; and (c) the source of a direct, immediate and specific entitlement.

However, despite these clear textual indications that FC section 29(1)(a) imposes a fairly onerous burden on the state, the Constitutional Court's existing socio-economic rights jurisprudence suggests that the Court will be inclined to limit the impact of FC

¹⁹⁰ Seloane (n 189 above) 140 - 141.

¹⁹¹ Seloane (n 189 above) 140.

¹⁹² *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) para 45.

section 29(1)(a)'s unqualified wording. The TAC Court, in rejecting the minimum core approach to socio-economic rights, held that

[I]t is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.¹⁹³

Thus, despite the difference in the texts of FC sections 26 and 27, on the one hand, and FC section 29(1)(a) on the other, the alleged 'impossibility' of providing an *adequate* basic education immediately may well push the Court to limit the scope of FC section 29(1)(a). Berger identifies the source of this tension in FC 29(1)(a) – the tension between the unqualified right and the qualified right – as follows:

[T]o announce standards that cannot be met would ultimately cheapen the Constitution; the Court can preach whatever message it wants, but that message – and the Constitution itself – will ring hollow once people begin to realize that its rulings do not improve their everyday lives. A narrow constitution, goes the argument, is better than an empty one.¹⁹⁴

The manner in which the Court has approached both qualified rights and unqualified rights also suggests that they will be hesitant to grant FC section 29(1)(a) full, unqualified status. In *Grootboom*, the Court adopted the following contextual approach to interpreting socio-economic rights:

Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the

¹⁹³ *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 5 SA 721 (CC), 2002 10 BCLR 1033 (CC) ('TAC') para 35.

¹⁹⁴ Berger (n 187 above) 642. This danger was specifically recognised by the Constitutional Court in *Soobramoney*: 'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.' *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC), 1997 12 BCLR 1696 para 8. The flip side of this argument, as Berger notes, is that the Constitution is, quite self-consciously, a transformative and aspirational document. In his words: 'if championing these rights without realising them risks emptying the Constitution, then abandoning them altogether would surely drain out even more of its content' (Berger (n 187 above) 643). The Court will, some time down the line, have to choose between placing a gloss on FC sec 29(1)(a) that promises too much and a reading of this unqualified right that offers far too little.

Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.¹⁹⁵

In interpreting FC section 26, the Constitutional Court held that '[s]ocio-economic rights must all be read together in the setting of the Constitution as a whole'.¹⁹⁶ No matter how important one views the right to education, it is difficult to argue that it should trump rights to housing, food, water, healthcare and social security. Housing, food, water, healthcare and social security are, after all, basic conditions of existence. Without them, the right to education, (however lavishly realised), will be of little worth.

In addition, the post-apartheid state inherited an education system that purposefully tried to ensure that the majority of the population could not be anything more than hewers of wood and drawers of water. Our historical gloss on FC section 29(1)(a) emphasises the restitutive character of the right of education. However, it also indicates the size of the problem facing the state and why the Court might be inclined to soften the budgetary impact of an unqualified FC section 29(1)(a).

But how would the Court craft a softer right? *Grootboom*, interestingly, offers an example. Although the applicants' primary complaint was based on FC section 26, the right to housing, they also claimed relief under the seemingly unqualified FC section 28(1)(c) right to shelter for children (and their families). Davis J, in the High Court, accepted FC section 28(1)(c)'s unqualified content and granted the children and families the specific remedy requested.¹⁹⁷ The Constitutional Court reversed the High Court. The Constitutional Court held that FC section 28(1)(b) required that a child's needs be provided primarily by his or her family. The obligation to provide shelter under FC section 28(1)(c) rests 'primarily on the parents or family' and, therefore, 'only alternatively on the State'.¹⁹⁸ That primary obligation would only shift to the state if children were removed from their families. However, under normal circumstances,

¹⁹⁵ *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) para 22 ('*Grootboom*').

¹⁹⁶ *Grootboom* (n 291 above) at para 24 (Constitutional Court continued: 'The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their inter-connectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them').

¹⁹⁷ *Grootboom v Oostenberg Municipality & Others* 2000 3 BCLR 277 (C) ('*Grootboom HC*').

¹⁹⁸ *Grootboom HC* (n 197 above) para 77.

the state would only bear a minimal enabling duty.¹⁹⁹ Although education is not mentioned in FC section 28(1)(c), the Court might well be open to a set of similar arguments – and that train of propositions would begin with a *Grootboom*-like contention that parents bear a primary duty to educate their children. Or the Court could rely on its reasoning in *Grootboom* that ‘the carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped’²⁰⁰ by the right to education and that the right to education must therefore be read in conformity with that scheme.²⁰¹

¹⁹⁹ The TAC Court also appears to subject the FC sec 28(1)(c) right to healthcare to ‘progressive realisation’. See TAC (n 193 above) para 77. For a critique of the Constitutional Court’s approach to FC sec 28(1)(c), see A Friedman & A Pantazis ‘Children’s Rights’ in Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2004) 47-9 – 47-11 (The authors note that ‘if the sections are read literally, the grounds for rejecting the [High Court’s] order are shaky at best.’ While they acknowledge the gravity of the Court’s concerns, they argue that ‘[r]ather than claiming that the overlap of the rights is inconsistent with the notion that separate rights are created, the court should have made it clear that a purposive, rather than a literal, interpretation of the section made it compatible with a scheme for progressive realisation of housing’). See also M Pieterse ‘Reconstructing the private/public dichotomy?: The enforcement of children’s constitutional social rights and care entitlements’ (2003) *Tydskrif vir Suid-Afrikaanse Reg* 1 11 (‘While the court’s concerns with the overlap of parental interests with section 28(1)(c) right and the possible abuse of such rights by indigent parents are perhaps understandable ... [v]iewing section 28(1)(c) as subject to the resource and other constraints in sections 26 and 27 would seem completely unsupported by the text of the constitution ... If the court’s interpretation is to be preferred, the separate inclusion of section 28(1)(c) in the bill of rights would be rendered almost entirely without purpose’).

²⁰⁰ *Grootboom* (n 195 above) para 71.

²⁰¹ On reading constitutional provisions in conformity with one another, see *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as amici curiae)* (No 2) 2003 1 SA 495 (CC), 2002 10 BCLR 1086 (CC); *South African Broadcasting Corp Ltd v National Director of Public Prosecutions & Others* 2007 1 SA 523 (CC), 2007 2 BCLR 167 (CC). The High Courts have sent mixed messages regarding unqualified socio-economic rights. In *B & Others v Minister of Correctional Services & Others* 1997 6 BCLR 789 (C), Brand J held that the FC sec 35(2)(e) right of prisoners to be provided with adequate medical care required that the state provide prisoners with anti-viral medication – if they had a *legitimate expectation* of receiving such treatment (namely previous treatment by the state and a doctor’s assessment that such treatment was necessary. However, prisoners who had no ‘legitimate expectation’ of such treatment were not entitled to such treatment – even if they met the criteria (a particular CD4 count) for treatment (above at paras 58 and 60). When the issue of HIV medication for prisoners arose again in *EN & Others v Government of RSA & Others* 2007 1 BCLR 84 (D) paras 30 - 31, Pillay J adopted a reasonableness standard for his evaluation of the applicants’ FC sec 27 and FC sec 35(2)(e) claims. Again, the EN court’s conclusions appear to turn on whether the prisoners had a legitimate expectation of treatment. The Witwatersrand Local Division has upheld a right to electricity for maximum security prisoners sourced, largely, in FC sec 35(2)(e): *Strydom v Minister of Correctional Services* 1999 3 BCLR 342 (W) para 15. However, Schwartzman J’s judgment in *Strydom* appears to fudge the justification for the outcome: he does not clearly contend that the right was independent of state resources; and he appears to grant the relief solely because he remained unconvinced by the state’s arguments about budgetary deficiencies (above para 17).

We suggest a reading of FC section 29(1)(a) that would explain the unqualified nature of the right but that does not, at the same time, make a hash of the budgetary constraints faced by the post-apartheid state: The absence of an internal limitation for the right to a basic education makes sense when viewed through the lens of apartheid-era funding inequalities. The drafters wanted to reaffirm the primacy of education in a social democracy and to undermine any attempt to perpetuate unequal levels of state funding. The historical context and aspirational content of the South African Constitution requires a more nuanced reading of the absence of the internal limitation in [FC s] 29(1)(a). In short, the section should be read as a reminder that the state may never again use education as a vehicle for the reproduction of – and must make every effort possible to eliminate all vestiges of – apartheid-era patterns of inequality.²⁰²

The absence of an internal modifier does not make it impossible for the state – or another social actor – to justify a limitation of the right. Any person can, in terms of FC section 29, demonstrate that they do not currently have access to a school that would enable them to secure a basic education. That showing, if accepted, would establish a limitation of FC section 29(1)(a).²⁰³ Then, assuming the right to a basic education had been impaired by a law of general application, the justificatory burden would shift to the state – or another party responsible for the inadequate education – to justify the limitation under FC section 36(1).²⁰⁴ (If the source of the limitation is mere government policy, or obstruction by particular schools, it will not be possible to justify the limitation.) The state will be legitimately able to raise resource constraints and the need to fulfil other constitutional obligations in showing that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

The other way to limit the unqualified character of FC section 29(1)(a) is through the remedy. While a person who establishes that the government has failed to provide her with a basic education is entitled to relief, that relief need not necessarily be an order that the

²⁰² Fleisch & Woolman 'On the constitutionality of school fees' (n 26 above) 111 n10.
²⁰³ It is necessary to stress that, prior to any judicial gloss on its meaning, FC sec 29(1)(a) ought to be given the full, unqualified reading that the text suggests.

²⁰⁴ For more on the meaning of 'law of general application', and the distinction between 'law' and 'conduct', see S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2006) sec 34.7 ('Law that fails to meet the "law" requirement of law of general application falls into roughly two categories. Those categories are: (aa) grant of power to government officials not constrained by identifiable legal standards; and (bb) commissions and omissions. Commissions and omissions that fail to meet the desiderata for "law of general application" fall into two related categories: (x) conduct carried out under colour of law but beyond the scope of actual legal authority; (y) the failure to discharge constitutional duties').

government immediately provide an adequate basic education. A court must give an order that is just and equitable. Such an order could encompass a simple declaratory order, an order suspending invalidity or a structural interdict that would give the government an opportunity to offer a *bona fide* plan to realise the right to a basic education. The benefit of this 'soft' remedial approach is that a court can simultaneously affirm the right to education, and still leave the government sufficient room to manoeuvre. This approach avoids compromising rights by tying their interpretation to a restrictive vision of available remedies. As Justice Kriegler noted in *Sanderson v Attorney-General, Eastern Cape*, remedies must be designed to give maximum effect to the rights enshrined in Chapter 2: 'our flexibility in providing remedies may [thereby] affect our understanding of the right'.²⁰⁵ Because our courts have broad discretion to fashion an 'appropriate' constitutional remedy, they are less likely to be deterred from finding a violation of the right than would be the case if they had a rather narrow menu of remedies from which to choose. The Constitutional Court has repeatedly emphasised flexibility in the provision of remedies and has held that courts must 'forge new tools' and 'shape innovative remedies' to ensure effective relief.²⁰⁶ As Mokgoro and Sachs JJ succinctly put it in *Bel Porto*: 'It is the remedy that must adapt itself to the right, not the right to the remedy.'²⁰⁷ It is the Court's willingness to exploit the remedial flexibility provided by the Constitution that drives our conception of how a violation of FC section 29(1)(a) can best be ameliorated.

²⁰⁵ *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC), 1998 1 SACR 227 (CC), 1997 12 BCLR 1675 (CC) para 27.

²⁰⁶ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC), 1997 7 BCLR 851 (CC) para 69, quoted with approval in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC), 2000 1 BCLR 39 (CC) ('*NCGLE v Minister of Home Affairs*') para 65. See also *Bel Porto School Governing Body v Premier, Western Cape & Another* 2002 3 SA 265 (CC), 2002 9 BCLR 891 (CC) ('*Bel Porto*') (Mokgoro and Sachs JJ) paras 181 and 186 ('The flexibility in the provision of constitutional remedies means that there is no constitutional straightjacket ... It would indeed be most unsatisfactory and have negative consequences for constitutionality to fail to provide a remedy where there has been an infringement of a constitutional right. While courts should exhibit significant deference towards the administration and recognise the practical difficulties which the administration faces, it could create a misleading impression that in instances where there is an infringement of a constitutional right, and there are significant practical difficulties in remedying the injustice caused, a decision-maker will not be held to account'). See, generally, M Bishop 'Remedies' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, Original Service, June 2008) chap 9.

²⁰⁷ *Bel Porto School Governing Body v Premier, Western Cape & Another* 2002 3 SA 265 (CC), 2002 9 BCLR 891 (CC) para 186. Although the Constitutional Court has as yet been hesitant to employ structural interdicts, the Justices in two recent hearings seemed to express considerable dissatisfaction with the state's continued non-compliance with court orders and hinted that structural interdicts might be appropriate in certain circumstances. *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* 2008 3 SA 208 (CC).

2.2 Content of the right

2.2.1 Various definitions of 'basic education'

The courts have yet to interpret the meaning of the term 'basic education'. Two possible constructions appear plausible. 'Basic education' could refer to a specific period of schooling: primary school. 'Basic education' could refer to a standard of education: its quality or its adequacy. As Berger bluntly puts it: 'Does section 29 promise merely a place to go to school, or does it provide for an "adequate" education?'²⁰⁸

The term 'basic' does have determinate content at international law.²⁰⁹ The World Declaration on Education for All de-emphasises the completion of specific formal programs or certification requirements.²¹⁰ Instead it stresses the acquisition of that level of learning necessary for an individual to realise his or her full potential. The World Declaration states:

Every person-child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to survive, to develop to their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.²¹¹

The DoE's *White Paper on Education and Training* initially appears to endorse this reading of 'basic education'.²¹² However, the *White Paper* then immediately goes on to undermine this construction by stating that meeting the certification requirements of the General Education Certificate (GEC) satisfies the constitutional entitlement to

²⁰⁸ Berger (n 187 above) 625.

²⁰⁹ South African courts are required to look to international law when interpreting the Bill of Rights. See FC sec 39(1)(b).

²¹⁰ See art 4: the 'focus of basic education must, therefore, be on actual learning acquisition and outcome rather than exclusively upon enrolment, continued participation in organised programmes and completion of certification requirements'.

²¹¹ Article 1. American courts have adopted a similar approach in their understanding of a state's educational obligations. See, eg, *Brown v Board of Education* 347 US 483 (1954) 493; *San Antonio Independent School District v Rodriguez* (1973) 411 US 1, 112 (Marshall J dissenting); *Serrano v Priest* 487 P2d 1241 (Cal 1971), 1258 and *Abbott v Burke* 575 A2d 359 (NJ 1990) 397. The German jurisprudence takes a similar line. See D Kommers *Constitutional jurisprudence of the Federal Republic of Germany* (1997) 294 - 304.

²¹² *White Paper on Education and Training* (March 1995) paras 13 - 15.

a ‘basic education’.²¹³ While the GEC may well appear, at first blush, to meet the World Declaration’s desiderata, it shies away from an express commitment to realising the Declaration’s goals.

That these two connotations of ‘basic’ reflect a distinction with a difference is illustrated in *Campaign for Fiscal Equity Inc v The State of New York*.²¹⁴ The applicant had argued that the standard of education in New York City schools did not meet the requirement of a ‘sound basic education’ found in the State of New York’s Constitution.²¹⁵ The New York State Court of Appeal (the State’s highest court) had, in a preliminary judgment, defined ‘sound basic education’ as the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.²¹⁶ The definition also embraced the ability to (a) find employment and (b) participate in political life. The Appellate Division, on remand, then found that held found that an eighth grade education was sufficient to meet the Court of Appeal’s standard: such an education would enable a person to obtain employment so as ‘not to be a charge on the public fiscus’ and to read the newspapers and the jury instructions necessary to fulfil their civic obligations. On appeal, the Court of Appeal disagreed. It held that an education had to enable people to obtain competitive employment and that the requirement of civic participation ‘means more than just being qualified to vote or serve as a juror, but to do so capably and knowledgeably’.²¹⁷ It concluded that ‘a sound basic education should not be pegged to the eighth or ninth grade, or indeed to any particular grade level’.²¹⁸ Thus while an eighth or ninth grade education might have served in 1894 when the New York State Constitution was drafted, only a full and an adequate high school education would now meet the twin goals that the right to a basic education was designed to serve. The Court of Appeal’s decision suggests that the right to a ‘basic education’ requires the state to meet a substantive – measurable – goal and not merely a

²¹³ *White Paper on Education and Training* (n 212 above) para 15: ‘basic education’ is ‘appropriately designed programmes to the level of the proposed General Education Certificate (GEC), whether offered in school to children, or through other forms of delivery to young people and adults.’ The GEC is awarded after completion of the one-year reception class (pre-school) plus Grades One through Grade Nine. In terms of sec 3(1) of the South African Schools Act 84 of 1994, it is compulsory for a learner to attend school from the age of seven until the age of fifteen or the ninth grade which ever comes first. This phase of education is also prioritised in terms of actual allocation of resources. See also Norms and Standards for School Funding GN 2362 GG 19347 (October 1998) para 95 (in the building and extension of schools this phase of education takes precedence).

²¹⁴ 100 NY 2d 893 (‘CFE II’).

²¹⁵ Article XXII, paragraph 1.

²¹⁶ 86 NY 2d 316.

²¹⁷ *CFE II* (n 214 above) 906.

²¹⁸ *CFE II* (n 214 above).

formal goal that any student marking time and any school pushing through students could satisfy.

The *Campaign for Fiscal Equity* Court focused on active political participation and competent jury service as the ultimate measures of basic education. By contrast, the West Virginia Supreme Court articulated a detailed list of knowledge that learners would be required to possess in order to meet West Virginia's constitutional requirement of a 'thorough and efficient' education system:

(1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work – to know his or her options; (5) work training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioural and abstract, to facilitate compatibility with others in this society.²¹⁹

A South African court would find itself hard pressed to enforce either New York's or West Virginia's definition of basic education. Fleisch's trenchant critique of our primary school system – a function of our two parallel economies, our two separate nations – causes him to arrive at the following conclusions:

After the end of apartheid – South Africa has not one, but two education 'systems'. The first 'system' is well resourced, consisting mainly of former white and Indian schools, and a small but growing independent sector. The first 'system' produces the majority of university entrants and graduates, the vast majority of students graduating with higher-grade mathematics and science. Enrolling the children of the elite, white-middle and new black middle-classes, the first system does a good job in ensuring that most children in its charge acquire literacy and mathematics competences that are comparable to those of middle-class children anywhere in the world. [NB: As tertiary educators know, Fleisch is being far too generous in this assessment.] The second school 'system' enrolls the vast majority of working-class and poor children. Because they bring their health, family and community difficulties with them into the classroom, the second primary school 'system' struggles to ameliorate young people's deficits in institutions that are themselves less than adequate. In seven years of schooling, children in the second system do learn, but acquire a much more restricted set of knowledge and skills than children in the first system. They 'read', but mostly at a very limited, functional level; they 'write', but not with fluency or

²¹⁹ *Pauley v Kelly* 255 SE2d 859 (1979) 877.

confidence. They can perform basic numeric operations but use inappropriately concrete techniques that limit application.²²⁰

Thus, the accepted criteria for a basic education in New York or West Virginia – literacy, numeracy, problem-solving skills and the basic knowledge necessary to function in society – is, unequivocally, beyond the current reach of the South African educational system. The massive current deficits – much of it inherited from apartheid – must not, however, be used as an excuse or a justification by the state for failing to provide a ‘basic education’. However South Africa chooses to go about achieving the constitutionally-mandated goal of a basic education, it ought to keep in mind Amy Gutmann’s description of the philosophical bases for the right: (a) participation in and promotion of government; (b) ability to function in the economic community; (c) the inherent dignity of the individual.²²¹

2.2.2 Adequacy as the core criterion of the right

The International Committee for Economic, Social and Cultural rights has accepted the so-called ‘Four A’s’ as an appropriate standard by which to measure a state’s compliance with its obligation to provide a basic education: (a) availability; (b) accessibility; (c) adaptability; and (d) acceptability. We do not deny that these four terms provide useful hooks for thinking about what, practically-speaking, a basic education requires. However, they are largely *formal* constraints. As a result, we believe that a proper construction of the right would place the greatest emphasis on the substantive standard of adequacy we adumbrate below.

2.2.3 The Four A’s

2.2.3.1 Availability

General Comment 13 states that

‘availability’ means that functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are

²²⁰ B Fleisch *Primary education in crisis* (2007) 1 - 2. Fleisch explains why – the absence of sufficient food, the near-universal presence of parasites, the lack of adequately trained teachers, especially in maths and sciences – South Africa will not, for the foreseeable future, provide their learners with a basic, let alone, adequate education.

²²¹ A Gutmann *Democratic education* (1987); J Dewey *Democracy and education* (1916).

likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.²²²

2.2.3.2 Accessibility

Accessibility requires that once the schools have been built, and stocked with teachers and textbooks, learners must be able to make use of them. Accessibility takes account of three discrete factors: Non-discrimination;²²³ financial accessibility;²²⁴ physical accessi-

²²² General Comment 13 'The Right to Education (art 13)' UN Doc E/C.12/1999/10 (21st Session, 1999) para 6(a).

²²³ The cases that have engaged in discrimination in education can usefully be divided into two general categories: direct discrimination and indirect discrimination. Direct discrimination occurs when a rule or practice specifically prohibits members from a certain group from having access to education. *Minister of Home Affairs v Wathenuka & Another* 2004 4 SA 326 (SCA) remains the only discrimination case to be decided specifically under FC sec 29(1). In *Wathenuka*, the Supreme Court of Appeal struck down regulations which prohibited asylum seekers from studying in South Africa. The Court held that it could never be reasonable or justifiable to deny education to a child lawfully in the country to seek asylum (above para 36). The general prohibition on study by asylum seekers was therefore an unjustifiable limitation of FC sec 29(1). *Wathenuka* stands for two further propositions. First, it reinforces the notion that 'everyone' in FC sec 29(1)(a) means precisely that: FC sec 29(1)(a)'s guarantees are not limited to citizens or even to permanent residents. Second, while total bans on certain classes will generally be unacceptable, a requirement that certain classes of person seek permission to study may conform to the dictates of FC sec 36(1). Both of these findings are to be welcomed. The second non-discrimination matter to arise in South African courts, *Harris v Minister of Education* 2001 8 BCLR 796 (T), concerned age limits for entry into primary school. In 2000, the Minister of Education published a notice that stated that from 2001 learners would not be permitted to enrol at independent primary schools before the year in which they would turn seven. The Pretoria High Court held that the measure was discriminatory on the basis of age and, because it was likely to impair the child's development, was both presumptively and ultimately unfair (above 800J - 804D). An earlier case, *Matukane & Others v Laerskool Potgietersrus* 1996 2 SA 223 (T) ('*Matukane*'), straddles the boundary between direct and indirect discrimination. Laerskool Potgietersrus – a parallel-medium Afrikaans and English school – was a traditionally white school that catered primarily for Afrikaans learners and that had that refused to admit black learners. The disgruntled black parents took Laerskool Potgietersrus to court. The High Court held that, despite the respondent's protestations to the contrary, the evidence showed that the school could accommodate more learners and that black learners had been refused access while white learners had been admitted. While ducking a finding that the discrimination had occurred on purely racial grounds – as opposed to potentially legitimate grounds of culture, language or ethnic social origin, Spoelstra J rejected the respondent's argument that the school would be unable to maintain its predominantly Afrikaans character by admitting a small number of English-speaking black learners. A third form of exclusion arises where a school's code of conduct, although seemingly neutral, excludes or punishes member of particular communities. In *Antonie v Governing Body, Settlers High School & Others* 2002 4 SA 738 (C), a learner had been found guilty of 'serious misconduct' for attending school with dreadlocks and a cap – essential parts of the practice of her

bility.²²⁵ Accessibility engages both negative dimensions and positive dimensions of the right to basic education. Accessibility requires (1) that people are not (unjustifiably) turned away; and (2) that appropriate steps are taken to make access easier for persons from groups that were either consigned to inferior institutions or excluded from certain educational institutions altogether.

2.2.3.3 Acceptability

We often presume that education, no matter what its content, is an

Rastafarian religion. In the High Court, Van Zyl J held that codes of conduct should not be assessed in a rigid manner, but rather in 'a spirit of mutual respect, reconciliation and tolerance.' (above para 17). Van Zyl J also emphasised the need to read any code of conduct in light of a learners' FC sec 16 rights to freedom of expression. The conduct was held to fall well short of the definition of 'serious misconduct', and the High Court set aside the SGB's decision (above paras 18 - 20). In *KwaZulu-Natal MEC for Education v Pillay* [2007] ZACC 21, 2008 (1) SA 474 (CC) ('*Pillay*'), the Constitutional Court had to consider whether a Hindu learner should be entitled to wear a nose stud to school as an expression of her South Indian, Tamil and Hindu culture or and as an integral part of the practice her Hindu religion. The Constitutional Court found that the 'norm embodied by the [school's] Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms' (above para 44). While recognising the importance of codes of conduct and the need to ensure discipline, Chief Justice Langa held that a mere appeal to uniformity would not be sufficient to refuse an exemption from a code (above para 114). In this case, no such evidence was presented and the Court found that Sunali should have been granted an exemption.

²²⁴ No person should be denied a basic education because they or their parents cannot afford school fees. That much is uncontroversial. See Roithmayr (n 8 above) 394 - 395 (Roithmayr refers to *Grootboom* (n 195 above) at para 36 and *TAC* (n 193 above) paras 70 - 71 as supporting the proposition that socio-economic rights must take account of differing financial circumstances and that the state has an obligation to provide housing and HIV drugs to those who cannot afford them. That seems to us to be an errant reading of *Grootboom* and *TAC*.) See Fleisch & Woolman 'On the constitutionality of school fees' (n 26 above) 111 n10; Roithmayr (n 26 above) 396. Whether FC sec 29(1)(a) demands that a basic education be free to all has generated heated debate and will be taken up in chap 7 below.

²²⁵ Physical accessibility requires that learners are in fact able to travel from their homes to schools. A 2000 study suggests that 'if a child is not within walking distance of her school, transport costs are the highest cost of attending school borne by the household.' K Porteus, G Clacherty & L Mdiya 'Understanding out-of-school children and out-of-age learners in the context of urban poverty in South Africa' Vuk'uyithathe Research Consortium (2000) (manuscript on file with authors) 44, as quoted in Fleisch & Woolman 'On the constitutionality of school fees' (n 26 above) 114.

unalloyed good.²²⁶ But that is not so.²²⁷ Education can just as easily be manipulated to perpetuate human rights abuses as it can to end them.²²⁸ International law requires that education be 'directed to the

²²⁶ K Beiter *The protection of the right to education by international law* (2006) 493.

²²⁷ While our courts will likely be loathe to interfere with the judgment of the educators who design school curricula, FC sec 29(1)(a) could support a claim that what our children are being taught is either biased or blatantly wrong. For example, in the United States there has been significant debate over the teaching of intelligent design or evolution in public schools. In *Epperson v Arkansas* 397 US 97 (1968) the US Supreme Court overturned a state law that prohibited the teaching of evolution. In *Edwards v Aguillard* 482 US 578 (1987) the US Supreme Court hewed to an even stricter line in finding unconstitutional a law that permitted evolution to be taught only in conjunction with creationism. In *Edwards*, Brennan J stressed that: 'Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the learner and his or her family. Learners in such institutions are impressionable and their attendance is involuntary (above at 584). A similar situation occurred in post-Second World War Japan. Textbooks often removed or softened confirmed reports of Japanese atrocities. A textbook author, Mr Saburo Ienaga, challenged the government's screening of text books and the censoring of some of his own works. The Japanese Supreme Court upheld the screening process, and thus the censorship, but stated that textbooks had to be accurate, neutral and fair as 'students do not have enough capability to criticise the content of class education and they can hardly choose a school or a teacher.' *Ienaga v Japan* No 1428 of 1986 (16 March 1993). In 1997, the Supreme Court partially upheld another claim by Mr Ienaga. Ienaga took issue with the state's deletion, from a textbook, of a description of Japan's biological experiments on 3 000 people in northern China. The Court found that reliable evidence existed to substantiate the claim. *Ienaga v Japan* No 1119 of 1994 (29 August 1997). The manner in which students are taught may also be contested in terms of 'acceptability'. Teachers must conduct themselves in a manner that respects the rights of their students. In *Ross v New Brunswick School District No 15* [1996] 1 SCR 825, 133 DLR (4th) 1, a teacher who had published anti-Semitic pamphlets in his capacity as a private citizen, had, as a result, been given a non-teaching position. The Canadian Supreme Court held that the decision to move the man to a non-teaching position was a justifiable limitation of his right to freedom of expression: 'Young children are especially vulnerable to the messages conveyed by their teachers. They are less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school. They are, therefore, more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong. Furthermore, they are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher. The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others' (above para 82).

²²⁸ Bieter (n 177 above 493) (author notes how schools in Rwanda were used to enforce theories of ethnic differences between Hutus and Tutsis and thus to promote mutual Hutu–Tutsi prejudices). See also K Tomasevski *Education denied* (2003) 17 (she gives the following historical examples of how education has been abused: In Nazi Germany, a mathematics textbook contained the following example: 'The construction of a lunatic asylum costs 6 million DM. How many houses at 15 000 DM each could have been built for that amount?' During the USSR's invasion of Afghanistan, the US printed maths books for Afghani refugees. They included this question: 'If you have two dead Communists, and kill three more, how many dead Communists do you have?' Finally, in Tanzania during the

full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms'.²²⁹ The Constitutional Court has reinforced the view that teaching children the value of human rights – and in particular the values of equality and diversity – is essential if they are to become adults who fully participate in the governance of our society.²³⁰

'Acceptability' also requires that learners are not treated in a manner that violates their dignity. In South Africa, corporal punishment and initiation practices are banned in all schools.²³¹ The ban on corporal punishment was the subject of a constitutional challenge in *Christian Education South Africa v Minister of Education*.²³² The applicants contended that the ban violated their FC sections 15 and 31 rights to religious freedom and religious practice because corporal punishment constituted a core tenet of their belief system. The *Christian Education* Court rejected the challenge in terms of the rights to dignity and security of the person:

The outlawing of physical punishment in the school ... represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.²³³

2.2.3.4 Adaptability

Education must be 'flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of

1970s, children were required to solve this problem: 'A freedom fighter fires a bullet into an enemy group consisting of 12 soldiers and 3 civilians and all equally exposed to the bullet. Assuming one person is hit by the bullet, find the probability that the person is (a) a soldier, (b) a civilian').

²²⁹ Art 26(2) of the Universal Declaration of Human Rights. See also art 13(1) of the ICESCR; art 29(1)(b) of the Convention on the Rights of the Child; art 11(2)(b) of the African Charter on the Rights and Welfare of the Child.

²³⁰ *Pillay* (n 223 above) para 104 ('Teaching the constitutional values of equality and diversity forms an important part of education').

²³¹ SASA secs 10 and 10A.

²³² 2000 4 SA 757 (CC), 2000 10 BCLR 1051 (CC).

²³³ *Christian Education* (n 232 above) para 50.

learners within their diverse social and cultural settings'.²³⁴ Adaptation, like accessibility, speaks to the content of the curriculum and the means used to articulate that content. The advent, and ubiquity, of computer technology should require that learners leave school properly equipped for the modern work environment.

Adaptation also means that a curriculum and a school environment must adapt to accommodate persons with different capabilities. This obligation dovetails with the right to non-discrimination. The accommodation of disabled learners is a paradigmatic example of the requirement of adaptability.²³⁵ Although some South African schools cater for disabled learners, they are in the minority and are unevenly spread across the provinces.²³⁶

2.2.3.5 Adequacy: a substantive standard

The Four-A scheme provides a useful rubric for understanding some of the formal requirements of a basic education – and we shall employ it where necessary. However, we believe that the legal construct of fiscal and instructional *adequacy* better serves our purposes: it creates criteria that courts and other state and social actors can employ when attempting to make good on the constitutional commitment to the provision of a basic education for all. Following the New York Court of Appeals in *CFE II*, adequacy can be summed up as 'the actual cost of providing a sound basic education' – teachers, materials, facilities – and provision of the fiscal and governance structure necessary to deliver it.

