

Chapter 57 Education

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29 Education

(1) Everyone has the right—

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(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.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

It would not be a sign of health if such an important social interest as education were not also an arena of struggles, practical and theoretical... . [However,] [i]t is the business of an intelligent theory of education to ascertain the causes for the conflicts that exist and then, instead of taking one side or the other, to indicate a plan of operations proceeding from a level deeper and more inclusive than is represented by the practices and ideas of the contending parties.

John Dewey *Education and Experience* (1938)

57.1 Introduction: *liberté, égalité, fraternité**

This brief introduction traces the historical, economic and political antecedents that led to the current constitutional and statutory framework for education. It begins

with the widely accepted — but radically incomplete — account of how the National Party's belated attempts to decentralize 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). Or to put it more pointedly, the standard account emphasizes how the weakness 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.

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Our historical account, culled from the travaux préparatoires of both the Interim Constitution¹ and Final Constitution², as well as extant education framework legislation (The South African Schools Act, The National Education Policy Act and The Educators Employment Act), demonstrates that appeasing the privileged or the provincial bureaucracy or the unions is but a small part of this story. School Governing Body autonomy, for example, was driven to a very large extent by the fundamentally democratic — not autocratic — commitment of African National Congress to grassroots politics.³

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Our specific views, about FC s 29(1), FC s 29(2), FC s 29(3) and FC s 29(4), as developed in Parts 2, 3, 4 and 5 of this chapter, are premised on three general assumptions. First, the legal space we describe is a variable space.⁴ That space expands and contracts as a result of the political exigencies of a given historical moment. Second, the legal history of education in South Africa follows a discernible 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 firm

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grip on the levers of power.⁵ 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. Third, and most importantly perhaps, that complex political agenda embraces egalitarian, utilitarian, democratic and communitarian commitments. The ANC as a governing party in the 21st century, and no longer a liberation movement in the 20th, pursues: (a) an egalitarian agenda that aims to provide a formally equal start for all its denizens; (b) a utilitarian agenda designed to create the greatest good for the greatest number of its learners; (c) and a communitarian agenda that privileges, in some respects, the face-to-face relationships found in kin, clan and commune over the more abstract relationships that bind us as citizens. How do

1 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

2 Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('Final Constitution' or 'FC').

these competing political claims — evident in any social democratic state — play themselves out in our Final Constitution, the enabling legislation and the case law?⁶

Take the right to basic education, and to adult basic education, granted in FC s 29(1). They are unequivocally granted to all. And they are granted in a manner *unqualified* by standard socio-economic tropes such as 'available resources', 'progressive realization' or 'reasonable legislative measures'. Thus, the commitment to basic education looks to be unswervingly egalitarian. Look again. Nowhere does FC s 29(1) indicate that 'basic education' means 'free education'. It doesn't. Basic education may mean charging fees — under the current statutory framework — in

3 See S Woolman & B Fleisch 'Democracy, Social Cohesion and School Governing Bodies' (forthcoming 2008). Extant SGB autonomy has its roots in the very history of liberation movements — and in particular, the ANC. Many of the State'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. 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... . In the short term, a priority is on the revitalization of participatory structure [sic] at the school governance level, and creating the space for their development and empowerment'); 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 Co-ordinating 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, amongst other things, a testament 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, 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 Mahlerbe 'Centralization of Power in Education: Have Provinces Become National Agents?' (2006) 2 *TSAR* 237 (Contends that the ANC believed that 'political power should be centralized as far as possible.')

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 decentralization of decision-making. Three points need to be made about this commitment to decentralization. First, the partial decentralization of decision-making may have 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 organizing in opposition to the State. Secondly, the partial decentralization of decision-making flows from inevitable conflicts between deontological, utilitarian and communitarian commitments that manifest in the ANC's political agenda (as it would in any well-developed, non-reductionist political theory.) Thirdly, 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 realize that this particular aspect of its agenda might have such 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 it shifted its policy imperatives. Indeed, the state also appeared to put on notice those parties who might conclude that the political vicissitudes experienced by the State in such variable space lay beyond the government's control. In the Department of Education's second white paper, then Minister of Education Bengu wrote:

the top three quintiles of schools. These poor, working class, middle class and upper middle class schools are manifestly unequal, and are generally better than their poorer brethren in the lowest two quintiles. And the Final Constitution permits such inequality (at least for the moment). The drafters of the Final Constitution also undertook a utilitarian approach to basic education premised upon the view that allowing school fees and school choice would allow for meaningful cross-subsidization of poor learners by wealthy learners. The complex political agenda does not end there. 'Basic education' and the devolution of powers to local school governing bodies was born from a deep-seated ANC belief in the democratic power of local communities to liberate themselves.

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.

See Department of Education *White Paper 2: The Organisation, Governance and Funding of Schools* General Notice 1229 (November 1995) 6 ('*White Paper II*' or '*WP II*'). The preceding paragraph suggests that the new government's understanding was not limited to the proposition that its 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. 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.

- 4 Why characterize FC s 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. As a result, the ANC crafted a legal regime for education that sought to tap the transformative potential of local communities and was designed to re-build a decimated school system from the ground up. At the same time, the new State, though highly centralized in terms of actual political power and policy determination, relied heavily on provincial government for the execution of its directives — and for the parents of learners in privileged communities to run their own schools. By choice, and by necessity, the South African government created a legal regime for education that permitted a broad array of disparate groups to determine outcomes and that produced results that few in government could have contemplated and even fewer would have desired. This tension between liberation and reconciliation dominated the early documents produced by the Department of Education. See, for example, Department of Education *White Paper 2: The Organisation, Governance and Funding of Schools* General Notice 1229 (November 1995) 5 ('The Review Committee proposes that the new structure of school organisation should create the conditions for developing a coherent, integrated, flexible national system which advances redress, the equitable use of public resources, an improvement in educational quality across the system, and democratic governance. The new structure must be brought about through a well- managed process of negotiated change, based on the understanding that each public school should embody a partnership between the state and a local community.'). See also Sayed (*supra*) at 142 ('Both the previous ruling National Party and the opposition anti-apartheid movement shared a commitment to some form of educational decentralization albeit for very different political and ideological reasons.')

- 5 The politics of education in South Africa, circa 1994, is the politics of a fragile state. The ANC government in 1994 inherited a system of education that ill-served the needs of the vast majority of South Africans. The dimensions of this fragility are well-documented: a lack of managerial legitimacy; inequitable funding; poor physical plants; inadequate teacher training; insufficient provision of and access to necessary social services in the related domains of housing, health care,

Basic education — and FC s 29(1) — is but one example of the egalitarian, libertarian and democratic convictions made manifest in the Final Constitution. Take FC s 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 s 29(2) was also forged at a time when Afrikaner nationalists worried — with good reason — about having all their socio-political institutions taken over by a majority of South Africans who preferred their children to learn English rather than Afrikaans. So

nutrition, and transportation. Our secondary interest, in this chapter, is to document the manner in which the state has attempted to use the Final Constitution and other forms of law to move education from this parlous state to one that effectively delivers equal access to an adequate education to all learners. Take the subject matter of school fees: which we discuss at greater length below. See also B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22 (1) *Perspectives in Education* 111; D Roithmayr 'Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education' (2003) 19 *SAJHR* 382. Shortly after ascending to power in 1994, the ANC promulgated several statutes — and a host of regulations — that permitted school fees. Although it ceded authority to SGBs to make significant decisions about such things as fees, policy-makers underestimated the ability of parents to organize. They believed that few SGBs would secure the statutorily required 50% approval rate of parents for fees if they attempted to charge excessive amounts. This initial miscalculation meant that the state did not anticipate the lengths to which the poor would go to fund the education of their children in fee-expensive schools and the concomitant interest some schools would have in excluding learners who would not or could not pay fees. It is also underestimated the extent to which information asymmetries would skew the distribution of educational goods. Ten years later, the state has a much better conception of the interests that shape and distort the market. The national DoE has promulgated amendments to the South African Schools Act designed to correct various market distortions. It divests SGBs of some of their current authority to hire teachers. It eliminates fees for the poorest 40% of schools and pushes for tighter enforcement of exemptions. It requires the reissuance of circulars that inform learners and their parents of their rights with regard to such exemptions. All of these initiatives are designed to minimize information asymmetries and to promote greater access to existing educational resources. The fragile State that governed from the mid-nineties through the *fin de siecle* did not possess the requisite power to effect such changes. An ever-strengthening state has announced its intention to reshape the environment in a manner that moves beyond reconciliation to redress.

- 6 For a demonstration of how egalitarian, democratic, communitarian and libertarian commitments in our basic law and in our enabling education have produced a de facto (as opposed to a de jure) commitment to school choice, see S Woolman & B Fleisch 'South Africa's Unintended Experiment in School Choice: How the National Education Policy Act, the 'South Africa Schools Act and the Employment of Educators Act Create the Enabling Conditions for Quasi-Markets in Schools' (2006) *Journal of Education and the Law* 31; S Woolman & B Fleisch 'Creating Quasi-Markets in Public Schools' (2006) *Perspectives in Education* 1. Woolman and Fleisch 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). They show how the enabling legislation and a raft of regulations 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 create an incentive to admit as many full fee-paying students as the school can accommodate; EEA — and Education Labour Relations Council (ERLC) resolutions — create additional incentives for principals to compete for bums in seats by tying promotion posts to the number of learners who attend the school. The authors then look at the concurrent constitutional competency for education exercised by national government and provincial government and show how co-operative government functions as an additional enabling condition for the creation of markets. Viewed collectively, the provisions of NEPA, SASA and EEA — as well as the Final Constitution — create the conditions for a conventional, if not the most efficient, market in education. Woolman and Fleisch then 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. Although statistics demonstrate that the majority of learners do *not* exercise meaningful school choice, a surprisingly large cohort do. The authors then track the State's responses to the de facto policy of school choice. They note how the State ensures greater access to existing quasi-markets, even as it asserts increasing control over

FC s 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, this nod to communitarianism — to fraternity — in the face of both egalitarian and libertarian interests, has been the source of most of the litigation surrounding educational rights.

FC s 29(3) takes these communitarian concerns seriously. To the extent that FC s 29(2) allows the right of each public school learner to tuition in their preferred official language to trump a local 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, FC s 29(3) enables linguistic, cultural and religious communities to create *independent educational institutions* that advance a particular way of being in the world. Thus, where the state declines to support such a communitarian good as a single medium public school, FC s 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.

FC s 29(4) goes FC s 29(3) one half-step better. To the extent that the needs and the concerns of South Africa's historically disadvantaged learners displace the desires of smaller communities — read Afrikaans-speaking communities — to keep public institutions as they are, FC s 29(4) announces that independent educational institutions may still be entitled to state subsidies. Thus, even on their surface, with no further explication by enabling legislation, national departmental regulations or provincial school circulars, FC s 29(1), FC s 29(2), FC s 29(3) and FC s 29(4) demonstrate the egalitarian, libertarian, communitarian and democratic tensions repeatedly reflected in our founding document. 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 FC s 29.

57.2 FC 29(1)

(a) Section 29(1)(a): Basic Education

(i) Nature of the right

(aa) Education as empowerment

The purpose of the right to a basic education is perhaps most evident in the opening lines of the Committee on Social, Economic and Cultural Rights' General Comment on the Right to 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 marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from 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

the parties whose 'legal', and thus legitimate, practices conspire to form markets in the first place.

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.⁷

Empowerment rights, such as education, serve two purposes that are not fulfilled by the majority of other rights found in Chapter 2.⁸ First, 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'.⁹ Secondly, 'they allow the individual to determine the shape and direction of his or her life.' Empowerment rights also facilitate the enjoyment of other constitutional rights.¹⁰

Beiter identifies four ways in which the right to education serves as an empowerment right.¹¹ First, education possesses the potential to liberate people from

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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. Third, education is

7 General Comment 13 (21st Session, 1999) 'The Right to Education (art 13)' UN Doc E/C.12/1999/10 at para 1. See also *Brown v Board of Education of Topeka* 347 US 483, 493 (1954):

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.'

8 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.)

9 Ibid at 234.

10 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.')

11 K Bieter *The Protection of the Right to Education by International Law* (2006) 28-30. See also Coomans (supra) at 160-161.

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 life 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. The Constitutional Assembly apparently believed that an adequate education provides the quickest route to a polity of a creative, productive and self-sufficient population of citizens — and not a country in which the majority of decisions relied on some form of state largesse.

(bb) Negative Dimension and Positive Dimension

FC ss 26 and 27 – the rights to housing, healthcare, food, water and social security – contain separate positive rights and negative rights. FC s 29(1)(a) and (b) do not draw a specific distinction 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 s 32(a),¹² the precursor of FC s 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.'¹³ Given the virtually identical wording of the two sections, the Constitutional Court would likely find that FC s 29(1)(a) confers both positive entitlements and negative entitlements.

(x) Negative dimension

By ensuring that people are not prevented from accessing existing educational resources, FC s 29 operates like an ordinary civil and political right. Any interference with the legitimate exercise of the right can be justified only in terms

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that meet the test set out in FC s 36(1).¹⁴ Schools may not refuse to admit learners of a particular race,¹⁵ or expel learners for trivial non-compliance with dress codes.¹⁶

12 IC s 32(a) read: 'Every person shall have the right — (a) to basic education and to equal access to educational institutions.'

13 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 9. The Constitutional Court has identified a similar negative dimension in FC s 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) at para 34.

14 See, further, S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34, § 34.8.

15 See *Matukane & Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T) ('*Matukane*').

16 See *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).

This negative dimension may well have horizontal application. Private or independent schools will, in terms of FC s 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.'¹⁷ FC s 29(3), when read with FC s 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 'private' educational goods.¹⁸

(y) Positive dimension

The positive right to basic education and to adult 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.¹⁹ Others refer to 'qualified' and 'unqualified' rights.²⁰ Whatever the nomenclature, the phrasing of FC s 29(1)(a) reflects a 'strong' right, 'unqualified' by any of the 'promises' or 'aspirational language' found in FC ss 26 and 27.²¹ The

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strong, unqualified character of FC s 29(1)(a) is reflected in four distinct linguistic tropes.

Firstly, everyone has the right to basic education itself, not, as might be the case in FC s 26 or FC s 27, to 'access' to basic education. Recall that in *Grootboom* the Constitutional Court interpreted the inclusion of the word 'access' in the FC s 26 right

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- 17 For a detailed discussion of FC s 8(2), see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4 (c).
- 18 See § 57.4 infra; S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31; B Fleisch & S Woolman 'On the Constitutionality of Single Medium Public Schools' (2007) 23 *SAJHR* 34.
- 19 R Kriel 'Education' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) 38-1-38-3.
- 20 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 realization; and (d) available resources. These rights are found in FC ss 26(1) and 27(1) and are qualified by FC ss 26(2) and 27(2). They are housing, health, food, water and social security. Second, unqualified positive rights encompass basic education (FC s 29(1)(a)), rights of children (FC s 28(1)(c)) and rights of prisoners (FC s 35(3)(e)). Third, other rights afford solely negative protection: FC ss 26(3) and 27(3). S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33, 33-5—33-6.
- 21 Berger asks whether the qualification in the second part of FC s 29(1)(b) is meant to apply to FC s 29(1)(a) as well. E Berger 'The Right to Education Under the South African Constitution' (2003) 103 *Columbia Law Review* 614, 638-639 n 139. This argument is, as Berger notes, entirely unconvincing. The grammar of FC s 29(1) separates the qualification in FC s 29(1)(b) from FC s 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 s 29(1)(a). In addition, FC ss 26 and 27, which include similar limitation clauses in their respective subsection (2)'s, contain specific references back to the rights in FC ss 26 and 27 (1). That the Constitutional Assembly chose such a palpably different structure for FC s 29(1) clearly suggests that the drafters did not intend FC s 29(1)(b)'s internal limitations to apply to FC s 29(1)(a).

to housing to mean that the State could fulfil its constitutional obligations by 'enabling' people to provide their own housing.²² The corollary must be that the absence of 'access' in FC s 29(1)(a) means that the State itself must provide a basic education to everybody.²³

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 s 29(1)(a) cannot be satisfied unless everyone receives a basic education. The State's 'reasonable' measures to meet its obligation cannot justify a failure to provide this good. FC s 29(1)(a)'s obligations can only be fulfilled by the provision of classrooms, teachers and textbooks.