The New York State Court of Appeal has identified three categories of 'inputs' to determine the adequacy of a school system: (a) teaching; (b) school facilities and classrooms; and (c) instrumentalities of learning.²³⁷ 'Teaching' encompasses the quality of teaching staff and the number of teachers per learner. 'School

²³⁴ General Comment 13 'The Right to Education (art 13)' UN Doc E/C.12/1999/10 (21st Session, 1999) para 6(d).

²³⁵ See Beiter (n 177 above) 507. The constitutional obligation to ensure that differentially abled individuals receive comparable education was specifically recognised by Chief Justice Langa in *Pillay*: 'Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society': *Pillay* (n 223 above) para 74.

²³⁶ B Bekink & M Bekink 'Children with disabilities and the right to education: a call for action' (2005) 20 *Stellenbosch Law Review* 125 138 - 139 (Bekink and Bekink argue that it is both inadequate legislation and implementation that led to this state of affairs, but that recent changes in policy should improve the situation if properly implemented (at 144)). See also Department of Education *White Paper: Special needs education: building an inclusive education and training system* (July 2001) 16 (280 000 disabled learners were out of school in 2001).

²³⁷ *CFE II* (n 214 above) 908.

facilities and classrooms' require structures that protect learners from the elements. This category also requires desks, chairs, water, electricity and sanitation. As for the instrumentalities of learning, they embrace textbooks, blackboards, stationary and possibly computers.

As we shall show in greater detail in the next section, according to relatively recent statistics, our DoE has acknowledged that significant numbers of schools lack the most basic resources: water, sanitation and electricity.²³⁸ Large numbers of schools face serious problems with class size, the quality of educators and the availability of learning materials.²³⁹ It is, of course, extremely difficult to set a precise standard for when an absence of resources will limit FC section 29(1)(a). Is it possible to learn with electricity but no water, with small classes but no textbooks, or qualified teachers but no blackboards?

Two possible solutions exist for this doctrinal difficulty. The first solution sets a very high standard – based on international norms and expert evidence – so that even a small deviation would constitute a limitation of the right. So, for example, if maximum class sizes are set at 30 learners, then any school that has classes with more than 30 learners has limited the right. This approach saves courts from having to make difficult assessments of the educational impact of various kinds of deficiencies. The disadvantage of this approach is that an extremely high percentage of our schools would fail to meet these international standards. Moreover, such criteria would unduly focus educators on meeting specific numerical targets rather than on finding innovative ways to improve education.

The second approach would eschew discrete standards – teacher: learner ratios, presence of running water, qualification level of the teaching staff, quality of the physical infrastructure – and allow a court to make an ad hoc inquiry as to whether the school could provide a 'basic education'. In reaching its conclusion, a court could look beyond the provision of facilities, and consider exam results and drop out rates.

The second approach suffers from two primary disabilities. First, the most obvious downside of this standardless approach is that courts are more likely to defer to executive or administrative claims of

²³⁸ The 2000 statistics found that 36% of schools did not have telephones, 29% lacked water, 45% were without electricity and 9% had no toilets. Department of Education 'Education for all – 2005 country status report: South Africa' (2005) 9.

²³⁹ 'Education for all' (n 334 above) (40% of learners reported classroom shortages. In 2002 there were 12 000 underqualified teachers, which reduced to 5000 in 2004).

practical difficulties in fulfilling their mandates.²⁴⁰ Second, as any student of constitutional property law now knows, the employment of a reasonableness standard employed outside the context of socio-economic rights faces the prospect of what Theunis Roux has described as a 'reasonableness vortex'.²⁴¹ All conceivably relevant factors will be considered under FC section 29(1)(a). Having considered those factors, the court is then free to generate an outcome that it believes does justice to the parties before the court. The problem with this reasonableness vortex in the context of FC section 29(1)(a) is that it provides little or no discernable criteria as to what will or will not fail FC section 29(1)(a)'s test for adequacy.

What distinguishes a 'realistic' or 'achievable' adequacy standard from the 4-A framework is that it focuses on the state's specific responsibility to provide a particular level of funding and would require the state to set meaningful standards for teachers, learning materials and facilities. An adequacy standard just might provide a set of common, nuanced and potentially objective indicia to which responsible parties can be held to account.

3 Evidence supports the finding that the state has failed to provide an adequate basic education

3.1 Accessibility

Despite poverty and the impact of HIV/AIDS, access to education in South Africa, particularly in primary education, is quite high. In 2005 the gross enrolment ratio (GER) in primary schools was 103 per cent.²⁴² While the primary school GER was much higher in earlier years (125 per cent in 1997), access at the time was rather inefficient: too many underage learners entered Grade 1 and then had to repeated this grade until they were old enough to go onto Grade 2. The implementation of the age-grade admission policy in 2000, which stated that learners must turn seven in the year that they enrol in

²⁴⁰ See, for example, D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or 'What are socio-economic rights for?' in H Botha, AJ van der Walt & J van der Walt (eds) *Rights and democracy in a transformative constitution* (2003) 33.

²⁴¹ See T Roux 'Property' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2003) chap 46. Cf AJ van der Walt *Constitutional property law* (2006).

²⁴² Gross enrolment ratio (GER) measures enrolment, regardless of age, in a specific level of education as a proportion of the appropriately aged population for the given level of education. Seven to 13 years is used as the appropriate age for primary school, 7 to 15 years for basic or compulsory schooling, 14 to 18 years for secondary schooling and 16 to 18 years for further education and training.

Grade 1, assisted in normalising Grade 1 enrolment.²⁴³ This policy change resulted in a 40 per cent drop in Grade 1 GER in Grade 1: from 166 per cent in 1997²⁴⁴ to 125 per cent in 2005.²⁴⁵

While the implementation of the age-grade norms have ensured a more efficient education system, other policies and programmes have enabled a larger number of children to receive access to education in South Africa. Basic education is now compulsory education for children aged seven to 15 years old or up to Grade 9.²⁴⁶ The National School Nutrition Programme feeds 5 996 050 learners in 18 039 primary schools throughout the country.²⁴⁷ Other recent 'access' programmes are: the introduction of a reception year, Grade R, for children turning five; pro-poor finance policies; tighter exemption mechanisms for school fees; and the declaration in 2006 that 40 per cent of schools in the country (the poorest 40 per cent) would be no-fee schools.²⁴⁸

As a result of these measures, participation in the education system is quite high. In 2007, more than 90 per cent of children of compulsory school age attended an educational institution (see Figure 6.1). Between the ages of seven and 14 years, just over 95 per cent of children were at school. 93.4 per cent of 15-year-olds attended. These figures reflect a significant improvement, over six years (2001 - 2007), in the participation rate of children in each age cohort between seven to 15 years of age since 2001. The biggest participation increase was among seven year olds: between 2001 and 2007 the participation rate increased from 88.4 per cent to 94.8 per cent – just over 6 percentage points. The phasing in of a reception year (Grade R) has seen a huge increase in the participation rate of five and six year olds. The increase in the participation rate of six-year-olds was also a result of the dropping of the age of entry into primary school to six years old in 2004.²⁴⁹ In 2007, 80.9 per cent of five-year-olds were enrolled in an educational institution compared to 45.6 per cent in 2001 and only 22.5 per cent in 1996. Among six-year-olds,

²⁴³ Department of Education 'The age requirements for admission to an ordinary public school' GN 2433 (1998). The regulation was implemented in 2000. It stated that the statistical norm per grade was the grade number plus 6, making, for example, 7 years the appropriate age for Grade 1, 15 years the appropriate age for Grade 9 and 18 years the appropriate age for Grade 12.

²⁴⁴ H Perry & F Arends 'Public schooling' in A Kraak (ed) *Human resource development review* (2003) 309.

²⁴⁵ Department of Education 'Annual Report for 2005 - 2006' (2006) 13.

²⁴⁶ SASA 84 of 1996.

²⁴⁷ Department of Education 'Annual Report for 2006 - 2007' (2007) 14.

²⁴⁸ 'Annual Report for 2006 - 2007' (n 247 above).

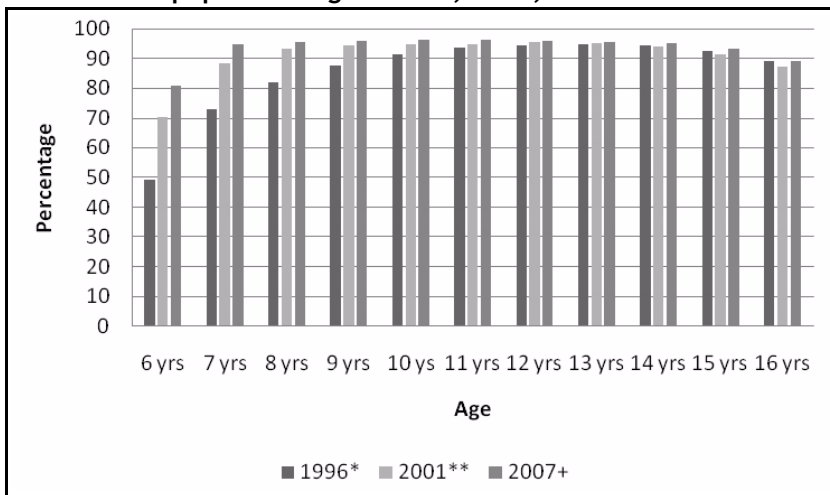
²⁴⁹ In terms of an amendment (RSA, 2002) to the age-grade regulation, from January 2004 children who were five turning six before 30 June could be admitted to Grade 1. Despite the lowering of the age at which children may begin school, seven years old remains the age at which compulsory schooling begins.

participation improved from 49.1 per cent in 1996 to 70.3 per cent in 2001, and to 91.4 per cent in 2007.

While the accessibility to schools as measured by the participation rate of children who fall into the basic education school age is very high, significant numbers of children do not attend schools. About 5.2 per cent of seven-year-olds and 4.4 per cent of eight-year-olds were not enrolled in school despite the fact that the law compels their presence. Even if one allows for children starting school late, 3.7 per cent of 10-year-olds, 3.7 per cent of 11-year-olds and 4 per cent of 12-year-olds were not enrolled in school in 2007.

The largest proportion of these children are most likely out of school as a result of a severe disability.²⁵⁰ Other likely reasons for absence include poverty,²⁵¹ the impact of HIV/AIDS,²⁵² and long distances or hazardous journeys to school.²⁵³

Figure 5.1: Enrolment at educational institutions among the population aged 5 - 24, 1996, 2001 and 2007.²⁵⁴



²⁵⁰ Department of Education 'Review of the financing, resourcing and costs of education in public schools' (2003) 13.

²⁵¹ Porteus, Clacherty & Mdiya (n 225 above).

²⁵² C Coombe 'Mitigating the impact of HIV/AIDS on education supply, demand and quality' in AG Cornia (ed) *AIDS, public policy and child well-being* (2007); A Case & D Ardington 'The impact of parent death on school outcomes: longitudinal evidence from South Africa' 43(3) *Demography* 401; J Vass 'The impact of HIV/AIDS' in A Kraak & K Press (eds) *Human resources development review 2008: Education, employment and skills in South Africa* (2008) 98.

²⁵³ Department of Education 'Report to the Minister: Review of the financing, resourcing and costs of education in public schools' (2003) 86.

3.2 Adequacy

While clear gaps in the levels of accessibility remain, the real challenge faced by South African learners turns on the quality of their education. To illustrate this proposition, we note the results of both cross-national studies and the state's own studies.

South Africa participates in two cross-country comparative studies: Progress in International Reading Literacy (PIRLS) (Grade 4 and Grade 5 reading),²⁵⁵ and Southern and Eastern Africa Consortium for Monitoring Education Quality (SACMEQ) (Grade 6 reading and maths).²⁵⁶ The message coming from both sources is unambiguous: the country performs poorly compared with many of its more impoverished neighbours, and very poorly in relation to developing countries in other parts of the world. More importantly, all the studies introduce basic benchmarks that clearly show that the vast majority of children have not satisfied minimal acceptable levels in literacy and numeracy.

When the results of the 2003 TIMSS tests were released, the media took note of what continued to be an extraordinarily poor national performance in mathematics. The average South African score for mathematics was 264. The international average was 467. The low average score conceals the huge spread in achievement within the 9 000 pupils who took the test. South Africa has the widest distribution of scores in mathematics and science of all the participating countries. Children, who attended formerly black schools, had an average mathematics score of 227. The average score of pupils who attended formerly white schools had a mean score of 456 – close to the international average.²⁵⁷

The Grade 8 TIMSS Mathematics Test was divided into two dimensions: a contents dimension and a cognitive dimension. The contents dimension assessed the following domains: number (approximately 40 per cent of the test); algebra (15 per cent);

²⁵⁴ Statistics South Africa *Community survey 2007* (Revised version) (24 October 2007), accessed 30 January 2008, available at <http://www.statssa.gov.za/publications/P0301/P0301.pdf>. See Department of Education 'Release of the report of the ministerial committee on learner retention in the South African schooling system' (2008); Department of Education 'Release of the report on learner absenteeism in the South African schooling system' (2008).

²⁵⁵ I Mullis, M Martin, AM Kennedy, & P Foy *Progress in international reading literacy: A study of primary schools in 40 countries* (2007).

²⁵⁶ M Moloi & J Strauss *The SACMEQ II project in South Africa: a study of the conditions of schooling and the quality of education* (2005), accessed 7 July 2008, available at <http://www.sacmeq.org/links.htm>.

²⁵⁷ See V Reddy 'State of mathematics and science education: Schools are not equal' in S Buhlungu, L Daniel, J Lutchman & R Southall (eds) *State of the nation, 2005-2006* (2005).

measurement (20 per cent); geometry (15 per cent) and data (10 per cent). The average South African score on the number dimension – 274 – mirrored the overall mathematics score and had a standard deviation of 5,4. Botswana had a national average of 384 and a much lower standard deviation of 2,2.²⁵⁸

Only when we interrogate individual questions do we really get a sense of how South African pupils are learning – or not. In a question that asked pupils to solve a one-step problem involving division of a whole number by a unit fraction, only 7 out of every 100 South African Grade 8 pupils received full credit: 78 per cent of learners in Singapore, 50 per cent of learners in England, and 11 per cent of learners in Botswana received full credit. (See the question below.)

Figure 5.2: TIMSS Mathematics Exemplar, 2003

A scoop holds $\frac{1}{5}$ kg of flour. How many scoops of flour are needed to fill a bag with 6 kg of flour?

Answer: $6 \div \frac{1}{5}$
 6×5
 30 scoops

Source: Reddy, 2006

Moloi and Strauss, in their analysis of the SACMEQ II data, ask: 'What is the prevalence of children who have achieved minimum and desired levels of mastery in reading and mathematics?' In order to answer this question, they convened a committee of South African educational experts who drew up a list of 'essential' test items, and indicated how many of these questions a learner should be expected to answer correctly in order (a) barely to survive during the next year of schooling and (b) to be guaranteed success during the next year of schooling. Those learners who could only answer the first set of 'survival' questions were said to have reached the 'minimum level of mastery'. Those learners who answered the second set of questions correctly were at the 'desirable level of mastery'.²⁵⁹

²⁵⁸ Ontario Education Quality Accountability Office *Trends in international mathematics and science study: 2003* (2004).

Table 6.1: Percentages and sampling errors of learners reaching minimum and desirable reading levels of mastery

	Learners reaching minimum level of mastery		Learners reaching desirable level of mastery	
	%	SE	%	SE
Eastern Cape	18.5	5.88	5.1	2.96
Free State	16.3	6.76	3.2	1.89
Gauteng	65.9	11.83	43.2	16.58
KwaZulu-Natal	43.9	8.34	22.1	6.76
Mpumalanga	12.9	7.06	3.7	3.67
Northern Cape	30.3	5.90	8.7	3.51
Limpopo	15.5	5.54	5.9	4.26
North West	10.4	3.19	0.6	0.45
Western Cape	84.2	4.44	56.8	7.80
South Africa	35.1	3.18	18.4	3.23

Source: Moloi and Strauss Southern and Eastern Africa Consortium for Monitoring Education Quality (2005)

These scores are confirmed by the PIRLS study. South Africa appears at the bottom of the 45 countries tested. South Africa was the only country in which both Grade 4 and Grade 5 children participated. In all other countries only Grade 4 children wrote the test. Scores for both cohorts of South African children were well below the international mean.

According to Howie and colleagues:

Only 17 to 18 per cent of English and Afrikaans learners in either Grade (4 or 5) could reach the high or Advanced International Benchmarks, rendering this group the only South African learner who could be considered competent readers. The majority of learners, more than half of the English and Afrikaans speaking learners and over 80% of African language speakers in South Africa do not even reach the lowest international benchmark: leaving these learners without basic reading skills and strategies to copy with academic tasks.²⁶⁰

²⁵⁹ See Moloi & Strauss (n 256 above) 170 - 171.

²⁶⁰ S Howie *et al* PIRLS 2006 summary report: South African children's reading achievement (29 November 2007).

The full extent of the huge achievement gap between children in advantaged and disadvantaged schools became evident in the Western Cape Learner Assessment Study.²⁶¹ In this study, every primary school in the Western Cape with five or more Grade 6 pupils were tested in 2003 (34 596 children). One of the main purposes of this assessment exercise was to determine the proportion of learners who had attained official curriculum grade-level competence in literacy and mathematics.

The results of the study showed that only 12 104 children (35.0 per cent) were performing at Grade 6 level. While the national Grade 3 Systemic Evaluation reported only a single mean score, with no reference to the proportion of learners who 'made the grade', the Western Cape not only reported on the achievement level based on curriculum requirements, but disaggregated the results by former department and by school poverty quintile.

On the numeracy test the researchers found that, overall, only 15.6 per cent of Grade 6 learners were performing at grade level in 2003. Forty per cent of the children in the sample could only operate at Grade 3 level. Less than one per cent of children (the talented few) in the poorest (former DET) schools were able to handle the Grade 6 questions. Sixty-two per cent of learners in the wealthiest schools correctly answered the questions. Between 2003 and 2005 the pass rates changed little for the CED and DET schools. Former HoR schools showed a mean overall increase of 33 per cent.

The most definitive and authoritative evidence came from the state itself. In 2005, the DoE released the results of the Grade Six Systemic Evaluation.²⁶² The evaluation was based on the results of an analysis of the academic performance of a sample of 34 015 learners tested in 2003 in three learning areas: language, mathematics and natural sciences. The results confirmed the trends evident in the Grade Three Evaluation study. The Grade Six Evaluation study found that learners obtained mean scores of 35 per cent for language and 27 per cent for mathematics.

These scores were reported for each learning area and according to four achievement levels – that is, outstanding, achieved, partly achieved and not achieved. The DoE could then determine the average levels at which South African learners function. In language, only 28 per cent of Grade 6 schoolchildren met the standard of 'achieved' or 'outstanding'. Put another way, the Evaluation found that more than two-thirds of South African Grade 6 learners

²⁶¹ Western Cape Education Department ('WCED') (2004).

²⁶² Department of Education 'Grade 6 Intermediate Phase systemic evaluation report' (2005) 75 - 86.

performed below the level expected of them. In mathematics, the picture painted by the statistics is even more horrifying. Only 12 per cent of all learners sampled scored at ‘achieved’ or ‘outstanding’ levels. Eighty-one per cent registered a score of ‘not achieved’ or below. In other words, only one learner in ten was at the standard required by the national government.

What more evidence would one require to establish that the vast majority of schoolchildren are not receiving an adequate basic education? Even if our expectations of learners do not rise to the level required by the West Virginia Supreme Court or the New York State Court of Appeal, surely this degree of innumeracy and illiteracy will prevent the majority of South Africans from either finding employment in non-manufacturing or non-labour industries or from discharging their duties, as citizens or officials, in the public sector.

4 Legislative, regulatory and budgetary activism: ‘hand-waiving’ or baby steps towards adequacy

The state is not unaware of the problems it faces in delivering an adequate basic education for all. Indeed, one can go so far as to claim that it is aware that most learners do not receive an adequate basic education. A third hard question – for the purposes of this chapter – is whether its efforts amount to a genuine attempt at redress, or constitute a very sophisticated law and policy puppet-show?

If we employ the adequacy framework developed in section 3, we can see that the state has begun to take some steps towards redress. The Education Laws Amendment Act of 2007 provides for a minimum package of resources per learner, creates amendments to SASA that require improvements in the DoE’s ‘new’ legislative or regulatory activism addresses infrastructure backlogs, holds principals accountable for performance, increases funding for fee free poor schools and demonstrates increased concern about teacher development and teacher remuneration. As we noted earlier, several social movements are engaged in rather narrow struggles over very specific schooling policies. As it turns out, the struggle for genuine improvement in our schools has – on its face – been taken up by the state itself.

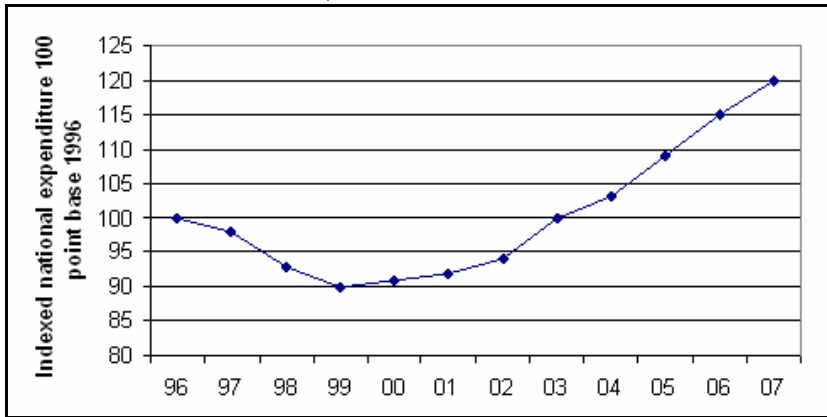
4.1 Funding

SASA section 12(1) requires the MEC with responsibility for education to provide public schools with the necessary funds to meet the legal

and regulatory standards adumbrated above. While provincial education budgets do not differentiate between funding for 'basic education' and funding for the broader category of ordinary schooling – which includes both primary and secondary ordinary schools – the latter category operates as a reasonable proxy for an assessment of the funding levels for 'basic education'.

Spending on public ordinary school has grown over 20 per cent in real terms between 1996 - 1997 and 2006 - 2007. However, between 1996 and 2003 the value of the allocation actually declined, and only began to recover after 2003 - 2004. Figure 5.3 below reflects both the fall and the rise in education allocation.

Figure 5.3: Indexed (R 1996) national education expenditure in South Africa, 1996-2007



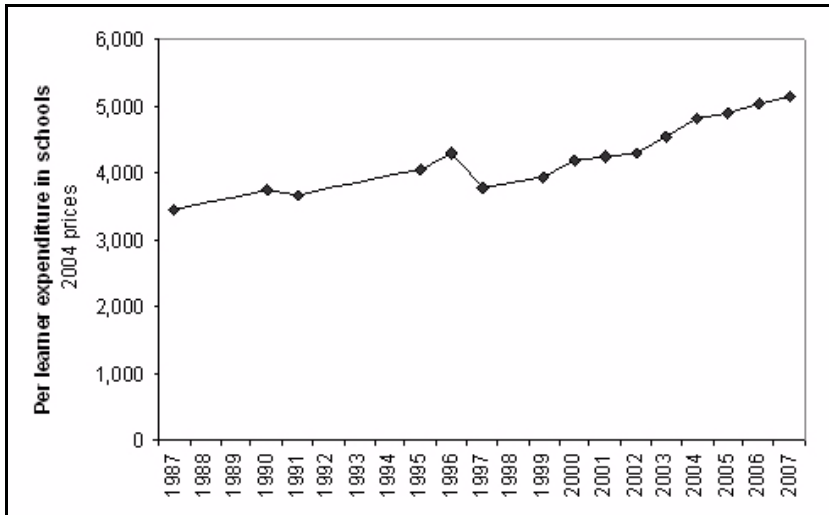
Note: Total government allocation excludes debt repayment and contingency reserve allocation.

Source: Department of Finance Budget Statistics Database (2007)

For the purposes of determining fiscal adequacy, we first need to examine the per capita or per learner allocation. While the statistics do not provide any insight into fiscal adequacy, they do show that substantial efforts have been made in recent years to increase the amount of funding available to each learner. Figure 5.4 below shows that per capita spending has gradually increased over the past decade. In real terms, spending on the average public ordinary school learner is 30 per cent higher in 2007 than it was in 1994.²⁶³

²⁶³ Department of Education 'Presentation to Select Committees of Finance, Social Services, Education and Recreation' (17 October 2007).

Figure 5.4: Per capita expenditure on public ordinary schooling, 1987-2007



Source: Department of Education (2007). Figure presented in presentation to Select Committees of Finance, Social Services, Education and Recreation, 17 October 2007

As we will explore in the next chapter on school fees, in addition to an increased overall expenditure per learner, substantial changes have been made to the mechanisms by which funding is allocated to schools. The most important of these new mechanisms are the new Norms and Standards for School Funding regulations. These new Norms and Standards introduce an 'adequacy'-type model of funding for the poorest 40 to 60 per cent of schools.²⁶⁴ The new regulations require provinces to allocate to each learner a set amount (R7xx in 2007) to cover non-personnel related expenditure in schools. Whether this amount was based on what is actually adequate or simply what is affordable, we cannot determine at this time. Irrespective of the answer, it is clear that a new approach to funding, based on some notion of adequacy, albeit, limited to non-personnel recurrent expenditure in schools, is beginning to take hold.

²⁶⁴ Department of Education 'National norms and standards for school funding' (NNSF) GG 29178 (31 August 2006); Department of Education 'Regulations relating to the exemption of parents from payment of school fees in public schools' R1052 GG 29311 (2007).

4.2 Infrastructure

The 2007 Education Laws Amendment Act has made provision for the Minister to issue regulations to ensure a minimum level of school infrastructure. SASA section 5A pushes adequacy with the provision for the Minister to '... prescribe minimum uniform norms and standards for school infrastructure; capacity of a school in respect of the number of learners a school can admit; and the provision of learning and teaching support material'.²⁶⁵ From the perspective of the right to a basic education, the norms and standards envisaged in section 5A of SASA may create a minimum standard for school facilities to which the provinces could be held to account.

4.3 Teachers

On the question of the (in)adequacy of teachers, the DoE has engaged this problem at two levels. First, over the past few years, it has negotiated new salary structures to make teacher remuneration more competitive.²⁶⁶ Second, a legal framework has been put in place in an attempt to improve the quality of the teaching corps.²⁶⁷ The new teacher education and development framework is designed to systematize all activities related to teacher quality. It deals with both initial teacher education at universities and continuing professional education. The framework signals that the state is attempting to

²⁶⁵ SASA sec 5a. In line with longstanding efforts to establish adequate school buildings, the national Department of Education has proposed new policy guidelines and new norms and standards. 'National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment' published for comment (GN 1438 in GG 31616 (21 November 2008)) issued in terms of National Education Policy Act 27 of 1996 and 'National Minimum Norms and Standards for School Infrastructure', published for comment (GN 1439 in GG 31616 (21 November 2008)) issued in terms of the South African Schools Act 84 of 1996. The two policy documents are designed to elicit comment regarding the appropriate norms and standards for teaching environments, school architectural designs, classroom sizes, space norms per learner, class size norms, school site and population sizes, school building needs, sports facilities and basic services. At the time of writing, there has been little public response to the two documents. One could offer two interpretations of these proposals. Given what we have suggested in this chapter, the new policies and regulations would appear to demonstrate that the national Department and the provincial departments are committed to the establishment of improved standards for school buildings and the school environment. Others less sanguine about the state's motivations – see Beckmann and Prinsloo's analyses in Chapter 6 of this book – might view the new norms as part of an ongoing effort to further limit the powers of school governing bodies. Minimum class sizes could be used, with some imagination, to require that a school shift from single-medium to dual-medium instruction. Even after promulgation, their actual meaning will depend on how provincial education departments, school governing bodies, parents, teacher and other interested parties mobilize around them.

²⁶⁶ Department of Education 'Occupational Specific Dispensation Agreement' (3 April 2008).

²⁶⁷ Department of Education 'National policy framework for teacher education and development in South Africa' (2006).

ensure that there are a sufficient number of competent teachers to meet the requirements associated with the learners' right to a basic education.²⁶⁸

The Governing Body Foundation has noted that the new policy 'is much more descriptive of the current situation than directive'.²⁶⁹ It has also expressed scepticism about whether the new policy framework can meaningfully address teacher shortages.

4.4 Curriculum and achievement standards

The DoE has been active with regard to curriculum development and the establishment of achievement standards. For example, under the most recent amendments to SASA (section 6A), the Minister must determine a national curriculum statement indicating minimum outcomes and standards.²⁷⁰ In addition, another new section of SASA now requires school principals to prepare and submit to the provincial HoDs an annual report on the school's academic performance against the minimum outcomes and standards and procedures for assessment.²⁷¹ On these new developments the Governing Body Foundation notes:

SGBs now play a defined role in maintaining the academic performance of the school through means of an academic performance plan drawn up by the principal and approved by the head of department. Progress with implementation is also now part of the SGB's role. In fact, the Act now recommends sanctions against the SGB should the improvement plan not be implemented.²⁷²

The comment speaks to the fundamental issue of who, that is which parties, are responsible or accountable for ensuring that everyone has a right to a basic education. This comment suggests that the amendment to SASA places responsibility for the realisation of the right not only on the state but also on school governing bodies. (It must be noted that neither the state nor the SGBs have expressed the view that they have an equal share in this responsibility.)

The DoE has initiated a campaign that attempts to address directly the core threat to the right to an adequate basic education:

²⁶⁸ Each teacher registered with the South African Council of Educators ('SACE') will be required to earn a specified number of professional development ('PD') points over a three-year cycle. At the moment the rewards attached to achieving are largely intrinsic. However, successful teachers – in terms of PD points and improvements in the classroom – should also receive the intrinsic benefits of promotion and performance recognition.

²⁶⁹ The Governing Body Foundation (National Office) Re: Newsletter No 4 (2007).

²⁷⁰ Education Laws Amendment Act, 2007 sec 6A.

²⁷¹ Education Laws Amendment Act, 2007 sec 16A.

²⁷² The Governing Body Foundation (n 269 above).

the fact, as shown by the evidence described above, that the vast majority of children complete a basic education without being able to read fluently in any of the official languages. The Foundations for Learning Strategy, issued in terms of the National Policy Act, puts in place a provision for the annual testing of all children from Grade 3 upwards.²⁷³

That said, a strong claim can be made that the state's recent legislative, regulatory and budgetary activism amount to little more than 'hand-waiving'. The Foundations for Learning Campaign Notice issued by the DoE, the Minister begins on a promising note:

The campaign is a national response to national, regional and international studies that have shown over a number of years that South African children are not able to read, write and count at expected levels, and are unable to execute tasks that demonstrate key skills associated with Literacy and Numeracy.²⁷⁴

One might expect the state to then announce a concrete set of proposals designed to provide an immediate response to the problems our schools face. The Notice does nothing of the sort. It sets out, instead, in the thinnest possible fashion, suggestions for how teachers and principals should arrange the curriculum. It then sketches out a few minimum standards that ought to be met. It offers no commitment of resources to resolve our dilemma – nor does it even suggest how its minimal minimum achievement standards might be realised.

But is it really just hand-waiving? The answer must be – *we shall see*. For if we accept the state's *bona fides*, then the measures put in place to ensure school, principle and teacher accountability for score results is clearly an effort to improve learner capacity. Up until now, no school, no principal and no cohort of teachers have been put on the hook for the abysmal achievement levels of South African learners. This Foundation for Learning Strategy might be more charitably viewed as an effort to 'shame' schools into improving their test scores and the adequacy of every learner's basic education.

In addition to these national strategies, two provinces have taken on more ambitious strategies to address the crisis in primary school reading and mathematics. The Western Cape has made provincial wide testing part of its provincial priorities and set specific achievement targets designed to move all learners towards adequacy

²⁷³ Department of Education 'Foundation for Learning Strategy' (National Policy Act) GG 29832, 26 April 2007.

²⁷⁴ Department of Education 'Foundations of Learning Strategy' (n 273 above).

in achievement.²⁷⁵ Gauteng has recently launched a similar seven-year literacy initiative with NGOs.²⁷⁶

5 The failure to provide an adequate basic education and some appropriate remedies based upon a theory of experimental constitutionalism

It should be clear from the empirical evidence that state has failed to provide the rudiments of an adequate basic education. It should also be clear that the state's recent legislative, regulatory and budgetary efforts to improve primary and secondary school education may, potentially be, little more than 'hand-waving' in the face of the enormous deficits of our learners. The question then is: What, as a constitutional matter, is to be done?