Third, FC s 29(1)(a) is not contingent on the availability of resources.²⁴ As Seloane notes, whether the State has enough resources to fulfil its constitutional obligations does not release the State from the duty FC s 29 imposes.²⁵ 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 interpretative matter, to read in an internal limitation in FC s 29(1) that simply is not there.

Finally, the right is not subject to progressive realization. In *Grootboom* Yacoob J described progressive realization 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.²⁶

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

In sum, the text of FC s 29(1)(a) indicates that, unlike the 'traditional' socio-economic rights, the right to basic education and adult basic education is: (a) not

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

23 See M Seleane 'The Right to Education: Lessons from *Grootboom*' (2003) 7(1) *Law, Democracy and Development* 137, 140-142.

24 *Ibid* at 140-141.

25 *Ibid* at 140.

26 *Grootboom* (supra) at para 45.

subject to a reasonableness standard; (b) not dependent on the availability of resources; and (c) the source of a direct, immediate and specific entitlement.

However, despite these clear textual indications that FC s 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 s 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.²⁷

Thus, despite the difference in the texts of FC ss 26 and 27, on the one hand, and FC s 29(1)(a), on the other, the alleged 'impossibility' of providing basic education immediately may well push the Court to limit the scope of FC s 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.²⁸

The manner in which the Court has approached both qualified rights and unqualified rights also suggests that it will be hesitant to read FC s 29(1)(a) in a full and unqualified manner. 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 Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.²⁹

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

28 Berger (*supra*) at 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 (CC) at para 8. The flip side of this argument, as Berger notes, is that the Final Constitution is, quite self-consciously, a transformative and aspirational document that proclaims the ideals upon which the new South Africa must be founded. In his words: 'if championing these rights without realizing them risks emptying the Constitution, then abandoning them altogether would surely drain out even more of its content.' Berger (*supra*) at 643. The Court will, some time in the future, have to tread a fine line between placing a gloss on FC s 29(1)(a) that promises too much and a reading of this unqualified right that offers far too little.

29 *Grootboom* (*supra*) at para 22.

In interpreting FC s 26, the Constitutional Court held that '[s]ocio-economic rights must all be read together in the setting of the Constitution as a whole.'³⁰ 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 provide, after all, the basic conditions of existence — without them, the right to education, however lavishly realized, 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. This historical gloss on FC s 29(1)(a) emphasizes the restitutorial 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 s 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 s 26, the right to housing, they also claimed relief under the seemingly unqualified FC s 28(1)(c) right to shelter for children (and their families). Davis J, in the High Court, accepted FC s 28(1)(c)'s unqualified content and granted the children and families the specific remedy requested.³¹ The Constitutional Court reversed the High Court. It held that FC s 28(1)(b) required that a child's needs be provided primarily by his or her family. The obligation to provide shelter under FC s 28(1)(c) rests 'primarily on the parents or family' and, therefore, 'only alternatively on the State.'³² That primary obligation would only shift to the State if children were removed from their families. However, under normal circumstances, the State would only bear a minimal enabling duty.³³ Although education is not

30 *Grootboom* (supra) at para 24 (The 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 interconnectedness 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.')

31 *Grootboom v Oostenberg Municipality & Others* 2000 (3) BCLR 277 (C).

32 *Grootboom* (supra) at para 77.

33 The TAC Court also appears to subject the FC s 28(1)(c) right to healthcare to 'progressive realization'. See TAC (supra) at para 77. For a criticism of the Constitutional Court's approach to FC s 28(1)(c), see A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2004) Chapter 47, 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 realization of housing.') See also M Pieterse 'Reconstructing the Private/Public Dichotomy? The Enforcement of Children's Constitutional Social Rights and Care Entitlements' (2003) TSAR 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.')

mentioned in FC s 28(1)(c), the Court might 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'³⁴ by the right to education and that the right to education must therefore be read in conformity with that scheme.³⁵

The High Courts have sent mixed messages regarding unqualified socio-economic rights. In *B & Others v Minister of Correctional Services & Others*, Brand J held that the FC s 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).³⁶ 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.³⁷ When the issue of HIV medication for prisoners arose again in *EN & Others v Government of RSA & Others*,³⁸ Pillay J adopted a reasonableness standard for his evaluation of the applicants' FC s 27 and FC s 35(2)(e) claims.³⁹

The Witwatersrand Local Division has upheld a right to electricity for maximum security prisoners sourced, largely, in FC s 35(2)(e)⁴⁰. However, Schwartzman J's judgment in *Strydom* appears to fudge the justification for the outcome: he does not clearly state 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.⁴¹

34 *Grootboom* (supra) at para 71.

35 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) ('UDM'); *South African Broadcasting Corp Ltd v National Director Of Public Prosecutions & Others* 2007 (1) SA 523 (CC), 2007 (2) BCLR 167 (CC).

36 1997 (6) BCLR 789 (C).

37 *Ibid* at paras 58 and 60 ('If a proper case were to be made out by respondents that, due to the constraints of its own budget, the Department of Correctional Services could not afford the medical treatment claimed by applicants, I might have ... found that "adequate medical treatment" for applicants is dictated by such budgetary constraints. From what I have already stated, it is apparent, however, that on the facts of this case it is not necessary for me to make a definite finding on these difficult issues.' (our emphasis)) On legitimate expectations and socio-economic rights, see Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34, at § 34.2.

38 2007 (1) BCLR 84 (D).

39 *Ibid* at paras 30-31.

40 *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W) at para 15.

Woolman and Fleisch offer a reading of FC s 29(1)(a) that would explain the unqualified nature of the right in a manner that does not 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.⁴²

As Woolman and Fleisch note, 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 s 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 s 29(1)(a).⁴³ 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 to justify the limitation under FC s 36(1).⁴⁴ (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 able to raise resource constraints and the need to fulfil other constitutional obligations in showing that the limitation is 'reasonable and justifiable'.

The other way to limit the unqualified character of FC s 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 government immediately provide a basic education. A court must give an order that is just and equitable. Such an order could encompass a simple declaratory order, a suspended order or a structural interdict that would give the government an opportunity to offer a bona fide plan to realize the right to a basic

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education. The benefit of the remedial approach is that a court can simultaneously affirm the right to education, and still leave the government sufficient room to manoeuvre. The remedial approach avoids compromising rights by tying their

41 Ibid at para 17.

42 B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22(1) *Perspectives in Education* 111 n 10.

43 It is necessary to stress that, prior to any judicial gloss on its meaning, FC s 29(1)(a) ought to be given the full, unqualified reading that the text suggests.

44 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, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34, § 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.')

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 affect our understanding of the right'.⁴⁵ 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 emphasized flexibility in the provision of remedies and has held that courts must 'forge new tools' and 'shape innovative remedies' to ensure effective relief.⁴⁶ As Mokgoro and Sachs J succinctly put it in *Bel Porto*: 'It is the remedy that must adapt itself to the right, not the right to the remedy'.⁴⁷

(ii) Content of the positive right

(aa) Defining 'Basic Education'

(x) Goals and years

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, ie primary school. 'Basic education' could refer to a standard

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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?'⁴⁸

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

46 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at 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*') at 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) at 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.')

47 *Bel Porto* (supra) at 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* CCT 24/07 (Heard on 28 August 2007); *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* CCT 19/07 (Heard on 30 August 2007). At the time of writing, these cases had not yet been decided. (They have since been reported as *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC) and *Nyathi v MEC for the Department of Health, Gauteng & Another* 2008 (5) SA 94 (CC), 2008 (9) BCLR 865 (CC).)

48 E Berger 'The Right to Education Under the South African Constitution' (2003) 103 *Columbia Law Review* 614, 625.

The term 'basic' does have determinate content at international law.⁴⁹ The World Declaration on Education for All de-emphasizes the completion of specific formal programs or certification requirements.⁵⁰ Instead it stresses the acquisition of that level of learning necessary for an individual to realize 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.⁵¹

The Education Department's *White Paper on Education and Training* initially appears to endorse this reading of 'basic education'.⁵² 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 a 'basic education'.⁵³ The GEC thus shies away from an express commitment to meeting the Declaration's goals.

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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*.⁵⁴ 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.⁵⁵ 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,

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

50 See Article 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'.

51 See 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, 493 (1954); *San Antonio Independent School District v Rodriguez* 411 US 1, 112 (1973) (Marshall J dissenting); *Serrano v Priest* 487 P2d 1241, 1258 (1971); *Abbott v Burke* 575 A2d 359, 397 (1990). The German jurisprudence has taken a similar tack. See D Kommers *Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 294-304.

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

53 *Ibid* at 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 Section 3(1) of the 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 whichever ever comes first. This phase of education is also prioritised in terms of actual allocation of resources. See also Norms and Standard for School Funding General Notice 2362 *Government Gazette* 19347 (October 1998) at para 95 (Requires that in the building and extension of schools this phase of education take precedence.)

54 100 NY 2d 893 ('CFE II').

calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury'.⁵⁶ The definition therefore embraced the ability to (a) find employment and (b) participate in political life. The Appellate Division, on remand, then found that an 8th 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'.⁵⁷ It concluded that 'a sound basic education should not be pegged to the eighth or ninth grade, or indeed to any particular grade level'.⁵⁸ Thus while an 8th or 9th grade education might have served in 1894 when New York State's Fourth 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 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.'⁵⁹

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A South African court would find itself hard pressed to enforce either the New York or the West Virginia definition of basic education. Brahm Fleisch's scathing analysis of our primary school system — a function of our two parallel economies, of 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

55 Article XXII, paragraph 1.

56 86 NY 2d 316.

57 *CFE II* (supra) at 906.

58 *Ibid.*

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

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, Flesich 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 confidence. They can perform basic numeric operations but use inappropriately concrete techniques that limit application.⁶⁰

Thus, the accepted criteria for a basic education in New York or West Virginia — literacy, numeracy skills, 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 goes 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) the participation in and the promotion of government; (b) the ability to function in the economic community; (c) the inherent dignity of the individual.⁶¹

(y) Criteria for assessment

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/adequacy; (b) accessibility; (c) adaptability; and (d) acceptability.⁶² While there

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may be more to a basic education than is captured by these terms, they do provide a valuable departure point for thinking about what, practically-speaking, a basic education requires.

(aaa) Availability/Adequacy

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;

60 B Fleisch *Primary Education in Crisis* (2007) 1–2. Fleisch explains, from soup to nuts — from the absence of food, to the presence of parasites, to the lack of adequately trained teachers, especially in maths and sciences — why South Africa will not, for the foreseeable future, provide their students with a basic, let alone, adequate education.

61 A Gutmann *Democratic Education* (1987); John Dewey *Democracy and Education* (1916).

62 General Comment 13 'The Right to Education (art 13)' UN Doc E/C12/1999/10 (21st Session, 1999) ('GC 13').

for example, all institutions and programmes are 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.⁶³

This passage suggests that 'availability' is a slight misnomer. What the General Comment appears to envisage is the availability *and the adequacy* of educational infrastructure. The quality of education depends not only on the content of the curriculum, but on the material circumstances in which learners receive their education.

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.⁶⁴ 'Teaching' encompasses the quality of teaching staff and the number of teachers per learner. 'School 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, stationery and possibly computers.⁶⁵

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63 GC 13 (supra) at para 6(a).

64 *CFE II* (supra) at 908.

65 The American learning in this area is both deceptive and instructive. As Danie Brand notes, the United States case-law 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' (2003) 2 (Unpublished manuscript on file with authors). These US cases, however, engage disparities 'in *state funding* of schools generated on an unequal tax basis.' Ibid at 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.' Ibid. 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. See F Michelman 'The Supreme Court, 1968 Term - Foreword: On Protecting the Poor through the Fourteenth Amendment' (1969) 83 *Harvard Law Review* 7. As Morgan, Cohen and Herskoff 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. See S Herskoff 'Positive rights and State Constitutions: The Limits of Federal Rationality Review' (1999) 112 *Harvard Law Review* 1132; J Morgan, T Cohen & S Herskoff 'Establishing Education Program Inadequacy: The Alabama Example' (1995) 28 *University of Michigan Journal of Legal Reform* 559.

Even where minimum funding requirements have been put in place and minimum adequacy guidelines have been established, historically disadvantaged schools struggle to improve 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 SW2d 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* SW2d 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.

According to relatively recent statistics, our Department of Education has acknowledged that significant numbers of schools lack the most basic resources: water, sanitation and electricity.⁶⁶ Large numbers of schools face serious problems with class size, the quality of educators and the availability of learning materials.⁶⁷ It is, of course, extremely difficult to set a precise standard for when an absence of resources will limit FC s 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 finding innovative ways to improve education.

The second approach would eschew discrete standards — teacher/student 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 provides 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 to administrative claims of practical difficulties in fulfilling

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their mandates.⁶⁸ 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 'arbitrariness vortex'.⁶⁹ All conceivably relevant factors will be considered under FC s 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 s 29(1)(a) is that it provides little or no discernible criteria as to what will or will not fail FC s 29(1)(a)'s test for availability and adequacy.

66 The 2000 statistics reflect 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.

67 Ibid (40% of students reported classroom shortages. In 2002, there were 12 000 under-qualified teachers. By 2004, that number of unqualified teachers had dropped to 5000.)

68 See, for example, D Brand 'The Proceduralisation of South African Socio-economic Rights Jurisprudence, or 'What are Socio-economic Rights For?' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33.

69 See T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. Cf A van der Walt *Constitutional Property Law* (2006).

(bbb) Accessibility

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

(xx) Non-discrimination

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 a practice specifically prohibits members from a certain group from having access to education.

Minister of Home Affairs v Wathenuka & Another remains the only discrimination case to be decided specifically under FC s 29(1). In *Wathenuka*, the Supreme Court of Appeal struck down regulations which prohibited asylum seekers from studying in South Africa.⁷⁰ The court held that it could never be reasonable or justifiable to deny education to a child lawfully in the country to seek asylum.⁷¹ The general prohibition on study by asylum-seekers was therefore an unjustifiable limitation of FC s 29(1).⁷²

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Wathenuka stands for two further propositions. First, it reinforces the notion that 'everyone' in FC s 29(1)(a) means precisely that: FC s 29(1)(a)'s guarantees are not limited citizens or even permanent residents.⁷³ Secondly, 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 s 36(1). Both of these findings are to be welcomed. However, it is important to re-iterate that there will seldom, if ever, be a reason to refuse a child access to education, even if she is only in the country temporarily.

The second non-discrimination matter to arise in South African courts, *Harris v Minister of Education*, concerned age limits for entry into primary school.⁷⁴ In 2000, the Minister of Education published a notice that stated that from 2001 learners

70 2004 (4) SA 326 (SCA).

71 *Ibid* at para 36.

72 As the prohibition applied to all form of study, the regulation in question would limit both FC s 29(1)(a)'s guarantee of basic education, and FC s 29(1)(b)'s right to higher education. Nugent JA did not uphold the principle that asylum-seekers would always be entitled to study at an institution of their choice. He sent the matter back to the administrative body for reconsideration in light of his reconstruction of the regulation and the body's newly limited ability to exercise its discretion. *Ibid* at para 37.

73 See *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

74 2001 (8) BCLR 796 (T).

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 rights to equality and to have her best interests protected. 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.⁷⁵ Coetzee J also held that the measure limited the child's FC s 28(2) right to have her best interests be considered paramount.⁷⁶ The Minister attempted to 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.⁷⁷ Coetzee J first 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.⁷⁸ The notice was therefore declared invalid.⁷⁹

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An earlier case, *Matukane & Others v Laerskool Potgietersrus*, 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 refused to admit black learners.⁸⁰ The disgruntled black parents took Laerskool Potgietersrus to court. The school denied that it had discriminated on the basis of race. It argued, firstly, that the school was full and, secondly, that it was striving to maintain the school's Afrikaans ethos. IC s 32 ostensibly protected a certain degree of cultural homogeneity in public schools. 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 students 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

75 Ibid at 800J-804D.

76 Ibid at 804E-805B.

77 Ibid at 805C-E.

78 Ibid at 805E-806D.

79 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). The South African Schools Act makes identical provision for public schools. This section has not yet been challenged. It appears from *Harris* that 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 is borne primarily by individual parents.

80 *Matukane & Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T) ('*Matukane*').

predominantly Afrikaans character by admitting a small number of English-speaking black students. At a minimum, *Matukane* must be read as standing for the proposition that cultural exclusion cannot be used as a proxy for racial discrimination.

A third form of exclusion arises where a school's code of conduct, although seemingly neutral, excludes or punishes members of particular 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.⁸¹ 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. The 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.'⁸² Van Zyl J also emphasized the need to read any code of conduct in light of a learner's FC s 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 School Governing Body's decision.⁸³

In *KwaZulu-Natal MEC for Education v 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 and as a part of the practice her Hindu religion.⁸⁴ 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

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of Equality and Prevention of Unfair Discrimination Act.⁸⁵ 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.'⁸⁶ Chief Justice Langa also found that both religious and cultural practices should be protected and that voluntary practices could be entitled to the same protection as obligatory practices. He emphasized 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 recognizing 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

81 2002 (4) SA 738 (C).

82 *Ibid* at para 17.

83 *Ibid* at paras 18-20.

84 [2007] ZACC 21 ('*Pillay*').

85 Act 4 of 2000.

86 *Pillay* (*supra*) at para 44.

a real disruption to school activities.⁸⁷ In this case, no such evidence was presented and the Court found that Sunali should have been granted an exemption.

(yy) Financial accessibility

No person should be denied a basic education because they or their parents cannot afford school fees. That much is uncontroversial.⁸⁸ Whether FC s 29(1)(a) demands that a basic education be free to all has generated heated debate.

At international law, some support exists for the proposition that primary education (which is not necessarily equivalent to 'basic education') must be free for all. Indeed, South Africa is bound by the Convention on the Rights of the Child ('CRC') to progressively '[m]ake primary education compulsory and available free to all'.⁸⁹ However, the fact that the drafters of FC s 29(1)(a) chose the words 'basic education' and not 'free primary education' in the Final Constitution suggests that they did not intend to limit the manner in which the government could go about ensuring a basic education for all.⁹⁰ While the Bill of Rights must

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be interpreted in light of international law,⁹¹ the Final Constitution's purposeful departure from a widely used international law formulation must be respected.⁹² In sum, we would argue that while South Africa has an obligation under international law to gradually make primary education free for all, that international obligation does not automatically translate into a constitutional obligation to provide immediately free basic education.⁹³

However, some commentators have argued that the current system for financing basic education violates both FC s 29(1)(a) and FC s 9. The basic structure of the

87 Ibid at para 114.

88 See D Roithmayr 'Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education' (2003) 19 *SAJHR* 382, 394-395 (Roithmayr refers to *Grootboom* (supra) at para 36 and *TAC* (supra) at 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*.)

89 Ratified by South Africa on 16 June 1995.

90 See B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22(1) *Perspectives in Education* 111, n 10; Roithmayr (supra) at 396.

91 FC s 39(1). For more on FC s 39(1) see H Strydom & K Hopkins 'International Law and International Agreements' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30, §30.3.

92 FC s 29(1)(a)'s obligation is immediate. The CRC obligation is progressively realisable. This difference suggests that the Final Constitution prefers that a basic education be made immediately available to all, by whatever means necessary, and that basic education ought not to be postponed in order to realise a free education for all.

93 See §57.2(a)(ii)(bb) infra for further discussion of why 'basic education' in FC s 29(1) does not mean free or equal, and why solace might better be found in the commitment to equity and to historical redress in FC s 29(2).

system is as follows: South African public schools are separated into five quintiles based upon the economic wealth of the surrounding community. The top quintile receives the least funding from government while the bottom quintile receives the most. Schools are then entitled to charge fees agreed to by 51% or more of the learner's parents in order to make up for any shortfall and to provide for additional services. In order to avoid the exclusion of some poorer learners that necessarily follows from a fee scheme, the South African Schools Act⁹⁴ creates a fee exemption system. Schools that charge fees must grant full or partial exemptions to parents for whom the fees are more than a set percentage of their income. In theory, this system should comply with the obligation that education must be financially accessible to all: those who can afford to pay fees will pay and those who cannot will receive free, subsidised education.

Daria Roithmayr correctly notes that schools have not been granting exemptions to parents who cannot afford to pay, have discriminated against learners who do not pay fees and that many people are unwilling to apply for exemptions because of the embarrassment that accompanies an admission of poverty.⁹⁵ These flaws in implementation, she argues, mean that the fee-exemption system does not meet the government's obligation to provide a basic education for everyone.

Similar challenges have been brought in state courts in the United States to so-called 'fee waiver' systems. The argument is that such schemes constitute a violation of that state's guarantee of free education. For example, in *Hartzell v 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.⁹⁶ 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'

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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 education guarantee.⁹⁷ 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.⁹⁸

94 Act 84 of 1996.

95 Roithmayr (supra).

96 679 P2d 35 (Cal 1984)('Hartzell').

97 *Hartzell* (supra) at 42 (The Court held: 'Such activities are 'generally recognized 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.')

98 *Ibid* at 43.

Bird CJ further noted that the stigmatization that flows from categorising students as fee-paying and non-fee-paying and characterized both the waiver procedure and its outcomes as a 'degrading experience'.⁹⁹

Hartzell's 'fee waiver schemes' are analogous to the South African fee exemption system in two significant ways. First, they both aim to assist 'needy' families who are unable to pay the required fees. Second, the decision to charge fees, and the amount of fees charged, are determined by school governing bodies made up of both parents and educators from the communities.

No one wants a second-class, a third-class or a *no-class* education. Roithmayr has argued, persuasively, that just such an inferior education is what many, perhaps the majority, of South African primary and secondary school students receive. The problem with Roithmayr's analysis — as Fleisch and Woolman point out — is that she attempts to redress ongoing problems of adequacy, access and equality through the elimination of school fees.¹⁰⁰ Fleisch and Woolman explain why, as an empirical matter, as well as a matter of policy and law, the

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elimination of the current fee scheme will not create the conditions for an adequate basic education or a meaningfully equal education. So while we must acknowledge the validity of some of the concerns raised by Roithmayr, as well as by the California Supreme Court in *Hartzell*, we remain unconvinced that these problems (of implementation) warrant a finding that a fee-exemption system is necessarily unconstitutional.¹⁰¹

First, the empirical evidence strongly suggests that school fees are in fact *not* the primary financial obstacle to education. Rather, other education-related costs -

99 Ibid at 44. But see *Chandler v South Bend Community Corp* (1974) 312 NE 2d 915 (A child challenged the charging of rental for textbooks on the basis that it violated the state constitutional guarantee to free education. The Court however took the view the textbooks did not fall within the ambit of the guarantee and accordingly did not have to deal with whether the waiver scheme was unconstitutional.)

100 Let us assume, for the sake of argument, that Roithmayr's comparison of Pretoria Boys High School to a tree school in Limpopo demonstrates to the Justices that some impairment of human dignity, and perforce, 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) and thus not improve the human dignity of the 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 school-going 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, *schadenfreude* 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 fee system entails just such a result.

101 Roithmayr and Fleisch/Woolman's respective positions would, at first blush, seem entirely antithetical. However, the self-conscious irony of Roithmayr's article flows from her recognition that a system of user fees may well be necessary to ensure the progressive realisation of equality, quality and accessibility in our public schools. Fleisch and Woolman note this convergence in their respective positions and the extent to which these shared beliefs require retention of and modification to the existing user fee system in public schools. See Fleisch & Woolman 'On the Constitutionality of School Fees' (*supra*) at 119-120.

transport, uniforms, food, books and stationary — constitute far more serious barriers to access.¹⁰² As a result, while school fees are an easily identifiable barrier

to access to a small cohort of schools, it does not follow that school fees, rather than uniform costs or the scarcity of schools in rural areas, are to blame for the exclusion of many learners from many, if not most, public schools. Second, eliminating school fees will remove several billion rand from the public fiscus and diminish the capacity for multiple forms of cross-subsidization between privileged and impoverished communities.¹⁰³ Learners from poor and working class families can secure access to

102 See Fleisch & Woolman 'On the Constitutionality of School Fees' (supra) at 113-114. Fleisch and Woolman note that the Vuk'nyithate Research Consortium (VRC) findings relied on by Rothmayr actually support their claims. First, the VRC study of out-of-school children demonstrates that the reasons for a family's decision not to enrol children in school was not primarily related to fees, but was the result of 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. However, 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. 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' (2000) *Vuk'uyithathe Research Consortium*. 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.' Ibid at 36. 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. Ibid at 36-43. 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.' School fees for the children in 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% of the population, school fees do not appear to be a meaningful factor for access or attendance. Ibid at 43-44. According to Perry, 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 actual proportion of children between 7 and 13 years attending school stands at 97%. See H Perry & F Arends 'Public Schooling between 1975-2000' in A Kraak (ed) *A Directory of Human Resource Development in South Africa* (2003).

103 Elimination of school fees would not only eliminate R3.5 billion from the public purse for public school education. It would mean that all schools would be entitled to the same minimum per learner expenditure — and whatever level of inadequacy that may entail. State expenditure on education will increase slightly over the next few years. Department of Finance *Review of the Financing, Resourcing and Costs of Education in Public Schools* (2003) 52. However, such growth will not offset the loss associated with the discontinuation of fees (8%). Department of Education *Intergovernmental Fiscal Review* (2003) 79.

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?

more privileged institutions through effective fee exemption. Fees enable the State to direct money away from schools in the top quintiles to schools in the bottom quintiles. Fees keep middle class parents from leaving the public school system: by remaining within the system, good school stock is preserved (through private funding) and learners from more privileged backgrounds remain committed, as citizens in training, to such democratic institutions as public schools.¹⁰⁴ Finally, the arguments against school fees are based

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almost entirely on problems of implementation and abuse by schools. In our view, the answer to these problems is, and has always been, the proper enforcement of the regulations and the elimination of fees for the poorest schools.

In 2005, government, while keeping the basic fee exemption system intact, made a few important changes. Under the new system, the government classifies each school as either a 'fee school' or a 'no-fee' school.¹⁰⁵ No-fee schools must be schools

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.' E Fiske & H Ladd 'Financing Schools in Post-apartheid South Africa: Initial Steps toward Fiscal Equity' Paper prepared for the International Conference on Education and Decentralisation: African Experiences and Comparative Analysis, Johannesburg, (10-14 June 2002) (On file with authors) 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. It seems clear 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. However, if equality is to be a meaningful concept, then it must take cognizance of improvements in opportunity and outcome which realise palpable differences in the lives of the less well off. The primary issue for those concerned with inegalitarian distributions should be whether citizens of unequal economic standing in a democracy will remain equals in so far as they engage one another as citizens. Fleisch & Woolman 'On the Constitutionality of School Fees' (supra) at 119.

104 Two further policy considerations suggest the intrinsic value of a user fee system. Both are grounded in a commitment to participatory democracy. The first argument based on 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 and white parents happy. However, the ultimate aim of user fees is not to reinscribe existing patterns of class disparity. Rather the current system, or a modified system, 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 government funding — may 'further important principles of community engagement and interdependence'. D Brand 'Community Participation and User Fees' (Unpublished manuscript on file with authors). By promoting community engagement and parental responsibility, even a modified fee system may 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.' Ibid at 4. See also Fleisch & Woolman 'On the Constitutionality of School Fees' (supra) at 121.

105 For a useful summary of both the old and new regulatory schemes, see F Veriava 'The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier?' (2007) 23 *SAJHR* 180.

in 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% or more of their annual income. Partial exemptions are available to parents for whom the fee forms between 2% and 10% of the learner family's income.¹⁰⁶

Despite these improvements, Faranaaz Veriava has charged that the new system still falls short of FC s 29(1)(a)'s obligations.¹⁰⁷ Indeed, it is possible that a proper evidentiary platform could be laid for a challenge to the fee exemption system. However, the evidentiary basis necessary to support a finding of unconstitutionality will have to show that such abuse 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 a better education by a significant cohort of learners. Moreover, we think that any Brandeis brief challenging fees in toto must overcome the presupposition of SASA's drafters — and ourselves — that a well-calibrated fee system can be used to improve the education of learners from historically disadvantaged backgrounds.

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(zz) Physical accessibility

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.'¹⁰⁸

(ccc) Acceptability

We often presume that education, no matter what its content, is an unalloyed good.¹⁰⁹ But that is not so. Education can just as easily be manipulated to perpetuate human rights abuses as it can to end them.¹¹⁰ International law requires that education be 'directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.'¹¹¹ The Constitutional Court has reinforced the view that teaching children the value of

106 The new norms include other changes to improve the fee-exemption system to make it easier for poor learners to get exemption and 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 (supra) at 187.

107 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 students travel to school in richer areas with fee-charging schools. Ibid at 188-189.

108 Porteus, Clacherty & Mdiya (supra) at 44 as quoted in Fleisch & Woolman 'On the Constitutionality of School Fees' (supra) at 114.

109 K Beiter *The Protection of the Right to Education by International Law* (2006) 493.

human rights — and in particular the values of equality and diversity — is essential if they to become adults who fully participate in the governance of our society.¹¹²

While our courts will likely be loath to interfere with the judgment of educators who design school curricula, FC s 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*, the US Supreme Court overturned a state law that prohibited the teaching of evolution.¹¹³ In *Edwards v Aguillard*, the US Supreme Court hewed to an even stricter

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line in finding unconstitutional a law that permitted evolution to be taught only in conjunction with creationism.¹¹⁴ In *Edwards*, Brennan J stressed the

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 student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.¹¹⁵

A similar situation occurred in post-World War II 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.'¹¹⁶ 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

110 Ibid at 493 (The author quotes an example of the Special Rapporteur of 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 1970's, 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.')

111 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.

112 *Pillay* (supra) at para 104 ('Teaching the constitutional values of equality and diversity forms an important part of education.')

113 397 US 97 (1968).

114 482 US 578 (1987).

115 Ibid at 584.

experiments on 3000 people in northern China. The Court found that reliable evidence existed to substantiate the claim.¹¹⁷

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*, 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.¹¹⁸ 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.¹¹⁹

'Acceptability' also requires that learners are not treated in a manner that violates their dignity. In South Africa, corporal punishment and initiation practices are

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banned in all schools.¹²⁰ The ban on corporal punishment was the subject of a constitutional challenge in *Christian Education South Africa v Minister of Education*.¹²¹ The applicants contended that the ban violated their FC s 15 and FC 31 rights to religious belief 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 to 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.¹²²

(ddd) Adaptability

116 *Ienaga v Japan* No 1428 of 1986 (16 March 1993).

117 *Ienaga v Japan* No 1119 of 1994 (29 August 1997).

118 [1996] 1 SCR 825, 133 DLR (4th) 1.

119 *Ibid* at para 82.

120 SSA s 10; SSA s 10A.

121 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC).

122 *Ibid* at para 50.

Education must be 'flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.'¹²³ Adaptation, like accessibility, speaks to the content of the curriculum and the means of deploying that content. The advent, and ubiquity, of computer technology probably requires that learners leave school properly equipped for the modern social and work environment.

Adaptation also means that a curriculum and a school environment must adapt to accommodate diverse people. This obligation dovetails with the right to non-discrimination. The accommodation of disabled learners is a paradigmatic example of the requirement of adaptability.¹²⁴ The constitutional obligation to ensure that differently 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.¹²⁵

Although some South African schools cater for disabled learners, they are in the minority and are unevenly spread across the provinces.¹²⁶

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(iii) Adult Basic Education ('ABE')

The right to an adult basic education receives the same degree and the same kind of constitutional solicitude afforded all learners in terms of the right to basic education. Thus, while the right to ABE might not, as a technical or a textual matter have been necessary,¹²⁷ the express inclusion of ABE in the Final Constitution emphasizes the importance of redressing the past inequalities of South African education under apartheid. Indeed, a delay in the realization of the right will undermine one of the main reasons the drafters specifically mentioned it in the Final Constitution.