A finding by the Constitutional Court that the state has failed to discharge its responsibilities in terms of FC section 29(1)(a) will not necessarily result in a change on the ground. Put slightly differently, the standard approach to rights analysis – a *prima facie* violation of a right, a failure to justify the limitation of a right and a remedy that notes that the law in question is constitutionally invalid – is not necessarily going to achieve our desired end: an adequate basic education.

However, there are approaches to constitutional adjudication that do offer a somewhat more optimistic view of what constitutional litigation can achieve. As one of the authors has written at length elsewhere, that view is generally described as experimental constitutionalism.²⁷⁷

Experimentalism integrates four primary concepts. The first is ethical empiricism. We should evaluate social norms and institutional arrangements against our practical experience instead of *a priori*

²⁷⁵ Western Cape Education Department Literacy & numeracy strategy: 2006 - 2016 (2006), available at http://www.wced.wcape.gov.za/documents/literacy_numeracy_strategy/index_ins.html.

²⁷⁶ Gauteng Department of Education 'Accelerated programme for literacy, language and communication vision' (2007) available at [www.education.gpg.gov.za/APLLC%20\(A5\).pdf](http://www.education.gpg.gov.za/APLLC%20(A5).pdf).

²⁷⁷ Woolman *Selfless constitution* (n 14 above).

norms or mere intuition.²⁷⁸ The second is reciprocal effect. Social norms and institutional arrangements are both constitutive of and dependent upon the legal framework. The third is reflexivity.²⁷⁹ We should examine, critically, the process of social change and our own self-understanding. The fourth is destabilisation. Destabilisation recognises that social formations invariably create structures intended to promote their own continued existence and that such structures may block meaningful individual efforts at change. Destabilisation therefore places a premium on shaking up existing

²⁷⁸ A commitment to deliberation ensures the accountability and the legitimacy of public decisions. It also seeks to have such choices derived, if possible, from shared understandings and insights. Deliberation requires that public choices are arrived at through processes that allow for the active participation of all meaningful stakeholders and are free, to the maximum extent possible, from coercion. See W Rehg *Insight & solidarity: the discourse ethics of Jurgen Habermas* (2000) 62; J Habermas *Facts and norms: contributions to a discourse theory of law and democracy* (1998). In sum, deliberation promises three goods consistent with our commitment to experimentation: flexibility, accountability and learning by doing and by error. The last part of this section describes in detail some of the forums for deliberation that create feedback mechanisms without necessarily destroying existing stores of social capital or the political institutions through which experiment and change are negotiated.

²⁷⁹ Experimentalism is made more coherent with a concomitant commitment to reflexivity. Operationally, reflexivity describes a political system that systematically evaluates the record of past performance and adjusts accordingly. Michael Dorf and Charles Sabel, for example, see reflexivity embodied in the idea of centralised standard-setting, localised experimentation, and rolling implementation of best practices. See M Dorf & C Sabel 'A constitution of democratic experimentalism' (1998) 98 *Columbia Law Review* 267. As a matter of principle, political reflexivity demands that we be willing to examine and to put to the test, individually and collectively, our preferred values and forms of life. This dimension of experimentalism corresponds with the notion that, in a deliberative democracy, no ideas, policies or principles should be regarded as above criticism. The Constitutional Court has recently warmed to the idea that an effective democracy is contingent upon the participation of an engaged and critical citizenry in the actual process of law making. See *Doctors for Life International v The Speaker of the National Assembly & Others* 2006 6 SA 416 (CC), 2006 12 BCLR 1399 (CC) paras 228 - 232 (footnotes omitted): 'This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness. The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy ... Yet the Constitution envisages something more. True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes ... *They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making.* Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years. Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation.'

hierarchies in a manner that might enable members of a political community – or a school system – to pursue new ways of being in the world.²⁸⁰ Through combining those four concepts, experimentalism

²⁸⁰ Destabilisation rights are designed to make good the South African Constitution's challenge to the *status quo* and the concentration of social and economic power in the hands of the white minority under apartheid. Perhaps the best known example of an intuition pump designed to get us to take destabilisation seriously is Roberto Unger's idea of a rotating capital fund. See, eg, RM Unger *Politics: a work in constructive social theory* (1987): *Social theory: its situation and its task* (Volume I); *False necessity: anti-necessitarian social theory in the service of social democracy* (Volume II); and *Plasticity into power: comparative historical studies on the institutional conditions of economic and military societies* (Volume III). A rotating capital fund bears a passing resemblance to a South African *stokvel*.) The rotating capital fund ensures that various members of society have access to a substantial portion of a polity's available economic capital at some point in time. We can contrive a similar set of incentives for political institutions. In order to ensure that elites do not capture state institutions, we might attempt to make provision for political arrangements that ensure that various groups and persons have a turn at the helm. Or, at a minimum, we can create bubbles of participatory democracy. The end of such institutional arrangements is not change for change's sake. Like the rotating capital fund, these political arrangements are best characterised as super-liberal. (These super-liberal political institutions take cognisance of the extent to which political power invariably shapes and reinforces the formation of group and individual identity. Thus, at the same time that these institutions recognise that 'freedom' is essential for genuine individual and associational flourishing, they also recognise that the state plays an essential role in mediating disputes between conflicting associations and promoting rational discourse about the ends of individuals and groups.) The destabilisation rights that any such super-liberal community might devise are designed to ensure that dominant beliefs do not remain dominant simply because they serve the interests of elites. For political or legal beliefs to remain dominant they must – as a prescriptive matter – offer solace for those who did not contrive them in the first place. (The argument from immanence is one of the attractive features of Unger's work. It suggests the kinds of institutional transformations that might be realised through tweaking the system. See R Rorty 'Unger, Castoriadis and a national future' *Philosophical Papers II: Essays on Heidegger & Others* (1991) 177.) Even in more modest incarnations, destabilisation rights allow individuals and groups to participate in the political processes that shape their lives. C Sabel & W Simon 'Destabilisation rights: how public law litigation succeeds' (2004) 117 *Harvard Law Review* 1015. Destabilisation rights are profitably contrasted with negative conceptions of liberty. Negative liberty takes stability as a good even where such stability works manifest injustice and takes certainty as a good even where it creates no efficiencies. (Many traditional legal doctrines, eg, *stare decisis*, privilege certainty or formal equality (as in the case of contractual freedom), even where such doctrines work manifest injustice. See S Woolman & D Brand 'Is there a constitution in this classroom? Constitutional jurisdiction after *Walters* and *Afrox*' (2003) 18 *SA Public Law* 38.) Destabilisation rights make no such assumptions about stability, certainty or efficiency. 'Destabilisation rights' can take a number of different forms: a rotating capital fund is but one. In another incarnation, destabilisation rights provide a judicial remedy for stakeholders who seek accountability from a government agency that influences private ordering or a social institution that exercises significant private power. Assertion of destabilisation rights provides two forms of relief to the stakeholders. First, they require those in power to account for their decisions on the basis of evidence and reasonable arguments. Second, they bestow upon stakeholders rights of participation in the processes meant to address the problems that concern them. (The Constitutional Court has recently accepted destabilisation rights in the legislative arena. FC secs 59(1)(a), 72(1) and 118(1) promise citizens – within reason – the right to participate in and to be consulted with regard to decisions that effect their communities: *Matatiele Municipality & Others v President of the RSA & Others* 2006 5 SA 47 (CC), 2006 5 BCLR 622 (CC) ('*Matatiele II*').)

seeks to achieve two goals: (1) social norms and institutional arrangements made more flexible and open to revision; and (2) the revision of those norms and institutions in light of the 'best-practices' revealed by well-designed studies of various policy initiatives.²⁸¹

²⁸¹ An adequate theory of South African constitutionalism must satisfy a number of conflicting demands. First, it cannot ignore the ineradicable textual tension between a commitment to constitutionalism and private ordering on the one hand and a commitment to social transformation through direct public action on the other. Second, such a constitutional theory cannot be committed to any specific comprehensive vision of the good. Within the bounds dictated by commitments to tolerance, dignity and rough equality, it must set out to promote a broad array of forms of human flourishing. One would think that the commitment to individual flourishing is so ingrained a feature of constitutionalism that it hardly bears mentioning. Yet many powerful traditions of humanistic thought committed to the idea of rational autonomy tend to overlook the value of human happiness. See B Fay *Critical social science* (1986) (Fay argues that an important drawback of many 20th-century critical theories, such as Herbert Marcuse's, is their failure to appreciate the value of happiness or to subsume happiness under the idea of autonomy.) Third, it must present an account of how a strong system of rights can assist in social transformation and not hinder it. For example, while John Stuart Mill's notion of 'experiments in living' unearths the potential for experimentation within private ordering, Mill himself dramatically overestimates the extent of our capacity for rational reflection on our experience and fails to appreciate fully the tenacity of social norms in resisting conscious change because of the manner in which social norms, legal rules, political power and individual identities are linked in contemporary societies. Entrenched private power creates a two-fold barrier to experimentalism. First, it aligns existing custom and practices with one's individual identity. It thereby makes critical self-reflection difficult and redefinition painful. It thwarts attempts at reflection and adjustment by increasing its costs. That is, entrenched private power forces individuals to choose *between* preserving their membership in a community by muting their demands or alienation if they choose to speak up. Second, it enables individuals or institutional practices supported by entrenched authority to suppress new ideas and alternative points of views on the basis of authority instead of merit. Entrenched private power creates a 'bottleneck' and prevents individual experimentation from leading to corresponding changes in social norms. Mill's insistence on the private order as the engine for social transformation fails to account for this inevitable brake on change. One can, however, reject Mill's classically liberal politics while retaining the essential spirit of his experimentalist vision. An experimental constitutional regime committed to human flourishing requires public intervention, not government abstention. Such intervention entails (a) historical redress for marginalised communities; and (b) institutions that promote reflexivity and increase our individual, and collective, capacity to challenge the tyranny of custom. State intervention can take two forms – neither of which excludes the other. It can either be imposed from above, via direct state action, or originate from below, through the initiative of individual stakeholders. Direct state action offers the virtue of speed. It suffers, however, from two important drawbacks: information deficiency and lack of participation. First, reconfiguring social institutions requires a certain amount of inside information. If trained anthropologists find such an understanding of other cultures exceedingly difficult, how much greater is the challenge for an untrained bureaucratic administrative staff paid to solve pressing polycentric problems. Second, by relying on a bureaucratic process, a top-down approach faces the peril of excluding the participation of the people most directly affected. Not only does such exclusion fuel the information deficit already discussed, it can also undermine an essential part of the political project of transformation – to change the mindset of those who govern. Finally, the silence of those affected undermines the legitimacy of the decisions taken. See S Sturm 'The architecture of inclusion: advancing workplace equity in higher education' (2006) 19 *Harvard*

5.1 Practical benefits of experimental constitutionalism for education

Experimental institutional design offers a number of important promises for South African constitutional doctrine and education policy. The most immediate benefits flow from enhanced fundamental rights protection. Experimental institutional design can invigorate limitations analysis by opening up the manner in which facts are placed before the court – moving from a model in which facts are arrayed in a binary opposition between applicant and respondent to a model in which additional, if not all, parties that have an interest in the outcome of a case may place evidence before the court. Similarly, experimental institutional design reinforces existing doctrines of costs, amici and intervenors intended to expand the number of voices – and to increase the amount of useful information – that a court hears in a given matter.

Other mechanisms can generate additional information for the process of adjudication. A temporary interdict might be issued while the court awaits the collection of apposite data. A structural injunction might provide even more meaningful information. A court that retains jurisdiction can determine, over time and as conditions change, whether the government has finally discharged its burden and, thereby, justified its initial *prima facie* infringement of a right. Experimentalist adjudication ought to reduce judicial deference to official policy and to private norms that arise out of information deficit and untested solutions.

By requiring that all parties provide more meaningful data, a court can demand greater accountability of government actors and greater participation by affected individuals and groups. Moreover, an interdict or an injunction may create incentives for the parties before the court to hammer out a solution that fits the specific needs of the parties' concerned – needs of which a court may have only the vaguest awareness. Such incentives cultivate individual reflexivity and actuate penetration of participatory democratic politics into civil society, generally, and our school systems in particular.

Journal of Law and Gender 248 (Sturm offers a framework for the advancement of women in tertiary education that identifies the key actors and the kinds of collaborative collective action required to break through well-entrenched discriminatory structures).

The demand for greater accountability of government actors and greater participation by affected individuals and groups need not be limited to constitutional litigation. The Constitutional Court has handed down judgments that make it plain that legislatures must invite greater public participation in the normal course of law-making processes. Once again, the motivation behind this expansion of the public's right to participate is the belief that legislatures will make better decisions when they consult the affected constituents and that the affected constituents will make better citizens if allowed to participate in their own self-governance.

Three principles undergird experimental constitutionalism: (1) the judiciary, as well as the legislature and the executive, can act as an agent of social change; (2) difficult cases, especially those cases requiring involving limitations analysis of *prima facie* abridgements of constitutional rights, become somewhat easier to resolve when courts move away from traditional models of adjudication and adopt an experimentalist, problem-solving perspective; and (3) for experimental constitutionalism to succeed, courts must facilitate dialogue between stakeholders and provide fora for information-gathering, information-sharing, collective action and collective norm-setting. By providing such fora, courts can expand our 'experiments in living' and shake-up existing social hierarchies in a manner that *may* enhance individual and group flourishing.²⁸²

²⁸² The limits of traditional legislative or administrative solutions to social ills manifest in two ways. First, a given legislature or an administrative agency will lack a panoptic view of all relevant information about particular form of abuse. The procedural requirements of the legislative process place inherent limits on the range of issues that can be addressed within a given session. Moreover, a good deal of legislative time must be devoted to more pressing political issues: foreign policy, economic development and budget allocation. Accordingly, legislatures will rarely meet the informational threshold necessary for optimal solutions to rights-based issues. Administrative agencies, in developed countries, often have greater expertise than other branches of government with respect to the enforcement of a specific set of rights. They therefore should possess a significantly lower informational threshold for action. That said, considerations of procedural fairness, on the one hand, and interest group capture, on the other, often constrain their capacity for engaging in pro-active, rights-vindicating, fact-finding processes. In South Africa, the often dramatic under-capacity of the fourth branch of government limits the ability of various organs of state to discharge their constitutional obligations. For example, several provincial government departments in Gauteng lack the internal capacity to do their own commercial legal work or to represent themselves effectively within government structures. As a result, they hire private counsel, at significant expense, to represent their interests and to discharge their constitutional duties. Second, limited resources constrain effective legislative and administrative solutions. The twin forces of budgetary pressures and conflicting priorities – say between large-scale delivery of such basic goods as housing, health and education and new investments in military hardware – means that while the legislature may be

5.2 Structures of experimental constitutionalism: shared constitutional interpretation and participatory bubbles²⁸³

Shared constitutional interpretation stands for four basic propositions. It supplants the notion of judicial supremacy with respect to constitutional interpretation. All branches of government have a relatively equal stake in giving our basic law content. It draws attention to shift in the status of court-driven constitutional doctrine. While courts retain the power to determine the content of any given

committed to human rights generally, it will experience little meaningful pressure to address rights violations experienced by marginal or vulnerable groups. Moreover, limits on the fiscus – even without conflicts in priority – would constrain the legislature’s capacity to make good the promise of various constitutional rights. In contrast to legislative and administrative solutions, the judiciary has a fairly low informational threshold. Under the liberal standing rules of the Constitution, many types of parties are eligible to initiate suit. Moreover, because courts have extensive powers for structuring the scope of discovery, their capacity for information-gathering, once a suit has begun, may be substantially greater than legislature and administrative agencies. See A Chayes ‘The role of the judge in public law litigation’ (1976) 89 *Harvard Law Review* 1281 at 1308 (Chayes notes that adversarial structure of litigation ‘furnishes strong incentives for the parties to produce information [and] that the information that is produced will not be filtered through the rigid structures and preconceptions of bureaucracies’ of the legislative or administrative process). Assuming adequate resources, a larger range of rights-based conflicts may be brought to the attention of the judiciary than to the legislature or administrative agencies. More importantly, as Unger has recognised, the law has an inherently ‘disentrenching power’. Because legal norms are intrinsically linked to people’s self-conceptions and social practices, judicial decisions tend to have a greater impact than administrative decisions.

²⁸³ Talk of ‘participatory bubbles’ and ‘shared constitutional interpretation’ is meant to draw our attention to the kinds of institutional arrangements that are most likely to realise the four basic ends of the South African state: (1) Given the radical givenness of the ends of individuals and groups, the South African state is under a constitutional obligation to protect those ways of being in the world that do not vitiate its concomitant core commitments to such goods as rough equality, tolerance, dignity and democratic participation. Civil and political rights protect extant ways of being in the world. (2) South Africa’s history of radical inequality in resource allocation requires a particular form of redress. The South African state is under a constitutional obligation to ensure that historically marginalised groups have access – at least initially – to the requisite stocks of political, economic and social capital necessary to sustain extant sources of the self. (3) Consistent with the Constitution’s core commitments, the South African state must ensure that its citizens are not held hostage by ways of being in the world that diminish individual flourishing. This concern is more about the ability of individuals to exit repressive communities than it is about creating novel conditions for flourishing. But that does not mean that state intervention on behalf of coerced individuals will not have such a secondary or knock-on effect. (4) State intervention on behalf of such persons may just shake up existing social hierarchies in a manner that creates new ways of being in the world. This commitment to experimentalism is predicated upon the notion that existing ways of being in the world – extant cultural formations – will, for many individuals, fail to recognise those ends upon which happiness of those individuals truly rests. Woolman *Selfless constitution* (n 14 above).

provision, a commitment to shared constitutional interpretation means that a court's reading of the constitutional text is not meant to exhaust all possible readings. To the extent that a court consciously limits the reach of its holding regarding the meaning of a given provision, the rest of the judgment should read as an invitation to the co-ordinate branches or other organs of state to come up with their own alternative, but ultimately consistent, gloss on the text. Shared constitutional competence married to a rather open-ended or provisional understanding of the content of the basic law is meant to increase the opportunities to see how different doctrines operate in practice and maintain the space necessary to make revision of constitutional doctrines possible in light of new experience and novel demands. In this regard, the Constitutional Court might be understood to engage in norm-setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realisation. A commitment to shared interpretations ratchets down the conflict between co-ordinate branches and levels of government. Instead of an arid commitment to separation of powers – and empty rhetorical flourishes about courts engaging in legal interpretation not politics – courts are freed of the burden of having to provide a theory of everything and can set about articulating a general framework within which different understandings of the basic text can co-exist. Indeed, the courts and all other actors have more to gain from seeing how variations on a given constitutional norm work themselves out in practice. The relationship between shared constitutional interpretation and experimentalism should be clear. Shared constitutional interpretation creates the space for different actors in different places or with different briefs to try doing things differently but constitutionally. The different means may show us which ways of doing things are more successful than others. Or the different means may shed new light on – or change our understanding of – the very constitutional ends the varying strategies seek to promote.²⁸⁴

²⁸⁴ This depiction of 'shared constitutional interpretation' is neither new nor merely theoretical. As Michael Dorf and Barry Friedman describe it, the 'invitations' by the US Supreme Court to Congress and state legislatures to share responsibility for giving various constitutional provisions content have been going out for some time. The South African Constitutional Court has issued similar 'invitations': see *Minister of Home Affairs & Another v Fourie & (Doctors for Life International & Others, amici curiae)*; *Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC). Dorf and Friedman use the cases of *Miranda* and *Dickerson* to great effect in explaining how shared constitutional interpretation works: *Miranda v Arizona* 384 US 436 (1966) ('*Miranda*'); *US v Dickerson* 530 US 428 (2000) ('*Dickerson*'). The *Miranda* Court, as Dorf and Friedman point out, 'explains that it granted certiorari 'to explore some facets of the problems ... of applying the privilege against self-

A scheme of shared constitutional interpretation introduces an experimentalist element into the upper tiers of government institutions (departments of education). The notion of bubbles of participatory deliberation directs our attention to experimentation in smaller units: at the level of the individual or the local community (schools and school districts).²⁸⁵

The physical metaphor of bubbles is meant to convey three qualities of such small-scale institutional processes. First, processes of deliberation are a natural part of ongoing social interactions. They

incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow'. The Court sets out its 'holding' at the outset, and that holding is only that the prosecution may not use statements made in custodial interrogation 'unless it demonstrates the use of procedural safeguards effective to secure' the privilege. And '[a]s for the procedural safeguards to be employed, unless other fully effective means are devised to inform the accused persons of their right of silence and to assure a continuous opportunity to exercise it' the specific *Miranda* guidelines are required. The Court then devotes an entire paragraph to encouraging governmental bodies to devise their own ways of safeguarding the right. At least twice more, the Court repeats the holding and re-extends the invitation': M Dorf & B Friedman 'Shared constitutional interpretation' (2000) 2000 *Supreme Court Review* 61 81 - 83, citing *Miranda* (above) 441 - 490. Congress accepted the invitation. But as the judgment in *Dickerson* reflects, it wilfully misconstrued the nature of the invitation. Congress did not, as the US Supreme Court suggested, come up with equally effective ways of safeguarding the right to remain silent and not to have statements made in custodial interrogation used by the prosecution unless adequate safeguards have been put in place. Instead, Congress simply enacted as legislation the pre-*Miranda* test that the voluntariness of a confession would be assessed in terms of a totality of the circumstances. The *Miranda*-specific warnings were merely included as factors to be taken into account when determining voluntariness. Not surprisingly, the *Dickerson* Court rejected Congress's 'new' take on the voluntariness of custodial confessions. It did so, as Dorf and Friedman argue, because Congress had failed to take seriously the Court's concern with the 'compulsion inherent in custodial interrogation' and had failed to offer an alternative that could be deemed "equally effective" in ameliorating this compulsion': Dorf & Friedman (above) 71. So while Congress and other government actors did indeed possess significant space to place their own gloss on the Fifth Amendment's protections, what they were not free to do was ignore entirely even the most limited construction of the Court's holding. The Constitution and recent South African case law sets up a similar field of play for non-judicial actors. The text of the Constitution contains several invitations to other political branches to alter the meaning of the Constitutional Court's explication of the basic law. The Constitutional Court's case law itself demonstrates that the Court speaks to the parameters of the 'constitutional' and that the Court is *not* an oracle of the 'optimal'. As one of the authors argues at length elsewhere, these invitations are of a piece with a commitment to experimental constitutionalism. Woolman *Selfless constitution* (n 14 above).

²⁸⁵ Because the naturalised account of the self – upon which this constitutional politics is based – takes seriously the limits on our capacity for rational reflection and collective deliberation, we believe it is inaccurate and obscurantist to ground our politics in an alleged capacity of individuals and groups to engage in profound reflection over critical existential questions. That said, a naturalised account of the self does not deny our capacity to engage in meaningful deliberation: Woolman *Selfless constitution* (n 14 above). The institutional design proposals suggested by Dorf and others – and defended in this chapter – seek to create small-scale 'bubbles' of limited participatory deliberation over the content of individual constitutional norms and their application to subject matter specific, and often time-sensitive, institutional contexts.

originate when challenges to a given institutional authority accumulate and finally come to a boil: just as bubbles form after pressure builds up and escape to the surface of a liquid. Second, bubbles are meant to suggest limits on the scope of deliberation. Bubbles enclose only a small amount of space – both in terms of the issues debated and the number of participants. Third, bubbles are ephemeral. After satisfactory resolutions emerge from processes of participatory deliberation, the *raison d'état* for such process ceases to exist. Participants can return to their more routine lives.²⁸⁶

How do bubbles relate to constitutional interpretation? As Robert Cover has observed, interpretations of constitutional norms are not confined to the courts. Instead, each community continually struggles to harmonise its internal values with the constitutional norms of the society at large.²⁸⁷ Such interpretive struggles are not mere word games. They can pose serious questions of individual and group survival.²⁸⁸ Does the constitutional right to shelter enable one to seek

²⁸⁶ Two important caveats are in order. Deliberation does not necessarily lead to better outcomes. As Cass Sunstein has pointed out, it can lead to greater polarisation of positions: C Sunstein *Infotopia* (2007). However, deliberation is less about consensus, and more about provisional agreement upon 'best practices'. The 'failure' of a practice – the negative feedback from our social environment – should lead us back to the drawing board to reflect further upon the nature of our failure and the options that remain. But even here, a further caveat is in order. As we have noted above, it seems relatively clear that many discussions between different branches of government in South Africa about 'best practices' never occur. And they do not occur because the political branches of government often appear incapable of making sense of the general norms articulated by the courts and of implementing the general norms – in the form of law and policy – that they do understand. The mere fact of participatory bubbles does not ensure 'better' outcomes. Any court making use of various kinds of participatory bubble must be alive to the possibility that the power imbalances reflected in adversarial legal processes will simply be replicated in a court-sanctioned participatory bubble. Courts must, in a Habermasian manner, attempt to craft bubbles that approximate 'ideal speech' conditions and that enable less powerful voices to be heard. In short, courts must be willing to articulate constitutional norms – as a departure point – that enable less powerful stakeholders to have a meaningful role to play in the polycentric decision-making process initiated by the court: J Habermas *The theory of communicative action Volume 1: Reason and the rationalisation of society* (1984); J Habermas *The theory of communicative action Volume 2: Lifeworld and system: a critique of functionalist reason* (1987). See also D Davis *Democracy and deliberation* (2000).

²⁸⁷ See R Cover '1982 term foreword: *nomos* and narrative' (1983) 97 *Harvard Law Review* 4 28 (commenting on the American Mennonites' *amicus curiae* brief in *Bob Jones University v United States*, Cover characterises the 'Mennonite understanding of the first amendment as not simply the 'position' of an advocate – though it is that [as well].' According to Cover, 'the Mennonites inhabit an ongoing *nomos* that must be marked off by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a religious community's resistance and autonomy').

²⁸⁸ See R Cover 'Violence and the word' (1986) 95 *Yale LJ* 1601 (Cover reminds us of the inevitably coercive dimension of constitutional interpretation: 'legal interpretation takes place in a field of pain and death ... A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life'). See also J van der Walt *Law and sacrifice* (2006).

accountability from housing agencies?²⁸⁹ Does the constitutional right to religious freedom allow a small and ostracised religious group to obligate law enforcement agencies to accommodate their deviant practices?²⁹⁰ Does the foundational value of equality permit one to challenge public mores – and the laws that flow from them – that discriminate on the basis of gender or sexuality or sexual orientation?²⁹¹

5 Conclusion: Making experimentalism work in the context of South African education law and policy

As we noted at the outset of this book, the DoE's second *White Paper* supports the proposition that the state has quite consciously adopted an experimentalist approach to education policy:

Policies are stated in general terms and cannot provide for all situations ... In this protracted transitional period, in which new policies for a democratic society are being developed and implemented, the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognised and corrected. The possibility of damage will be reduced if new policies are based on knowledge of our charter of fundamental rights and on sufficient consultation with those who are affected by them, if conflicts are negotiated, and if principled compromises are sought.²⁹²

The Minister acknowledges that the DoE's various policy imperatives pulled in numerous directions and that no amount of analysis could anticipate the manner in which a complex set of policy initiatives would interact with a dynamic social environment. More importantly, he makes it clear that the state would revisit its experiments in education at some later date and revise them as circumstances required.

How might such an experiment look, with regard to a constitutional challenge to the right to an adequate basic education, in terms of the concepts and mechanisms for experimental constitutionalism set out above? Well, as much as a court might wish

²⁸⁹ See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) ('Grootboom').

²⁹⁰ See *Prince v Law Society* 2002 2 SA 794 (CC), 2002 3 BCLR 231 (CC) ('Prince').

²⁹¹ See *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as amici curiae)* 2002 6 SA 642 (CC), 2002 11 BCLR 1117 (CC) ('Jordan'); *Minister of Home Affairs & Another v Fourie & (Doctors for Life International & Others, amici curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC).

²⁹² Department of Education *White Paper II* (n 5 above) 7.

to eschew the general norm setting required by the Constitution, it is obliged to give it some content. We have sketched out in section 3 the basic parameters for FC section 29(1)(a). It must capture the degree of fiscal equity that a basic education requires and establish the criteria for assessing whether learners receive the kind of education that delivers adequate levels of literacy, numeracy and other skills that will enable them to flourish as individuals and to participate as citizens in the governance of the various communities of which they are a part.

That's awfully general – and a court committed to an arid separation of powers doctrine might be tempted to let it lie there. However, our imaginary court is committed to building a better system of education and realises that it lacks the requisite capacity to do so alone.

The first thing that an experimentalist court can do – when hearing argument and crafting an appropriate remedy – is invite as many interested stakeholders to the process as possible. The Court has allowed amici to run a case even where no applicant could be found to pursue a matter.²⁹³ The Court has, very recently, twice invited the Centre for Child Law to brief it on matters within their specific domain of expertise.²⁹⁴ No reason exists that a variety of civil society actors (from the Education Policy Unit, to the Governing Body Foundation, to the Education Rights Project, to SAADTU), an array of number of government actors (from the DoE to provincial departments to school principals and teachers) to independent institutions such as the SA Human Rights Commission could not be invited to make submissions regarding the appropriate contours of the right. At the very least, the court could not complain that informational deficits – the bogeyman of socio-economic rights – would prevent it from setting very general norms.

Having set those general norms, the court might wish to kick the matter back to the parties to the litigation (and other interested stakeholders) to come up with a plan to resolve the particular

²⁹³ *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd & Another* 2006 6 SA 103 (CC), 2006 6 BCLR 669 (CC).

²⁹⁴ See, eg, *M v The State* [2007] ZACC 18 (CC) (Court held that focused and informed attention needed to be given to the interests of children at appropriate moments in the sentencing process. The objective was to ensure that the sentencing court was in a position adequately to balance all the varied interests involved, including those of the children placed at risk. To the extent that the current practice of sentencing courts fell short in this respect, proper regard for constitutional requirements necessitated a degree of change in judicial mindset). See also *AD & Another v DW & Others (Department of Social Development Intervening; Centre for Child Law as amicus curiae)* [2007] ZACC 27 (CC), 2008 (3) SA 183 (CC).

problem that drove the litigation.²⁹⁵ (Nobody goes to court to find out – as an abstract matter – what a fundamental right means.) The participatory bubble created by a temporary interdict – with an order to reach consensus – or a structural injunction that left the court in the position to ensure fair negotiations and a commitment by all parties to effect a norm-bound agreement – would allow the court to benefit from the knowledge possessed by the parties before the court when it came down crafting (or merely ratifying) an appropriate remedy.

One would expect that the general norm setting that brackets decision-making married to a system that extracts as much information as possible from the parties to the litigation would have two basic consequences. First, it would establish that the court is not a one stop shop for dispute resolution: it would likewise establish that it is not only the state that bears responsibility for adequate educational outcomes. We would come to expect all affected parties to participate in the resolution of the general problem of South Africa's inadequate system of basic education: the state, the unions, the various social movements, teachers, principals, SGBs and even learners. Second, we would expect the 'disentrenching power' of such cases to have a spillover effect on future litigation. That power possesses two features: it would invite more litigation about specific kinds of problems that confront not just the state, but particular communities; it would create a variety of experiments in education.

²⁹⁵ For those readers who still think this modest approach reflects no more than the abstract musings of ivory-tower academics, we would suggest that they read the Constitutional Court's recent judgment in *City of Johannesburg and Others, Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg* 2008 (3) SA 208 (CC) ('*Occupiers*'). Prior to handing down its decision, the Constitutional Court issued an order that requiring the parties to the dispute to engage meaningfully with each other with a view to addressing the possibilities of short-term steps to improve current living conditions and of alternative accommodation for those who would be rendered homeless. As a result of this interim order, the parties reached a consensus that the City of Johannesburg would not eject the occupiers, that it would upgrade the buildings and that it would provide temporary accommodation. In addition, the parties agreed to meet and discuss permanent housing solutions. This agreement was then ratified by an order of the Constitutional Court. That consensus decision about the optimal remedy left the Court free to articulate general norms about the right to access to adequate housing: (1) evictions cannot occur in the absence of meaningful engagement; (2) the potential for homelessness must be considered prior to any decision by a state actor to eliminate unsafe buildings. An experimental constitutionalist could not ask for (much) more: general norm setting by the Constitutional Court which still leaves all the interested parties – including an important NGO (the Centre for Applied Legal Studies) – sufficient space to work out, for themselves, an optimal agreement (marked by its enhanced empirical validity and normative legitimacy) within the specific factual constraints set by this dispute. Critics of this judgment have, however, suggested that the *Occupiers* Court managed to avoid any meaningful norm setting.

These experiments in education would operate as feedback mechanisms.²⁹⁶ Some experiments would work. Some would fail. But with each experiment both the Court and other interested parties would come to have a better understanding of what the realisation of the right to an adequate basic education requires. Based upon this 'experience', the court might be prompted to alter – in one way or another – its understanding of the general norm. In such a manner is the requirement for shared constitutional interpretation met. Based upon this experience, state actors and interested parties around the country might come to possess a better understanding of the specific problem that confronts their community. Such is the promise of participatory bubbles: they may burst upon the resolution of specific piece of litigation. But they leave in their wake information about successes and failures from which future parties can learn.

It should be clear from the evidence set out above that the problems that beset South Africa's educational system are so large and so varied, that no pat prescription could issue from these pages. What is evident to the authors, however, is that an untapped reservoir of good will, good intentions, and good information is spread throughout the country and every single school system. If South Africa is to meet its constitutional obligations, then one requirement must be a commitment of all concerned parties to the realisation of an adequate basic education for all learners.²⁹⁷ That commitment can be assisted by appropriate court doctrines. However, it remains – as FC section 7(2) tells us – the responsibility of the state 'to promote, to protect and to fulfill' the basic law's commitment to such goods as an adequate basic education. Experimental constitutionalism provides a way of thinking about the realisation of an adequate basic education that moves beyond the binary, adversarial setting of a courtroom. It is, ultimately, a court-initiated invitation to the state to draw on all the resources available to it – most especially the various participants in the system – to come up with solutions to the wide variety of problems our learners currently confront.

Finally, our description of the inability of both the fragile state and the ever strengthening state to provide an adequate basic education is consistent with many of the state's apparent weaknesses in other areas of policy construction and execution. The problems

²⁹⁶ Woolman *Selfless constitution* (n 14 above).

²⁹⁷ In the United States, surveys have been conducted regarding the kinds of reform process we have described here. In a finding that might seem initially counter-intuitive, many of the states with the worst educational systems demonstrated the greatest degree of improvement once an adequacy model based upon fiscal equity, achievement assessment and greater public participation was put in place. Conversation with Professor William Simon, Columbia Law School (1 December 2006). Whether those results can be replicated here in South Africa is another matter.

with current policies appear to flow, in part, from the weak state's previous political agenda of dividing and conquering various competing educational constituencies. The time may have come for the state to draw down on the immense resources available in both the public sector and the private sector. Teachers, principals, provincial HoDs, unions, NGOs, learners and parents must be viewed as part of the 'struggle' to fix our school system.

CHAPTER 6

DEMOCRACY, SOCIAL CAPITAL AND SCHOOL GOVERNING BODIES

1 Introduction

1.1 Democracy, communitarianism and experimentalism

In chapters 3 and 4, we contended that the Constitution and the enabling education legislation vouchsafes to lesser and to greater degrees the ability of various religious, cultural and linguistic communities to control the curriculum of (and thus, generally, through a process of self-selection) and the matriculants in public schools and independent schools. Such collective rights are often described as communitarian. And that, as a matter of common nomenclature, they may well be. But it is also true that they reflect an important form of self-governance. So although they may be (somewhat) exclusive in nature – due to their commitment to various (partial or comprehensive) conceptions of the good – these schools also create the conditions for a certain form of democracy. The members of each community determine the contours of the learners' environment.

One might well object to this characterisation of single-medium public schools or independent schools on the grounds that the self-governance made manifest in these religiously, culturally and linguistically-based schools reflects a particularly cramped form of democracy (if they can be called democratic at all.) In this chapter, however, we want to suggest the enabling education legislation demonstrates an obvious commitment to a uniquely South African form of democratic government: SGBs. A close and careful reading of the provisions governing SGBs demonstrates a clear commitment to various forms of democracy – representative, participatory, direct – embedded in both the Constitution and in SASA. If one wishes to understand our basic law's favourite catch-phrase – 'an open and democratic society based upon human dignity, equality and freedom' – there may be no better place to start one's journey than through an understanding of how our education law – by empowering SGBs –

creates the space for new forms of democratic action and produces new stores of social capital.

We also suggest that the state's approach to SGB's bears most of the major hallmarks of experimental constitutionalism. The new ANC was bequeathed these semi-privatised and irrefutably privileged institutions by the apartheid state in terms of pre-constitutional statute and in terms of the interim Constitution and the final Constitution. Despite their questionable provenance, the new government has simultaneously recognised the power and the autonomy of SGB's at the same time as it has attempted to make these institutions more inclusive, more open and more democratic. Our analysis of SASA Chapter 4 supports two primary propositions: (1) SGB's operate as a fourth tier of government; (2) the state has regularly tweaked the powers of SGB's in order to make them more transparent, more responsive and more accountable to the community of learners they are meant to serve.

1.2 Structure of the argument

Our starting point for this analysis of school governance and South African education law should seem familiar to most readers. One set of commentators contend that the powers granted to school governing bodies (SGB's) in the South Africa Schools Act (SASA) obscures the real intention of the government in creating such bodies.²⁹⁸ This conspiratorial reading of the law suggests that its underlying motive is to provide communities with the illusion that they have genuine control over the governance of their schools.²⁹⁹ Thus SASA, when read with constitutional rights to equality, to religion, and to freedom of expression, leaves little scope for SGB's to take decisions that reflect the comprehensive – or even partial – conception of the good held by the members of their community.³⁰⁰ Another set of commentators reply that the creation of school governing bodies in SASA and other pieces of legislation was part and parcel of a global neo-liberal agenda. In sum, the state granted certain democratic political rights to communities, parents and

²⁹⁸ J Beckman 'The emergence of self-managing schools in South Africa: devolution of authority or disguised centralism?' (2002) 14(3) *Journal of Education and the Law* 1. See also J Jansen 'Race and restitution in education law and policy in South Africa and the United States' in Russo *et al* (eds) (n 105 above) 284 - 285.

²⁹⁹ See R Malherbe 'Centralisation of power in education: have provinces become national agents?' (2006) 2 *Tydskrif vir Suid-Afrikaanse Reg* 237 (Argues that ANC believed that 'political power should be centralised as far as possible').

³⁰⁰ This contention is only partially true with respect to single-medium public schools and entirely false with respect to independent schools. See S Woolman 'Defending discrimination' (n 96 above); B Fleisch & S Woolman 'On the constitutionality of single medium public schools' (2007) 23 *South African Journal on Human Rights* 34.

learners over their individual schools in return for the parents' acceptance – especially in elite public schools – of significant financial responsibility for their children's education.³⁰¹ These critics assert that the hollowing out of the state – that flowed from a neo-liberal agenda (the declining responsibility to pay for adequate public services in line with the demands of global capital for a cheaper, less tax-intensive economic environments) – made cost recovery initiatives such as SGB autonomy and school fees an attractive answer to budgetary constraints and the need to attract foreign direct investment. The consequences, according to the critics, were clear. Like so much else about the neo-liberal, Washington consensus policies, these 'cost recovery programmes', and the grant of political authority to SGBs to create and to enforce them, could only exacerbate pre-existing patterns of social and economic inequality.³⁰²

The problem with both accounts of SGB power is that they offer very selective readings of SASA provisions and constitutional norms that govern this 'fourth level of government'. In this chapter, we offer a third line of interpretation regarding SGB autonomy.³⁰³

³⁰¹ See Y Sayed 'Democratising education in a decentralised system: South African policy and practice. (2002) 32(1) *Compare* 35 - 46; Y Sayed 'Discourses of the policy of educational decentralisation in South Africa since 1994: an examination of the South African Schools Act' (1999) 29(2) *Compare* 141 143; Y Sayed 'Understanding educational decentralisation in post-apartheid South Africa' (1997) 66(4) *The Journal of Negro Education* 354; Y Sayed & N Carrim 'Democracy, participation and equity in educational governance' (1997) 17(3) *South African Journal of Education* 91.

³⁰² See Roithmayr (n 8 above); F Veriava 'The amended legal framework for school fees and school funding: a boon or a barrier?' (2007) 23 *South African Journal on Human Rights* 180. See J Karlsson 'The role of governing democratic bodies in South African Schools' (2002) 38(3) *Comparative Education* 327 (Karlsson argues that while the use of democratic institutions in school governance has much to recommend it, several studies, though largely anecdotal, have suggested that these institutions have merely re-enacted traditional South African relations of race, class and gender). But see Fleisch & Woolman 'On the constitutionality of school fees' (n 26 above); S Woolman & M Bishop 'Education' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2007) chap 57.

³⁰³ Of course, we, and the aforementioned authors, are hardly the only other interlocutors in this complex debate. Dietlin and Enslin contend that participatory governance by SGBs block significant change in public schools, especially in those communities with limited resources, and that we would be better served by direction and intervention by our representatives at the national level of government. See V Dieltiens & P Enslin 'Democracy in education or education in democracy: the limits of participation in South African school governance' (2002) 28 *Journal of Education* 5. Piper responds directly to Dietlin and Enslin and suggests that they may have 'reached their conclusions too hastily' and that they have thrown out 'the participatory baby with the School Governing Body bathwater': L Piper 'Participatory democracy, education, babies and bathwater: a reply to Dietlins and Enslin (2002) 28 *Journal of Education* 28. For another bracing exchange, see J Jansen – 'Grove Primary: power, privilege and the law in South African education' (1998) 23 *Journal of Education* 5 – and H Maree and A Lowenherz – 'Grove Primary: a response to Professor Jonathan Jansen' (1998) 23

Our reading takes seriously all of the provisions of SASA that determine the powers and functions of SGBs. It also relies on a particularly thick conception of democracy made expressly manifest in text of the Constitution, as well as in recent case law that more clearly delineates the political, communal, cultural and associative rights of South Africa's citizens. A careful reading of the Constitution, SASA and the case law reveals the lineaments of this fourth level of government.

This argument, on its face, might seem rather odd. No-one has, as yet, challenged the constitutionality of SGBs or the enabling legislation that breathed life into them. We believe that the silence – at the level of constitutional discourse – is instructive. The absence of visible public debate belies the fundamental administrative, managerial and political work that SGBs undertake in our still new democracy. They possess the potential to be the bedrock – the ur-source of social cohesion – of a sizable number of communities. Even with their uneven success in this regard, they reflect, in many respects, the most important interactions that citizens have with the state. We shall argue that SGB's provide a vehicle for popular political participation that is quite real: and that participation is made no less real by the strictures imposed upon them by our basic law and the subordinate statutory order. Despite concerns about their lack of capacity, SGBs enjoy popular acceptance and participation across class and language divides. SGBs are one of the few institutions that have the makings of a great, new and rather unique 'South African' political tradition.³⁰⁴

That does not mean that the power they wield – in the name of parents, learners and local communities – has gone unchallenged. As we shall see, the state has – through the original legislation in SASA, in subsequent amendments to that legislation and in a large number of court cases – attempted to place significant limits on what this fourth level of government can and cannot do.

Journal of Education 31. See also L Tikly 'Governmentality and the study of education policy in South Africa' (2003) 18(2) *Journal of Educational Policy* 161; T Chaka & V Dieltiens 'Stumbling blocks in the way of democratic school governance' (2007) (manuscript on file with authors); V Dieltiens *et al* 'Changing school practice: the role of democratic school governance' (2007) (manuscript on file with authors).

³⁰⁴ The tradition of local control dates back to the earliest schools on the subcontinent and has continued in various forms ever since. EG Malherbe *Education in South Africa* (1934).

Section 2 of this chapter engages the statutory underpinnings of SGB's. It offers a comprehensive reading that cuts the Gordian knot that binds, perversely, those who view SGBs as little more than a thin form of compensatory legitimation for a state with little regard for communitarian concerns, and those who view SGBs as an unfortunate consequence of the need for a negotiated settlement between the apartheid state and the forces for liberation (and that took place against the background of the more general hegemonic structures of democratic capitalism gussied up in the discourse of human rights.) Some 27 discrete sections of SASA, when read together, support our contention that SGBs enjoy genuine autonomy – at the same time as they as they are subject meaningful curbs on their power by other spheres of government, most notably the provincial government and the national government. Our reading of SASA puts paid to the dual contentions identified above: (1) that SGBs are mere extensions of provincial departments of education or (2) that many SGBs operate like private, gilded associations.

Section 3 of this chapter reviews the legislative amendments to SASA that have – ostensibly – restricted the power of SGBs. While there exists some merit to the claim that the state has attempted reel in SGBs, the amendments, and the existing sections of SASA that empower SGBs, demonstrate both their unique status in the larger world of school governance (that exists beyond our borders) and the relatively uncontested nature of school governance. In this section, we make a number of related claims. First, the SGB/provincial government/national government arrangement of shared competence and power over education has been effectively institutionalised in South Africa. Second, SGBs, as rather unique institutions, have found equal acceptance in diverse settings and contexts.

Section 4 of this chapter examines the case law involving the exercise of various powers by SGBs over the last ten years. The challenges brought against and on behalf of SGBs reflect the fundamental tension between largely affluent communities attempting to protect their privilege and a state attempting to advance its own interests as well as the interests of South Africa's many disadvantaged learners. These challenges have all been played out on a canvas in which the administrative arm of the state secured greater credibility and capability over the past decade. The consequence of these cases is somewhat unsurprising: the SGBs' status as 'juristic persons' enhances various forms of local democracy and creates effective social networks that create new stores of social capital. With such legal personality, SGBs possess the requisite authority to take community-based decisions on a range of school governance issues: from the hiring to the firing of teachers, to the right-sizing of school staff, to decisions on language policy and curriculum offerings. As we shall see, these considerable powers are

subject to two powerful provisos: (1) no decision may block the ability of learners and parents from historically disadvantaged communities to become members of a school's community (should they meet all of the accepted statutory and regulatory criteria); and (2) codes of conduct must be designed in a manner that enhances inclusion and diversity and does not unfairly limit the expressive, religious, cultural or linguistic rights of learners.

In section 5 of this chapter we conclude – based on our reading of the applicable legal texts, the facts on the ground, and the legal battles fought in our courts – that this little discussed institution has an important role to play in the making of our national civic culture. It is, thankfully, a role that is neither reliant on party patronage nor on sectarian religious allegiances, but rather on the secular modern democratic project of citizen participation at all levels of government.

1.3 Theoretical underpinnings

1.3.1 Social capital and SGB's

Ivor Chipkin has recently argued that social cohesion is the cornerstone of long-term economic stability.³⁰⁵ Building on recent debates about the importance of various kinds of social capital,³⁰⁶

³⁰⁵ I Chipkin 'Social cohesion as factor in development' Symposium for Office of the President (11 - 12 June 2007). For another recent version of this argument, see I Chipkin & B Ngqulunga 'Friends and family: social cohesion in South Africa' (2007) 34(1) *Journal of Southern African Studies* 310.

³⁰⁶ See, eg, R Putnam *Bowling alone: the collapse and revival of American community* (2000); R Putnam *Making democracy work: civic traditions in modern Italy* (1993); R Putnam (ed) *Democracies in flux: the evolution of social capital in contemporary society* (2002); J Coleman *Foundations of social theory* (1990); P Bourdieu 'Forms of capital' in JC Richards (ed) *Handbook of theory and research for the sociology of education* (1986) 241; N Lin *Social capital: a theory of social structure and action* (2001); D Halpern *Social capital* (2005). In *Bowling alone*, Putnam defines 'social capital' as follows: 'Whereas physical capital refers to physical objects and human capital to the properties of individuals, social capital refers to social networks and the norms of reciprocity and trustworthiness that arise from them. In that sense, social capital is closely related to what some have called "civic virtue". The difference is that social capital calls attention to the fact that civic virtue is most powerful when embedded in a sense network of social relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital': *Bowling alone* (above) 19. See also S Woolman 'Freedom of association' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2003) chap 44 (Woolman contends that 'there is a signal difference between Putnam's account of social capital and the one developed in these pages. First, ... , social capital is not assumed to be desirable primarily because of its instrumental link to civic virtue and the well-ordered

Chipkin contends that state institutions – especially in a developing democracy – have an essential role to play building social capital and promoting social cohesion:

There are several ways in which such linking is achieved. It may be that churches and other religious organisations, working on the basis of charity, are the key linking mechanisms between poor and resource rich(er) communities. Various civil-society bodies, including Non-Governmental Organisations, may play similar roles. Yet the most important institution, in this regard, is the State. This is true for several reasons. In the first place, democratic State institutions, like local governments, are able to realise benefits, not simply for members of ascriptive groups, but for communities of citizens – irrespective of religious affiliation or culture or ethnicity. What matters is the degree to which their operations are inclusive and participatory and the degree to which they are able to invest in and/or leverage resources for poor communities ... In the second place, the democratic State builds networks and creates linkages on the basis of democratic values. In other words, they encourage a culture of democratic citizenship in the country. In this regard, other kinds of ‘linking’ mechanisms, like the church, for example, may have important developmental effects, but they do not necessarily deepen the democratic culture.³⁰⁷

Chipkin’s contention is both incisive and illuminating with regard to our general arguments about SGBs. The SGB, viewed through the lens of Chipkin’s analysis, possesses a uniquely democratic nature that enables it to play a distinctive role in fostering social cohesion. As an institution that straddles civil society and the state, it has the benefit of providing services both to existing ascriptive groups – groups determined by ascriptive characteristics such as race, religion and culture – and to communities of citizens and of learners that do not identify with particular religions, cultures or ethnic formations. While principals and teachers may dominate the day-to-day operation of schools and heavily influence the decisions taken by SGBs, SGBs are, in principle, both inclusive and participatory. What they really lack, according to Chipkin, is the ability to leverage limited resources in poor communities. That said, and it is an important concession, Chipkin still contends that SGB-like institutions have the potential to encourage and to deepen a culture of democratic citizenship in South Africa.

society. Social capital is simply a cause and an effect of all stable associational frameworks. It is a predicate good for most other social goods. Second, because associational life is the necessary setting for most meaningful action, it makes little sense to speak, as Putnam does, of virtuous individuals in isolation. Virtue is a feature of human life that can exist only in the context of a densely woven fabric of social practices that define the good’.

³⁰⁷ Chipkin (n 305 above) 3.

What we shall show in the pages that follow is – *pace* Prinsloo – that there is little evidence that the state’s actions have been aimed at reducing the role of SGBs in fulfilling the mandate of deepening our democratic culture. If anything, a careful examination of amendments to the legislation over the past ten years, as well as the case law, demonstrates that the state has, in fact, remained deeply committed to the process of representative, participatory and direct democracy in SGBs. Most of the express changes in the legislation and the clarification of the legislation through case law reflect attempts to limit arbitrary use of power by SGBs, to clarify rules regarding the internal operation of SGBs and their relationship to other branches of government, and to enhance equality of opportunity for as many of South Africa’s learners as possible. These changes can hardly be viewed as full frontal attacks on the citadel of the SGB.

1.4 Democracy and SGB’s

1.4.1 Democracy and the Constitution

In *United Democratic Movement v President of the Republic of South Africa*, the Constitutional Court issued a challenge of sorts to the academic community: tell us what ‘democracy’ means, and more importantly, tell us how it ought to inform, in a principled manner, our understanding of various provisions in the text of the Constitution.³⁰⁸ Some South African academics, and in particular, Theunis Roux, have begun to do just that.³⁰⁹ Roux pulls together the political theories out of which our particular South African conception of democracy arises, the textual provisions of the Constitution that shape that conception, and the extant case law of our courts, to generate a ‘principle of democracy’.³¹⁰ We will not rehearse Roux’s

³⁰⁸ *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)* (No 2) 2003 1 SA 495 (CC), 2002 11 BCLR 1179 (CC).

³⁰⁹ See T Roux ‘Democracy’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2006) chap 10.

³¹⁰ This principle stated in its clearest form holds: ‘Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained. (2) The rights necessary to maintain such a form of government must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom’: Roux ‘Democracy’ (n 309 above) 10 - 68.

arguments in support of that principle here. We will, however, draw down on several of his arguments, especially those that serve part (2) of his 'principle of democracy' and our view of democratic practices in SGBs.

The argument that lends the greatest force to our views on representative, participatory and direct democracy in SGB's is Roux's contention that, read together, FC sections 7(1), 36(1), and 39(1) 'structure the way in which the tension between rights and democracy is to be managed in South African constitutional law'.³¹¹ As Woolman has argued elsewhere, FC sections 36(1) and 39(1) require a value-based approach to fundamental rights analysis and limitations analysis in part because they invoke the same set of values, the same linguistic trope, 'an open and democratic society based upon human dignity, equality and freedom'.³¹² However, Roux's connection of the oft-ignored FC section 7(1) to both fundamental rights interpretation (FC section 39) and limitations analysis (FC section 36) enables us to make four new critical points in this article.

First, FC section 7(1) reads: 'The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' Notice that democracy is treated as an independent value. Notice that the values of human dignity, equality and freedom are 'democratic' values. At a minimum, the language of FC section 7(1) should give pause to those interpreters of the basic law who privilege, reflexively, the value of human dignity. One can press this point further and argue that FC section 7(1), in fact, reverses the spin placed by the Constitutional Court on the phrase 'an open and democratic society based upon human dignity, equality and freedom'. It makes a democratic society, and not dignity, foundational.

Second, it is, we think, unnecessary to read the language of FC section 7(1) in a manner that privileges democracy over dignity. Indeed, FC section 7(1) and Roux suggest that we should be just as wary of such overly simplistic reductions (rights service democracy) as we are chary of claims that rights and democracy stand in irreconcilable tension with one another (the counter-majoritarian dilemma). We think that it is enough to suggest, as Roux does, that FC

³¹¹ Roux 'Democracy' (n 309 above) 10 - 65(b) (author's italics removed).

³¹² S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, July 2006) chap 34.

section 7(1) delinks the phrase ‘an open and democratic society’ from ‘human dignity, equality and freedom’.³¹³

Third, Roux’s arguments support our contention that rights stand not in opposition to democracy, but that they are, instead, constitutive of it. That is to say, without the rights to equality, dignity, life, belief, expression, assembly, association, voting, political party membership, citizenship, access to information, access to courts, and just administrative action, we would not have a meaningful democracy. These rights are themselves the preconditions for an ‘open and democratic society’.

Fourth, the principle of democracy, when taken seriously, gets read back into these rights. And by that we mean that the virtues of belonging, deliberating and participating, identified first and foremost with democracy, attach not just to the political realm, but to an array of associational forms – religious, traditional, linguistic, commercial, labour, intimate, cultural – that are part of, but not identical to the political.³¹⁴ So, although Roux does not make this claim, we do. Indeed, it is an appreciation for these ‘democratic’ values of membership, deliberation and participation that underwrites our defence of SGBs as sites of representative, participatory and direct democracy. And we come to value SGBs, not simply because they serve as reminders of the emancipatory potential of robust democratic discourse, but because SGBs, and other groups and counter-republics like them,³¹⁵ are where democracy takes place everyday for the vast majority of us (if it takes place at all).³¹⁶

Indeed, there is good reason to believe that the Constitutional Court itself may be slowly coming round to this very position. In its recent judgment in *Fourie*, the Court remarked that ‘[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner’.³¹⁷ In *Matatiele II* and *Doctors for Life*, the Court expressed a clear desire to deepen democracy and to create space for citizens to address specific problems that have a direct bearing on their lives. The *Matatiele II* Court was asked, amongst

³¹³ That is, whereas the phrase ‘open and democratic society based upon human dignity, equality and freedom’ suggests a miasma of ‘big’ ideas that, if read jointly and severally, could exhaust the entire universe of modern political theory, delinking the two phrases forces the reader of FC secs 36(1) and 39(1) to stop and to attend – for a moment – to the meaning, as well as the desiderata, of an ‘open and democratic society’.

³¹⁴ See S Woolman ‘Freedom of association’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2003) chap 34.

³¹⁵ K Thomas ‘Racial justice’ in A Sarat, G Bryant & R Kagan (eds) *Looking back at law’s century* (2002) 78.

³¹⁶ Woolman *Selfless constitution* (n 14 above).

³¹⁷ 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC) para 95.

other questions, whether the Twelfth Amendment to the Constitution was ‘unconstitutional’ because it re-demarcated the boundary of the municipality of Matatiele – and removed it from KwaZulu-Natal and into the Eastern Cape – without sufficient public consultation.³¹⁸

Justice Ngcobo, writing for a majority of the *Matatiele II* Court, held that a provincial legislature, whose provincial boundary is being altered, is required by the Constitution to approve such an alteration. Moreover, when a provincial legislature takes a decision of this nature, it clearly invokes its law-making powers. As such, the provincial legislature is required by the Constitution to facilitate public participation in making its decision-making process.

When determining whether a provincial legislature has acted reasonably with regard to the extent of public participation, the Constitutional Court will pay particular attention to the impact of the legislation on (the affected segment of) the public. As Ngcobo J writes:

The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to ensure that the potentially affected section of the population is given a proper opportunity to have a say.³¹⁹

In *Doctors for Life*, the Constitutional Court was asked to address a comparable question: whether the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act were unconstitutional because they had been passed without the requisite levels of public participation.³²⁰ Ngcobo J, again writing for a majority of the Court, began by noting that the National Council of Provinces (‘NCOP’) enabled the provinces to have a say in the national law-making process. NCOP delegations are generally obliged to secure voting mandates from their respective provincial legislatures. This direct influence of the provincial legislatures on their NCOP

³¹⁸ *Matatiele Municipality & Others v President of the RSA & Others* 2006 5 SA 47 (CC), 2006 5 BCLR 622 (CC) (*‘Matatiele II’*).

³¹⁹ n 318 above, at para 68. Ngcobo J found that *Matatiele II* satisfied the factual predicate required by test: the proposed amendment would have moved an entire, identifiable community from one province to another province. Moreover, the consequences of the proposed amendment were more than symbolic. The move of the municipality from KwaZulu-Natal to the Eastern Cape would have significant effects on the provision – to the constituents of Matatiele – of welfare payments, health services and education. (No one would argue that KwaZulu-Natal benefited from a more professional civil service.) Given the test to be applied, and the salient facts, the Court concluded that KwaZulu-Natal, in not holding any public hearings or inviting any written submissions, had acted unreasonably. As a result, that part of the Twelfth Amendment that altered the boundary of KwaZulu-Natal was declared unconstitutional.

³²⁰ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC), 2006 12 BCLR 1399 (CC).

delegations meant that both Parliament and the provincial legislatures had a constitutional obligation to facilitate public involvement.³²¹

For our purposes, *Matatiele II* and *Doctors for Life* stand for the proposition that public participation is not a good simply because it enhances deliberation or moral agency – though it does do that. Our claim is two-fold. Public participation will generally elicit the kind of information that will result in better, if not always optimal, decision-making. Public participation should deepen the commitment of our citizens to the commonweal. Moreover, the kind of participation contemplated by the *Matatiele II* and *Doctors for Life* Courts supports the proposition that public political participation in South Africa is

³²¹ That the Constitutional Court has recently warmed to the idea that an effective democracy is contingent upon the participation of an engaged and critical citizenry in the actual process of law-making is evident from Justice Sachs's opinion in *Doctors for Life International*: This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness. The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions ... It should be emphasised that respect for these three inter-related notions in no way undermines the centrality to our democratic order of universal suffrage and majority rule, both of which were achieved in this country with immense sacrifice over generations. Representative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended ... Yet the Constitution envisages something more. True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the sidelines while it is being adopted. *They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making.* Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years ... Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation. n 320 above paras 228 - 232 (footnotes omitted). Reflexivity and its relationship to the principle of democracy and to public participation in the processes of law-making are discussed in Woolman *Selfless constitution* (n 14 above); W Rehg *Insight & solidarity: the discourse ethics of Jurgen Habermas* (2000) 62; J Habermas *Facts and norms: contributions to a discourse theory of law and democracy* (1998). See also: R Young *A critical theory of education: Habermas and our children's future* (1990).

meant to address specific problems that have a direct bearing on the lives of would-be participants.³²²

1.4.2 Democracy and SASA

Given that we are about to go into rather gory detail about those sections of SASA that support our thesis that SGBs do exercise power in a manner that allows for important operational decisions to be taken by parents, learners and community members, it is unnecessary to rehearse the legal underpinnings of that argument here. It is enough, we think, to show that throughout SASA one finds evidence of the state's commitment to democratic structures of government.

The Preamble not only calls for the 'democratic transformation of society' but calls on 'learners, parents and educators' to take 'responsibility for the governance and funding of schools in partnership with the State'. SGB's, in sections 6, 7, and 8 are granted the power to determine the language policy of a school, to set up the conditions for religious observation and to create a binding code of conduct for learners. Section 11 sets up a representative council of learners – an entity that wields power unlike student bodies in other jurisdictions. Chapter 3, while notionally entitled Public Schools, contains provisions – from section 16 through section 32 (80 per cent of the Chapter) – devoted to the role and the responsibilities of SGBs. SASA Chapter 4 – which engages the funding of public schools – is, from start to finish, about the complex decision-making structure that exists between SGBs, school officials, learners, parents and the state. So although the next section concerns itself with the specific powers of an SGB that make it a compelling site for a 'fourth level of government' and several forms of democracy (representative, participatory and direct), our delineation of SASA's provisions demonstrates that the Act welcomes public participation in school affairs in any number of different ways.

³²² These two decisions have shaken up political practices in all nine provincial legislatures. None of the legislatures knows how much participation is 'reasonable' for any given decision. But they do know that they are obliged to consider public participation when reaching decisions that will have some demonstrable effect on a discrete and identifiable portion of the community: Panel discussion on *Matiele II* and *Doctors for Life*, South African Human Rights Commission and the South African Institute for Advanced Constitutional, Human Rights, Public and International Law (11 October 2006).

2 A comprehensive, non-selective, reading of SASA on the power and the authority of SGB's to operate as a fourth level of government

2.1 The three orthodoxies

Three dominant positions on school governance have framed the debate in the South African academy over the past decade.

Yusef Sayed argues that the new school governance dispensation has led to the commodification of education and exacerbated inequality. For his purposes, the rotten core of the governance legislation are those provisions which give SGBs the powers to charge compulsory school fees. Even with its 'generous' exemptions, Sayed sees school fees as the thin edge of the wedge. Given the historically unequal nature of these school communities, and the limits of meaningful state support for disadvantaged schools, these new legal powers and financial instruments have, according to Sayed, deepened inequalities.³²³ Some of Sayed's contentions may well be true. (Post-apartheid South Africa's economic policies – balancing the budget while placing an emphasis on black middle class growth – must be at least partially responsible for South Africa's ignominious distinction of having the world's highest gini coefficient for wealth and poverty.) But because Sayed's reading of the text is largely limited to the funding provisions of SASA Chapter 4 – SASA sections 34 - 41 – he underplays the democratic structures that SASA Chapters 2 and 3 undeniably create.

By contrast, Johan Beckman's analysis of the legislation suggests that a 'disguised centralisation' lies at SASA's heart. The disguised centralism argument focuses on the limitations placed on an SGBs powers to establish entirely autonomous language, admission and religion policies (SASA sections 5, 6 and 7). Beckman contends that while SASA attempted to provide authority to communities in two areas, language and religion, that authority is so tightly circumscribed as to blunt meaningful communal autonomy.³²⁴ From Beckman's

³²³ Y Sayed 'Democratising education in a decentralised system: South African policy and practice (2002) 32(1) *Compare* 35 - 46. See also Y Sayed 'Discourses of the policy of educational decentralisation in South Africa since 1994: an examination of the South African Schools Act' (1999) 29(2) *Compare* 141 143; Y Sayed 'Understanding educational decentralisation in post-apartheid South Africa 66(4) *The Journal of Negro Education* 354; Y Sayed & N Carrim 'Democracy, participation and equity in educational governance' (1999) 17(3) *South African Journal of Education* 91.

³²⁴ J Beckmann 'The emergence of self-managing schools in South Africa: devolution of authority or disguised centralism?' (2002) 14(3) *Journal of Education and the Law* 153.

perspective, SASA looks to be little more than a form of compensatory legitimation.