The right to ABE is not solely reactive. Rule identifies three further purposes: (a) to improve personal and community development; (b) to foster democracy; and (c)

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

124 See Beiter (supra) at 507.

125 *Pillay* (supra) at para 74.

126 B Bekink & M Bekink 'Children with Disabilities and the Right to Education: A Call for Action' (2005) *Stellenbosch Law Review* 125, 138-139, 144 (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.) 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.)

127 R Kriel 'Education' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) 38-4 (Kriel points out, firstly, that the World Declaration on Education for All simply states that all people, including adults, are entitled to a basic education without mentioning ABE separately. Secondly, ABE was not included in the Interim Constitution, but was still government policy.)

to develop sustainable livelihoods.¹²⁸ Rule criticizes current efforts because they appear to view ABE as an instrumental good designed solely to achieve economic growth.¹²⁹ From a constitutional perspective, the instrumental good is only of passing concern. ABE must be provided because it promotes dignity, equality, community, and democracy: in other words, ABE, like all forms of education, is intended to realize ensure the basic law's commitment to a society based upon liberty, equality and fraternity.

The Adult Basic Education and Training Act ('ABETA')¹³⁰ defines ABE¹³¹ as all learning or training programmes for people over 16 up to the qualitative equivalent end of compulsory schooling.¹³² As noted in the above discussion

128 P Rule "'The Time is Burning": The Right of Adults to Basic Education in South Africa' (2006) 39 *Journal of Education* 113, 122-123.

129 Ibid at 120.

130 Act 52 of 2000.

131 The Act refers to 'adult basic education *and training*'. FC s 29(1)(b) refers only to adult basic education. Rule notes that this change reflects 'an official preoccupation with linking Education and Training'. Rule (supra) at 115. For the purposes of the constitutional right, there does not seem to be any meaningful difference between training and education. ABETA itself does not draw a distinction between the two. For the purposes of this chapter, we do not attempt to distinguish between 'education' and 'training'.

132 The Act refers to 'framework level 1 as contemplated in the South African Qualifications Authority Act, 1995'. Level 1 is defined as:

A learning programme leading to the award of a qualification or unit standards at NQF level 1 shall develop learners who demonstrate with regard to:

(a) applied competence—

- (i) a general knowledge of one or more areas or fields of study, in addition to the fundamental areas of study;
- (ii) an understanding of the context within which the learner operates;
- (iii) an ability to use key common tools and instruments;
- (iv) sound listening, speaking, reading and writing skills;
- (v) basic numeracy skills including an understanding of the symbolic systems;
- (vi) an ability to recognise and solve problems within a familiar, well-defined context;
- (vii) an ability to recall, collect and organise given information clearly and accurately; and
- (viii) an ability to report information clearly and accurately in spoken and written form;

(b) autonomy of learning—

- (i) a capacity to apply themselves to a well-defined task under direct supervision;
- (ii) an ability to sequence and schedule learning tasks;
- (iii) an ability to access and use a range of learning resources; and
- (iv) an ability to work as part of a group.

of basic education, these terms should be defined by substantive outcomes and not by formal criteria. Properly understood, ABE is basic education for adults and the definition of ABE simply uses the expected substantive outcome of compulsory schooling as a readily identifiable benchmark.¹³³ Indeed, it is only a benchmark: no reason exists to deny ABE to adults who received nine years of schooling under apartheid when the quality of that education likely failed to meet the currently accepted criteria for a basic education.¹³⁴

The nature of the right to ABE is much the same as the right to a basic education: it is immediate, direct and does not depend on the availability of resources. The unqualified nature of the right raises innumerable questions about delivery in a country where, according to the most recent census, 8.6 million people over the age of 20 (34.9%) are functionally illiterate.¹³⁵ The difficulties in realizing the right must not dilute its content: genuine difficulties in delivery must be addressed — as a constitutional matter – through a combination of limitations analysis under FC s 36 and the crafting of innovative remedies in terms of FC s 38 and FC s 172.

In an attempt to meet these challenges, the legislature enacted ABETA. ABETA establishes a scheme of both public and private centres for ABE. Public centres are funded by the government and may, if other facilities cannot be found, make reasonable use of school facilities. The Act, however, contains three troublesome features. First, s 18, while requiring that centres do not discriminate in their admissions procedures, permits the Head of Department to refuse an application without the provision of reasons for refusal. Secondly, s 23 mentions that centres may raise funding through monies 'payable by learners for adult basic education and training provided by the centre'. However, the Act provides no regulation with regard to those fees or any possibility for an exemption. The legislative framework would seem to contemplate financial exclusions

— and thus an obvious prima facie limitation on the right to an adult basic education. Finally, ABETA criminalizes the offering of non-ABETA sanctioned ABE.¹³⁶ While these penalties may serve as a guarantee of quality, they have the potential (1) to discourage the provision of ABE, and (2) by requiring supervision by a state bureaucracy, to make ABE more expensive to provide.¹³⁷

133 On increasing the breadth of adult education, see S Walters 'Adult Learning Within Lifelong Learning: A Different Lens, A Different Light' (2006) 39 *Journal of Education* 7 (Walters contends that the focus on adult education improperly limits the scope of life-long adult learning. She may be correct that, as a matter of policy, we should not focus unduly on basic education but concentrate equally on lifelong learning. However, as a matter of constitutional interpretation, it seems that 'adult basic education' should be given the same meaning as 'basic education'.)

134 Rule (supra) at 115.

135 Statistics South Africa *Census 2001: Primary Tables South Africa: Census '96 and 2001 Compared* (2004) 37. The definition of functionally illiterate is the combination of those who have no schooling and those who did not complete primary schooling. See J Aitchison & A Harley 'South African Illiteracy Statistics and the Case of the Magically Growing Number of Literacy and ABET Learners' (2006) 39 *Journal of Education* 89, 90.

136 ABETA s 38.

The Act faces serious barriers to effective implementation. ABE is primarily funded by provincial education departments. In 2002, provincial departments allocated a mere 0.8% of their budgets to ABE. In 2004/5 that figure dropped to 0.5%.¹³⁸ In addition, the number of Public Adult Learning Centres and the number of NGO's offering ABE has actually decreased over recent years.¹³⁹

A further statistic indicates that the political support for ABE is more a matter of rhetoric than reality. South Africa has ratified the Dakar Framework of Action. The Framework would require South Africans to decrease levels of adult illiteracy by 50% by 2015. That commitment would require the education of some 7 million South African adults. At present, only 260 000 adults are enrolled in ABE programmes. The government would have to more than double that figure to 575 000 to have any hope of meeting that target.¹⁴⁰

ABE is further undermined by its conflation of basic education with skills training for the workplace.¹⁴¹ Firstly, skills-training does not necessarily provide the same outcomes as a basic education. Secondly, skills-training tends to focus on the employed. It thereby fails to connect adult illiteracy with large-scale structural unemployment (and abject poverty).¹⁴²

(iv) Looking in the wrong place for 'free and equal' public schools

FC s 29(1)'s 'basic education' requires adequate, 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 s 29(1). First, FC s 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 s 9(2) and FC s 9(3) commits the state to the eradication of inequality on a host of listed (and unlisted) grounds.

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(b) FC s 29(1)(b): Further Education

The Department of Education has identified the following three roles of further education in 'a knowledge-driven world':

137 See J Aitchison 'Struggle and Compromise: A History of South African Adult Education from 1960-2001' (2003) 29 *Journal of Education* 125, 161-162.

138 RA Wildeman *Reviewing Provincial Education Budgets 2002* (2002) 16.

139 Rule (supra) at 117 and 121.

140 Ibid at 124.

141 Ibid at 121.

142 Ibid at 117-118.

Human resource development: the mobilisation of human talent and potential through lifelong learning to contribute to the social, economic, cultural and intellectual life of a rapidly changing society.

High-level skills training: the training and provision of personpower to strengthen this country's enterprises, services and infrastructure. This requires the development of professionals and knowledge workers with globally equivalent skills, but who are socially responsible and conscious of their role in contributing to the national development effort and social transformation.

Production, acquisition and application of new knowledge: national growth and competitiveness is dependent on continuous technological improvement and innovation, driven by a well-organised, vibrant research and development system which integrates the research and training capacity of higher education with the needs of industry and of social reconstruction.¹⁴³

The differences in purpose between a basic education and a higher education should be kept in mind as we consider the constitutional obligations that a right to further education imposes upon the State.

(i) Nature of the right

Unlike the strong positive right enshrined in FC s 29(1)(a), FC s 29(1)(b) provides only a 'weak' or 'qualified' positive right. It reads:

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

The right to further education is quite clearly qualified by the terms 'reasonable measures'¹⁴⁴ and 'progressively available and accessible'. The Constitutional Court has, for better or worse,¹⁴⁵ made 'reasonableness' the bedrock of its socio-economic rights jurisprudence and has begun to give significant content to the term. Generally, the Court requires a comprehensive and coordinated plan, and

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that the plan be genuinely capable of implementation.¹⁴⁶ 'Progressive realisation' requires the state to 'move as expeditiously and effectively as possible towards

143 Department of Education *Education White Paper 3: A Programme for the Transformation of Higher Education* (1997) 12.

144 FC s 29's wording is slightly different from that of FC ss 26 and 27. FC ss 26 and 27 employ the phrase 'reasonable legislative and other measures'. However, the catch-all 'other' in FC ss 26 and 27 seems to eliminate any meaningful difference between the two formulations.

145 For a sustained critique of the reasonableness approach, see D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007). See also S Liebenberg 'Socio-Economic Rights: Evaluating Reasonableness Review and Minimum Core Obligations' in S Woolman & M Bishop (eds) *Constitutional Conversations: Proceedings of the Constitutional Law of South Africa Conference and Public Lecture Series* (forthcoming 2008).

146 Sandra Liebenberg identifies five basic elements of a reasonable programme mentioned by the Court in *Grootboom*:

(a) it must be comprehensive and co-ordinated;

(b) it must be capable of realising the right;

(c) both the conception and implementation must be reasonable;

[fulfilment of the right]. Moreover, any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified'.¹⁴⁷ The State is thus obliged to ensure that access to further education does not decrease and that it is improved with all deliberate speed. Finally, although it is not specifically phrased as an 'access right', the qualification that the State need only make the right 'progressively available and accessible' suggests that it should be interpreted much like the access rights found in FC s 26 and FC s 27.

However, FC s 29(1)(b) does not, unlike the rights in FC ss 26 and 27, include the phrase 'available resources'. While some commentators have argued that the absence of this phrase should be largely ignored,¹⁴⁸ we prefer a reading that gives the difference in wording some real bite. Veriava and Coomans contend that a lack of resources alone will not justify a failure to make further education 'available and accessible' and that the state *must* make the necessary funds available. At the very least, Veriava and Coomans argue, it would entail that

where a state policy or programme is challenged in terms of this right, the criteria for assessing the reasonableness of the programme, could, in addition to those set out in *Grootboom*, also entail an evaluation of the sufficiency of funding available for the policy or programme's implementation.¹⁴⁹

(ii) Content of the right

(aa) Defining 'Further Education'

The term 'further education' is not used in international law. International law refers instead to 'secondary education' and 'higher education'.¹⁵⁰ In South Africa,

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the Further Education and Training Colleges Act distinguishes between 'general education' (compulsory schooling), 'further education' (everything up to matriculation) and 'higher education' (everything after matriculation). However, that distinction does not make sense in the context of FC s 29(1). FC s 29(1) makes

(d) it must be balanced and flexible and cater for the short, medium and long terms;

(e) it must be capable of responding to urgent needs.

S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33, 33-34.

147 Committee on Economic, Social and Cultural Rights General Comment 3 'The Nature of States Parties Obligations (art 2)' U.N. Doc. E/1991/23 (5th Session, 1990) at para 9. The Constitutional Court accepted the meaning assigned to the phrase by the General Comment in *Grootboom* (supra) at para 45. For more on 'progressive realisation', see Liebenberg 'Interpretation' (supra) at §33.5(g).

148 D Davis 'Education' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law* (2nd Edition, 2005) 24-5-24-6.

149 F Veriava & F Coomans 'The Right to Education' in D Brand (ed) *Socio-economic Rights in South Africa* (2003) 74.

150 See, for example, ICESCR art 13(2); San Salvador Protocol to the Inter-American Convention for Human Rights art 13(3); Convention on the Rights of the Child art 28(1); African Convention on the Rights and Welfare of the Child art 11(3).

mention only of 'basic' and 'further' education. The only sensible interpretation of 'further education' in terms of FC s 29(1) is that it denotes all education after basic education.¹⁵¹ It seems unnecessary and unwise to provide any further — or more restrictive — definition of the term. It should cover any and all forms of education that do not fall under 'basic education' or 'adult basic education'. Such education would encompass technical and vocational training as well as traditional tertiary education. It should embrace secondary education and pre-primary education if such schooling is not captured by the extension of the term 'basic education'.¹⁵²

(bb) Negative Dimension of the Right

Only two cases directly address FC s 29(1)(b).

In *Minister of Home Affairs & Another v Watchenuka*, the Supreme Court of Appeal held that an absolute ban on study by asylum seekers, including further education, constituted an unjustifiable limitation of FC s 29(1)(b).¹⁵³ However, the Supreme Court of Appeal did endorse a procedure that would require asylum-seekers to apply for permission to study.

In *Thukwane v Minister of Correctional Services*, the applicant was a prisoner attempting to complete his law degree from prison.¹⁵⁴ He argued that he needed access to a computer and the internet to complete his studies. Van Loggerenberg AJ recognized that even this slight interference with the applicant's studies limited his FC s 29(1)(b) right.¹⁵⁵ However, the High Court held that the 'prison is a place of incarceration, not an internet café, private training institution, university campus, university hostel or the like'.¹⁵⁶ The potential security risks of permitting the applicant to access the internet combined with the fact that the ban would last only as long as the applicant was incarcerated — and only precluded him from courses that required internet access — easily justified the limitation.¹⁵⁷

Thukwane stands for two important propositions. First, prisoners have the right to further education. Second, any interference with access to further education, no matter how slight, limits FC s 29(1)(b). The Constitutional Court has made it clear

151 Veriava & Coomans (supra) at 74-75.

152 While the term 'further' would seem to apply only to education that is more advanced than a basic education, that need not be so. 'Further' can also be read, as suggested here, as simply meaning any education that is not 'basic'. The advantage of this reading is that it would require the state to gradually introduce early childhood learning. The alternative interpretation would mean that, despite its proven benefits, early childhood education would not raise any constitutional obligations.

153 2004 (4) SA 326 (SCA).

154 2003 (1) SA 51 (T).

155 Ibid at para 44 read with para 24.

156 Ibid at para 39.

157 Ibid at para 44.

that prisoners do not lose their rights at the prison door.¹⁵⁸ With regard to the second proposition, any limitation of this 'negative right' must take place in terms of FC s 36(1). In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*, the Constitutional Court reached a similar conclusion regarding the limitation of the negative right found in FC s 26(1). Mokgoro J held that 'any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(1)'.¹⁵⁹ Limitations of negative rights can, therefore, only be justified in terms of FC s 36(1).

One of the more interesting issues to arise under FC s 29(1)(b)'s 'right to further education' involves affirmative action admission policies. In *Motala & Another v University of Natal*, the applicant challenged the admission procedures of the University's medical school on the basis that it treated Black applicants better than Indian applicants.¹⁶⁰ She argued both that the measure constituted unfair discrimination and that that it impaired her right under IC s 32(a) to 'equal access to educational institutions'. Hurt J dismissed both claims. He held that although both groups had been mistreated under apartheid, black South Africans had suffered considerably greater disadvantage than Indian South Africans. Granting black South Africans preferential treatment did not, therefore, fall afoul of the prohibition on unfair discrimination.¹⁶¹ More importantly, for present purposes, Hurt J held that although IC s 32(a) applied to institutions of higher learning, IC s 32(a) had to be read — in the instant matter — with IC s 8(3)'s promotion and protection of measures designed to rectify historical wrongs.¹⁶²

Questions of affirmative action policies in universities have not generated the same degree of heated debate in South Africa as they have in the United States. However, the continued existence of ethnic tensions in South Africa and the competition for limited university spots will likely lead to a challenge similar to *Motala*. In our view, the basic claim was correctly disposed of by Hurt J. A similar analysis should flow from the provisions of the Final Constitution. A policy which denies a person access to further education because of their race or their ethnicity would undoubtedly limit FC s 29(1)(b). However, that limitation could be justified in terms of FC s 36(1) *if it was properly designed to redress past discrimination*. And that is the acid test. The question is not whether affirmative admissions policies are acceptable. FC s 9(2) disposes of that question.¹⁶³ The question is, and will continue to be, what types of policies are constitutionally permissible? Can a university have a strict quota system? Can it make race a decisive factor? Or must race be only one of many factors?