Prinsloo extends Beckmann's arguments – in bold, sweeping and rather truculent terms. Prinsloo argues that 'the State, its functionaries, and organs of State have been trying to assert themselves to an increasing extent by limiting or interfering in the real authority that can exercised by school-level governance structures'.³²⁵ The result, he concludes, 'is a sorry state of affairs' in which SGBs are compelled to turn to the courts – at great monetary cost to themselves and to the taxpayer – to stop officials from committing unlawful actions and from jeopardising the smooth functioning of schools through failure to carry out their duty. Another disturbing trend that emerges ... is of government officials abusing their power, unlawfully interfering in the management and governance of schools, neglecting their duty, showing no respect for the rule of law; and even ignoring court orders against them.³²⁶

As we note below in our discussion of the case law, Prinsloo's contentions are wrong in fact and law. From the earliest cases, we see predominantly Afrikaner institutions attempting to hide behind the Constitution in order to retain privileges acquired under apartheid. Their use of the courts, and their narrow constructions of the Constitution smacks of *bittereinders* undertaking rearguard actions in defence of the indefensible.³²⁷

The problem with all three positions is that the authors simply fail to read SASA as a whole. Their focus on a small subset of provisions underwrites their rather narrow, partisan readings. But such readings do little justice to the complex array of forces that forged this legislation. And it does even less justice to the genuinely democratic structures that SASA and other pieces of legislation have created.³²⁸

The irony is that, to some degree, the three authors share our view that SGBs operate as a fourth tier of government. The problem for Beckmann and Prinsloo is that both national government and provincial government have engaged in an illegitimate strategy to erode the rights and the authority of SGBs. Leftist critics such as Sayed are less pessimistic about the curtailment of SGB powers. They recognise that SASA grants power to recommend the hiring of teachers, to collect and to distribute fees, to determine the ethos of

³²⁵ S Prinsloo 'State interference in the governance of public schools' (2006) 26(3) *South African Journal of Education* 355-356.

³²⁶ n 325 above, 366.

³²⁷ Bittereinders were those Boers who refused to concede defeat after the South African War (1899-1902), and wished to continue the war against the British by any means possible.

³²⁸ See Fleisch (n 7 above).

the school, and to embrace the participation of learners, parents and community members in the regular affairs of school governance. These powers – they recognise – often far outstrip the powers accorded to school boards and local communities anywhere else in the world. So while leftist critiques tend to hold a view of SGB powers not discernably different from our own, the critique, as we have noted, is that the state has ceded too much power to SGBs and thus further reinscribed long-standing inequalities in the provision of educational resources. The autonomy of this fourth tier of democratic government is, for Sayed, exactly the problem.

2.2 More nuanced positions

Between Sayed, on the one hand, and Beckmann and Prinsloo on the other, lie a whole range of alternative, and often more nuanced positions. Roos, for example, notes that many of the SGBs powers are effectively shared with provincial governments.³²⁹ Provincial governments retain partial or complete authority with respect to and ownership of:

- Land and buildings;
- School admissions, language and funding;
- Labour agreements;
- Requirements for teacher registration with SACE;
- Audited financial accounts;
- Curriculum and assessment;
- Provision of appeals concerning admission, hiring and fees.

Thus, despite the initial appearance that SGBs exercise relatively unmediated control over a broad range of school governance, significant authority over schools vests in the provincial government. The result, as Roos notes, is that we have a rather uneasy division of authority between two tiers of school governance and, not unexpectedly, a contested relationship between provincial governments and SGBs over *who* may do *what*, and *when*. As Roos also reminds us, statutes can be changed. SGBs are not constitutionally-mandated institutions. Their powers can be altered or even eliminated by national government and provincial government through the promulgation of new legislation. As we shall see, amendments to SASA have, in fact, altered the authority of SGBs and attempted to change the balance of power between provincial government and SGBs.

³²⁹ C Roos 'Privatisation and the funding of education' (2004) 22(3) *Perspectives in Education* 125.

Other commentators have demonstrated an interest in going beyond the law – and the legal skirmishes between SGBs and provincial governments – to test the extent to which the authority granted SGBs has resulted in a fourth level of government and a new opportunity for citizen self-governance. Jennifer Karlson contends that the original school governance legislation – and SASA in particular – was overly ambitious.³³⁰ As a result, SGB authority was largely symbolic and SGBs did not – according to Karlson – deepen the Constitution’s commitment to democracy. She reads two empirical studies as supporting two conclusions: (1) that SGB governance (or the lack thereof) tends to reinforce principal and teacher authority, and (2) SGB authority – as reflected in the quality of tuck shops – tends to reproduce existing patterns of inequality.

However, a substantially different picture of school governance emerges in Zolani Ngwane’s study: “‘Real men reawaken their fathers’ homesteads, the educated leave them in ruins’: the politics of domestic reproduction in post-apartheid rural South Africa.”³³¹ Ngwane studied intergenerational conflict and social reproduction in the context of school governance in the rural Eastern Cape. Ngwane found, *pace* Karlson, that the openness and the inclusivity of school governance turned them into sites of political opposition to the patriarchal structures of local traditional leaders. Women – who had, and continue to be, excluded from traditional centres of power – found that they could use the SGB as a vehicle for articulating grievances, making themselves heard, and changing the way things have been traditionally done. He notes: ‘unpredictable as they were, these [SGB] meetings were ... important sources of legitimacy for the school and gave indispensable stamps of approval for its projects.’³³²

Grove Primary School v Minister of Education & Others offers another opportunity to assess complex, but competing, claims about the virtues and the vices of SGB power.³³³ (We proffer our own take on *Grove Primary* below.) Jonathan Jansen, in a carefully reasoned and nuanced article, recognises that *Grove Primary* was – in 1998, in the Western Cape – part of the vanguard of the revolution in historically white, former Model C schools.³³⁴ It hired black teachers and attempted to ‘give effect to government priorities for

³³⁰ Karlsson (n 302 above) 329.

³³¹ Z Ngwane ‘Real men reawaken their fathers’ homestead, the educated leave them in ruins’: the politics of domestic reproduction in post-apartheid rural South Africa’ (2001) 31(4) *Journal of Religion in Africa* 402.

³³² n 331 above, 410 (SGB ‘meetings had a reputation for turning into uncomfortable confrontations, with parents complaining about the behavior of teachers or challenging some decision of the school committee. Because of their size, these meetings could also digress into a discussion of community matters that did not have much to do with the school’).

³³³ 1997 4 SA 982 (C).

³³⁴ Jansen ‘*Grove Primary*’ (n 303 above) 5.

transformation'. It attempted to recruit additional black teachers. It found that only two of 70 applicants responded to its advertisements. It found itself obliged to 'head-hunt' black graduates of the University of Cape Town in order to advance its transformative goals. Jansen accepts the proposition that Grove Primary's actions, in resisting the government's redeployment plan, were not motivated by racism. Jansen adamantly defends Grove on this ground. At the same time, he notes that 80 other white schools joined Grove in its contestation of the government's redeployment plan. He refuses to defend the bona fides of these other schools. For Jansen, it is clear that historically white schools wished to maintain their position of privilege and that such privilege, in South Africa, meant that schools in wealthy white communities could maintain their substantial funding and teaching advantages over schools in poor historically disadvantaged black communities. *Grove Primary*, on Jansen's reading, stands for the proposition that existing SGB powers and general funding norms invariably re-inscribe racial privilege. But Jansen's reading does not go uncontested. Maree and Lowenherz, while sympathetic to many of Jansen's conclusions, express dismay with Jansen's 'unsupported claims' that Grove Primary became the object of black ridicule.³³⁵ They note that public support for Grove's efforts appeared evenly divided amongst black and coloured residents in the Western Cape, that black and coloured applicants for admission had increased substantially in the aftermath of the litigation and that a large number of black teachers sent their children to Grove Primary. Moreover, they argued that Jansen's tarring of Grove Primary's opposition to the VSP/Redeployment Scheme by associating it with three Wynberg schools (that had decided to spend R2 million on Astro turf fields) constituted an *ad hominem* attack that did not do justice to Jansen's otherwise balanced account. In the end, Maree, a member of Grove's SGB, and Lowenherz, the school's Principal, argue that the existing structures of school governance were, in fact, what enabled them to pursue a first class education for their learners at the same time as they pursued the government's – and the country's – pressing agenda for transformation.

2.3 Our position

We have seen that defenders of community rights are rather exorcised by a small set of provisions in Chapter 2 that involve issues of community identity – SASA sections 5 - 7. The left critique focuses almost exclusively on the school funding provisions found in SASA Chapter 4. Most of the education sociologists on the left emphasise the extent to which SGBs replicate positions of privilege. But other

³³⁵ Maree & Lowenherz (n 303 above) 31.

sociologists reveal the opportunity SGBs create for women and learners contesting patriarchal arrangements of power within traditional communities. Some researchers note the extent to which SGB's mobilise around governance issues that enable them to maintain the relative privilege of their institutions: their interlocutors note that without such powers of governance relatively privileged schools could not negotiate the passage from exclusion to inclusion, from excellent monochromatic schools that draw down on significant stores of social capital to excellent diverse institutions that draw down on new forms of social capital.

All of these accounts are partial – and some are a little confused. In our view, what is missing from all of the accounts is a careful reading of totality of the provisions found in Chapters 2, 3 and 4 of SASA. What emerges from a close reading of SASA's provisions is an unprecedented commitment to democratic participation in school governance. Learners, parents, teachers, non-teaching staff, and even members of the broader community, are granted not only a voice but actual authority to take decisions on behalf of the educational institution of which they are a part. Indeed, it has recently been remarked that SASA could equally have been referred to as the School Governance Act because of its overwhelming emphasis on the details of school governance.³³⁶ We will argue that the governance provisions of the Act provide clear evidence of a broader constitutional commitment to an open and democratic society that recognises the rule of law at the same time as it gives effect to the will of the people.

2.4 Inclusion

Some of the most exceptional provisions of SASA, and those provisions that continue to receive considerable international attention, are the statutory provisions for learner participation in school governance. Three distinct provisions underwrite this unique power of participation. In addition to articulating the legal requirement of all public schools that enrol learners in Grade 8 or higher to establish a representative council of learners (RCLs), section 11 demands that provinces develop guidelines concerning the establishment, election and function of the learner councils. SASA section 23(2)(d) recognises that learners in the eighth grade or higher at school are a category of persons that must be represented on the SGB. SGB section 8(1) requires that SGBs consult with learners (and other stakeholders)

³³⁶ Governing Body Forum Newsletter 'Changes to various acts and regulations' (February 2008), available at <http://www.gbf.org.za/documents/default.asp?id=Newsletters>.

prior to the adoption of a school code of conduct for learners.³³⁷ According to Karlsson, SASA provides learners with an opportunity to 'experience democracy in student affairs, and through their representatives on the governing body, to engage in democratic structures and practices involving all relevant constituencies of the school community'.³³⁸ While the law opens up considerable space for participation in line with the best practices of democratic governance, the actual practices of RCLs are, at best, uneven.³³⁹ The incorporation of learners into the governance of schools through RCLs is but one, albeit important, innovation in the law.

SASA promotes broader – more inclusive – democratic participation in three other respects. First, the definition of parent (SASA section 1, xiv) extends the normal definition beyond the conventional definition: a parent is a biological parent or legal guardian, and embraces 'the person who undertakes to fulfil the obligation referred to in (a) and (b) towards the learner's education'. In other words, an individual who may be neither a biological parent nor legal guardian, but who has taken on a major role in the education of a learner's life, may participate in school governance on an equal basis to person that have conventional legal claims to parental status. Given long historical patterns of informal fostering,³⁴⁰ this recognition of the complexity of parenting in South Africa also represents an important effort to extend participation in school citizenship.

While parents (broadly defined) are explicitly required to be in the majority on the school governing body, SASA provides for the inclusion of all key stakeholders: such stakeholders include older learners, teachers and non-teaching staff. Fleisch provides a detailed

³³⁷ See C Harber & B Trafford (1999) Democratic management & school effectiveness in two countries: a case of pupil participation? (1999) 27(1) *Educational Management, Administration and Leadership* 45.

³³⁸ See Karlsson (n 132 above) 329.

³³⁹ Nongubo has found evidence of continued autocratic tendencies among educators regarding learner involvement in school governance: MJ Nongubo 'An investigation into perceptions of learner participation in the governance of secondary schools' (unpublished Master's thesis, Rhodes University, 2005). Nongubo's findings are consistent with Karlsson's findings from an earlier period. Karlsson's analysis of studies from the late 1990s suggests that secondary schools preferred to leave learners out of decision-making processes. However, as learners became aware of the new legislation – and their increased powers – they were gradually brought into school governance: even if their involvement tended to focus on sports policies, fundraising and discipline. See I Carr 'From policy to praxis: a study of the implementation of representative councils of learners in the Western Cape, from 1997 to 2003' (unpublished PhD dissertation, University of the Western Cape, 2005).

³⁴⁰ See F Zimmerman 'Cinderella goes to school: the effect of child fostering on school enrolment in South Africa' (2003) 38(3) *Journal of Human Resources* 557; K Anderson 'Relatedness and investment in children in South Africa' (2005) 16(1) *Human Nature* 1; K Anderson 'Family structure, parent investment, and educational outcomes amongst black South Africans' University of Michigan Population Studies Centre Research Report (2000) 461.

historical account of the origins of these particular patterns of participation. He suggests that they emerge out of a complex history of democracy in the anti-apartheid movement, the trade union's particular conception of democracy, the compromises reached in the drafting of the Hunter commission report and the horse-trading involved in subsequent legislative processes.³⁴¹

In addition to elected members, SASA section 23 provides for the presence of non-elected or ex-officio members – including the school principal and co-opted members – on the SGB. SASA also specifically envisages the inclusion of a member or members of the community: at the same time, it restricts their voting rights.

2.5 Decision-making

As we have previously seen, Beckman contends that SGBs have limited decision-making authority with regard to critical areas of school policy: these policy decisions are, ostensibly, tightly circumscribed by provincial and national legislation and policy. Prinsloo offers a conflicting account. In his view, SGBs possess real authority, but have had that authority curtailed by illegitimate (if not *ultra vires*) forms of interference by the state.

SASA expressly grants a wide range of specific functions and responsibilities to SGBs:

(1) Determine the school admissions policy (SASA s 5(5)); (2) Determine the language policy (SASA s 6(2)); (3) Issue rules regarding religious observance at school (SASA s 7); (4) Adopt a code of conduct after consultation (SASA s 8(1)); (5) Suspend learners (SASA s 9(1)); (6) Function in terms of a constitution (SASA s 18); (7) Adopt a constitution (SASA s 20(1)(b)); (8) Develop a mission Statement (SASA s 20(1)(c)); (9) Determine times of the school day (SASA s 20(1)(f)); (10) Administer and control school property (SASA s 20(1)(g)); (11) Recommend the appointment of educators (SASA s 20(1)(i)); (12) Recommend the appointment of non-educator staff (SASA s 20(1)(j)); (13) Give permission to use school facilities including the charge of a fee (SASA s 20(2)); (14) Take reasonable measures to supplement the resources of the school (SASA s 36(1)); (15) Establish a school fund (SASA s 37(1)); (16) Open and maintain a bank account (SASA s 37(3)); (17) Prepare an annual budget for parent approval (SASA s 38 (1)); (18) Implement resolution parent meeting (SASA s 38(3)); (19) Enforce the payment of school fees (SASA s 41); (20) Keep financial records (SASA s 42(a)); (21) Draw up an annual financial Statement (SASA s 42(b)); (22) Appoint a registered auditor (SASA s 43(1)). In addition, SGB's that have been allocated additional functions may undertake: (23) Improvement of the school's

³⁴¹ See B Fleisch (n 7 above).

property (SASA s 21(1)(a)); (24) Determine the extra-mural curriculum (SASA s 21(1)(b)); (25) Make choices of subject options (SASA s 21(1)(b)); (26) Purchase textbooks, education materials and equipment (SASA s 21(1)(c)); (27) Pay for services (SASA s 21(1)(d)).

This list of functions, responsibilities and powers range from very substantial decisions over the core business of the institution – such as recommendations for the appointment of educators and choices about subject options – to important administrative decisions about school hours, the purchase of educational resources and the payment of services. The SGB – in the hotly contested SASA Chapter 4 – takes decisions that have an enormous impact on school finance: the raising of fees, the drafting of annual budgets and the oversight of bank accounts. Of course, many of these functions are circumscribed by national and provincial law, regulation and policy. (How could it be otherwise, since both national government and provincial government share legislative competence over primary schools and secondary schools?) That SGB powers are circumscribed by law simply states the obvious: a close examination of that law reveals the extensive and substantive decision-making authority granted by the law to SGBs.

2.6 Forms of democratic participation

The primary form of democratic participation envisaged by SASA – across a range of school institutions – is conventional representative democracy. So, for example, in terms of SASA section 28, the MEC is required to issue regulations that specify how representative elections of members of the SGB are to be conducted. SASA section 29 then requires that elected members of the SGB elect office-bearers (the chairperson of the SGB must be a parent). SASA section 30 outlines rules related to the establishment of committees or subcommittees that could include non-elected members. (However, the chairperson of any such structure must be an elected member of the SGB.) On a slightly more mundane level, SASA specifies the composition of the governing body (section 23), specifies the term of office of members (section 31), the status of minors on the body (section 32), and the legal standing of the body (section 15). SASA likewise specifies the procedures that need to be followed in the event that a legal constituted SGB fails to perform its function (section 25). Learners are, as we have seen, also introduced to the practices of representative democracy through learner representative councils (section 11). When read closely, SASA provides a comprehensive set of guidelines for the exercise of representative democracy in and over public schools.

But representative democracy alone would be insufficient to give full expression to a government – even at this fourth level – based on the will of the people. SASA provides for two instances of direct forms

of democracy. SASA section 8(a) states that the SGB must adopt a code of conduct for learners ‘after consultation with learners, parents and educators of the school’. Why the requirement for a higher standard of democratic participation for the adoption of a code of conduct? If we are to follow the logic of *Matatiele II* and *Doctors for Life*, consultation, particularly with learners and parents, is likely to deepen the commitment to the democratic rules by which learners and parents are to be governed. Representative democracy is a first step in self-government. Consultation regarding the rules that govern everyday life in school for learners is designed to consolidate self-government.

In another instance, representative democracy supplemented by compulsory consultation is deemed insufficient to discharge the general commitment to self-government. Direct democracy is required for approval of a school budget and, by extension, a schedule of compulsory fees (section 38(2)). In this case, the final authority for approval lies with a simple voting majority of parents present at an annual parents meeting. Given that SGBs have the power to proceed with legal proceedings to enforce for payment of school fees by parents who are obliged to pay fees, the drafters of the legislation thought it prudent to ensure that every potential payee could give voice to her views and ultimately cast a vote on this matter directly.

2.7 SASA and the creation of social capital

SASA constitutes a veritable gold mine for the maintenance of existing stores of social capital and the creation of new stores of social capital. It accomplishes this end by granting parents and learners, who live together and know through the school and the surrounding environs, the power to take decisions together about one of the most important institutions in their lives: local primary and secondary schools. Such decisions – which do not always lead to communal accord and harmony – do increase the kinds of face-to-face relationships that create the kind of trust, loyalty, friendship, kinship and commitment to shared associations that are both constitutive of, and are an ongoing by-product of, social capital.

SASA does not simply preserve social capital by preserving the status quo. Its commitment to fee exemptions that permit the political participation of parents from historically disadvantaged backgrounds to learner representation on SGBs demonstrates SASA’s commitment to extending social networks, and to building new sources of social capital. The state, through SASA, has charted an intelligent course between maintaining institutions (SGBs) that possess vibrant social networks, and creating mechanisms that enhance access to these networks for the historically disadvantaged

without destroying the institutions that continue to produce such substantial amounts of social capital.

3 Amendments in legislation that affect the power and autonomy of SGB's

In the 11 years since the adoption of SASA, Parliament has amended the legislation eight times. This section's systematic analysis of the amendments underscores our general thesis that the state has used its power to increase access to 'better' schools for learners from historically disadvantaged communities and to enhance participation in the governance of schools from members of historically disadvantaged communities. The state has not, by and large, undermined the ability of SGBs to determine – sometimes in consultation with provincial government – a broad array of critical decisions around hiring, firing, funding, class size, curriculum, language and culture.

3.1 1997: Establishment of SGB-funded posts³⁴²

The 1997 Education Laws Amendment Act primarily provides for a range of small technical changes to the original enabling legislation. However, it does make one major additional addition to the original 1996 Act. The 1997 Amendment Act grants governing bodies the right to establish posts for additional educators and non-teaching staff to be paid for by funds from the SGB.

3.2 1999: Suspension pending expulsion and co-opted members³⁴³

The 1999 Education Laws Amendment Act contains two significant changes that have had a direct impact on the majority of schools. The first relates to the role of the governing body in suspension decisions. In terms of the original version of SASA section 9(1)(b), SGBs had the right, after a fair hearing, to suspend a learner from school pending the outcome of that fair expulsion hearing. In the amended legislation, SGBs could not take the decision alone – no matter how fair the process. The amendment now requires the SGB to 'consult with the Head of Department' prior to suspending a learner awaiting an expulsion decision.

³⁴² Education Laws Amendment Act 100 of 1997.

³⁴³ Education Laws Amendment Act 48 of 1999.

The 1999 Amendment also changes the rules related to co-opted members. The 1999 Amendment adds to SASA section 23 a number of provisions that enable SGBs to continue to function when elected parents drop out of the governing body. The amendment allows the SGB to co-opt parents, temporarily, and grants these parents voting rights pending the outcome of a by-election.

What is the significance of these two amendments? The first amendment places an added burden on an SGB attempting to expel a learner. However, it also, arguably, shifts some of the SGBs authority to the provincial HoD. Read in a benign fashion, this amendment simply provides a check upon SGB power. Put differently, the first amendment makes SGBs more accountable. The second amendment addresses a situation in which an SGB may be rendered dysfunctional by a mid-term resignation and provides a practical solution that enables SGBs to continue to function with a parental majority. If anything, this amendment increases SGB authority and the ability of parents to exercise meaningful control over the governance of their children's school.

3.3 2000: Head of department to determine reasonable and fair use of school facilities³⁴⁴

In 2000, section 20(1)(k) was amended in such a way as to give the Head of Department (HoD) the right to determine what constituted reasonable and fair use of school facilities for educational programmes not actually conducted by the school. The story behind this amendment is that some schools were refusing to grant provincial government the right to use parts of educational campuses to establish new schools or to provide additional classroom accommodation for nearby schools that were overcrowded. In the original formulation, schools were required to allow reasonable use under fair conditions. The question of ultimate legal authority – ‘who would define what constituted reasonable use and fair conditions’ – was left unspecified. Schools could have contested the meaning of these terms and in the process delayed the state's attempt to make use of the facilities indefinitely.

³⁴⁴ Education Laws Amendment Act 53 of 2000.

3.4 2001: Representative council of learners as the only recognised and legitimate body; no loans to SGB's³⁴⁵

The 2001 Amendment to section 11 added the phrase: 'and such a council is the only recognised and legitimate representative body at the school'.³⁴⁶ How are we to interpret the addition of this restriction? In many institutions, residual practices of the prefect system had been retained: in such cases, duly elected representative councils of learners were not receiving the respect and the authority that SASA had granted them. The amendment provided a mechanism by which the state could signal to schools the importance that they attached to democratic procedures – not just for adults, but for learners as well.

SASA section 36's new subsection prohibits governing bodies from entering into loan or overdraft agreements, in order to supplement the school fund, without first securing the consent of the MEC. SASA's section 37(3) similarly permits the establishment of an investment account – but again subjects its creation to the prior consent of the MEC.

3.5 2002: Age of admission, curriculum and assessment, initiation practices³⁴⁷

The 2002 Education Laws Amendment Act must be read, in large part, as a response to the outcome of *Harris v Minister of Education*. In 2000, the Minister of Education published a notice that stated that from 2001 learners would not be permitted to enrol at independent primary schools before the year in which they would turn seven. Mrs Harris, the mother of a child who would turn six in 2001, argued that the notice violated her daughter's right to equality (FC section 9) and the best interests of her child (FC section 28). Mrs Harris, along with expert witnesses, contended that her daughter was academically ready for primary schooling and that delaying her education would have a negative effect on her development. The Pretoria High Court agreed. It held that the measure was discriminatory on the basis of age and, because it was likely to impair the child's development, was both presumptively and ultimately unfair.³⁴⁸ Coetzee J also held that the measure limited the child's FC section 28(2) right to have her best interests be considered paramount.³⁴⁹ The Minister attempted to

³⁴⁵ Education Laws Amendment Act 57 of 2001.

³⁴⁶ Education Laws Amendment Act 57 of 2001.

³⁴⁷ Education Laws Amendment Act 50 of 2002.

³⁴⁸ 2001 8 BCLR 796 (T) at 800J - 804D.

³⁴⁹ n 348 above, 804E - 805B.

justify the limitation on three grounds: (a) younger learners tend to fail and create backlogs in the education system; (b) the state possessed no educationally sound manner to grant exemptions; and (c) the age requirement was based on sound educational principles.³⁵⁰ Coetzee J noted that the notice only applied to independent schools. He then ended the matter by finding that the Minister had failed to provide *any* evidence in support of his arguments.³⁵¹ The notice was therefore declared invalid.³⁵²

Section 4 of SASA was comprehensively revised and now provides very specific details related to the age of admission to both Grades R and 1:

- (4)(a) The admission age of a learner to a public school—
 - (i) *grade R* is age four turning five by 30 June in that year of admission.
 - (ii) *grade 1* is age five turning six by 30 June in the year of admission.

The change from ministerial use of notices to articulate policy to the promulgation of legislation ensures that this amendment lacks the procedural infirmities identified by the Constitutional Court and the substantive flaws discovered by the Pretoria High Court in *Harris*. There should be little confusion surrounding the age of admission for learners.

The insertion of a new subsection on ‘curriculum and assessment’ grants the Minister the powers to issue a notice on a National Curriculum Statement. This Statement may encompass minimum standards, processes for assessment applicable to all schools as reflected the implementation of the National Curriculum Statement and other reforms that might occur with regard to school curricula. .

The amendment also adds new due process safeguards to the disciplinary procedures of a school’s code of conduct. The new procedures require that accused learners be accompanied to a disciplinary hearing by a parent, that accused learners not be harshly cross-examined, and, if necessary, that accused learners must have an intermediary appointed.

³⁵⁰ n 348 above at 805C - E.

³⁵¹ n 248 above at 805E - 806D.

³⁵² The Minister took the matter on appeal to the Constitutional Court. The Court dismissed the matter on the grounds that the Minister lacked the power under NEPA to issue such a notice. It did not, as a result, have to consider the issue of age discrimination. *Minister of Education v Harris* 2001 4 SA 1297 (CC), 2001 11 BCLR 1157 (CC) (*‘Harris’*). SASA makes identical provision for public schools. This section has not yet been challenged. It appears from *Harris* that a different set of concerns may apply to public schools. For example, a child’s continued failure in a public school places a strain on the public purse; the costs of the failure of a child in an independent school are borne primarily by individual parents.

Finally, the 2002 Amendment Act prohibits initiation practices in schools. After the Constitutional Court's decision in *Christian Education* to uphold the provisions in SASA that banned corporal punishment, initiation practices also came to be understood by education authorities as out of step with the constitutional right to human dignity.³⁵³

3.6 2004: No SGB payments to state employees³⁵⁴

The single amendment to SASA in 2004 prohibited SGBs from providing unauthorised remuneration, financial benefits and benefits in kind to state employees.

3.7 2005: Suspension and no fee schools³⁵⁵

The 2005 Education Laws Amendment Act contained a number of significant and far-reaching changes. The most significant change was the creation of a new institution: the 'no fee' school.

Earlier amendments to the suspension and the expulsion sections of SASA were designed to ensure fair administrative action. In the 2005 amendments, SGBs were granted slightly more latitude with respect to instances of serious misconduct. If SGBs have reasonable grounds, then they are given the authority to suspend learners suspected of serious misconduct as a precautionary measure. The amendment provides for the suspension prior to the disciplinary proceedings, and makes provision for circumstances in which the prescribed disciplinary proceedings cannot be conducted within seven days. The amendment also stipulates a maximum period (14 days after receipt of a recommendation) within which the HoD has to respond to an expulsion recommendation. The amendment also allows for a period of no longer than 14 days for the decision of the HoD to be received. Thus with respect to particularly serious misconduct, the SGB can enforce the exclusion of a learner for up to 14 days while it awaits the decision of the HoD on a recommendation for expulsion.

The 2005 amendment provides much more detail on developing norms and standards for school funding. Schools are still the beneficiaries of the requirement that state funding be distributed to all public schools in a fair and equitable manner. The 2006 amendment notes that a national school index of need, based on

³⁵³ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC), 2000 10 BCLR 1051 (CC).

³⁵⁴ Education Laws Amendment Act 1 of 2004.

³⁵⁵ Education Laws Amendment Act 24 of 2005.

learners' financial means, will assist the state and the schools in making this assessment.

In the original 1996 version of SASA, all schools could charge fees and SGBs would determine the fees to be charged. Of course, a majority of parents had to vote in favour of any fee scheme adopted. In terms of the 2005 amendments, the Minister is given the right to decide if a school can charge school fees:

(7) Despite subsection (1), the *Minister* must by notice in the *Government Gazette* annual determine the national quintiles for *public schools or part of such quintiles which must be used by the Member of the Executive Council* to identify schools that may not charge school fees.

As a rule of thumb, the bottom two quintiles of schools are now 'no fee schools'. However, this new power to determine that a school be made a 'no fee school' came at a price. Any ministerial determination that a school could not charge school fees imposed upon the state an obligation to provide sufficient funding to such a school so as to compensate it for the loss of funds associated with forgone fees.

The original formulation of SASA section 41 – which provided for the enforcement of payment of fees – has been substantially revised by the 2006 legislation. The 1996 formulation simply states that the governing body may legally enforce payment of school fees. In the 2006 amendments, SASA section 41 was re-written in an attempt to clamp down on a range of abusive practices that had emerged around the enforcement of the payment of fees. For example, enforcement of payment can only take place after it has been determined that parents do not qualify for exemptions and all due process requirements have been satisfied. The new law also prohibits schools from placing an attachment on dwellings in any effort to recover unpaid school fees.³⁵⁶

3.8 2007: Basic infrastructure; searches; school underperformance³⁵⁷

The pace of change to the South African Schools Act (84 of 1996) gained momentum in 2007.

In terms of the new norms and standards for basic infrastructure, the amendment gives the Minister the right to prescribe minimum

³⁵⁶ For an overview of the 2007 amendments, see F Veriava 'Framework' (n 302 above).

³⁵⁷ Education Laws Amendment Act 31 of 2007.

norms and standards around a range of issues related to school infrastructure. These issues embrace class size and classroom utilisation, first and foremost. Moreover, the new norms set minimum standards for the provision of electricity, water, sanitation, libraries, labs, and sports facilities. The amendment also envisages regulations regarding the provision of learning support materials of all kinds.

The most significant amendment can be found in SASA section 5A(3) and (4). One would anticipate that the responsibility to meet the minimum standards would primarily fall on the provincial department. However, the amendment stresses instead that the SGB bears the responsibility of compliance with the norms and standards. The SGB must review any school policy that may have a deleterious effect on compliance with these provisions. The School Governance Foundation's interpretation suggests that:

... these norms and standards will create a basis for the state to attempt to become prescriptive concerning the number of learners in a school in relation to teacher numbers, class size and utilisation of classrooms.³⁵⁸

Given the strong emphasis on compliance by SGBs, it is difficult not to read this amendment against the background of battles between provincial departments and SGBs over class size and oversubscription. As we have noted elsewhere, cases such as *Sunward Park* demonstrate that the provinces regularly struggle to deal with large learner flows around and across provinces.³⁵⁹ The new norms provide provincial governments with well-established and reasonable norms against which they can measure school compliance with any now legally enforceable instruction to increase learner enrolment in an individual school. But before one reads these norms solely as an effort to restrict the autonomy of SGBs, one must recognise that the new norms likewise provide a standard against which provincial governments may be held. The ongoing failure of provincial governments to respond timeously to demands for more teachers and buildings will now be viewed as a failure to comply with SASA's norms and standards. Parents can just as easily – perhaps more easily – hold the provincial government's feet to the fire than can the state an obstreperous SGB.

While the aforementioned norms and standards place limits on both provincial governments and SGBs, the new provision for reasonable search and seizure and drug testing does substantially increase a school principal's authority. No reference at all is made to the role of the SGB. Another amendment regarding the functions and responsibilities of the principal of a public school requires the

³⁵⁸ 'Newsletter' School Governance Foundation (2007).

³⁵⁹ *Sunward Park High v MEC, Education, Province of Gauteng* (Case 05/2937, unreported, Witwatersrand Local Division, 6 June 2005).

principal to prepare an academic improvement plan in the event that a school fails to meet certain still to be defined minimum outcomes and standards. Again, the SGB has no role to play in this process.

A fourth amendment concerns the role of the SGB in the administration of school property. SGBs are now prohibited from exercising their functions in a manner that interferes with decisions of the MEC or HoD taken in terms of any law or any policy.

Another new element of the 2007 amendments that has led to considerable controversy turns on the responsibility of SGBs for the improvement of schools that have been identified as underperforming. Under the new amendments to SASA, the provincial HoD can withdraw the powers and the functions of an SGB that governs a school that fails to improve. The 2007 amendment thereby makes manifest the need for provincial oversight of SGB compliance with existing norms and standards regarding school admissions, school language policies and school capacity projections.

3.9 SASA's Amendments and their effect on school democracy and the creation of new stores of social capital

Recall that Prinsloo and Beckmann question the degree of genuine authority wielded by SGBs and have asserted that the state has repeatedly attempted to limit SGB autonomy. Does the direction or the trajectory of these amendments to SASA bear out their theses? Do the amendments, in any meaningful way, undermine the democratic processes and the mechanisms for the creation of social capital envisaged by the original SASA legislation?

The state does not seem to think its recent efforts undermine either school democracy or local social networks. In response to queries about the 2003 amendments, the DoE wrote:

[T]he legislation does call on parents through their school governing bodies to take a more active interest in the quality of education and the performance of the school. It must receive from the principal an academic improvement plan and receive regular reports on these matters. Being illiterate or unschooled themselves does not make parents unable to judge quality and assess the performance of their children, as some have claimed.³⁶⁰

³⁶⁰ Ministerial Review Committee Review of the School Governance in South African Public Schools: Report to the Minister of Education (2003).

However, one would have to be a flak – and a very disingenuous flak at that – to conclude that 11 years worth of amendments have not altered the balance of power between the state and SGBs over the control of our classrooms. Indeed, the more general thesis of our work demonstrates the extent to which an ever strengthening state has used its power through law-making, litigation or more subtle forms of persuasion to challenge more privileged schools to open their gates to historically disadvantaged learners. The amendments themselves – from 1997 to 2007 – reflect subtle shifts back and forth. Recall that 1997 saw the state grant SGBs the power to create SGB-funded posts. 2004 saw the state curtail the ability of SGBs to supplement the salaries of state employees. However, the SGB posts remained. And the SGB is still recognised as an employer of school staff. Additional financial oversight mechanisms were put in place in the 2004 Amendments: but the amendment did not prevent SGBs from taking out loans. It only subjected them to MEC approval. Again, the state may press for greater accountability. But so far, the changes have not come at the cost of SGB autonomy. Moreover, it is simply impossible to view these amendments as restrictions on the democratic processes created by this fourth level of government. Indeed, the 2001 amendments reinforced the ability of learners to participate – through the RCL – in the governance of their school.

That said, it would be absurd to deny that the state has made efforts to curb to the autonomy of SGBs – especially SGBs in privileged communities. The amendments have reinforced fee exemptions and come to grips with other exclusionary practices of some elite public schools. The new norms enable provincial governments – and parents – to take firmer stands against schools that turn away learners when they are clearly undersubscribed. Once again, these restrictions on SGB power do not come at the cost of school democratic processes or the creation of new stores of social capital. In fact, these amendments are what John Hart Ely has called representative democracy reinforcing actions: when a majority fails to adequately cater for the equal participation of all community members (because the majority can always, by virtue of the franchise, effectively exclude meaningful minority participation), then it falls to the courts to ensure that the representative democratic processes work as they were intended.³⁶¹ The enforcement of fee exemptions, the power to ensure admittance to undersubscribed institutions and the move away from prefect systems to RCLs all ensure greater inclusion of various members of the community in the democratic processes that govern the school. Yes, such inclusion may come at a price to existing members of the school community. But that is the price the law had always intended the

³⁶¹ JH Ely *Democracy and distrust* (1985).

communities to pay. Recalcitrant schools and SGBs are simply being asked to play by the rules, and to ensure that democratic processes within our fourth level of government function in the manner intended.

As for social capital and social networks, it is, once again, our thesis that the amendments largely preserve existing stores of capital found in school communities and SGBs. What the amendments do is extend these stores of social capital, and the social networks that produce such capital, to individuals – learners and parents – who had previously been denied access to this capital and those networks. The state has charted an intelligent course between maintaining institutions (SGB's) that possess large stores of social capital and vibrant social networks, and creating mechanisms that enhance access to those stores of capital for the historically disadvantaged. Social institutions in developing countries such as South Africa are fragile, and the state has been extraordinarily creative in generating rules and systems that expand access to social capital without destroying the institutions that continue to produce such capital.

4 How the case law ensures that SGB autonomy serves the ends of an open and democracy society and the creation of social capital

The case law suggests that the state does far better – in court – when it takes a principled stand, or, at the very least, has some principle on which to stand in challenges to SGB autonomy. The state has won a number of matters in which an SGB has attempted to use its 'right' to determine language policy in order to control the admission of learners. A number of the cases were easy cases. The SGB in question clearly used language policy to promote racially discriminatory ends. However, a number of these cases were more difficult to decide. The issue was not whether language was being used as a proxy for race, but whether the constitutional and statutory commitment to equality trumped a community's desire to have its preferred language of instruction serve as the sole language of instruction.

The state has lost quite a number of battles with SGBs in which the issue is ultimately about identifying the party with the ultimate authority to take a decision. Whether these cases are simply evidence of a general disregard for the demands of due process, or whether they signify the conscious intent to challenge private power on all fronts, the following cases of administrative overreach certainly suggest the willingness of the state to push up against the limits of the law in order to achieve its objectives. Whether a strengthening state

will sit on the fence in the face of such defeats, or whether it will change the law in order to change the outcome, remains to be seen.

4.1 SGB authority vindicated

4.1.1 Hiring

In *Observatory Girls Primary School & Others v Head of Department of Education, Gauteng*, a contest of wills broke out between the SGB of Observatory Girls Primary School and the GDoE.³⁶² The former needed an educator to teach Mathematics to Grade 5 and Grade 6 learners. The Personnel Administration Measures of the GDoE required that the SGB first appoint an interview committee.³⁶³ The regulations then obliged the SGB to submit a list of preference to the DoE. According to SASA section 20(1)(i), the SGB ‘must ... recommend to the Head of Department (‘HoD’) the appointment of educators at the school, subject to the Employment of Educators Act 76 of 1998 and the Labour Relations Act 66 of 1995’. While the Personnel Administration Measures and SASA appear to give the HoD the final call, the Employment of Educators Act section 6(3)(b) states that the HoD is entitled to reject the recommendation only if:

- (i) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer has not been followed;
- (ii) the candidate does not comply with any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer;
- (iii) the candidate is not registered, or does not qualify for registration, as an educator with the South African Council for Educators;
- (iv) sufficient proof exists that the recommendation of the said governing body ... was based on undue influence; or
- (v) the recommendation of the said governing body ... did not have regard to the democratic values and principles referred to in s 7(1).

The SGB attempted to comply with the various regulatory and statutory requirements.³⁶⁴ Prior to forwarding the name of the

³⁶² *Observatory Girls Primary School & Others v Head of Department of Education, Gauteng* 2003 4 SA 246 (W).

³⁶³ See GN R222, GG 19767 (18 February 1999). The regulations were enacted in terms of sec 4 of the Employment of Educators Act 76 of 1998.

³⁶⁴ It created an ‘[i]nterview committee [with a] ... mandate to make a final recommendation to Gauteng Department of Education.’ The four-member interview committee proceeded to conduct interviews on 17 May 2002. Each member of the committee scored each applicant. Their respective scores were then combined. The top three candidates received, respectively, scores of 249, 243 and 219 points.

candidate with the most points in the selection process to the GDoE HoD, the SGB learned that the preferred candidate lacked the requisite experience for the post and had not admitted such at her interview. Two members of the selection committee then took it upon themselves to forward the name of the candidate with the second highest point total to the GDoE HoD.

The GDoE HoD received the recommendation. But he declined to reject or to confirm the SGB's new preferred candidate. The school pressed for a decision. The HoD continued to stall. This stalemate persisted for several months. The school eventually decided to institute court proceedings to force the HoD to make a decision. The HoD finally justified his refusal to act on the grounds that an applicant, who had received the third highest mark, had filed a complaint. The HoD stated that he could not make an appointment until the complaint had been resolved. Moreover, the HoD concluded that the recommendation forwarded to the GDoE was invalid because the decision to recommend the second highest ranked applicant had been taken by only two members of the committee.

The *Observatory Girls Primary Court* found that although the HoD was obliged to hear the complaint, the applicant had produced no evidence to support his claim. A thorough enquiry by the HoD would have revealed the baselessness of the charges – the complainant failed to make even a *prima facie* showing for a negative finding as delineated in the EEA.

The heart of the matter, as the statutory language above suggests, was who, ultimately, had the authority to recommend and to ratify the appointment. Under both SASA and the Personnel Administration Measures regulations, the SGB makes the apposite recommendations. The HoD appears to retain the power to confirm or to deny.

But the EEA narrows the HoD's discretion to instances in which the SGB acted *ultra vires*. The SGB in the instant case delegated the selection process to the interviewing committee and then permitted two of the committee members to identify the replacement appointee. The crisp question was: Is the HoD entitled to refuse to ratify their selection because the SGB did not follow, to the absolute letter, the appointment procedures in SASA and the Personnel Administration Measures? The *Observatory Girls Primary Court* held that substantial compliance with procedural provisions is sufficient. The purpose of the procedures is manifestly not to provide grounds 'to stymie the process of appointing suitable candidates to teaching

positions'.³⁶⁵ The High Court found that the HoD's intransigence did just that, and that the SGB had, in fact, followed a fair and equitable procedure.

4.1.2 Firing

Another attempt by a Provincial Education Department to bring the personnel and the SGB of a school to heel is on display in *Schoonbee v MEC for Education, Mpumalanga*.³⁶⁶ The provincial auditor-general, investigating allegations of malfeasance, submitted an initial report to the HoD and the SGB. The provincial auditor-general requested a response by 5 September 2001. The SGB was granted an extension until 15 October 2001. On 25 September 2001, the HoD sent a letter to the principal of the school asking him to provide reasons why he should not be suspended. (The letter was, presumably, based on the auditor-general's findings.) The principal – with the assistance of his trade union – replied that the HoD was obliged to give reasons for the suspension prior to any response by the principal. A meeting was held on 12 October 2001 between the principal, the HoD and representatives of the SGB to discuss and to resolve the matter. The SGB contended that the parties had agreed to release the principal from any obligation to respond to the HoD's letter. The HoD demurred.

On 15 October 2001, the SGB delivered their written response to the auditor general's management letter. On 22 October 2001, the SGB and the auditors met to discuss the contents of the SGB's response. The auditor-general submitted his final forensic report to the HoD on 11 December 2001. The report canvassed such issues as financial record-keeping, human resources contracting, and the management of certain school fleet vehicles. On 12 December 2001, the HoD issued a letter dissolving the SGB and suspending both the principal and the senior deputy principal. The SGB lodged an urgent application in the High Court requesting that the HoD's decisions be set aside.

The High Court held that the suspension of the senior deputy principal violated one of the most fundamental tenets of natural justice and just administrative action: the *audi alteram partem* rule.³⁶⁷ In addition to being denied the opportunity to make representations to the trier of fact and to being given no notice of the HoD's intention to suspend him, the *Schoonbee* Court found that the

³⁶⁵ *Observatory Girls Primary* (n 362 above) 255.

³⁶⁶ 2002 4 SA 877 (T).

³⁶⁷ See Promotion of Administrative Justice Act 3 of 2000; I Currie & J Klaaren *The Promotion of Administrative Justice Act benchbook* (2001).

auditor-general's analysis provided no factual basis for a legal finding of malfeasance.

The suspension of the principal turned on the legal relationship between the principal and the assets or the property of the school.³⁶⁸ In terms of SASA, the school is a juristic person. As such, the school possesses legal personality. It can act as if it is person. It can own property – such as the assets of the school – and dispose of that property. The School Governing Body ('SGB') exercises a fiduciary – or a caretaker – role with respect to the school. Amongst other responsibilities, the SGB administers and controls the school's assets. This administrative function embraces such varied duties as keeping accounts, managing the school fund, acquiring necessary educational material and maintaining and improving all school property.

The principal is responsible for the professional management of the school. In so far as school property is concerned, the principal simply assists the SGB. SASA does not vest any financial rights, powers or duties in the principal. While she may perform acts related to the administration of school assets if the SGB delegates such functions to her, the principal is, then, liable only to the SGB for any failure or malfeasance. The HoD, under SASA, can hold the SGB liable only for a failure to perform these fiduciary duties

The matters engaged by the auditor general's report fell within the competency of the SGB, not the principal. The HoD was, therefore, not entitled to suspend the principal with regard to a failure to administer school assets appropriately.

The HoD did, ultimately, identify the SGB as the party responsible for the matters raised in the auditor's report. Unfortunately, neither the process followed by the HoD nor the substantive outcome of the HoD's review of the SGB's actions met the minimum requirements of just administrative action.

The HoD's refusal to give the SGB an opportunity to address the HoD's concerns, to notify the SGB of an intention to take a decision, or to inform the SGB of the decision-making procedure or the consequences of a negative finding – the hallmarks of a fair hearing

³⁶⁸ The *Schoonbee* Court states that SASA captures comprehensively the legal nature of the relationship of all stakeholders to the assets of the school: '[T]he Schools Act, which came into operation on 1 January 1996, contemplates an education system in which all the stakeholders, and there are four major stakeholders – the state, the parents, educators and learners – enter into a partnership in order to advance specified objectives around schooling and education. It was intended ... to be a migration from a system where schools are entirely dependent on the largesse of the state to a system where a greater responsibility and accountability is assumed, not just by the learners and teachers, but also by parents': *Schoonbee* (n 366 above) 883.

– was deemed inconsistent with the values of rationality, reasonableness, fairness and openness that underlie our Constitution and the basic tenets of administrative law. As a result, the *Schoonbee* Court held that the HoD’s dissolution of the SGB was invalid.

4.1.3 Right-sizing

Much ink has been spilled about the meaning of *Grove Primary School v Minister of Education & Others* and the power it ostensibly accords to SGB’s.³⁶⁹ In short, an attempt by the national government to right-size and to redeploy educators failed in the face of an SGB’s refusal to allow the national government to control the process of redeployment and its willingness to use and to defend the authority vested in it by legislation – in this case, SASA and EEA.

Grove Primary was formerly known as a ‘Model C’ or ‘state-aided’ school. Such schools came to be known simply as ‘public schools’ under section 1 of SASA. As we have already noted, SASA recognises public schools as juristic persons and vests the governance of such schools in their SGB’s.

At the commencement of the period from 30 April 1996 to 22 November 1996 (‘the 1996 period’) the appointment of teachers to so-called ‘subsidised posts’ at the applicant school and other ‘Model C’ schools was governed by section 4 of the EEA. Section 4(2) of the EEA vested the power to fill such posts by appointment, transfer or promotion in ‘the employer’, which was defined in section 1 of the EEA as, inter alia, ‘the body that which employs an educator’. ‘Employer’ as defined in the EEA embraced either the school concerned or its SGB.

Resolution 3 – as articulated by the national government – laid down in broad terms how, in accordance with ‘government policy’, the ‘phasing in of equity’ in education was to be effected. No reduction in the ‘total educator personnel provision in the country’ was envisaged. The resolution went on to stipulate that ‘[a]ll vacancies existing at the commencement date of these measures and vacancies occurring’ thereafter ‘... are reserved for purposes of accommodating serving educators that should be redeployed according to prevailing practices including those with reference to governance structures at education institutions’. The procedure then outlined in Resolution 3 involved a right-sizing committee designed to determine which teachers were superfluous and were to be redeployed rather than retrenched. On 1 July 1996, the Minister of

³⁶⁹ 1997 4 SA 982 (C). See, eg, Jansen (n 303 above) 5; Maree & Lowenherz (n 303 above) 31.

Education, acting in terms of section 12(6)(a) of Act 146 of 1993, declared that, with immediate effect, all the provisions of Resolution 3 should be binding on all employers and employees as defined in that Act. The applicant, Grove Primary, and all other public schools were such employers.

The applicant, Grove Primary, applied in a provincial division for an order reviewing and setting aside these acts on the ground that they were *ultra vires*. By and large, the Court found in favour of Grove Primary. Although the applicant's right to play its statutorily appointed role in the appointment of educators to its staff might, for legal technical reasons, not be immediately exigible, the lack of ripeness regarding the exercise of such powers did not mean that they did not exist, nor that Grove Primary lacked a direct interest in the resolution of this matter. Indeed, the Court held that how Grove Primary would fill its four existing vacant posts and other future vacancies might, eventually, give rise to similar real uncertainties and problems.³⁷⁰

Furthermore the Court rejected the respondents' contention that the school was not the sole employer, but was part of a sort of joint or composite employer together with the MEC for Education or the state. This composite entity allegedly possessed the power on the first respondent to play a role in filling teaching posts, more particularly in deciding who should receive teaching appointments and, conversely, who should not. The Court again rejected this claim of authority by the state.

However, the state did not walk away entirely empty-handed. The Court noted that while the power to recommend educators to fill posts was vested, in terms of section 4(2) of the EEA, solely in the schools and their SGBs, this power was subject to two constraints. First, the qualifications required for appointment, or promotion, as an educator were prescribed by section 4(1) of the EEA. Second, the SGB's power of appointment with regard to subsidised posts was subject to the approval of the MEC.³⁷¹ But even here the state's victory was pyrrhic. The state's power was largely limited to formal matters – such as the nature of advertising posts. As the law stood in 1996, the Minister could not 'impose his will as regards the selection of a particular educator for appointment (or non-appointment), and thus override that of the SGB and the MEC concerned'.³⁷²

³⁷⁰ n 369 above, 996.

³⁷¹ n 369 above, 1000.

³⁷² n 369 above, 1001.

4.2 Reasonable language policies

As we shall see, a large number of the cases litigated over the SGB's power to determine the language policy, and thus the admission policy, of a school have turned on the courts' recognition that language was being used as a proxy for racial discrimination and exclusion. The courts have rightly demonstrated no sympathy for such nasty, brutish behaviour.

Still, reasonable language policies have been met with a some degree of judicial solicitude. As we noted at some length in chapter 3, *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* turned on the refusal of an Afrikaans medium public school to accede to a request by the WCDoE to change the language policy of the school so as to convert it into a parallel-medium school.³⁷³ Acting on behalf of 21 learners, the WCDoE had directed the primary school to offer instruction in their preferred medium: English.

Most importantly, the Supreme Court of Appeal rejected the applicant's contention that FC section 29(2) could be 'interpreted to mean that everyone had the right to receive education in the official language of his or her choice at *each and every* public educational institution where this was reasonably practicable'.³⁷⁴ Such a reading, the *Mikro* Court held, would mean that any significant cohort of learners could demand instruction in their preferred language if it was conceivably possible to do so. The *Mikro* Court noted that such a construction of FC section 29(2) would lead to the absurd consequence that 'a group of Afrikaans learners would be entitled to claim [a right] to be taught in Afrikaans at an English medium school immediately adjacent to an Afrikaans medium school which has vacant capacity provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school'.³⁷⁵ The Supreme Court of Appeal held that the correct reading of FC section 29(2) affords the state significant latitude in deciding how best to implement this right and that FC section 29(2) grants everyone a right to be educated in an official language of his or her choice at a public educational institution if, in the totality of circumstances, it is reasonably practicable to do so. That means, of course, that the right is only to language instruction, generally, and, thus to instruction at some school within an accessible geographical domain, and not, as the

³⁷³ *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* 2006 1 SA 1 (SCA), 2005 10 BCLR 973 (SCA) ('*Mikro*').

³⁷⁴ n 373 above, para 30.

³⁷⁵ n 373 above, para 30.

applicants had claimed, to language instruction at each and every public school the applicants might wish to attend.

The decision is notable in two important respects. First, it curbs the state's power to determine — exclusively — public school admissions policies and language policies. Such power continues to be shared — to some degree — with each existing SGB. Second, while affirming the rights of learners to instruction in a preferred language, it simultaneously confirmed that some individual schools were entitled to offer instruction in a single medium. It is impossible to read *Mikro* and not come away with the impression that a community's interest in maintaining its linguistic and cultural integrity may legitimately trump purely ideological considerations of equity.

4.3 How the state manages the conditions for meaningful representative and participatory democracy and the creation of social capital in public schools

4.3.1 Inclusion as a prerequisite for representative, participatory and direct democracy

We now have a line of cases that stand for the proposition that SGBs may prove fertile grounds for participatory democracy and the creation of effective social networks *where and only where* they agree to enhance — as opposed to block — the ability of learners and parents from historically disadvantaged communities to become members of communities from which they have been historically excluded. All of these cases turn on the use of language by Afrikaans single-medium public schools to prevent English-speaking black learners from securing admission.

As we saw in chapter 3, Laerskool Potgietersrus — a parallel-medium Afrikaans and English school — was a traditionally white school that catered primarily for Afrikaans learners and that had that refused to admit black learners.³⁷⁶ Disgruntled black parents took Laerskool Potgietersrus to court. The school denied that it had discriminated on the basis of race. It argued, first, that the school was full. Second, it contended that it was striving to maintain the school's Afrikaner ethos. The High Court was unimpressed. It held that despite the respondent's protestations to the contrary the evidence showed that the school could accommodate more learners and that black learners had been refused access while white learners had been

³⁷⁶ *Matukane & Others v Laerskool Potgietersrus* 1996 2 SA 223 (T) ('*Matukane*').

admitted. While ducking a finding that the discrimination had occurred on purely racial grounds, Spoelstra J rejected the respondent's argument that the school would be unable to maintain its predominantly Afrikaans-speaking character by admitting a small number of English-speaking black learners. At a minimum, *Matukane* must be read as standing for the proposition that cultural exclusion cannot be used as a proxy for racial discrimination.³⁷⁷

Similar circumstances, and similar results, followed in *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere*,³⁷⁸ *Seodin Primary School v MEC Education, Northern Cape*³⁷⁹ and *High School Ermelo & Another v Head of Department Mpumalanga Department of Education & Others*.³⁸⁰ We have discussed and analysed these cases – all of which turn on the use of language policies to exclude learners from

³⁷⁷ It should be noted that *Matukane* was heard before SASA came into effect.

³⁷⁸ *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 4 SA 160 (T).

³⁷⁹ *Seodin Primary School v MEC Education, Northern Cape* 2006 4 BCLR 542 (NC), [2006] 1 All SA 154 (NC). The High Court held that the SGBs of three Afrikaans-medium public schools could not use language preference alone to exclude black, English speaking learners from admittance where the provision of English language instruction was 'reasonably practicable'. In addition, in all three cases heard in *Seodin*, the single-medium Afrikaans schools were undersubscribed. Finally, the High Court found that public pronouncements by the MEC for Education on the need for greater integration in the public schools system could not be interpreted as an *ultra vires* act aimed at the elimination of single-medium – read Afrikaans – public schools. Where public schools are concerned, *Seodin* makes it clear that the Constitution will not tolerate racist and discriminatory admissions policies masquerading as policies that claim to be about the need to maintain the language and the culture of a given community.

³⁸⁰ [2007] ZAGPHC 232 (17 October 2007) ('*Ermelo II*'). In *Hoërskool Ermelo I*, Judge Prinsloo, of the Pretoria High Court, suspended a decision of the Mpumalanga DoE to dissolve the school's governing body and to replace it with a departmentally appointed committee. The dissolution would have enabled the Mpumalanga DoE to alter the school's language policy and would have allowed 113 English-speaking learners to receive instruction in English. The DoE decided not to wait for the full hearing. In their papers, the DoE and the parents of the learners claimed that right to education in the language of choice was impaired by the school's language policy. In addition, the Mpumalanga DoE asserted that its position was underwritten by the under-subscription at Ermelo and the oversubscription at adjacent high schools. These facts were not disputed by the parties. Ermelo was built for 1 200 learners and carried a mere 589 at the time of litigation. On appeal, Transvaal Judge President Ngoepe and Judges Seriti and Ranchod set aside the High Court ruling in *Hoërskool Ermelo I*. The *Hoërskool Ermelo II* Court found that the single-medium Afrikaans-only public school must admit English-speaking pupils. Of particular moment for the *Hoërskool Ermelo II* Court was the under-subscription of Hoërskool Ermelo. Given that Hoërskool Ermelo was operating at only half-capacity, the Full Bench found that it was 'reasonably practicable' – as contemplated by FC sec 29(2) – for the high school to accommodate the 113 Grade 8 learners. The mere fact that all classrooms were being employed and that the existing curriculum turned on the current availability of classrooms did not constitute sufficient grounds for excluding English learners and maintaining Hoërskool Ermelo as a single-medium Afrikaans public school. Equity, practicability and historical redress justified the transformation of Hoërskool Ermelo from a single-medium into a parallel-medium public school.

historically disadvantaged backgrounds in order to reinscribe privilege and, even more unforgivably, to reinforce patterns of racial discrimination – at great length in chapter 3.³⁸¹ In *Seodin*, Northern Cape Judge President Frans Kgomo captures the general texture of the judiciary’s response to any scintilla of evidence of racial discrimination in admission policies:

It would be a sad day in South African educational annals that hundreds of children remained illiterate or dropped out of school because they were excluded from under-utilised schools purportedly to protect and preserve the status of certain schools as single-medium Afrikaans schools.³⁸²

4.3.2 Democracy, diversity and codes of conduct

Another form of exclusion that undermines SGB claims to be legitimate sites for representative or participatory democracy occurs where a school’s code of conduct, although seemingly neutral, excludes or punishes members of particular cultural, religious or linguistic communities. In *Antonie v Governing Body, Settlers High School & Others*, a learner had been found guilty of ‘serious misconduct’ for attending school with dreadlocks and a cap – essential parts of the practice of her Rastafarian religion.³⁸³ In the High Court, Van Zyl J held that codes of conduct should not be imposed in a rigid manner. The reading and the enforcement of such codes must, instead, be informed by ‘a spirit of mutual respect, reconciliation and tolerance’.³⁸⁴ This mutual respect, in turn, ‘must be directed at understanding and protecting, rather than rejecting and infringing, the inherent dignity, convictions and traditions of the offender’.³⁸⁵ Van Zyl J also emphasised the need to read any code of conduct in light of a learners’ FC section 16 rights to freedom of expression. The conduct was held to fall well short of the definition of ‘serious misconduct’, and the High Court set aside the SGB’s decision.³⁸⁶

In *KwaZulu-Natal MEC for Education v Pillay*, the Constitutional Court was asked to consider whether a Hindu learner should be entitled to wear a nose stud to school as an expression of her South Indian, Tamil and Hindu culture, and as reflection of her commitment

³⁸¹ S Woolman & M Bishop ‘Education’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2007) chap 57; Fleisch & Woolman ‘Single-medium public schools’ (n 130 above).

³⁸² *Seodin* (n 379 above) para 56.

³⁸³ 2002 4 SA 738 (C).

³⁸⁴ n 383 above, para 17.

³⁸⁵ n 383 above, para 17.

³⁸⁶ n 383 above, paras 18 - 20.

to the practice her Hindu religion.³⁸⁷ The school had refused to permit her to wear the stud on the grounds that the wearing of the stud was not a religious obligation. Ms Pillay instituted the action as a discrimination claim under the Promotion of Equality and Prevention of Unfair Discrimination Act.³⁸⁸ The Constitutional Court found that the ‘norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms’.³⁸⁹ Chief Justice Langa also found that both religious and cultural practices should be protected and that voluntary practices were entitled, upon a proper demonstration of sincerity, to the same protection as obligatory practices. He emphasised the importance of ‘reasonable accommodation’: such accommodation meant that schools would have to take positive steps to accommodate learners whose cultural practices might not easily comply with a school’s existing rules. While recognising the importance of codes of conduct and the need to ensure discipline, Chief Justice Langa held that a mere appeal to uniformity would not be sufficient to refuse an exemption from a code. Instead, a school would have to show that a particular exemption was likely to cause a real disruption to school activities.³⁹⁰ In this case, no such evidence was presented and the Court found that Sunali should have been granted an exemption.

4.4 Competing readings of the case law

As we noted in section 1 of this chapter, SGB’s are legally legitimate fourth spheres of government that enhance democracy and the creation of effective social networks. They possess the requisite authority to take community-based decisions on a range of school governance issues: from recommending appointment of government teaching, the hiring to the firing of SGB teachers, to the right-sizing of school staff, to decisions on language policy and curriculum offerings. As we have already noted, these immense powers are subject to two powerful provisos: (1) no decision may block – on the basis of race or another ascriptive characteristic – the ability of learners and parents from historically disadvantaged communities to become members of a school’s community should they meet all of the accepted statutory and regulatory criteria; (2) codes of conduct must be designed in a manner that enhances inclusion and diversity and does not unfairly limit the expressive, religious, cultural or linguistic rights of learners.

³⁸⁷ [2007] ZACC 21, 2008 1 SA 474 (CC) (*‘Pillay’*).

³⁸⁸ Act 4 of 2000.

³⁸⁹ *Pillay* (n 387 above) para 44.

³⁹⁰ n 387 above, para 114.

Not all commentators would agree with the manner in which we parse the cases. Sakkie Prinsloo views the case law as a reflection (a) of a concerted effort by the state to interfere with the rights of learners and their parents in the governance of their schools and (b) of meddlesome actions taken by incompetent public officials.³⁹¹ With respect to proposition (a) Prinsloo writes:

The State, its functionaries, and organs of State have been trying to assert themselves to an increasing extent by limiting or interfering in the real authority that can be exercised by school-level governance structures. Since 1996 there has [sic] been an increasing number of court cases in which provincial heads of education departments have been challenged for illegal actions against schools.³⁹²

With respect to proposition (b) Prinsloo asserts: ‘Since 1996 there has [sic] been an increasing number of court cases ... where State officials have failed to carry out their duties towards schools.’³⁹³ Both of Prinsloo’s arguments are as thin as they are selective, unreflective and unpersuasive.

With respect to proposition (a), for example, his engagement with *Mikro* constitutes his sole attempt to deal with the problem of language policy in single-medium public schools. Neither *Matukane*, *Laerskool Middelburg*, *Seodin*, *Ermelo I* or *Ermelo II* nor dozens of other cases in which white parents have physically, financially and litigiously bullied black learners (and parents) and have attempted to have them barred from admission, feature in his account. Such selective reading against the background of pervasive racism is disingenuous at best. As for the rest of proposition (a), we are left scratching our heads. In the last section, we demonstrated that SGBs have won the majority of cases in which their authority over hiring, firing, right-sizing, or other forms of school governance have been challenged. That SGBs have been challenged is inevitable part of participation in a constitutional democracy where the politico-legal system must serve an incredibly heterogeneous community.

With respect to proposition (b), one answer is ‘so what?’. The courts exist – at least in part – to settle disputes between the state and private actors – or, just as often, disputes between private actors alone. A clutch of challenges to official action (or inaction) that the author does not like hardly supports the thesis that the state is mobilising its forces against an embattled minority. Sometimes the cases do reflect official incompetence – that again is a universal phenomenon. In other cases, the state’s actions are deliberately

³⁹¹ S Prinsloo ‘State Interference in the Governance of Public Schools’ (2000) 26(3) *South African Journal of Education* 355.

³⁹² n 391 above, 356.

³⁹³ n 391 above.

designed to push the boundaries of the law and to test, in the courts, the limits of SGB and state power. That strategy, as we have argued elsewhere, is also a universal phenomenon. Different branches of government, different social groups, different juristic persons will have conflicting interests and agendas that they believe are best settled in court. Prinsloo's clutch of cases – many actually won by the SGB's – hardly supports his attribution of malign intent or pervasive incompetence to the state.

Our reading of the case law is also selective – if only in the sense that we have chosen a dozen representative reported cases and have not attempted to unearth each and every unreported matter. The unreported cases we do possess, and have worked on, actually bolster the claims we make in this chapter.