158 *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at paras 18-19.

159 *Jaftha v Schoeman & Others; van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at para 34.

160 1995 (3) BCLR 374 (D).

161 *Ibid* at 383B-D.

162 *Ibid* at 383E-F.

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

The US Supreme Court has adopted the requirement that an affirmative action policy must be 'narrowly tailored' to achieve the outcome of redress and must grant only the minimum necessary preference to disadvantaged candidates. The Court famously rejected strict quotas in *Bakke*.¹⁶⁴ In two recent cases decided together, *Gratz v Bollinger*¹⁶⁵ and *Grutter v Bollinger*,¹⁶⁶ the Court gave further content to what would and would not be permissible. Both cases concerned affirmative action policies at the University of Michigan. In *Gratz*, the Court invalidated the School's undergraduate admission program. The program assigned up to 150 points to each student: 20 points were awarded if the applicant was Black, Latino or Native American. The *Gratz* Court found that the system gave dispositive weight to an individual's race and did not permit individualized review. By contrast, the law school's admissions policy at issue in *Grutter* made race a relevant factor. However, rather than adopt a mechanical algorithm, the policy required that each applicant to be evaluated individually. The Court upheld that program.

The different history and constitutional framework of the United States suggests caution when using their precedents to understand uniquely South African concerns. However, a respectful engagement with US jurisprudence does serve to highlight a range of possible responses to affirmative action or restitutionary programmes. That said, FC s 9(2)'s explicit constitutional endorsement of measures to address past inequalities should lead to far greater leniency from our courts when evaluating affirmative action admissions policies. The political,¹⁶⁷ legislative¹⁶⁸ and constitutional demand for transformation will mean that *Motala*-like programmes, which would undoubtedly have been rejected in the US, will survive constitutional scrutiny under the Final Constitution.¹⁶⁹

(cc) Positive Dimension of the Right

164 *Regents of the University of California v Bakke* 438 US 265 (1978).

165 539 US 244 (2003).

166 539 US 306 (2003).

167 See Department of Education *White Paper 3* (supra) at 18 ('The principle of equity requires fair opportunities both to enter higher education programmes and to succeed in them. Applying the principle of equity implies, on the one hand, a critical identification of existing inequalities which are the product of policies, structures and practices based on racial, gender, disability and other forms of discrimination or disadvantage, and on the other *a programme of transformation with a view to redress. Such transformation involves not only abolishing all existing forms of unjust differentiation, but also measures of empowerment*, including financial support to bring about equal opportunity for individuals and institutions.' (our emphasis).)

168 See the preambles of the National Student Financial Aid Scheme Act 56 of 1999 and the Higher Education Act 101 of 1997 ('it is desirable to redress past discrimination and ensure representivity and equal access') and s 39(1) of the Higher Education Act ('The Minister must, after consulting the CHE and with the concurrence of the Minister of Finance, determine the policy on the funding of public higher education, *which must include appropriate measures for the redress of past inequalities*, and publish such policy by notice in the Gazette.' (our emphasis))

169 See C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35.

The positive dimension of the right to a further education does not mean that everybody may study whatever course wherever they please. Indeed, at international law, the right is limited by the phrase 'equally accessible on the basis of capacity'. And it is worth taking note of the international community's construction of this phrase, before we turn back to our own. As Beiter notes, 'capacity' possesses two distinct denotations.¹⁷⁰ First, it denotes an individual applicant's intellectual capacity.¹⁷¹ Second, it denotes the quantitative ability of educational institutions to accommodate students.¹⁷² While the text of FC s 29(1)(b) does not mention capacity, we believe that the drafters would have assumed both forms of capacity — as internal demarcations of the right — before granting this positive entitlement.

Institutions of further learning need not admit (grant access to) students who lack the requisite intellectual capacity to complete a course of study. To require institutions to do so will prevent them from producing the kind of graduate who would serve the three ends of further education described above. At the same time, selection criteria based solely on previous school results would have the undesirable consequence of barring access to a large segment of the population who have historically received and continue to receive inferior schooling. And thus schools, and especially universities, in South Africa must take into account — in some instances — the limited capacity of some of its matriculants during the admissions process. Universities could, and do, base entrance on tests that 'assess the potential of students whose schooling results do not necessarily qualify them for university entrance but who nevertheless through these tests demonstrate an ability to succeed at university.'¹⁷³ They could also admit students for a probation period or create bridging courses to help disadvantaged students reach levels necessary for the meaningful use of further education.

Institutional capacity creates a related set of problems. No authority exists for the proposition that further education should be free. It should, rather, be affordable for all those who wish to pursue it.¹⁷⁴ That may not be immediately possible, but the State must make reasonable steps to ensure that further education becomes gradually more accessible. One example of government action to achieve that goal is the establishment of the National Student Financial Aid

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170 K Beiter *The Protection of the Right to Education by International Law* (2006) 524-525.

171 According to Gerbert, the following methods would be acceptable methods to ascertain a student's capacity: (a) successful completion of prior education; (b) entrance exams; (c) occupational experience; (d) an interview; (e) a period of probation; (f) or a combination of the above. P Gerbert *Das Recht auf Bildung nach Art. 13 des UNO-Paktes über wirtschaftliche, soziale und kulturelle Rechte und seine Auswirkungen aus das schweizerische Bildungswesen* (1996) 461 cited in Beiter (supra) at 524.

172 Beiter notes that the state may only restrict student numbers for acceptable reasons. It may not, for example, pander to the needs of the labour market. Beiter (supra) at 524.

173 Veriava & Coomans (supra) at 75.

174 Ibid at 76.

Scheme (NSFAS). The scheme provides loans and bursaries to students.¹⁷⁵ The NSFAS is funded primarily by government and the repayment of previous loans.¹⁷⁶ The criteria for eligibility for a loan are simply academic potential and financial need.¹⁷⁷ In 2005, it assisted 106 852 students,¹⁷⁸ 92.7% of whom were Black.¹⁷⁹ The total value of the awards was R1.2 billion.¹⁸⁰ Today's totals reflect a marked increase from 1994: only R70 million was awarded to just 25 574 students.¹⁸¹ Of course, the NSFAS is not the only way that government funds further education. Government funds public universities and technikons directly,¹⁸² provides money for research and research facilities¹⁸³ and facilitates further skills training in the workplace.¹⁸⁴ However, the greatest benefit of the student aid scheme is that, like the fee-exemption policy, it reserves benefits for the students most in need of aid, and through loan repayments provides an additional source of revenue.

57.3 Language rights in public schools¹⁸⁵

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.

175 Act 56 of 1999.

176 NSFAS *Where Does the Money Come From?* available at <https://www.nsfas.org.za/web/view/donors/Donor/home> (accessed on 22 October 2007)(74.42% came from Government and 18.25% from loan repayments.)

177 NSFAS *Student Guide to Funding* available at https://www.nsfas.org.za/resources/109/NSFAS_universityBrochure011.pdf (accessed on 22 October 2007) 2.

178 NSFAS *2006 Annual Report* (2006) available at <https://www.nsfas.org.za/resources/169/NSFASAnnualReport2006.pdf> (accessed on 22 October 2007) 10 (fig 2).

179 *Ibid* at 11 (fig 3).

180 *Ibid* at 11.

181 NSFAS *NSFAS Fact Sheet* available at <https://www.nsfas.org.za/web/view/general/statistics/loanstatistics> (accessed on 22 October 2007).

182 Higher Education Act 101 of 1997 s 38G(1).

183 National Research Foundation Act 23 of 1998.

184 Skills Development Act 97 of 1998.

185 Much of this section is drawn from B Fleisch and S Woolman 'On the Constitutionality of Single Medium Public Schools' (2007) 23 *SAJHR* 34.

(a) Historical background

Conflict around the issue of language informs just about every stage of this Republic's history.¹⁸⁶ According to Giliomee, the language issue began to smoulder

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in the ashes of the South African War 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 appointments to the civil service were required to be bilingual, Afrikaners were vastly underrepresented. The reason: few Afrikaner children finished the seventh year of school required for state employment.¹⁸⁷

The political pressure for single medium education surfaced 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 percent to 62 percent.¹⁸⁸ 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, South Africa possessed a complex network of language practices and an equally complex arrangement of single medium, dual medium and parallel medium institutions.¹⁸⁹ This surface complexity masked the increasingly strong shift, amongst 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.¹⁹⁰ 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

186 For the general contours of this history, see LM Thompson *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).

187 See H Giliomee 'The Rise and Possible Demise of Afrikaans as Public Language' (2004) 10(1) *Nationalism and Ethnic Politics* 25.

188 See EG Malherbe *Education in South Africa: Volume 2* (1977).

189 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 Bilingualism in South Africa* (1946).

190 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.

emphasized 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:

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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.¹⁹¹

Despite the fact that both political parties clearly understood that language policy was a powerful mechanism for both galvanizing 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.'¹⁹² 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.

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.¹⁹³ The Eiselen Report made a strong case for compulsory *African* language instruction — for *African* students — 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.¹⁹⁴ The foundation for such a

191 EG Malherbe *Education in South Africa* (supra) at 39.

192 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 has the shortcoming that diminishing numbers of a particular language group puts tremendous pressure on that language and may in practice lead to an institution eventually becoming single medium... . [I]n parallel and dual medium schools the English component is numerically becoming progressively larger and that in relation, the other language component of such schools is becoming smaller and marginalized. Many parallel medium schools will eventually become completely English medium.

R Malherbe Submission to President Nelson Mandela on Behalf of a Group of Afrikaans Organizations (15 May 1996).

193 Republic of South Africa 'Report of the Commission on Native Education: Chair: WNN Eiselen' (1951). See also LE Meyer 'A Report on South Africa's Black Universities' (1959) 4(3) *Issue: A Journal of Opinion of the African Studies Association* 12.

community for true believers and politicians alike was the 'single language school'.

To impose this vision of the good life and its requirement of single medium schools upon a largely resistant populace required social engineering on an unprecedented scale.¹⁹⁵ 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.¹⁹⁶

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 Education had overplayed their hand.¹⁹⁷

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. Interim Constitution s 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.'¹⁹⁸ Negotiations in the Constitutional Assembly around the issue of single medium schools under the Final Constitution were rather protracted and led to a deadlock between the ANC and the NP.¹⁹⁹

194 For a fuller account of the issues of language in Bantu Education, particularly the work of WNN Eiselen as one of the key architects of apartheid, see C Kros *Economic, Political and Intellectual Origins of Bantu Education, 1926-1951* (Unpublished PhD thesis, 1996, University of the Witwatersrand).

195 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).

196 See Hartshorne (supra) at 203-207.

197 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 onward, 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 identified the source of the high failure rate and subsequent drop-out problem as the abrupt shift from mother-tongue to English 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.)

198 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

The ANC, which viewed single medium Afrikaans schools as vehicles for continued racial exclusion and the perpetuation of minority privilege, refused to sanction any reference to single medium schools in the Final Constitution.²⁰⁰ The NP, which viewed single medium 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 good will 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 single medium schools. 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 schools in the Final Constitution. Here – again – is the result of that compromise — FC s 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.

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 Afrikaner rule? FC s 29(2) does not support either of these two readings. It rather raises the question of the extent to which the particularist demands of linguistic communities can be accommodated in our public schools.²⁰¹ FC s 29(2) also draws

199 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). On the history of the negotiations for the Final Constitution, see G Heald *Learning Amongst Enemies: A Phenomenological Study of the South African Constitution Negotiations from 1985 to 1998* (Unpublished PhD thesis, 2007, on file with authors); I Currie & J De Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 1, 23; S Woolman & J Swanepoel 'Constitutional History' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 2.

200 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, (accessed on 1 December 2006). Evidence to support this supposition has emerged in recent work on school financing. Motala has recently shown that Afrikaans single medium schools continue to be financially advantaged in terms of state expenditure even after the end of apartheid. S Motala *Education Transformation in South Africa: Finance Equity Reform in Schooling after 1998*. (Unpublished PhD thesis, 2005, University of the Witwatersrand).

201 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 No. 17* (2004); W Visser '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).

our attention, in the form of its sister clause FC s 29(3), to the space that the Final 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.²⁰²

There exists, after some twelve years of constitutional jurisprudence, a sizeable 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 Final Constitution vouchsafes the right of school governing bodies 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 section of the chapter attempts to answer the following question: does South Africa's legal regime guarantee existing public single medium Afrikaans institutions — or any single medium school — the right to retain their language policies? It 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 constitutional 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 comes to the establishment and the maintenance of single medium public schools.

However, this section takes a fairly 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 Final Constitution, the South African Schools Act ('SASA'), the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') and our courts' nascent jurisprudence — on to the admissions policies and language policies of public schools, this section arrives at the following conclusions. First, some real 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 'language and culture' will not be so readily permitted to determine the admissions policies of a public school and that single-medium Afrikaans schools are fighting

a rear-guard, and potentially losing, battle with the State over transformation.²⁰³ Third, the upshot of this legal analysis is that communities which 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 s 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

202 S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31.

to create independent schools if they wish to be assured of retaining their cultural and linguistic integrity.

(b) Drafting history of the language provisions in the Interim Constitution and the Final Constitution

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.

For starters, before the 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.²⁰⁴ 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 utilization of rights discourse reflected a considered rhetorical response to romantic assertions of white, Christian, English and Afrikaner supremacy.

The African National Congress ('ANC') 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

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'racial group rights'.²⁰⁵ 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.²⁰⁶ 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

203 This battle is not only being lost in the courts. Students themselves are choosing English medium (or at least parallel-medium public) schools over single-medium Afrikaans 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 2% 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. On the other hand, no number, large or small, can be used to justify overt discrimination or radical inequity in the distribution of such an important public good as education.

204 See A Sachs 'Opening Remarks' *KAS Multiculturalism Seminar* (1999) available at www.kas.org.za (accessed on 1 April 2005) 1; H Giliomee 'The Majority, Minorities and Ex-nationalities in South Africa and the Proposed Cultural Commission' *KAS Multiculturalism Seminar* (1999) available at www.kas.org.za (accessed on 6 January 2005) 37.

205 See S Woolman 'Community Rights: Religion, Language and Culture' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 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, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F.

provisions concerned with culture, eight with language and four with religion.²⁰⁷ The Final Constitution, as a liberal political document, carves out the 'private' space within which self-supporting cultural, linguistic and religious formations might flourish.²⁰⁸

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')(1996), 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.²⁰⁹ IC s 32 (c), (soon thereafter, FC s 29(3)), 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

206 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 right of minorities to seek recognition as distinct societies and to resist assimilation into a common national culture. See South Africa 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 B de Villiers (ed) *Birth of a Constitution* (1994) 89, 93. IC s 31 attracted near universal assent because, though 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 to the NP. The NP believed that white minority interests would be better protected at the level of distribution of governmental power, rather than by judicial mechanisms. The National Party 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 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 the eleven South African languages to be treated as official languages. See African National Congress *A Bill of Rights for a New South Africa: Preliminary Revised Version* (1992) arts 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.

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

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.²¹⁰

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.

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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, and 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-theorized that it leaves us with no useful guidance as to how the State ought to engage the religious, cultural and linguistic communities that make the State up and how those communities ought to engage one another.

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.²¹¹ State-sponsored discrimination would not be tolerated. The *Fourie* Court did not make the same demands of religious denominations 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

208 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-actualization 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 — that sought to further the ends of the community through single medium schools. But this last conclusion is, of course, where the rubber meets the road. The extent to which the Final Constitution protects 'public' space and provides 'public' goods in the service of particularist ends is the question at issue. Liberal constitutional theory, with its dual commitments to 'equality of respect' (individual dignity) and 'equality of recognition' (pluralism), is invariably at odds with itself over claims made on state resources for the particular ends of a specific cultural, linguistic or religious community. See S Woolman 'Community Rights: Language, Culture and Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa: Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58. See also C Taylor *The Ethics of Authenticity* (1991).

209 *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*').

210 *Ibid* at paras 39-42.

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.²¹² But therein 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 requirements of the rights to equality and to dignity.²¹³

211 *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'). See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA).

212 The *Fourie* Court wrote:

[The amici's] arguments raise important issues concerning the relationship foreshadowed by the Constitution between the sacred and the secular. 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... . In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred... . 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 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 (supra) at paras 90-96. The *Fourie* 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 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.

213 See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. See also N Haysom 'Dignity' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 123.

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 Final 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.²¹⁴

FC s 15(2) offers another clear example of state accommodation of comprehensive visions of the good within existing state structures. FC s 15(2) 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 observances. Assume learners from several different religions attend a given public school: the public school may legitimately observe multiple religious rituals for its different

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constituencies. In either case, public space is being used to advance the ends of specific religious communities.²¹⁵

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 Final 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.²¹⁶ 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. The traditional leaders exercise public power in public spaces.

The Final Constitution also places customary law on an equal footing with legislation, subordinate legislation, regulation and common law. FC s 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.' FC s 39(2) says nothing about two bodies of law — one

214 Woolman & Soweto-Aullo 'CRLC' (supra).

215 See P Farlam 'Freedom of Religion, Conscience, Thought & Belief' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41. See also I Currie & J De Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 336.

216 See TW Bennett & C Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26.

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.'²¹⁷ 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.²¹⁸ However, it is the 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 characterizes the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. By having

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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 as frozen in statute and case law that 'emphasizes ... patriarchal features and minimises its communitarian ones,' the *Bhe* Court closes the gap between constitutional imperative and customary obligation.²¹⁹ 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).'²²⁰ 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 re-working of customary understandings of the competence 'to own and administer property' in a manner that vindicates a woman's right to dignity under FC s 10.²²¹ 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.²²² And so, again, there are not two bodies of law — one public, one private. The force of all law flows from one body of law: the basic, the constitutional.

217 *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) at para 44.

218 *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*').

219 *Bhe* (supra) at para 89.

220 *Ibid* at para 83.

221 *Ibid* at para 84.

This brief constitutional history of community rights — and especially the rights of 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, the sacred and the profane, in South African politics. That said, the Final Constitution's active encouragement of diversity and pluralism in the 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.

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(c) Legal Framework for Admissions Policies and Language Policies in Public Schools

As we noted at the conclusion of the last section, the public space afforded for the advancement of sectarian interests — be they religious, linguistic or cultural — 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 school space for sectarian ends is even more tightly circumscribed. Thus, while independent schools benefit from FC s 29(3)'s clear commitment 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.²²³

(i) Language rights and the Final Constitution

Earlier on, we noted that the Constitutional Court's (and other commentators') gloss on IC s 32(c) was quite generous. Recall that IC s 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*, characterized IC s 32's entitlements as follows:

222 Judge Hlophe employs a similar disabling strategy in *Mabuza. Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C). He recognizes 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, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64.

223 See S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31.

[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.²²⁴

Again our liberal democratic Constitution permits communities to establish institutions — such as schools — designed to further their preferred way of being in the world. However, there is no concomitant commitment 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 new constitutions which do oblige the state to fund schools 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:

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"(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.²²⁵

Chaskalson does note, however, that his findings are limited to the text of IC s 32(c).

FC s 29 is both more and less expansive with respect to the latitude afforded parents of learners in both independent schools and private schools. FC s 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 s 29(3) is on all fours, it would seem, with the gloss placed upon IC 32(c) by Justice Kriegler in *Gauteng Education Bill* and Advocate Chaskalson in his memorandum.

The real action, in so far as public schools are concerned, revolves around FC s 29(2). FC s 29(2) is a complex provision. It 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.

224 *Gauteng School Education Bill* (supra) at para 42.

225 M Chaskalson 'Constitutional Issues Relevant to School Ownership, Governance and Finance' *Durban Education Conference Paper* (1995, on file with authors).

It is possible to identify two interpretive poles for this passage. At one end of the spectrum, some commentators contend that FC s 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, other commentators contend that FC s 29(2) vouchsafes continued state support for all single medium public schools, and, in particular, single medium Afrikaans schools.

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

Let's begin with the uncompromisingly egalitarian position defended by Blade Nzimande.²²⁶ Nzimande construes FC s 29(2)'s second sentence requirements as matters of administration and policy, and not constitutional law. Though FC s 29(2)'s second sentence may provide a rather weak test for justification, it

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does not turn the choice of medium of instruction into a matter of mere policy preference. Moreover, FC s 29(2) does not, as Advocate Chaskalson suggested of IC 32, possess the structure of an affirmative action provision. FC s 9(2) provides the perfect example of a constitutional norm whose aim is restitutionary justice.²²⁷ Whereas FC s 9(2) differentiates between groups that have been historically disadvantaged and those that have not, FC s 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 criteria of equity, practicability and redress. As we have consistently been at pains to point out, the Final Constitution, as a liberal political document, does not view all social, legal and economic arrangements through the prism of equality and reparations.

Commentators such as Rassie Malherbe, occupying the opposite end of the ideological spectrum, contend that FC s 29(2) provides a strong guarantee — a rebuttable presumption — that linguistic communities can create and maintain publicly funded single medium schools.²²⁸ With respect, Malherbe misreads FC s 29(2). He collapses, repeatedly, 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 schools.²²⁹ FC s 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

226 See B Nzimande 'Address to the Constitutional Assembly — 7 May 1996' available at www.polity.co.za (accessed on 1 December 2006).

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

228 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 I: Education Rights in South Africa' (2000) 4(1) *European Journal for Education Law and Policy* 49. Malherbe's positions on FC s 29(2) are not new. He articulates virtually the same point of view in R Malherbe 'Reflections on the Background and Contents of the Education Clause in the South African Bill of Rights' (1997) 1 *TSAR* 85.

229 Malherbe 'Constitutional Framework' (supra) at 21.

for delivering mother-tongue instruction — *one* of which is single medium schooling — must satisfy, to some degree, the three criteria of equity, practicability and historical redress. Malherbe characterizes the three FC s 29(2)(a)-(c) criteria as mere factors to be considered in some global proportionality assessment. This characterization of the three criteria is 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 Final 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,

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single medium institutions should be the first option'.²³⁰ 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 recognize 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 only be a 'first option' for mother-tongue instruction if it meets the three threshold criteria of equity, practicability and redress. Finally, that Malherbe's obvious interest in protecting single medium public schools leads him to misread FC s 29(2) — virtually in its entirety — is made patently 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'.²³¹ This statement is false. As the above language of FC s 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*'.²³²

Given the above analysis, we believe FC s 29(2) should be parsed as follows.

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(ii) FC s 29(2) and the Right to Receive Education in the Official Language of Choice

FC s 29(2) grants all learners 'the right to receive education in the official language or languages of their choice in 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.²³³ The right is subject to a standard of reasonable practicability. How should this internal limitation of the right be read?²³⁴ We suggest that where sufficient numbers of learners request instruction in a preferred language — and, as we shall see below, we do possess regulations, as well as standards and norms, that make clear what those numbers are — and no *adequate alternative*

230 Malherbe 'Constitutional Framework' (supra) at 22.

231 Ibid (Our emphasis).

232 FC s 29(2)(Our emphasis). For another reading of FC s 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:

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.²³⁵

(iii) FC s 29(2) and the Right to Receive Education in the Official Language of Choice, Where that Education is Reasonably Practicable

Before we proceed to the second sentence in FC s 29(2), it is worth taking another look at the meaning of 'reasonably practicable'. As an evidentiary matter, the learner or 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

The Constitution does not guarantee mother-tongue education for minorities, as does for example section 23 the Canadian Charter of Rights and Freedoms. The Constitution, however, guarantees the right in public institutions to education in the language of one's choice. This 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 in a particular school... . This is in keeping with the internationally practised sliding scale formula: the larger the number of speakers of a language in a particular area, the greater the obligation to provide mother-tongue education in that area... . Furthermore, the Language in Education 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. In this regard, the 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. This would mean that where, for example, there are equal numbers of students 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 students 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. Here factors such as resources and numbers of teachers will play a role. Finally, the need to redress the imbalances of the past is emphasised. Thus, 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 school remains a single-medium school. That position is not consistent with the DoE's language policy, international practice or the text of FC s 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 official language speakers. For a critique of Bekker and Mahlerbe's positions on linguistic rights, 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.

- 233 *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA).
- 234 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, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.
- 235 See *High School Ermelo & Another v Head of Department Mpumalanga Department of Education & Others* [2007] ZAGPHC 232 (17 October 2007).

instruction in Sepedi in a single medium IsiZulu school may be hard pressed to demonstrate that it is reasonably practicable to accommodate her at a single medium IsiZulu school. An inability to establish reasonable practicability would be even more pronounced where the learner, who preferred instruction in Sepedi, possessed 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 s 29(2) inquiry.

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(iv) The State's Obligation to Ensure Effective Access to and Implementation of the Right to Instruction in an Official Language and its Relationship to Single Medium Public Schools

Assume that a 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 s 29(2).²³⁶

The second sentence of FC s 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; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices.' The second sentence of FC s 29(2) makes it patently clear 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 schools in no way privileges such institutions over dual medium schools, parallel medium schools, or schools that accommodate the multilingualism of the student body in some other way. All that this portion of FC s 29(2) requires is that the state consider 'all reasonable educational alternatives' that would make mother tongue or preferred language instruction possible.

However, even if single medium public schools are found to be one of the reasonable alternatives for preferred language instruction, the single school medium school must be able to satisfy a three factor test. That is, for a single medium 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, of practicability and of historical redress.

FC s 29(2)'s concession to single medium schools is quite weak indeed. It is, in fact, not really a right at all. It is, perhaps, best described as a right to have reasons or an entitlement to justification for the State's refusal to sanction a single medium public school. That said, this entitlement is not without value for proponents of single medium public schools. What the second sentence of FC s 29(2) ultimately requires is that the State be able to justify its preference for one form of school instruction over another. Given the Final 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

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

learners in question. Moreover, the Final Constitution's recognition 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 must be taken seriously. For where preferred language instruction is reasonably practicable, and where single medium 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 Final Constitution is, ultimately, a post-apartheid constitution. Thus, at the same time as it sets its face against exclusion and discrimination, it rejects the totalizing view of the apartheid state. 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.²³⁷ But however narrow it may be, it cannot be entirely wished away.

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

(v) Statutory and Regulatory Framework for Linguistic Rights

The apposite 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')²³⁸ rejects unfair discrimination on any grounds. The Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA')²³⁹ and regulations passed under the Gauteng School Education Act²⁴⁰ subject admissions requirements at public schools to even stricter scrutiny than the enabling legislation.²⁴¹ While these regulations expand — in line with FC s 9 — the

237 One reader asked, given our reading of FC s 29(2), 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 Khoi-San medium public school is necessary because of the historical disadvantage experienced by the Khoi-San people. FC s 29(2) expressly recognizes equity and historical redress as appropriate grounds for the creation of single-medium public schools — as well as parallel-medium or dual-medium schools. The irony, of course, is that FC s 29(2) arguments are being deployed by communities that, over the past 50 years at least, have been historically privileged.

238 Act 84 of 1996.

239 Act 4 of 2000.

240 Act 6 of 1995.

241 Regulations passed under the GSEA s 11(1) and the Gauteng Education Policy Act 12 of 1998 ('GEPA'), s 4(a)(i), entitled 'Admission of Learners to Public Schools' General Notice 4138 of 2001 (PG 129 of 13 July 2001).

grounds for a finding of unfair discrimination with respect to admission policies, they do not make it *absolutely* impossible for a school governing body to run a public school with a particular comprehensive vision of the good life in mind. That said, FC s 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 work to further restrict the space within which single medium institutions can operate. For example, SASA s 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 statement of the school.' One can't over-emphasize the importance of this provision. Some school governing bodies 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 s 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 the National Education Policy Act.²⁴² 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 s 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

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human resources ... and providing alternative language maintenance programmes in schools ... that cannot be provided with ... additional languages of teaching.²⁴³

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 large 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, again, is that the new South African State is not, unlike the apartheid state, a totalizing entity. It will not subordinate the plural, comprehensive visions of the good held by 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 totalizing 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 — especially single medium Afrikaans public schools — are 'encouraged' to maintain their current cramped sense of identity.

(vi) Case Law on Single Medium Public Schools: Matukane; Middelburg; Mikro; Seodin; Ermelo

Given the argument that has proceeded, advocates of single medium public schools may find our contention that single medium public schools are actually 'encouraged' by the Final Constitution to maintain their identity and to retain their integrity difficult to believe. After all, 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 appear to evince nothing more than the State's desire to rid itself of single medium Afrikaans-speaking public schools.²⁴⁴ What is beyond doubt, however, is that the case law demonstrates that the primary fault line in public school admissions policy litigation occurs around the use of Afrikaans as the sole medium of instruction.

243 These policy statements are drawn from the language in education policy in terms of NEPA s 3(4) (m) and the *Norms and Standards Regarding Language Policy Published in Terms of Section 6(1) of the South African Schools Act, 1996 Government Notice No 383, Vol 17997* (9 May 1997).

244 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. In the past, before 1998, pupils were locked into a system that privileged Afrikaans and English for those in search of a matric endorsement. That is now no longer true and all languages will now be equally available as subject choices.

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 s 29(2) or other applicable laws.²⁴⁵ The 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 Final Constitution and our courts refuse to endorse any 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 has made it patently clear that it recognizes 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.²⁴⁶ 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 Final Constitution vouchsafes significant amounts of private space within which various comprehensive visions of the good can be pursued.

MATUKANE²⁴⁷

As one might have predicted, the State has weighed in on the side of black students who wish to receive instruction in English, but found themselves excluded from Afrikaans medium, or predominantly Afrikaans medium, schools. At issue in

245 We would like to emphasize that the grounds for deciding these five cases do not generally 'fit' within the analytical rubric supplied by FC s 29(2) and the gloss we place on FC s 29(2). As most readers of South African case law and jurisprudence know, South African courts prefer technical textual solutions over answers to 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), 2002 (11) BCLR 1164 (CC) ('UDM') (Court strikes down legislation because the government failed to pass the Act in the timeframe required by the Final Constitution rather than finding the legislation invalid in terms of FC s 19 or a more basic commitment to a principle of democracy.) See, especially, I Currie 'Judicious Avoidance' (1999) 15 SAJHR 138 (Endorses the proposition, first articulated in *Mhlungu*, that courts ought to avoid deciding the issues before them in terms of constitutional dictates.) See, further, C Sunstein *One Case at a Time* (1996). It seems reasonable to conclude, given this disposition of our courts, that our courts have avoided addressing the extent to which FC s 29(2) vouchsafes single medium public schools because the matter is so politically charged. As we shall see, 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 s 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 and concentrate their attention on the internal logic of a judgment or set of judgments. The internal logic of the five judgments speak pretty directly to the appropriate contours of FC s 29(2).

246 See *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) ('Fourie'); *KwaZulu-Natal MEC for Education & Others v Pillay* [2007] ZACC 21.

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

Matukane & Others v Laerskool Potgietersrus was the attempt by the parent of three learners, Mr Matukane, to enroll 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 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'). 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 a group of black parents and students and white parents and students 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 other English medium 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 neighboring town — despite the fact that a school catering to Afrikaans-speaking students 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.

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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 students and 89 English-speaking students. 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 Section 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 school governing body 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 students 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 students to English-speaking students 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 IC s 8's listed grounds, 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 s 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.²⁴⁸ 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 students 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.