5 Conclusion

We have, in this chapter, attempted to demonstrate what we believe to be an array of relatively uncontroversial – but relatively misunderstood – theses. SASA, the amendments to SASA and the case law litigated under SASA (and other laws) demonstrate that SGBs are a legally legitimate fourth sphere of government that enhance democracy and the creation of effective social networks. SGB's clearly possess the requisite authority to take community-based decisions on a range of school governance issues: from the hiring to the firing of teachers, to the right-sizing of school staff, to decisions on language policy and curriculum offerings.³⁹⁴ These immense SASA-based grants of power – as the amendments to SASA have shown – do not simply preserve social capital by preserving the status quo. Through SASA's oft-renewed and oft-revised commitment to fee exemptions, to learner representation on SGBs and to a generally tougher legal regime hold out the promise of new face-to-face relationships in schools, the state has charted an intelligent course between maintaining fundamentally democratic institutions (SGB's) that possess large stores of social capital and creating new social networks that will deepen democracy in a manner that is cross-racial, cross-creed, and cross-class.

SGBs are not perfect. Far from it. The cases tell us that no such deepening of democracy or expansion of social networks can occur where SGBs intentionally block the admission of learners from historically disadvantaged communities or employ codes of conduct

³⁹⁴ These immense powers, as the case law has repeatedly shown, are subject to two provisos: (1) no admission decision may block entry of a learner on the basis of race or another ascriptive characteristic; (2) codes of conduct must be designed in a manner that enhances inclusion and diversity.

that unfairly limit the expressive, religious, cultural or linguistic rights of learners from non-dominant groups.

We have also illustrated – without explicitly pointing out the connection – how the history of the South African Schools Act and the more recent history of SGB's – demonstrate the more basic theses of this book. We see, for starters, a SASA that is about more than appeasement. SASA and its amendments actually reflect the fundamentally democratic commitment of the African National Congress to grassroots politics. Second, we see a South African Schools Act – and a long line of amendments – that reflects the ANC's commitment to experimentalism. Recall – again – then Minister of Education Bengu's earlier remarks: 'In this protracted transitional period, in which new policies for a democratic society are being developed and implemented, the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognised and corrected.'

And so it has been with the South African Schools Act. SASA's fundamental commitment to SGB autonomy – and the various forms of democracy that go with it – has not changed. However, we have also seen that a more powerful state has been able to effect changes in SASA that ensure that SGBs pursue policies that more closely approximate the ANC's rather egalitarian political agenda.

Finally, the case law has demonstrated that such change has occurred within the egalitarian, democratic, utilitarian and communitarian commitments of the Constitution. The decisions of our courts reflect the current constitutional state of play: the case law often privileges the democratic and the associational agenda of SGB's over the more specific political agenda of the national government or of provincial governments. However, the case law also demonstrates that the specific agendas of all SGBs are subject to powerful egalitarian constraints designed to ensure a formally, if not substantively, equal start for all South Africans learners.

CONCLUSION: ON THE CONSTITUTIONALITY OF SCHOOL FEES AND THE NARRATIVE ARC OF LAW AND EDUCATION IN SOUTH AFRICA, 1994-2008

1 Introduction

1.1 Threefold purpose of this chapter

1.1.1 *Retracing our original arguments*

Initially, this final chapter served as a mildly updated version of an argument we had proffered, 4 years ago, on a hotly contested political/constitutional issue. Much has changed in those four years. It struck us that a rather desiccated treatment of those constitutional arguments would not do. The arguments would have to track, more precisely, the fast pace of change in both law and policy.

That's a rather easy task.

However, it also struck us that the debate around school fees, and the changes in the law and policy of school fees from 1996 to 2008 captures the form and substance of many of arguments that we develop through the books first six chapters. Recall then that in tracking those arguments a fairly clear four-fold framework for analysis emerged.

First, we have described the space for education law as a highly variable space. The continued open texture of this area of law reflects a series of continuous negotiated settlements between political parties, state bureaucracies, national government, provincial government, unions, local communities, principals, teacher, parents and learners. Initially, those negotiated settlements reflected the state's need to cede authority to multiple groups in order to avoid concentrating power in a group that might contest the government's new transformative agenda. The South African system of public education is no longer the product of a parlous, fragile state: it is the product of a government with a much firmer grip on the levers of power. This narrative arc correlates with the state's attempt – with

varying degrees of success – to use the variable space of the law to effect changes in education policy that more closely approximate the ANC’s current political agenda. The law and the policy on fees in 2008 reflect a much strengthened state.

Second, the decentralisation of decision-making in the beginning (1994) still exists now (2008). That continued decentralisation of power flows from the inevitable conflicts between egalitarian, utilitarian, communitarian and democratic commitments clearly manifest in the Constitution and the ANC’s political agenda. Again, fees are still very much a part of the South African public school system. What we see, however, is a greater policy convergence between the parties to the initial debate – even as the state floats radically egalitarian policy balloons and other actors in civil society push back with utilitarian, communitarian and democratic arguments of their own.

Third, as we have noted repeatedly throughout this work, the ANC government (in 1994 and 1996) was aware that various political and legal choices would have a number of unintended consequences. We have put to use on several occasions then Minister of Education Bengu’s remarks, in the second *White Paper*, regarding the ‘provisional’ nature of the structures being created by the state and the state’s commitment to revisiting and to revamping those structures as it consolidated its power and shifted its policy imperatives.

Fourth, that last response sounds very much like our commitment to experimental constitutionalism (as first fully articulated in Chapter 5). The government – without much assistance from the courts – recognised the basic character of the norms set out in IC section 32 and FC section 29. It then crafted laws and regulations consistent with that original understanding of those basic norms. However, as we have seen in chapter 3 and 4, on language rights and community rights in public schools and independent schools, in chapter 5, on the right to an adequate basic education, and in chapter 6 on democracy and SGBs, the state has been willing to use both the courts and the legislature to alter the basic normative structure of our educational system for reasons that have to do with (a) greater experience of what works and what doesn’t; (b) an enhanced normative legitimacy secured by working with – and not always against – various parties with a stake in our educational system and (c) an increased consolidation of power that has allowed the ANC to move from reconciliation to redress. The history of fees – and the changes in the law of fees – mirrors these four basic theses about law and education in South Africa from 1994 to 2008.

1.1.2 A brief social history of fees

For many in the education fraternity, the incorporation of compulsory school fees into the South African Schools Act of 1996 came as something of a surprise. While the Hunter commission, subsequent debates around *White Paper II*, and innumerable drafts of SASA clearly spelled out both the provision and the rationale for school fees, the ANC as a political party had historically advocated 'free education for all' as a central platform in various pre-1990 party documents. While we need not rehearse here the detailed arguments made in favour of fees, it is important to remember that the architects of the school fee policy viewed it as an integral feature of school funding policy. Given the fragility of the state in 1994, fees became, least at the level of rhetoric, a tool designed to ensure continued middle class participation in the 'public' school system, to preserve a high quality subsector of schools within the system, to provide access to high quality education to at least a small cohort of learners from historically disadvantaged communities and to create some level of cross-subsidisation for poor and working class learners in poor and working class schools. Moreover, the state was careful to offset the inevitable reinscription of class that would flow from pro-fees policies with an exemption regime that would ensure that no child would be excluded from a public school on the basis of her parents inability to pay a given school's fees. An important part of the exemption regime consisted of a set of procedures that required schools to inform all parents and learners of their rights to such exemptions.

However, despite the care given to the construction of this new pro-fee regime, policy-makers failed to anticipate three significant problems. First, the global financial crises of 1997 - 1998, and the concomitant determination of the Treasury to avoid funding recurrent expenditure through borrowing, led the national government to adopt restrictive macro-economic policies. That is, they adopted 'Washington Consensus'-style policies – commonly called 'belt tightening'. Second, provincial DOE's found themselves under considerable financial pressure. They had contractual obligations to meet teacher and staff salaries and were generally able to meet those commitments. However, the provincial departments of education had virtually no means to increase resources to cover non-personnel costs and running costs. The strict constitutional limitations placed on provinces from raising additional funds – see FC section 228 – meant that even the 'generous' and 'redistributive' character of the national norms for non-personnel costs left many schools in the same parlous state in which they existed under apartheid. So although the poorest schools (in the lowest quintile) were to receive allocations for non-personal costs seven times greater than those received per learner in the highest quintile, the difference in per learner in real terms was

insufficient to close the gap between schools in each of the 5 quintiles. Third, some of the more affluent schools in middle class suburbs began to vote substantial increases in school fees. The school fees associated with the best public schools rose rapidly in the late 1990s. The net effect of national government belt-tightening, limited provincial resources and the steep escalations of fees in many middle-class schools was that the total per capita expenditure for children remained consistent with patterns that existed before 1994.

Given the apparent reinscription of the status quo, and some quite understandable difficulty with the enforcement of the fee/exemption regime, a number of NGOs such as the Anti-Privatisation Movement, the Education Policy Unit and the Education Rights Project began to press for the elimination of school fees *in toto*. As part of this campaign, these organisations explored possible constitutional challenges to the school fee policy. The lines of argument that they developed became part of the academic literature we explore below. But in so far as actual legal change was concerned, these arguments were stillborn.

By 2003, the government's own review of education finance emerged with a number of important findings with reference to school fees.³⁹⁵ While the *Review* did not challenge the basic theoretical framework for justifying fees, the review did recommend the creation of systems that would more carefully monitor fee setting procedures and provide regular checks on the procedures employed for fee exemption. Moreover, the *Review* noted that the poorest schools received less than half of their rather nominal fee payments and that the state subsidy transferred to these poorest of schools did not meet the minimum criteria for an adequate basic education.

The clear inadequacy of the constitutional challenges being considered by various NGOs did not end the debate about school fees. The NGOs succeeded in keeping the issue – a legal and empirical non-starter – very much alive. The notion of 'forcing' the poor to pay fees was anathema to most South Africans – even if fees and exemption bore little or no relationship to the quality of education learners received.

While meaningful interest in fee challenges began to fade amongst most NGOs, the government seized upon the issue as a means of telegraphing its commitment to a more egalitarian system of public education. (Moreover, its attraction lay in the fact that a new policy might cost national government a negligible amount.) In 2006, the new regulations on school funding and school fees became official

³⁹⁵ Department of Education, 'Review of the financing, resourcing and costs of education in public schools' (2003).

state policy. In 2007, they became law. One of the major unacknowledged consequences of the new policy (which also required an amendment to SASA) was the emergence of two distinct types of 'public schools'. Some 60 per cent of schools retained the right to levy compulsory school fees. The bottom two quintiles of schools could no longer charge fees. Provincial governments charged with enforcing these new laws fretted about another unfunded mandate. Individual schools worried about whether a small shortfall in funds derived from fees would be offset by national government largesse. Interestingly enough, both sets of concerns ultimately fell off the radar.

In 2007 - 2008, the Gauteng province promised to extend the no-fee policy applicable to some 60 per cent of its schools. The national government – or at least the new ANC electorate at the ANC Polokwane Conference – likewise resolved to extend the category of no fee schools to 60 per cent of all schools nationwide by the end of 2009. Even more recently, Cassius Lubisi, the Superintendent General of the KwaZulu-Natal DoE, floated the idea that 'free', 'no-fee' education could be achieved in schools that fall within Quintiles 4 and Quintile 5.

1.1.3 *The continued constitutionality of fees*

This book is about the law of education. It is not a book about shifts in policy (or policy churn.) What we shall trace in the remaining sections of this chapter are the arguments that have been made regarding the constitutionality of school fees, the extent to which those arguments have converged and reflect a present consensus about school fees, and the importance that one must still attach to this hot button issue.

2 The original argument against fees

The constitutionality of school fees attracted considerable public and academic debate from 2001 through 2005. Of all the contributions to this conversation, Daria Roithmayr's issue paper for the Education Rights Project (ERP) and her subsequent article in the *South African Journal on Human Rights* contain the most sustained and sophisticated *legal* critique of school fees.³⁹⁶

³⁹⁶ Roithmayr (n 8 above); D Roithmayr 'The constitutionality of school fees in public education, Education Rights Project, Centre for Applied Legal Studies Issue Paper, University of the Witwatersrand (2002). For more recent contributions to this discussion, see Veriava (n 302 above); F Vierava & S Wilson 'A critique of the proposed amendments on school funding and school fees' (2005) 6(3) *ESR Review*

In her ERP paper and her subsequent *SAJHR* article, Roithmayr delineates three ostensibly distinct lines of argument against school fees. She asserts that:

The [C]onstitution requires government to (a) guarantee access for all learners, so that no children remains out of school ... (b) guarantee substantive adequacy for all learners so that no learner attendants a school that DOE's not comply with minimal standards of substantive adequacy (c) eliminate race and class inequalities between learners who attended fee rich schools and those attend fee poor schools.³⁹⁷

In sum, Roithmayr, Veriava and others continue to claim that the elimination of a user fees system in public schools will facilitate the realisation of all three constitutionally-mandated goals.

We demur on all three counts.

Section 3 examines the contention that the user fee system creates a significant barrier to access to basic education. Available empirical evidence suggests that school fees *simpliciter* do not constitute such a barrier. (That evidence applies with equal force to the very recent, significant and desirable modifications in the school fees system.) If the fee system does not constitute such a barrier, then any constitutional argument based upon a relationship between fees and access lacks purchase. Section 4 interrogates the claim that an (in)adequate basic education is linked to school fees. Assuming, *arguendo*, that the adequacy of a basic education is a constitutional entitlement, the adequacy argument cannot be organically tied or causally linked to school fees. Section 5 evaluates the apparently self-evident connection between a system of school fees, unfair discrimination and the impairment of the dignity of our most disadvantaged learners. While school fees may reproduce patterns of

9; F Veriava 'Free to learn: a discussion document on the school fee exemption policy' in A Leatt & S Rosa (eds) *Towards a means to live: targeting poverty alleviation to make children's rights real* (2005); Fiske & Ladd *Elusive equity* (n 26 above); Fiske & Ladd 'Balancing public and private resources for basic education: school fees in post-apartheid South Africa' in Chisholm (n 26 above) 72; K Porteus 'Education financing: framing inclusion or exclusion' (2002) 9 *Quarterly Review of Education and Training in South Africa* 13; S Wilson 'Taming the Constitution: Rights and reform in the South African education system' (2004) 20 *South African Journal on Human Rights* 418.

³⁹⁷ Roithmayr (n 396 above) 129 - 130. We have, at the ellipsis, left out the argument on the unfair burdening of families that allegedly follows from the fact of fees unfairly applied. We believe that the burden on families, where it exists, is best conceived not as an issue of access but as an issue of equality and the disparate impact of a fees regime on families. However, as we argue at length below, when cigarette expenditures constitute 3 per cent of household spending in the poorest quintile of families and schools fees 2 per cent (as compared to 1 per cent in the wealthiest families), then one is entitled to ask whether such a disparate impact warrants description as a violation of the right to equality.

inequality, the notion that the removal of school fees would somehow enhance human dignity is both normatively and descriptively false.

At first blush, our respective positions would seem entirely antithetical. However, the underlying irony of Roithmayr's position flows from her recognition that a system of user fees may well be necessary to ensure the progressive realisation of equality, quality accessibility and, ultimately, adequacy in our public schools. We think that this convergence in positions reflects something greater than mere serendipity. More importantly, sections 3 and 6 note, again, that the state in 2008 has, thus far, vindicated *our original position* on user fees through its retention of and modifications to the user fee system, through the elimination of fees for the lowest two quintiles and through increased per capita subsidies for our poorer public schools.

3 Access

3.1 Policy arguments

Roithmayr's strongest assertion is that the system of school fees fundamentally impairs a large number of learners' access to a basic education.³⁹⁸ Roithmayr's further avers that the system cannot be saved by the inclusion of a means-based test carefully calibrated to ensure that poor, working class and even middle-income families receive partial and full exemption from the payment of such fees.³⁹⁹ Each allegation rests on questionable assumptions, *not* incontrovertible empirical evidence, about how school fees restrict access. Indeed, what evidence exists evinces the counter-claim that school fees are not the principal, or even a primary, barrier to access.⁴⁰⁰

³⁹⁸ Roithmayr (n 396 above) 39 - 46. Our analysis of the content of the right to a basic education commits us only to the proposition that a right to a basic education must logically mean the right to an 'adequate' basic education. That we accept such a logical inference does not oblige us to provide a meaningful empirical benchmark for adequacy analysis.

³⁹⁹ SASA 84 of 1996 sec 39. For original regulations related to the exemptions, see GN R1293, GG 19347 (12 October 1998.) These regulations describe the original categories of and mechanisms for exemption. See Roithmayr (n 396 above 32 - 37) for a brief account of how the original exemption system was designed to work. For a description of how the amended school fee system is designed to work, see F Veriava (n 132 above).

⁴⁰⁰ It is worth noting that 69 (mostly developing) countries permit school fees – in some form – to supplement inadequate levels of public funding. See R Bentaouet-Kattan & N Burnett *User fees in primary education* (2002). See also: Fiske & Ladd *Elusive equity* (n 26 above) 134.

3.1.1 School attendance and school fees

One might expect, on the basis of Roithmayr's claims, that the problem of school fees would be reflected in school enrolment. It is not. Existing studies demonstrate that South Africa has maintained net enrolment rates ('NER') – estimates of the appropriate aged participation in education – of greater than 95 per cent throughout the 1990s.⁴⁰¹ The DoE's (2002) Education for All ('EFA') Report notes that 2001 Census data indicates that the out-of-school children of primary school age has declined from 1 million children in 1996 to 250 000 in 2001.⁴⁰² According to the DoE's recently released Review of the Financing, Resourcing and Costs of Education for 2003 ('FRC'), the NER in 2001 was 97 per cent.⁴⁰³ The FRC Report further notes that South African NERs of 95 per cent to 97 per cent compare quite favourably to the NERs of countries with comparable wealth and development indices. An independent analyst has reached a similar conclusion.⁴⁰⁴

But let us assume that even an NER of 95 to 97 per cent is ethically repugnant and constitutionally suspect. What do we know about the 3 - 5 per cent of excluded learners? The EFA Report indicates that a minimum of 28 per cent of the out-of-school primary school age children have serious special educational needs.

What of the remaining 72 per cent of excluded learners? Roithmayr, drawing on the research of Dietlies and Vally, who, in turn rely on the work of the Vuk'nyithate Research Consortium,⁴⁰⁵ asserts that (of the remaining) 'children who are out of school, fees are a very significant factor in a family's decision not to enrol a child in

⁴⁰¹ The most current statistics available suggest that 92% of children in the age range 7 to 13 years are enrolled in *age appropriate* grades. However, a large number of 13-year-olds remain in Grade 8. When the statistics are adjusted to account for this state of affairs, the proportion of children between 7 and 13 years attending school stands at 97%.

⁴⁰² Department of Education 'Education in a global era – challenges to equity, challenges for diversity' 14th Conference of Commonwealth Education Ministers (27 November 2000). Even if we take a less optimistic view, the likely number of out-of-school children at basic education age stands at 300 000.

⁴⁰³ Department of Education 'Improving access to free and quality basic education for all' (14 June 2003); Department of Education 'Review of the financing, resourcing and costs of education in public schools' (2003).

⁴⁰⁴ C Simkins 'The jagged tear: human capital, education and AIDS in South Africa, 2002 - 2010' *CDE Focus Occasional Paper 3* (2003).

⁴⁰⁵ K Porteus *et al* 'Understanding out-of-school children and out-of-age learners in the context of urban poverty in South Africa' Vuk'uyithathe Research Consortium (2000) (manuscript on file with authors), as cited in V Dieltiens & S Vally *An overview of developments in the education sector in South Africa, 1998 - 2000* Commissioned by the Swedish International Development Cooperation Agency (2001).

school'.⁴⁰⁶ The Vuk'nyithate Research Consortium ('VRC') findings do not support this claim.⁴⁰⁷

First, the VRC study of out-of-school children demonstrates that the reason for a family's decision not to enrol children in school was not primarily related to fees. It flows from a combination of factors including deep poverty, lack of family structure, stability and support, residential mobility, illness, learning barriers and temperament, and community violence. Second, school fees do not even rate a mention in the executive summary's discussion of the various barriers to school access and the various causes of absenteeism. Third, the study notes that even when fees are discussed by interviewees, fees as a barrier to access are invariably mentioned in conjunction with school uniforms. Fourth, the study identifies abject poverty as the primary cause of absenteeism. (Abject poverty takes a variety of forms and has a number of pernicious effects on school attendance.) In short, while the study supports the conclusion that poverty impedes some children's access to a basic education, it clearly does not support the conflation of poverty, failure to pay school fees and restricted educational access.⁴⁰⁸

The VRC study takes great care to unpack and rank the range of economic pressures attendant to school-going under conditions of abject poverty. For example, according to the Consortium study, 'if a child is not within walking distance of her school, transport costs are the highest cost of attending school borne by the household'. This statistic is especially significant given that out-of-school children in this urban area are far more likely than the in-school control group to live out of walking distance from a language appropriate school. The study then establishes that uniforms (including shoes) are the 'largest initial investment required for school entry'. For poor families with children out-of-school, the purchase of the school uniforms becomes *the* primary barrier to entry.⁴⁰⁹

And where do school fees rank as a barrier to entry? The VRC report concludes that 'in reality, (school fees) were less of a practical barrier than the school uniform ... They represent the "last straw" when combined with other costs.'⁴¹⁰ School fees for the children in

⁴⁰⁶ Roithmayr (n 396 above) 51 - 52.

⁴⁰⁷ As a general matter, this independent and critical study of out-of-school children and out-of-age learners in Kathlorus is consistent with broader claims made by the DoE. The study notes that compared to other developing nations in their post independent period, South Africa's out of school population 'has been relatively low, and there was a marked decrease in the number of out-of-school children in the post transition period'. Porteus *et al* (n 405 above) iii.

⁴⁰⁸ Porteus *et al* (n 405 above) ix - xvii.

⁴⁰⁹ Porteus *et al* (n 405 above) 36 - 43.

⁴¹⁰ Porteus *et al* (n 405 above).

the poorest quintile averaged R50 per year. The VRC study estimates that the annual cost of attending an out-of-walking distance school without a feeding programme is approximately R950. Even with respect to within-walking-distance schools, the lion share of school attendance costs takes the form of uniforms, shoes, stationery, books, school ‘donations’ and pressure to provide ‘pocket money’. Thus, the VRC study strongly suggests that while abject poverty is a barrier to a basic education for 2 to 3 per cent of the population, school fees do not appear to have been a meaningful factor for access or attendance.⁴¹¹

3.1.2 On the new law and politics of school fees

The mobilisation around the potentially negative effects of school fees on educational access has had a direct affect on both law and policy.⁴¹² The state and the DoE have promulgated amendments and regulations that have eliminated school fees for the poorest two quintiles of schools.⁴¹³ This poorest 40 per cent of schools is determined nationally, not provincially. And the poverty index that determines a school’s ranking turns on an assessment of the school’s community, not the poverty of the individual learners in the schools. The amendments and the regulations aim to eliminate ‘more pernicious forms of discrimination against children of non-fee paying parents’, attachment of homes for failure to pay fees and registration fees.⁴¹⁴ They also attempt to place the onus on schools to

⁴¹¹ Porteus *et al* (n 405 above) 43 - 44.

⁴¹² Early on in the reform process, the Gauteng Department of Education called for an immediate cessation of *all* school fees in so far as they are linked to ‘teacher perks’. The national Minister of Education had another plan that called for the cessation of fees over time: Department of Education ‘Review of the financing, resourcing and costs of education in public schools’ (n 395 above) 93 - 94.

⁴¹³ Amendments to the South African Schools Act regarding the national norms and standards for school funding GN 1282, 14 December 2006; Regulations regarding the exemption of parents from the payment of school fees pursuant to SASA secs 39(4) and 61.

⁴¹⁴ See Veriava (n 302 above) 187. Veriava provides an excellent overview of the changes to school funding, to the school fees policy now in place and to the exemption policy for learners of qualified families. However, she continues to argue that fees constitute a significant, and potentially unconstitutional, barrier to access. She contends: ‘The legal framework is conceptually flawed to the extent it DOE’s not take account of the poverty of the learners at a particular school but focuses instead of the poverty of surrounding communities ... [M]any schools are inadequately funded ... The framework ... fails to provide certainty as to whether a school is ... “no-fee” or “fee-paying” ... [T]o the extent that the obligations in respect of the exemption policies are ignored, the framework is not capable of enforcement.’ Veriava’s last contention is simply incoherent: Whether the new, improved, tightened framework is enforced is the issue – not whether they might be ignored. Only a factual demonstration of a systemic rejection of the exemption policy by administrators would provide support for the claim that the framework is unconstitutional. Veriava provides no such evidence. Her second claim is equally implausible. Significant learner movement makes such designation difficult, if not impossible, for provincial HoDs to determine appropriate learner and teacher allocations far in advance of a school year.

demonstrate that they have implemented fairly the new fee exemption policy and to extend the automatic exemption to orphans, learners in foster care and learners in families that receive child support grants. Most importantly, the regulations have attempted to simplify the formula for the determination of exemptions.⁴¹⁵

The elimination of school fees for the bottom two quintiles of schools and the improvement in the fee exemption process is entirely consistent with the constitutional positions we adopted in 2004 regarding the nature of fees. To put these positions crisply, the elimination of fees looks easy and cheap when compared to the complex and expensive policies that would have to be put in place to overcome the barriers created by current transportation, food feeding, learner support material and school uniform costs. Moreover, the DoE's 2001 Systemic Evaluation suggests that the major challenge facing South African education has less to do with current levels of state and private funding and more to do with such basic pedagogical issues as the teaching of literacy and numeracy in the first years of schooling. Another overriding concern, at the other end of our learners' school careers, is the relatively low levels of internal efficiency of the system and the concomitantly poor completion rates of learners. When viewed against the background of real state expenditure per learner, near optimal enrolment and attendance, the variety of significant impediments to access for the most disadvantaged learners and such basic and persistent problems as innumeracy and illiteracy, the new and improved fees policies – while laudable – do not address the primary ills of the system.⁴¹⁶

In 2006, the government, while keeping the basic fee exemption system largely intact, made a number of dramatic changes. Under the new system, the government classifies each school as either a 'fee school' or a 'no-fee' school. No-fee schools are made up of the bottom two quintiles of schools. Fee schools are still entitled to charge fees. However, the schools must grant total exemptions to parents for whom the annual fee is 10 per cent or more of their annual income. Partial exemptions are available to parents for whom the fee forms

⁴¹⁵ Veriava (n 302 above) 187, 191 - 194.

⁴¹⁶ Fleisch (n 220 above).

between 2 per cent and 10 per cent of the learner family's income.⁴¹⁷ Fees are such a hot button political issue that in early 2008, the GDoE mooted the idea of eliminating fees for the third poorest quintile of schools.

However, while the school fees system allows for unequal per capita expenditure, it is not the source of inadequate per capita funding. More importantly, the school fees system enables the provincial departments to implement a school funding system that intentionally and actively privileges poor schools. The school funding norms and the new post provisioning norms ensure that *far less* public funds are lavished on the most privileged learners, and *far greater* public funds are expended upon the poorest learners.⁴¹⁸

The school funding norms and the post provisioning norms privilege poor schools in the following fashion. The school funding norms allow the state to allocate progressively funds to schools for non-personnel, non-capital costs. The Norms and Standards for School Funding (1998) and more recently the Amended Norms (2006) require the national department to rank all schools on the basis of their relative deprivation. (The formula takes account the relative poverty of the school community.) Schools are then funded for non-personnel costs on a sliding scale. The poorest quintile receives a per-learner allocation up to seven times that of learners in the wealthiest quintile.⁴¹⁹ In the amended Norms and Standards, it is clear that the allocation would be sufficient to cover the following school requirements: learning support materials, equipment, consumable items such as stationery and cleaning materials, services such as repairs and maintenance, and other services such as telephone calls, electricity and water.

The new Norms and Standards also introduce guidelines for per capita allocations for the various quintiles. For example, the new

⁴¹⁷ The new norms include other changes to improve the fee-exemption system to make it easier for poor learners to secure exemption and to make it more difficult for schools to discriminate against learners who do not pay fees: (a) schools are prohibited from charging anything other than a basic school fee subject to strict exemption criteria; (b) clear terms prohibit the more pernicious forms of discrimination such as denial of access to school, sport or cultural activities, refusing to provide reports, suspension and verbal or non-verbal abuse; (c) an onus is placed upon the School to prove it has implemented the regulations before instituting legal action against a parent; and (d) automatic exemptions are extended to parents who receive child care grants (whereas in the past the government encouraged parents to use the grants to pay school fees). Veriava (n 302 above) 187.

⁴¹⁸ See Amendment of regulations for the distribution of educator posts in a provincial Department of Education GN 1451, Employment of Educators Act 76 of 1998.

⁴¹⁹ SASA 84 of 1996 Norms and Standards for School Funding paras 98 - 103. The original school funding provisions were amended in 2006. See Amended National Norms and Standards for School Funding GN 869 GG 29179 (31 August 2006).

Norms recommend that in 2008 the children in the poorest schools should be allocated R775.

However, while the main change in the new Norms is the introduction of no fee schools, the post provisioning norms also allow the state to allocate progressively funds to schools for additional teaching posts. According to the post provisioning formula, all schools are entitled to a basic number of posts per weighted learner. The total number of weighted learners in each school is then adjusted in terms of a poverty ranking. The head of the provincial department is obliged to set aside up to five per cent of its available posts for poverty redress purposes. The provincial department then distributes the redress posts to schools based upon the relative poverty of the learners.⁴²⁰ The schools then receive additional teaching posts in proportion to and in reverse lexical ordering of their provincial relative inequality ranking. The current school funding, post provision and fees regime thereby demands that the transfer of state funds from the wealthiest communities to the poorest communities in the service of adequacy.⁴²¹

Despite these across-the-board improvements, Veriava has charged that the new system still falls short of FC section 29(1)(a)'s obligations.⁴²² One could imagine conjuring up a proper evidentiary platform for a challenge to the fee exemption system. However, the evidentiary basis necessary to support a finding of unconstitutionality will have to show that current abuse of the system is pervasive, that fees themselves (and not other education-related costs) are the *actual* barriers to access and that universal free education would result in improved access to an adequate basic education by a significant cohort of learners. We think that any Brandeis brief challenging fees *in toto* must overcome the presupposition of SASA's drafters – and re-drafters – that a well-calibrated fee system can be used to improve the education of learners from historically disadvantaged backgrounds.

⁴²⁰ Amendment of Regulations for the Distribution of Educator Posts in a Provincial Department of Education sec 5 GN 1451 GG 2407, Employment of Educators Act 76 of 1998.

⁴²¹ Fees aid the redistribution of wealth in the following manner: (1) School fees shift any burden of differentiation from the state to the private sector; (2) The state no longer subsidises middle-class and wealthy learners at the same level as working class and poor learners; (3) The state uses the school funding norms, and relies on the existence of fees in fee-rich communities, to subsidise fee-poor schools. That the school funding norms and the progressive post provisioning norms could be further amended to facilitate adequacy and parity is not a bone of contention.

⁴²² Veriava contends that the manner in which the schools are put into the appropriate quintile fails to take account of the fact that many poorer learners travel to school in richer areas with fee-charging schools (n 302 above, 188 - 189).

First, given our arguments in chapter 5 regarding the current status of primary and secondary school education in South Africa, and the requirements of FC section 29(1)(a)'s right to an adequate, basic education, we think it highly unlikely that any such challenge can succeed. Second, as we have just shown, the new fee structure and the new norms and standards are far more redistributive than any one could have imagined a decade ago. Once again, given the pro-poor outcomes of the two-fee system and the new norms and standards, it is difficult to imagine a court finding the current statutory and regulatory structure for school funding unconstitutional.

3.1.3 Constitutional arguments

Government statistics and studies upon which both Roithmayr and Veriava rely suggest that: (a) South African NERs are near optimal for a country of its wealth and development;⁴²³ (b) existing user fee policies are not the primary impediment to a basic education⁴²⁴ and (c) any legal argument predicated upon the assumption that user fees constitutionally impair the right of access to a basic education must fail.⁴²⁵

⁴²³ It goes without saying that the descriptive fact of South Africa's near optimal NER performance as a developing country ought not to – and cannot – determine or prescribe policy. South Africa could still decide that the costs of making up the difference between 97 per cent and 100 per cent enrolment are worth incurring.

⁴²⁴ Fiske and Ladd write: 'Though admittedly imperfect, these estimates of enrollment rates provide no evidence that school fees have kept significant numbers of South African children from enrolling in primary schools': Fiske & Ladd *Elusive equity* (n 26 above) 141.

⁴²⁵ Part of Roithmayr's strategy when arguing that school fees unconstitutionally impair the right to basic education of an identifiable class of children is to suggest that 'basic education' means 'free education' and that school fees, *ipso facto*, constitute a violation of the right to a free education. We can identify four reasons why such a strategy is misconceived. First, as Roithmayr acknowledges, the drafters of the Constitution opted for the term 'basic' and not 'free': Roithmayr (n 396 above) 39 - 46. In light of the clear opportunity to have the Constitution mean what Roithmayr wants it to mean, a democratically elected Constitutional Assembly decided otherwise. Second, Roithmayr's description of the international jurisprudence intimates that the various covenants and treaties that engage education unequivocally support her rendering of 'basic' as 'free'. Such a reading is selective. While the recent Dakar Declaration holds that primary school education should be free, other international instruments do not. Third, Professor Roithmayr places particular emphasis on the International Covenant of Social, Economic and Cultural Rights ('ICSECR'). Whatever the merits of that treaty body's general comments, South Africa is merely a signatory to the ICSECR. It has not ratified the document. The failure to note this signal difference insinuates that the ICSECR has a place in municipal law and constitutional jurisprudence that it just does not possess. The weight of international law in South African constitutional interpretation is not an entirely straightforward matter. Under FC sec 232, 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' Thus, the assertion that basic means free – in the face of legislative intent to the contrary

To the extent that school fees feature in the educational landscape of out-of-school children, they play a minor role in a larger narrative that reflects the state's general failure to deliver the basket of goods that make school attendance possible.⁴²⁶ So, once again: If

– complicates any attempt to reconcile customary international law and South African constitutional law. Likewise, FC sec 39(1)'s injunction that courts consider both binding and non-binding international law does not settle the issue: J Dugard *International law: a South African perspective* (3 edition 2005); H Strydom & K Hopkins 'International law & international agreements' in Woolman *et al* (eds) *Constitutional law of South Africa* (2 edition, OS, December 2005) chap 30. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 35 (Both binding and non-binding international law should be considered by the courts when interpreting constitutional provisions); *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC) (Courts must consider international law but it does not take precedence over constitutional imperatives). Fourth, Roithmayr and others like to argue that because the right to a basic education does not include the boilerplate socio-economic rights language regarding the progressive realisation of the right, basic education is not conditional upon available state resources: Roithmayr (n 396 above) 39 - 46.

Compare the language of FC sec 26, the right to housing, with FC sec 29, the right to basic education. Why should basic education occupy primacy of place in the hierarchy of socio-economic rights? It is not at all clear that a basic education – especially in an argument about school fees – should ever take precedence over such immediate 'survival' requirements as water, food, housing and health care. Roithmayr offers no argument to support this contention (n 396 above, 124 - 126). One reply might be that we must take cognisance of the absence of an internal limitation for basic education and presence of such internal imitations for other socio-economic rights. We believe that the absence of an internal limitation for the right to a basic education must be viewed through the lens of apartheid-era funding inequalities. The drafters wanted to reaffirm the primacy of education in a social democracy and to undermine any attempt to perpetuate unequal levels of state funding. The historical context of the South African Constitution requires this more nuanced reading of the absence of the internal limitation in FC sec 29(1)(a).

⁴²⁶ As we noted above, Roithmayr links her access argument to 'an unfair burden on the poor' argument. According to Roithmayr, for those poor families who do choose to enrol their children in fee-paying schools, the burden of paying fees on these families is so great that it may constitute an unconstitutional limit on their right to a basic education: n 396 above, 52 - 64. She cites anecdotal evidence from the *Hearings on Poverty* held by the Human Rights Commission (HRC) in 1999 and an HRC-commissioned study. See S Vally & Y Dalamba 'Racism, racial integration and desegregation in South African public secondary schools' Education Policy Unit, University of the Witwatersrand (1999). Roithmayr lays particular emphasis on the testimony of a single parent 'who spent 59% of his net income on school fees even after qualifying for partial exemption' (Roithmayr (n 396 above) 61 - 62). With respect to her first example, Roithmayr herself clarifies the position of the parent when she notes that the 59 per cent of the net income is not spent on school fees alone but includes secondary fees such as transport, uniforms, textbooks, and activity fees. As we have already suggested, while combined expenses associated with attendance at school may place an unreasonable burden on the poor, formal official school fees do not. Using Statistics South Africa data, the DoE has analysed the level of fees paid relative to household income. Department of Education Review of the financing, resourcing and costs of education in public schools (n 395 above) 80. This analysis found that although the poorest 20 per cent of households paid the lowest school fees in

the constitutional remedy that we desire is one that makes access to an *adequate* basic education for all possible, then the elimination of school fees alone will not achieve the desired result.⁴²⁷

4 Adequacy

4.1 Policy arguments

Roithmayr, at various points in her paper,⁴²⁸ and her article, maintains that the existing system of school fees causes or contributes to the inadequacy of the basic education of a constitutionally meaningful class of learners. We agree that many learners receive an inadequate education. Indeed, we agree that such learners may have a colourable constitutional claim.⁴²⁹ However, there is *no* causal connection between school fees and inadequate education.⁴³⁰

Once again the numbers and the policy as applied do not support a link between school fees and pervasive systemic failure. According

absolute terms, around R50 per year, this constituted a high proportion of household income. More specifically, the poorest households spent, on average, 2 per cent of their income on school fees, compared to 1 per cent for middle- and upper-income families. The department conceded that this represented an 'anti-poor bias'. But this still begs the question: Would it represent an unconstitutional burden on the poor? Even with the substantial increase in the cost of education for both the rich and the poor, the amount spent on school fees constitutes a smaller portion of the total household expenditure than that spent on cigarettes and alcohol combined. In any event, the new fee regime has eliminated that burden for learners who attend the bottom 2 quintiles of schools.

⁴²⁷ Roithmayr's other argument, as we noted at the outset of this section, is that school fees with an exemption system *as applied* create a barrier to access to those persons seeking partial or full exemptions for their school age children. As a matter of empirical evidence, most families who do not pay fees because they cannot afford to do so do *not* have their children barred from school. Almost 40 per cent of children in the poorest quintile of learners do not pay fees. Yet they are able to attend school.

⁴²⁸ Roithmayr (n 396 above) 73 - 74.

⁴²⁹ As Edward Fiske and Helen Ladd acknowledge, defining adequacy in optimal settings is often difficult. In South Africa the problem of limited resources makes the definition even more problematic. They write: 'the additional spending required for to assure adequate funding would most likely have been unaffordable. That conclusion follows largely from the fact that the fraction of the student population that was disadvantaged based upon any reasonable definition of the term was of the order of 80% of the population. This situation differs from developed countries, including the US, where educational adequacy typically requires additional funding for at-risk students who account for a small proportion of all students': E Fiske & H Ladd 'Financing schools in post-apartheid South Africa: initial steps toward fiscal equity' International Conference on Education and Decentralisation: African Experiences and Comparative Analysis, (Johannesburg, June 2002) 5 - 6.

⁴³⁰ The connection of fees to inadequacy rests on a logical fallacy and some conceptual confusion. While we may need to employ the newly modified fee system in order to realise an adequate education for all – though that is clearly not the only alternative – it does not follow that the inadequacies in the new, modified fee system cause inadequate basic education.

to the DoE, school fees in 2003 contributed R3.5 billion to primary and secondary school expenditure.⁴³¹ In 2003, they accounted for 8 per cent of public school expenditure.

The DoE has conceded that school fees secured from parents offer the greatest benefit to the wealthiest quintile of public schools.⁴³² Moreover, learners in this highest quintile are likely to receive per capita combined public and private expenditure that is 50 per cent higher than per capita combined public and private expenditure on learners in the lowest quintile.⁴³³

⁴³¹ Department of Education 'Review of the financing, resourcing and costs of education in public schools' (n 395 above) 79.

⁴³² Fiske and Ladd write: 'The African National Congress recognised ... that any redistribution of funds from formerly white schools to others in the country would be spread so thinly that historically disadvantaged schools would experience little benefit': *Elusive equity* (n 26 above) 135.

⁴³³ While the previous fees system allowed for unequal per capita expenditure, it was not the source of inadequate per capita funding. More importantly, the school fees system enabled the provincial departments to implement a school funding system that intentionally and actively privileges poor schools. The school funding norms and the new post provisioning norms ensured that far fewer *public* funds were lavished on the most privileged learners, and *far greater* public funds are expended the poorest learners. See GN 1451 GG 24077, Employment of Educators Act 76 of 1998 Amendment of Regulations for the Distribution of Educator Posts in a Provincial Department of Education.

The school funding norms and the post-provisioning norms privileged poor schools in the following fashion. The school funding norms allowed the state to allocate progressively funds to schools for non-personnel, non-capital costs. The Norms and Standards for School Funding required provincial departments to rank all schools on the basis of their relative state of deprivation. (The formula takes account of, amongst other indices of school environment, the condition of the school's physical plant and the relative poverty of the school community.) Schools were then funded for non-personnel costs on a sliding scale. The poorest quintile receive a per learner allocation up to seven times that of learners in the wealthiest quintile: SASA 84 of 1996 Norms and Standards for School Funding paras 98 - 103.

The post-provisioning norms allowed the state to allocate progressively funds to schools for additional teaching posts. According to a revised formula, all schools were entitled to a basic number of posts per weighted learner. The total number of weighted learners in each school is then adjusted in terms of a poverty ranking. The head of the provincial department was obliged to set aside up to five per cent of its available posts for poverty redress purposes. The provincial department then distributes the redress posts to schools based upon the relative poverty of the learners: GN 1451 GG 24077, Employment of Educators Act 76 of 1998, Amendment of Regulations for the Distribution of Educator Posts in a Provincial Department of Education sec 5. Thus, the schools then received additional teaching posts in proportion to and in reverse lexical ordering of their provincial relative inequality ranking. This school funding, post provision and fees regime demanded the transfer of state funds from the wealthiest communities to the poorest communities in the service of adequacy.

The DoE sought to further refine the school fees system so as to realise greater cross-subsidisation.⁴³⁴ The 2006 amendments to SASA demonstrate the State's commitment to designing new policies that enhance cross-subsidisation by eliminating fees for the bottom two quintiles and by increasing the per capita expenditure on learners in no-fee schools.⁴³⁵

4.2 Constitutional arguments

Does the right to a basic education demand some quantum of adequacy? Let us assume, as we have in chapter 5, that a right to a basic education would be meaningless unless one could provide some baseline for determining what satisfies the right.⁴³⁶ That baseline must, by definition, be adequacy. Put another way, the right to a basic education cannot mean the right to an inadequate education.⁴³⁷

⁴³⁴ There is an obvious logical disjunction between the assertion that fees cause inadequacy and the suggestion that a partial remedy for inadequacy is to use the school fee system to enhance delivery. School fees cannot be the cause and the cure. Roithmayr and the authors of this book do not (appear to) agree on this point.

⁴³⁵ As we noted above, in 2006, the government created a bifurcated fee school scheme. Under the new system, the government classifies each school as either a 'fee school' or a 'no-fee' school: Veriava (n 302 above) at 187. No-fee schools are made up of the bottom two quintiles of schools. Fee schools are still entitled to charge fees. However, the schools must grant total exemptions to parents for whom the annual fee is 10 per cent or more of their annual income. Partial exemptions are available to parents for whom the fee forms between 2 and 10 per cent of the learner family's income. Fees are such a hot button political issue that in early 2008, the GDE mooted the idea of eliminating fees for the third poorest quintile of schools.

⁴³⁶ We discuss the content of the right to an adequate basic education in chap 5 above. The American learning in this area is both deceptive and instructive. As Danie Brand notes, the United States case law upon which Roithmayr relies in support of both her adequacy and her equality claims indicates a willingness on the part of 'United States courts to strike down school funding systems that rely on an unequal revenue-raising basis': D Brand 'Community participation and user fees' (unpublished manuscript on file with authors, 2003) 2. These US cases, however, engage disparities 'in State funding of schools generated on an unequal tax basis' (above, 3). They do not engage a system of progressive redistribution of state funds married to a policy that permits 'additional private funding of State schools' (above). Thus, the form of institutional arrangement challenged in South Africa is quite distinct from its American counterpart. Difference of form aside, the attempts to establish standards of adequacy through both litigation under US federal and state constitutions has proved decidedly difficult. F Michelman 'The Supreme Court, 1968 Term — Foreword: On protecting the poor through the Fourteenth Amendment' (1969) 83 *Harvard Law Review* 7; J Morgan *et al* 'Establishing education program inadequacy: the Alabama example' (1995) 28 *University of Michigan Journal of Legal Reform* 559; S Herskoff 'Positive rights and state constitutions: the limits of federal rationality review' (1999) 112 *Harvard Law Review* 1132. As Morgan *et al* argue, the primary problem with tying together minimum adequacy requirements to minimum funding requirements is that the two variables do not permit a sufficiently close fit. Even where minimum funding requirements have been put in place and minimum adequacy guidelines have been established, historically disadvantaged schools struggle to improve

Even if we admit that the right to a basic education means that the core content of the right features some notion of adequacy, our policy arguments have demonstrated that there is no clear causal connection between the elimination of school fees and the realisation of an adequate basic education. Indeed, as Roithmayr and other opponents of school fees have been forced to concede,⁴³⁸ the desire for an adequate basic education for all would seem to entail a careful expansion of school fees and the recalibration of the current funding formula to allow for greater cross-subsidisation of fee-poor schools by fee-rich schools.

5 Equality

Professor Roithmayr's equality arguments take three forms. First, the policies behind school fees are intended consciously to reproduce apartheid-era distributions in outcome. Second, the policies, as applied, result in apartheid-era results for all learners. Third, the policies create inequalities in financing so dramatic that they pre-empt the need for analysis.⁴³⁹

performance. These difficulties have not prevented a couple of courts in the US from requiring that the state provide equal funding and – in some instances – an adequate education. See, eg, *Rose v Council for a Better Education* 790 SW 2d 186 (Ky 1989). However, the majority of courts have concentrated on removing disparities in public school funding created by unequal municipal property taxes. See, eg, *Abbott v Burke* 575 A2d 359 (NJ 1990); *Edgewood Independent School District v Kirby* SW 2d 391 (Tex 1991). Improved performance at historically disadvantaged schools turns out to be a function of a number of factors – not the least of which is the management model employed at the school district level and by the principal. The difficulty in disaggregating the causes of improved performance is no argument against parity in funding. It serves, however, as a cautionary note when various NGOs and other actors attempt to determine school policy through the prism of very narrowly focused litigation.

Roithmayr (n 396 above) 133 - 135.

Arguments about equality are invariably complicated by disputes about whether equality should be measured in terms of opportunity or outcome. Should equality in education be measured in money spent per learner or achievements per learner? Should equality in education be measured in terms of public monies spent per learner or in terms of public and private monies spent per learner? However, even analysts who make such distinctions – and acknowledge room for debate – offer problematic examples of equality and inequality. For example, Fiske and Ladd argue that 'if an educational system were reformed in such a way that more resources were provided for learners at the bottom, making those students better off in absolute terms, but at the same time even more resources were made available to schools at the top, the new system would be deemed even more inequitable than the old': Fiske & Ladd (n 431 above) 4. But this argument suggests that if the new system offered a meaningful education in terms of opportunity and outcome for the least well off, but the old system offered none, the old system is to be preferred. That may fit some definition of equality, but one might reasonably ask whether one would want it. Even if we assume that what strikes Fiske and Ladd as objectionable is that the new system reproduces basic patterns of inequality – that is, the wealthy remain wealthy and remain proportionally better off than the less well off – if equality is to be a meaningful concept, then it must take cognisance of improvements in opportunity and outcome which realise palpable differences in the lives of the less well off.

5.1 Policy arguments

As we have already noted, Professor Roithmayr's policy arguments fail to take account of the extent to which the government's education funding policies constitute progressive forms of taxation, and, in fact, will result in significant redistribution of resources. The changes rendered by the 2005 amendments to SASA and the subsequent regulations in 2006 have only enhanced the redistributive attributes of the school fees framework. The current system not only shifts the burden of any differentiation from the public fiscus to the private purse, school fees enable the state to ensure that fee-rich schools cross subsidise fee-poor schools.

The rhetorical contrast between fee-rich (and formerly white) schools and fee-poor (and predominantly black) schools distorts a much more subtle re-arrangement of access and inequality. Changes in funding norms and in exemption policy now mean that many poor and working class kids have access to middle class schools. The rhetoric of contrast between Pretoria Boys and a Limpopo Tree School also masks the extent to which race no longer maps as readily onto class.⁴⁴⁰

5.2 Constitutional arguments

Professor Roithmayr's equality arguments are her most dramatic. Though they resist caricature, they are, by her own admission, almost as simple as a picture.

On the one hand, Pretoria Boys High. On the other hand, a nameless tree school. The underlying cause of the inequality in the current climate is, she asserts, the active encouragement of Pretoria Boys High by public school educators to levy extraordinarily high school fees. These high fees result in total aggregate public/private expenditures at the respective schools not substantially different than the expenditures made available from the public fiscus under apartheid. The equality argument then proceeds, in a simplified manner, as follows.

⁴⁴⁰ To deny that white children's prospects for a better education and a better life still generally outstrip similar prospects for black, coloured and Indian children would be equally unwarranted. Nor would we deny that school policy should be altered, through *state* funding and other policy mechanisms, to ensure a better education for all.

Roithmayr tracks the tests set out by the Court in *Harksen v Lane*,⁴⁴¹ *Pretoria City Council v Walker*⁴⁴² and other equality cases. She concludes that the user fee system would likely satisfy the requirements of FC section 9(1): namely, user fees are *rationaly connected to a legitimate government objective*.⁴⁴³ She then moves on to the test grounded in FC section 9(3), (4) and (5): in short, DOE's the differentiation created by the user fee system under scrutiny amount to unfair discrimination.⁴⁴⁴ Here, however, Roithmayr claims that because the user fee system reproduces apartheid-era inequality based upon race and class, the system unfairly discriminates.

Let us assume that the picture demonstrates to the Constitutional Court justices that some impairment of human dignity, and per force, equality, has taken place. In many equality cases, eliminating the apparent source of the offense would enhance human dignity. However, in this particular case, the elimination of the school fees would not improve the per capita spending on the tree school (indeed, given the dependency of the state on fees for cross-subsidisation it might well diminish it). It would certainly not improve the human dignity of those learners. At the same time, the elimination of school fees and caps on spending could well result in the impairment of the dignity of all schoolgoing children. All children would be funded at the same non-fee supplemented rate. Only the most cynical view of human nature would hold that one's dignity is repaired by witnessing the suffering of others. Whatever the apt description of this response, *schaudenfraude* perhaps, it can hardly be equated with according a class of invidiously differentiated learners greater dignity. And yet, the equality argument intended to dismantle the school fees system entails just such a result.

It is, in fact, an argument that the ANC itself has refused to buy. Although generally committed to fairly egalitarian policies, the ANC recognised, as Fiske and Ladd note, that:

Allowing schools to charge fees provide[s] a mechanism to enhance limited public resources ... It also serve[s] to maintain support for the

⁴⁴¹ *Harksen v Lane* NO 1998 1 SA 300 (CC), 1997 11 BCLR 1489 (CC).

⁴⁴² *Pretoria City Council v Walker* 1998 2 SA 363 (CC), 1998 3 BCLR 257 (CC).

⁴⁴³ Roithmayr (n 396 above) 90 - 93.

⁴⁴⁴ This test itself has two parts. First, if the basis for differentiation is expressly specified in FC sec 9(3), then discrimination is established. If the basis for differentiation is merely analogous, then the differentiation must have the potential to impair the fundamental human dignity of the complainants. Second, if the differentiation in question amounts to discrimination, then there is a presumption that it constitutes unfair discrimination. If, however, the basis for the differentiation is merely analogous to a ground specified in FC sec 9(3), then the complainant will have to establish the unfairness of the differentiation. It is worth noting how race drives the class analysis, and how it obscures a more nuanced assessment of the distribution of educational goods.

state education system among privileged classes that were no longer predominantly defined by race.⁴⁴⁵

Fiske and Ladd's observations reflect the political complexity of arguments on school fees – and they capture the conflicting utilitarian, communitarian, associational and democratic interests that have informed government policy and law-making on the subject.

6 Looking in the wrong place for 'free and equal' public schools

FC section 29(1)'s 'basic education' requires *adequate* – as well as accessible, acceptable and adaptable – public schools. Contrary to what many commentators would like to believe, 'basic' does not mean 'free', nor does it even mean 'equal'. Had the drafters intended basic education to carry such a burden, the text would surely reflect that choice. However, an explanation exists for the absence of such language in FC section 29(1). First, FC section 29(2) commits the state to the provision of public school education in the language of the learner's choice (where reasonably practicable) in an environment committed to equity and to historical redress. Second, FC section 9(2) and FC section 9(3) commits the state to the eradication of inequality on a host of listed (and unlisted) grounds.

Compare South Africa's choice of language with that found in state constitutions in the United States. In state courts, applicants have challenged, successfully, the so-called 'fee waiver' systems. The argument is that such schemes constitute a violation of that a state's express guarantee of a 'free' education. For example, in *Hartzell & Connell*, parents were not required to pay fees for a basic education but were required to pay fees for their children's extra-curricular activities.⁴⁴⁶ A fee waiver policy was instituted to ensure that the fees would not deny children the opportunity of participating in extra-curricular programmes. A parent challenged the 'fee waiver' scheme on the grounds that it violated the state's constitutional guarantee to free basic education. The court first held that extra-curricular activities did form part of the California State Constitution's free

⁴⁴⁵ Fiske & Ladd *Elusive Equity* (n 26 above) 137. Fiske and Ladd further note that '[b]y joining with whites to preserve the independence and the quality of the former Model C schools, black leaders [have been] able 'to silently permit their own class interests to be taken care of without confronting (or clashing with) their own, largely poor, constituencies': n 26 above, quoting J Karlsson *et al* 'A critical examination of the development of school governance policy and its implications for equity' in Motala & Pampallis (eds) (n 1 above) 115.

⁴⁴⁶ 679 P2d 35 (Cal 1984).

education guarantee.⁴⁴⁷ Next, the court concluded that the imposition of fees for educational activities, even with a waiver policy, violated the free education guarantee:

The free school guarantee reflects the people's judgement that a child's public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and non-needy families. Individual families needy or not, may value education more or less depending upon conflicting budget priorities.⁴⁴⁸

Until such a time as the Constitution and FC section 29(1)(a) contains the words 'free basic education', good reasons exist for resisting the attempt to squeeze 'free' out of the word 'basic'. What matters, as we argued in chapter 5, is not the cost of the education, but that learners receive an *adequate* basic education that provides them with the requisite levels of literacy and numeracy necessary to survive and to flourish in the 21 century. No proponent of 'free' education would be content to allow our children to remain near the bottom, if not last, amongst developing countries. So while we agree that all barriers to basic education should be removed – and that may mean fees for many learners – the mere elimination of 'fees' does not discharge the constitutional burden the state must carry. If a mixed model of public school financing were to achieve an adequate basic education for all, then that is the educational goal we should pursue (until such a time that an *adequate* basic education for all can be made free.)

7 Points of convergence and subsequent changes in the law

As Roithmayr acknowledges in her section on remedies, perhaps the best that litigants challenging the system of fees in place at the time could have hoped for was a policy which kept fee-rich families in the system, while allowing for greater cross-subsidisation of poor schools by wealthier schools and greater direct support from the national

⁴⁴⁷ *Hartzell* (n 447 above) 42 (The Court held: 'Such activities are generally recognised as a fundamental ingredient of the educational process. They are [no] less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens physically, mentally, and morally, than the study of algebra and Latin').

⁴⁴⁸ *Hartzell* (n 447 above) 43.

fiscus.⁴⁴⁹ And that is exactly what the 2006 amendments to SASA and its regulations gave us – with their elimination of fees for the lowest two quintiles of schools, the tightening up of the fee exemption system and the promise of significantly greater direct per capita spending on learners.

The state has recognised that the truly meaningful issues regarding fees are not about ‘opinion-makers’ withdrawing support for government policy. The truly meaningful issues turn on questions of pure economics. How does the government craft a policy which keeps *wealthier* families within the public school system so as to extract the greatest amount of money from them in support of historically disadvantaged schools and learners from historically disadvantaged communities.⁴⁵⁰

Two further policy considerations suggest the intrinsic value of a user fee system. Both are grounded in a commitment to democracy

The first argument from democracy focuses primarily on the integrity of the polity and the creation of a common set of referents. Public schools, through both curriculum and status, make South Africa their students’ primary reference point for identity formation, and not, as with many private schools, England, Europe, North America or the Antipodes. The argument about needing to maintain white and/or wealthy families within the system in order to keep politically influential persons happy is a red herring. Public schools with fees *may* well make middle class black parents and white parents happy. However, the ultimate aim of user fees is not to reinscribe existing

⁴⁴⁹ Is this a constitutionally mandated remedy? Roithmayr’s arguments on a limited role for separation of powers in this set of circumstances are compelling. However, her gloss on the willingness of the courts to intervene in socio-economic rights cases to establish a scheme consonant with constitutional dictates stands at odds with even the most generous appraisal of the existing jurisprudence. A court might be willing to strike down an existing regulatory framework in order to force the production of something better: it could suspend an order of invalidity pending the realisation of a constitutionally satisfactory scheme. A court would probably refuse the invitation to adumbrate a system of school funding that undoes the manifest injustices of the past: issues of institutional competence suggest that these detailed kinds of policy considerations are best handled by the legislature and the executive. That said, the present authors would be inclined to agree that where the state steadfastly refuses to act on a court order that mandates reform, the courts should be willing to offer structural remedies which more readily define constitutionally mandated outcomes: see S Woolman *Selfless Constitution* (n 14 above).

⁴⁵⁰ Roithmayr seems to be aware of the problem of unintended consequences: namely that the elimination of school fees may increase teacher flight, diminish teacher capacity and diminished learner capacity. However, her legal analysis of school fees deflects attention away from the more expensive and rather intractable problems of teacher training and teacher remuneration. The cost of school fees to the educational system and public fiscus pales in comparison to the costs associated with remedial teacher training and the increased school staffing needed to ensure both greater adequacy and greater equality.

patterns of class disparity.⁴⁵¹ The now modified system of fees ensures that the vast majority of South African children continue to participate in public institutions and see themselves as part of the larger political community.

The second argument, as suggested to us by Danie Brand, advances the claim that the user fee system – in concert with a commitment to greater state funding – may ‘further important principles of community engagement and interdependence’. By promoting community engagement and parental responsibility, the modified fees system created by the state may well foster the kinds of changes in institutional culture that, as much as increased resources per learner, affect the quality of education. Indeed, Brand suggests that values critical to a democracy – participation, citizenship, cooperation, self-governance – can ‘potentially be advanced by the user fee system not only within specific schools, but also across racial and class lines ... if creative forms of cross-subsidisation can be implemented’.⁴⁵²

8 Fee schools and no fee schools: On experimental constitutionalism, a strengthening state and public schools in an ‘open and democratic society based upon human dignity, equality and freedom’

No one wants a second-class, a third-class or a *no-class* education. Professor Roithmayr argued, persuasively in 2003, that just such an inferior education is what the majority of South African primary and secondary school learners received. We have argued here, and in chapter 5, that such an inadequate education is what many learners continue to receive.

The problem with Roithmayr’s analysis, and similar arguments made by Faranaaz Veriava, Stuart Wilson and Salim Vally, is that they attempt to redress ongoing problems of adequacy, access and equality through the elimination of school fees. We have explained why, as a matter of policy and law, the elimination of the current fee scheme will not create the conditions for an adequate basic education or a meaningfully equal education. It is difficult to imagine – at this

⁴⁵¹ Even a radically egalitarian redistribution of educational funds, invariably married to privatised schooling by the middle and upper classes, will not prevent the reinscription of existing patterns of inequality.

⁴⁵² D Brand ‘Community participation and user fees’ (unpublished manuscript on file with author, 2003).

juncture of history – any constitutional challenge to school fees succeeding in any South African court.

However, we actually do believe that the challenges articulated by the ERP, the EPU and APF have succeeded in using the Constitution to advance a fairly progressive legal agenda. They have simply not pressed their case in the courts. While threatening legal challenges, and talking up the ‘wrongness’ of fees in the press, Variava, Wilson, Vally and other actors have been able to move the state towards the ‘fee-less’ society they envisage.

The state has responded to these challenges in a number of different ways over the last decade. Initially, it responded with flyers announcing exemptions and district officers assigned to review the exemption policies of schools. We have also witnessed several waves of changes to the funding formula for public schools: a movement from the employment of progressive post provisioning norms to a commitment to increased per capita spending on learners in the poorest schools. We have thus seen an evolutionary – and experimentalist – response to the call for the elimination of fees. First, the state attempted to ensure the efficacy of the system in place. Second, it moved to eliminate fees in the lowest two quintiles of schools. Third, it has announced the likelihood of the elimination of fees in the third quintile of schools. And most recently, it has mooted the idea of an entirely fee-less public school system.

Without offering comment on the reasonableness or the justification for some of these choices, it is worth noting three things about the nature of this policy change over the last decade.

First, as we noted in the outset of this book, in chapter 5 and the beginning of this chapter, the state has worked these changes within the general norms established by both the Constitution and the education enabling legislation. This form of response dovetails nicely with our suggestion in chapters 5 and 6 that courts are not the only fora within which the determination of the meaning of our basic law takes place. The executive, the legislature, SGBs, provincial governments, teachers, parents and learners have all played a role in shaping our current educational norms. That multiple site and multiple actor response to the ‘problem of school fees’ has enabled all the parties to overcome the informational deficits that might have occurred in court battles and has ensured the greater normative legitimacy of the current funding and fee scheme than we might witnessed in an adversarial setting. In short, the state has, as it promised it would do, run several experiments on school funding and school fees over the last ten years. And, at the moment, it is hard to gainsay their conclusions and their policy choices. (That again, however, is different from saying that we ever thought the scheme of

school fees is or was unconstitutional.) And because of the manner in which they occurred – slow, incremental, reflective, engaged – these choices enjoy a legitimacy that they might not otherwise possess.

Second, the changes also support our thesis regarding the strengthening state. In 1994 and 1996, the state was primarily concerned with securing its own legitimacy and security. If ceding power over decisions about school fees to parents and learners and SGBs was the price for that legitimacy and security, then the fee scheme put in place a decade ago was well worth any costs incurred in terms of the ANC's preferred agenda. It is now strong enough to push harder for the kinds of egalitarian arrangements that it might well have preferred to see enshrined in law in 1996.

Third, the ANC government remains quite attuned to the competing interests of the multiple constituencies – and the multiple agendas – that exist within the South African state. It understood exactly how much it could do to placate the radically egalitarian interests of the ERP, EPU and APF – without rocking the rest of the boat. It has understood the utilitarian virtues of not destroying the better public schools in South Africa by eliminating a much needed source of funding – namely the middle class. It has allowed schools – as both democratic and communitarian institutions – to maintain a significant degree of autonomy over the manner in which they are run and to continue to build upon significant existing stores of social capital. With regard to fees, the state has charted as wise a course as one can imagine through the choppy waters of the egalitarian, utilitarian, communitarian and democratic commitments found in our Constitution. That's no mean feat.

Where does that leave us now – in 2008/2009 – on the constitutionality of school fees? The state has actually tracked the position we proposed 5 years ago when we wrote that the system should be altered and improved, but was not *per se* unconstitutional. We still believe that the real solutions lie elsewhere: with the elimination of school uniforms, the creation of publicly underwritten transport, the adoption of a universal feeding scheme and the improvement of teaching within our schools. The elimination of fees was never going to improve the adequacy and the efficacy of our primary and secondary schools.

Can more be done within the existing system of school fees? Certainly further cross-subsidisation of schools through a scheme of progressive taxation on fees in wealthier schools is a promising additional intervention. It would simultaneously enable better-funded public schools to deploy available capital in the service of schools with limited sources of private funding and create incentives for all South African children to remain South African. The desirability

of such an experiment is best left to the stakeholders involved in arriving at such a policy choice.⁴⁵³

⁴⁵³ The chance of a challenge to fees is no longer likely to come from the left. While the ANC's policy statement at the Polokwane Conference in December 2007 indicates that fees should be eliminated for the poorest three quintiles of schools, some media reports have suggested that a strong commitment exists within some quarters of the ANC leadership to discontinue all fees. It is difficult to imagine the relatively powerful School Governing Body Foundation not using all the means at its disposal to prevent such an eventuality. Indeed, if we were to speculate, then the challenge to a 'no fee' regime would turn, ironically, on the inability of the state to deliver an adequate education in many, if not most, of its currently underfunded no-fee schools.

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