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MIDDELBURG²⁴⁹

Laerskool Middelburg & 'n ander v Departementshoof, Mpumalanga Departement van Onderwys, & andere extends the holding in *Matukane* from parallel-medium to single-medium schools. However, in *Laerskool Middelburg*, the High Court was clearly more troubled by the conflict between the right to a single-medium 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 Department of Education's attempt to turn the single medium school into a parallel medium school. It held that neither SASA, nor the regulations issued under them, authorised the provincial Head of the Department 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.²⁵⁰ The *Laerskool Middelburg* court then rejected the Department's argument that the applicant school's admission policy discriminated unfairly against English learners. The High Court held that in circumstances in which the English learners could be accommodated elsewhere, the Department's actions simultaneously violated the FC

248 *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).

249 2003 (4) SA 160 (T) ('*Laerskool Middelburg*').

250 *Ibid* at 171-172, 176.

s 29(2) right of Afrikaans-speaking students to single medium schools and the FC s 29(2) right of English-speaking students to an education in the official language of their choice in public educational institutions.²⁵¹

Having notified the State that it had failed to take cognizance of FC s 29's commitment to linguistic diversity, 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 s 28(2)'s guarantee that 'the best interests of the child' are always of 'paramount importance' was held by *Laerskool Middelburg* court to trump the language and cultural rights of the school's Afrikaans learners.²⁵² 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 court.

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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 s 29(2) offered above is correct, then the *Laerskool Middelburg* court should never have had to rely on FC s 28(2). In terms of FC s 29(2), the court should have first determined whether it was 'reasonably practicable' to accommodate English-speaking students in Laerskool Middelburg. The court's conclusion — that the only public school in the area had to take in 20 local learners — suggests that it was 'reasonably practicable'. That should, or could, have been enough. But further support for the court's conclusion can be found in the second sentence of FC s 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 court's conclusion that a single medium school must, in order to accommodate these 20 learners, become a parallel-medium school is consistent with a reading of FC s 29(2) that makes it patently clear that single-medium institutions are but one way of accommodating the right of a learner to instruction in the language of choice and that the mere mention of single medium schools in no way privileges such

251 Ibid at 173 and 175.

252 In deciding that the 'minority' students must be accommodated, the *Laerskool Middelburg* court correctly concluded that the right to a single-medium public educational institution was clearly subordinate to the right which every South African had to education in a similar institution and to a clearly proven need to share education facilities with other cultural communities. The *Laerskool Middelburg* court seems to be on far shakier grounds when it suggested 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 or cultures. Moreover, the court's claim that a single-medium institution was probably best defined as a claim to emotional, cultural, religious and social-psychological security trivializes the desire to maintain basic, constitutive attachments. The desire to sustain a given culture — especially a minority culture, as Afrikaner culture now is — is best served by single-medium institutions that reinforce implicitly and expressly the importance of sustaining the integrity of that community. As a result, 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 organized around its language and culture. Ibid at 173. That is, with respect, exactly what the conversion *per se* does.

institutions over parallel medium schools or dual medium schools. The second sentence of FC s 29(2) — and its commitment to equity, practicability and historical redress — provides further justification for the *Laerskool Middelburg* court's conclusion that a single-medium institution was obliged, under the circumstances, to become a parallel-medium institution.

MIKRO²⁵³

At issue in *The 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 Department of Education 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.

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The Supreme Court of Appeal summarily rejected both the WCDoe's reading of the Norms and Standards and its gloss on FC s 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 constitute a guideline for members of the department and those parties responsible for the governance of public schools. Second, the Supreme Court of Appeal held that SASA s 6(1) grants 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 authorize him or her to authorize 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 s 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.'²⁵⁴ 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 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.'²⁵⁵ The Supreme Court of Appeal held that the correct reading of FC s 29(2) affords the State significant latitude in deciding how best to implement this right and that FC s 29(2) grants everyone a right to be

253 *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*').

254 *Mikro* (supra) at para 30.

255 *Ibid.*

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 individual schools were entitled to offer instruction in a single medium.

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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 s 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. Where, as in *Mikro*, it is not reasonably practicable to give English speaking students instruction at a single medium Afrikaans speaking 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 s 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 school — in circumstances where adequate English medium instruction was 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 very narrow set of conditions — legitimately trump purely ideological commitments to equity.

*SEODIN*²⁵⁶

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 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 school 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 Final Constitution will not tolerate racist and discriminatory admissions policies masquerading as policies that claim to be about the need to maintain the language

256 *Seodin Primary School v MEC Education, Northern Cape* 2006 (4) BCLR 542 (NC), [2006] 1 All SA 154 (NC) ('*Seodin*').

and the culture of a given community. As Northern Cape Judge President Frans Kgomo noted in his judgment:

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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.²⁵⁷

ERMELO²⁵⁸

Hoërskool Ermelo offers perhaps the best set of circumstances under which to assess — in terms of FC s 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 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 Department of Education to dissolve the school's governing body and to replace it with a departmentally appointed committee. The dissolution would have enabled the Mpumalanga Department of Education to alter the school's language policy and would have allowed 113 English-speaking pupils to receive instruction in English.²⁵⁹

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 public school must admit English-speaking pupils.²⁶⁰ 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 s 29(2) — for the high school to accommodate the 113 grade eight learners.²⁶¹ The mere fact that all classrooms were being employed and that the existing curriculum turned on the current availability of classrooms

257 *Seodin* (supra) at para 56.

258 *Hoërskool Ermelo & 'n Ander v Departement van Onderwys & Andere* [2007] ZAGPHC 4 (2 February 2007)

259 Judge Bill 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 the other schools in the area. Prinsloo J ruled that his interim order should stand until a full hearing on the matter was held. The Department of Education 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. In addition, the Mpumalanga DoE claimed 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 1200 students and carried a mere 589 in some 30 classrooms at the time of litigation.

260 *High School Ermelo & Another v Head of Department Mpumalanga Department of Education & Others* [2007] ZAGPHC 232 (17 October 2007) ('*Ermelo II*').

261 It is also important to note that much of the *Ermelo II* court's decision turned on the power of the provincial government to withdraw the powers of the School Governing Body to determine language policy and to determine that language policy itself.

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 — the three express grounds for assessment of existing language policy in terms of FC s 29(2) — justified the transformation of Hoërskool Ermelo from a single medium public school into a parallel medium public school.

The numbers of the other primarily black schools in the immediate vicinity are worth noting. Ligbron Academy of Technology possesses 20 classrooms and accommodates 917 learners; Ermelo Combined School has 14 classrooms and accommodates 463 learners; Lindile School possesses 29 classrooms and accommodates 1799 learners; Cebisa School has 19 classrooms and accommodates 926 learners; Ithafa School possesses 36 classrooms and accommodates 1677 learners; Reggie Masuku School has 21 classrooms and 804 learners. Hoërskool Ermelo, the applicant, had 32 classrooms for 589 learners.²⁶² Judge President Ngoepe and his fellow judges believed that the numbers — schools such as Lindile and Ithafa teach three times as many learners as Hoërskool Ermelo in a comparable space — spoke for themselves.

While the conclusions of the *Hoërskool Ermelo II* court are hard to gainsay, the court's inability to undertake basic fundamental rights analysis is troubling — and does little to advance our understanding of the structure of FC s 29(2). The first paragraph the *Ermelo II* court devotes to FC s 29(2) analysis reads as follows:

Counsel for the applicants submitted that the admission of English speaking learners would prejudice the rights of the Afrikaans speaking learners. Section 33 provides that the rights contained in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. From the above provisions it is clear that, firstly, a learner has a right to basic education; secondly, that no right is unlimited. In case of competing rights, it becomes necessary to balance them. In the present case, the rights of the current learners of Ermelo High School to enjoy an extended curriculum which is offered at their school must be balanced against the right to basic education of the learners who would otherwise not gain admission to any school. Assuming for a moment that there is such an encroachment of the rights of the current students, that, in our view, would constitute a reasonable and justified limitation insofar as it limits the enjoyment of an extended curriculum which offers far more than the basic government curriculum. But, as already mentioned, the real difficulty for the applicants is that they have not placed before the courts the facts showing precisely in which way the current students would be prejudiced. They are also vague on the nature of the prejudice to be suffered.²⁶³

First, general limitations analysis occurs under FC s 36 — not FC s 33. Second, FC s 29(2) is clear about the State's obligations with regard to the right to education in an official language and its duty to investigate the manner in which that right would be best accommodated. Third, since FC s 29(2) does not grant a right to single medium public schools, there cannot be a conflict of rights. An appellate court would do well to reconsider the *Ermelo II* court's mode of analysis and frame the discussion largely, if not entirely, in terms of FC s 29(2).

262 *Ermelo II* (supra) at 26.

263 *Ibid* at para 62.

A second paragraph — quoting the judgment of Olivier J in *Hoërskool Victoria-Wes en Andere v Die Departementshoof, Departement van Onderwys, Noord-Kaapse Provinsiale Regering* — makes somewhat better sense of the matter:

To my understanding, actions such as these (introducing dual medium of instruction) by the respondent would not in any way unreasonably affect the integrity of the applicants or their collective components. Mr Colditz suggests in this regard that the respondent's decision regarding dual medium instruction infringes the rights of the Afrikaans learners in terms of Section 29(2) of the Constitution. I fail to understand this argument. Section 29(2) guarantees the right to education 'in an official language or language of choice...' This however does not include the situation where dual-medium instruction is implemented. In such a situation, the Afrikaans learners will in predetermined times receive their lessons in Afrikaans, which ultimately is their language of choice, and then they will receive the same lesson again, in the same period, but in English this time. I cannot imagine how such a system could infringe any rights of the learners in terms of Section 29(2).²⁶⁴

Olivier J, and by extension Ngoepe JP, recognize that FC s 29(2) only entitles a learner — be they Afrikaans or not — to instruction in the official language of their choice (where practicable). It does not entitle a learner to any particular arrangement — single-medium, dual-medium, parallel-medium or special education. Both Olivier J in *Hoërskool Victoria-Wes* and Ngoepe JP in *Hoërskool Ermelo II* reach the right conclusion: FC s 29(2) does not guarantee the right of any learner to a single medium public school.

(vii) Current Status of Single Medium Public Schools

The foregoing account supports a number of relatively uncontroversial conclusions. The Final Constitution — and a broad array of statutes — recognize 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 the affairs of a given religious, linguistic and cultural community, and those learners who do not wish to participate in or advance the ways of being of a given community. The Final 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

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advance legitimate constitutional ends.²⁶⁵ However, when it comes to public schools, the State's tolerance for discrimination of any kind — even via means narrowly tailored to realize 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 s 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 schools to continue to exist. However, the Final 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 Final Constitution's answer to those parents who wish to school their children in the language, culture or religion of their

264 Case No 357/2004 (Northern Cape Division, Unreported) 17 at para 42 (translation Natasha Sott).

choice is straightforward: you may 'dig into your own pocket' and build an independent school on 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 Final 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 s 29(2) reinforces the proposition — at 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, neither a School Governing Body 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

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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.²⁶⁶

265 See S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31. See also *Taylor v Kurtstag* [2004] 4 All SA 317 (W)(FC s 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 17 of the [I]nterim Constitution and s 18 of the [Final] Constitution recognise the freedom of association. [IC] Section 14(1) and [FC] s 15(1) respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith etc. 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.')

266 The wilful misconstruction of the constitutional space that exists for single-medium 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 anglicize in the name of greater access will cease. Currently several Afrikaans schools countrywide are subject to such pressure, with possible court action involved. 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" (June 27, 2005) available at <http://vryeafrikaan.co.za/lees.php?id=272> (accessed on 24 January 2007).

Let us be clear. The Final Constitution neither provides a guaranteed right to single-medium public schools nor does it prohibit the existence of such institutions. The Final Constitution sets its face against the kind of cultural and linguistic hegemony that marked apartheid and, at the same time, recognises the necessity of a multiplicity of patterns of school language policy. The principle constitutional norms that bracket language policy do not entail some ideological pre-commitment to any particular language practice: say English over Afrikaans, or IsiZulu over IsiXhosa. 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 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 schools' language policy. In the absence of such reasons, our courts will view state-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 s 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 Final Constitution again has an

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answer. Under FC s 29(3), they may 'dig into their own pocket' and build the school on their own time and in their own fashion.²⁶⁷

57.4 Language rights in independent schools²⁶⁸

(a) Community Rights and Language Rights in a Liberal Constitutional Order

This section answers the following question: to what extent may independent schools discriminate fairly between learners in order to advance the legitimate constitutional objectives of various religious, cultural and linguistic communities? A close reading of the Final Constitution tells us that while our basic law does not guarantee a right to single medium public schools, faith-based public schools or culturally homogenous public schools, FC s 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. The answer regarding the extent to which these FC s 29(3) schools may discriminate lies in a close analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act. Rightly construed, PEPUDA contemplates the ability of independent schools to advance linguistic, cultural and religious understandings of the good in a manner that may,

267 See *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) at para 42.

268 Much of this section is drawn from S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, if not Comprehensive Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31.

on its face, look discriminatory. 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.

This space is not insignificant. For as we have just seen, 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 one of the authors has argued elsewhere,²⁶⁹ the Final Constitution does not guarantee a right to single-medium public schools, faith-based public schools or culturally homogenous public schools.

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However, it bears repeating that for those learners and their parents who want to know whether they are entitled to create and to maintain a school that furthers a particular linguistic, cultural or religious way of being in the world, the Final Constitution has a much more sanguine response. Under FC s 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 vision of the good. The justification for the drafter's choice lies in the recognition that it 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, so far as independent schools that further a particular way of being in the world are concerned, is 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 that are made available in these communal formations and that cannot be easily accessed elsewhere.

(b) State Attempt's 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 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 one of the authors has argued elsewhere 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.²⁷⁰ Whether the issue was school choice, school fees, the medium of instruction, teacher-hiring, or language policies, the fragile post-

269 See S Woolman 'Community Rights: Religion, Culture and Language' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58; B Fleisch & S Woolman 'On the Constitutionality of Single-Medium Public Schools' (2007) 23 *SAJHR* 34.

apartheid State of the mid-1990's crafted legislation and regulation that divided management, governance and policy-making responsibilities between national

government, provincial government, provincial Heads of Department, 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 legitimization 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 benefitted 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 such ascriptive identifiers as language, religion or culture. What the State failed to take sufficiently seriously was the ability of individual parents 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' right to equality.²⁷¹ 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.²⁷² *Harris*

270 See B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22(1) *Perspectives in Education* 111; S Woolman & B Fleisch 'South Africa's Education Legislation, Quasi-markets and School Choice' (2006) 24(2) *Perspectives in Education* 1; B Fleisch & S Woolman 'On the Constitutionality of Single-Medium Public Schools' (2007) 23 *SAJHR* 34; S Woolman & B Fleisch 'South Africa's Unintended Experiment in School Choice: How the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act Create the Enabling Conditions for Quasi-Markets in Schools' (2006) *Journal of Education & The Law* 31.

271 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.)

272 The Minister was naturally 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. Secondly, the Minister argued that the diversity of cultures and languages within South Africa produced insuperable difficulties for the creation of a school readiness test. Thirdly, the Minister argued that there are sound pedagogical reasons for starting formal education at age 7.

The 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 as exercised through private institutions. *Harris* stands for the proposition that the State may not assert control over independent schools simply because they are privileged. Associational rights in independent schools trump State interests in equality where the equality interest asserted cannot be backed up by any compelling pedagogical reason.

stands for two propositions. It reinforces this chapter's basic contention that the Final 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.

(c) Legal Framework for Admissions Policies in Independent Schools

As we noted at the outset, one purpose of this section 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

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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 correct legal framework for understanding the limits of exclusionary admissions policies designed to promote particular or 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 or a syllabus that makes language instruction in a particular tongue obligatory in order to sustain its use within a given cultural community — will likely pass constitutional muster.

(i) The Final Constitution

The language of FC s 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.²⁷³

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

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The Constitutional Court added insult to injury in *Minister of Education v Harris*. 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC). It decided the matter without reaching the substance of the equality challenge. The Constitutional Court found that the Minister lacked the requisite authority under NEPA s 3(4) to create a rule that obliged independent schools to admit learners to Grade 1 only after they turned seven. Ibid at paras 11-13. NEPA s 3(4) empowered the Minister to create non-binding policy, but not law, with respect to the provinces and the independent schools found therein.

273 IC s 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'.

(ii) Statutory framework and statutory interpretation

(aa) SASA and PEPUDA

Statutory interpretation may appear to be a rather dry, academic exercise. However, in historical circumstances such as ours, the stakes can be quite high. A State that is cognizant 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 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 Act²⁷⁴ ('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.²⁷⁵

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 s 9.²⁷⁶ Indeed, it would appear to encompass just about any imaginable ground for unfair discrimination. According to section 5(1) of SASA:

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A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.

274 Act 84 of 1996.

275 While no mention of admissions policies is made in these regulations, the enabling provision for these regulations in SASA, s 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 Chapter 8 *Discrimination at Private Schools*, s 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.

276 PEPUDA analysis largely tracks FC s 9. According to FC s 9(4), 'no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)'. Private persons and juristic persons are clearly bound by FC s 9. FC s 9(3) establishes the prohibited grounds for discrimination: '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.' FC s 9(5) establishes a rebuttable presumption of unfair discrimination where discrimination on a prohibited ground occurs: 'Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.' See, for example, *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 53.

Sections 5(2) and 5(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.²⁷⁷

These statutory provisions suggest that a significant gap exists between the equity requirements for admissions at independent schools and 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.²⁷⁸ Indeed, were one to read — today — only those constitutional and statutory provisions that engage educational institutions directly, the change in the legal landscape, of which we shall now speak, might pass unnoticed.

The enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act²⁷⁹ ('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.²⁸⁰ 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

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must be had to standard canons of statutory interpretation in order to determine which law applies to admissions policies at independent schools.²⁸¹

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

277 According to GSEA Chapter 3, s 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 s 11(1) and the Gauteng Education Policy Act 12 of 1998 ('GEPA') s 4(a)(i), entitled 'Admission of Learners to Public Schools', GN 4138 of 2001 (PG 129 of 13 July 2001). The regulations expand — in line with s 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 FC s 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' one open window for disparate treatment enables a gender specific school to refuse admission on the grounds of gender.

278 That we have good reasons for treating 'public' social formations differently from 'private' social formations is a matter that lies beyond the scope of this article. A strong commitment to associational freedom is determined elsewhere in this work. See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

279 Act 4 of 2000.

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

primacy of place.²⁸² PEPUDA makes it clear that its provisions prevail over all other law — save where an Act expressly amends PEPUDA or the Employment Equity Act²⁸³ 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 those pieces of legislation and another piece of legislation, SASA ought to prevail.²⁸⁴ 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 Final Constitution,²⁸⁵ would appear to prevail over all other pieces of legislation that engage equality considerations in independent schools.

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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 the

281 The supremacy clause of the Final Constitution 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 Final Constitution. See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at 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) at para 8. For the purposes of this chapter, we assume that the apposite provisions of PEPUDA and SASA — and all subordinate legislation — are 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 this chapter. A court is also apt to take into account the fact that PEPUDA is the piece of super-ordinate legislation contemplated by FC s 9(4) '[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, for example, *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC).

282 See, generally, LM Du Plessis *The Re-interpretation of Statutes* (5th Edition, 2002); C Botha *Statutory Interpretation* (4th Edition, 2005).

283 Act 55 of 1998.

284 SASA s 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.'

285 FC s 9(4).

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

(bb) 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.²⁸⁶ How then should PEPUDA be construed in this context?

Although neither SASA nor apposite provincial legislation dictates how the general terms of PEPUDA ought to be applied to the sectoral specific context of admissions policies in independent schools, a court will, generally, take into account the distinctions made in such sectoral specific education legislation.²⁸⁷

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 found in the Final Constitution itself. Independent schools may be set up in order to further a particular religious or cultural vision of the good life 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 Van Dijkhorst J wrote

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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'.²⁸⁸

How then should we read the provisions of PEPUDA — and the apposite provisions of SASA, the Final Constitution, as well as our extant body of common law — when

286 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.

287 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. At least 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.

288 1998 (4) SA 423 (T), 454.

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.

(cc) PEPUDA's Test for Admissions 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.²⁸⁹ 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.²⁹⁰ 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 them 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) of PEPUDA states that fair discrimination may occur where the respondent can demonstrate that: '(f) ... the discrimination has a 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 have the furtherance of religion, culture or language as an end should be able to meet this test for 'legitimate purpose'.

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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 — consistent with our discussion of voice, entrance and exit below — 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,

289 See PEPUDA s 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).

290 See PEPUDA s 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.'

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.²⁹¹ Anyone can speak Afrikaans; anyone, over time, can become a South African.

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

291 As one of the authors, Stu Woolman, contends elsewhere, 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 Final Constitution. See S Woolman 'Community Rights: Religion, Culture and Language' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58. At a gut level, some readers of the constitutional text would like to be able to say that there is a sliding scale of judicial solicitude for these communities: a scale that runs from fairly weak in so far as linguistic communities are concerned, to 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? The text of the Final Constitution and the decisions handed down by our Courts tend to confirm this admittedly limp set of intuitions. See *Fourie* (supra) at paras 90-98 (In *Fourie*, the Constitutional Court goes out of its way to note that no religious order and no religious officer will be required to consecrate same-sex life partnerships as marriages under religious law.) The Constitutional Court has, however, shown demonstrably less hesitancy in altering customary law arrangements enforced by traditional leaders, common law and statute. See, for example, *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) (Court declared the customary law rule of male primogeniture invalid.)

The primary difficulty with trying to squeeze any further analytical precision out of the terms 'religious community', 'linguistic community' and 'cultural community' flows from the lack of consensus as to how terms like 'cultural community', 'religious community' or 'linguistic community' are to be used. With respect to this difficulty, Amy Gutmann 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.

Identity in Democracy (2003) 38. See also IM Young *Justice and the Politics of Difference* (1990) 22-23, 152-155.

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 educated in an environment where others take their faith seriously and do not merely put up with curriculum requirements because of other instrumental 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.

Other theorists take a tougher line. For Raz and Margalit, 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. J Raz & M Margalit 'National Self-determination' in J Raz (ed) *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 119. See also S Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (2002); A 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'. Raz & Margalit (supra) at 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.' Ibid 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' — properly understood — 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 community that fits the rule-following, comprehensive vision of the good life model that Raz and Margalit's definition is meant to capture. The strict dictates of the Amish's version of Christianity married to a pastoral existence that eschews almost all forms of modern technology sets the Amish apart. Moreover, continued membership in the community is contingent upon adherence to religious dictates and other non-religious norms. Such communities would, if they could, withdraw entirely from the largely secular polity within which their community exists. As it stands, they simply draw invisible lines between us and them. But the Amish community in America does not fit commonplace understandings of cultural communities. Most individuals experience a sense of belonging to communities in which no penalties can be exacted for rule non-compliance and 'membership' can never be threatened. Thus, Raz and Margalit's definition of 'cultural community' confirms the foremost difficulty: locating precise definitions for the entities protected by FC ss 15, 29, 30 and 31. However, what matters, for the purposes of the constitutional analysis of community rights are, in fact, membership and rule-following. For an extended analysis of the relationship between membership and rule-following, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.1(c). 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 canons of rules.

Problems with community identification are not limited to internal debates about who belongs and who does not. As the recent judgment in *Pillay* reflects, community identification will arise, as a constitutional problem, far more often in the context of exclusion and discrimination, and in terms of PEPUDA and FC s 9. *Pillay* accepts Guttmann's and Woolman's warning that, even in the realm of discrimination, 'culture' must have meaningful boundaries; at the same time, *Pillay* declines to describe the contours of those boundaries. Ibid at para 49. However, 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

What is interesting about this 'close' question is that the State — through PEPUDA — is able to force a private actor to look to the Final Constitution to support its position. Given that the Final Constitution is always the last port of call, 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 general provisions in the Final Constitution — FC ss 15, 18, 29, 30 and 31 — that protect religious belief, practice, tradition, association and community, as well as the express right in FC s 29(3) 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*, 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'.²⁹² 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'.²⁹³ In sum, the constitutional right to run an

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independent school grounded in culture, language or religion inevitably entails a concomitant right to exclude students 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 grounds of race.²⁹⁴

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 s 14(3) of PEPUDA place genuine responsibility

cultures cannot be described from outside as uniform bodies of rules and practices but are instead 'living and contested formations'. Ibid at 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 value cultural norms. Ibid at para 88. We agree with this approach in the context of discrimination or equality analysis. But *Pillay* does not resolve the difficult problems of group membership for individuals who wish to participate in the practices of community life, and whose views on the meaning of those practices differ from those persons within a community who determine how and whether those practices have been correctly interpreted. The notion that the South African State will displace the Pope as the ultimate interpreter of Catholic dogma has no place in our jurisprudence.

292 *Wittmann v Deutsche Schulverein*, Pretoria 1998 (4) SA 423 (T), 454, 1999 (1) BCLR 92 (T) ('*Deutsche Schulverein*').

293 Ibid at 454.

294 The apposite language of SASA mirrors that of FC s 29(3). SASA s 46(3)(b) reads: 'The admission policy of the school may not discriminate on the grounds of race.'

on the complainant (and the State) to demonstrate that the exclusionary admissions policies or expulsion procedures in question do, in fact, deleteriously affect the complainant.²⁹⁵

(x) Constitutional constraints on PEPUDA in the context of independent school admissions

(aaa) 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*, 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.²⁹⁶ In *Wittmann v Deutsche Schulverein, Pretoria*, the Pretoria High Court upheld the right of a school

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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.²⁹⁷ 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 school curriculum policy in order to secure entrance to 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.

(bbb) Expulsion, rule-following and fair hearings

295 PEPUDA s 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 that most, if not all, non-Jewish students 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 student (or even a Jewish student) 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 student 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.

296 2004 (4) All SA 317 (W) ('*Kurtstag*') at para 38 (FC s 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.)

297 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. Section 17 of the interim Constitution and s 18 of the Constitution recognise the freedom of association. Section 14(1) [of the interim Constitution] and s 15(1) [of the Constitution] respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith etc. 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.')

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.²⁹⁸

(ccc) 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 'capture'.

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. Secondly, and for similar reasons, an association's very existence could be at risk. Individuals, other groups,

298 South African Courts have engaged associational rights and fair hearings in four relatively recent cases. See *Kurtstag* (supra); *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T); *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C); *Deutscher Schulverein* (supra). 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 the *Cronje* case, 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. In the *Ward* and *Wittmann* cases, the High Court 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 the *Wittmann* case 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, the *Kurtstag*, *Wittmann*, *Ward* and *Cronje* cases 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 Court in the *Kurtstag* case notes: 'The potential for exclusion is part of the consideration the member offers in return for admittance.' *Kurtstag* (supra) at para 37.

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, build and 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, community rights and the right to create independent schools to ensure that both literal forms and

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figurative forms of property are protected from *capture* by those who would use them for ends at a variance with the objectives of the existing, and rightful members, of the association.²⁹⁹

(ddd) 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 overemphasizes dramatically the actual space for self-defining choices.

As one of the authors has 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.³⁰⁰ This determined, conditioned theory of the self

299 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, a 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 liberal democratic society may require that institutions designed to deliver such goods — trade unions, political parties, universities — must do so in a fair manner — a manner that is in some sense congruent with the values of a liberal democratic society. See N Rosenblum 'Compelled Association, Public Standing, Self-respect and the Dynamic of Exclusion' in A Gutmann (ed) *Freedom of Association* (1998) 75.

300 See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.1(b); S Woolman *The Selfless Constitution: Experimentation and Flourishing as the Foundations of South Africa's Basic Law* (forthcoming 2008).

supports some pretty straightforward conclusions about associational freedom and community rights in the context of independent schools.³⁰¹

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* arational attachments preferred status to

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the arational attachments of *others*.³⁰² 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.

(eee) 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 an empirical impossibility.

(y) 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

301 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 heterogenous 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.

302 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, in these pages, why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. As Walzer has convincingly argued, there is a 'radical givenness to our associational life'. M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67. 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'. Ibid at 73.

with respect to 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.³⁰³ Another equally important line of cases is designed to prevent insiders and outsiders from altering the fundamental purposes of an

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association.³⁰⁴ 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 strike the appropriate balance between equality, on the one hand, and community rights, on the other.

(z) 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 Final Constitution vouchsafes 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 Final 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 Final Constitution recognizes that great stores of social capital (that can be used for transformative ends) will be lost unless we leave many 'conservative' institutions just as they are.

303 See *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 (4) SA 159 (A), 166 citing *Total South Africa (Pty) Ltd v Bekker* 1992 (1) SA 617 (A), 624 (emphasis added).

304 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* (3rd Edition, 1982); *Murray v SA Tattersall's Subscription Rooms* 1910 TH 35, 41 (Curlewis J: '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 (2) 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. *Ibid* at 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.

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 linguistic, cultural and

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religious understandings of the good life. The reason PEPUDA does not, necessarily, undermine the ability of independent schools to advance linguistic, cultural and religious understandings of the good life is that although discrimination in the admissions process may occur, any discrimination that advances the *legitimate* linguistic, 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.

Furthermore, the Final Constitution's undeniable commitment to transformation does not mean that every egalitarian claim will trump a more particularistic claim. The Final Constitution's answer to those parents who wish to school their children in the language, culture or religion of their choice is unequivocal. Parents and learners may create and maintain privately funded independent schools that advance linguistic, cultural and religious understandings of the good life provided that they do not employ admissions policies or expulsion procedures that serve as proxies for discrimination based upon race.

57.5 State subsidies for independent educational institutions

We lay significant emphasis on the distinction between state-aided independent schools and non-state-aided independent schools because the former are subject to constitutional constraints to which the latter are not. The best example of this distinction engages the exercise of religious practices in a school environment.

FC s 15(2) requires that attendance at religious observances be free and voluntary. FC s 15(2) states that:

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. (Emphasis added).

Thus, FC s 15(2) introduces a level of equity at state-aided independent schools that makes the religious character of such an institution difficult, if not impossible, to maintain. However, by forsaking state aid, an independent school seeking to advance the tenets of a given faith can do so without having to concern itself with FC s 15(2)'s requirements of equity and voluntariness. Non-state-aided independent schools that seek to advance a culture or a language need not worry about finessing FC s 15(2)'s dictates. They simply do not apply. However, while such independent schools devoted to the promotion of a language or a culture are not subject to any state aid-related constraints, FC s 30 and FC s 31 make plain that the right to form 'cultural ... and linguistic associations' ... may not be exercised in a manner inconsistent with any provision of the

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Bill of Rights.' The implication of this proviso in both FC s 30 and FC s 31 is that the rights of such associations are more likely to fall before other constitutional imperatives, say the right to equality.³⁰⁵

In any event, while the distinction we make between state-aided independent schools and non-state-aided independent schools is real, our reliance on it here is largely rhetorical. It is simply easier to contrast how constitutional and statutory equity requirements for admissions policies play out in two contexts, rather than three. It is also easier to contrast how FC s 9 and PEPUDA operate differently in the private domain than in the public domain. State-aided independent institutions must — by the very nature of their state support — occupy a somewhat murky middle ground between the private and the public.

305 But see S Woolman 'Community Rights: Culture, Language and Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 58. Of course, as one of the authors has argued elsewhere, the internal limitations clauses of FC s 30 and FC s 31 merely beg the question of whether the other rights in Chapter 2 trump FC s 30 and FC s 31. One can, in many instances, argue that community rights are both consistent with and reinforce others rights — eg, to dignity, to equality, to expression, to association, and to various socio-economic rights. The strength of FC s 30 and FC s 31 turn, to a significant degree, on the extent to which the Constitutional Court recognizes the associational rights of various religious, cultural and linguistic communities. The Constitutional Court's recent judgments in *Fourie* and *Pillay* suggest a growing appreciation for South Africa's diverse communities and a well-deserved recognition of the deep reservoir of meaning that those communities provide their members (as well as South Africans generally).