

# The Constitution as a limitation on government power in educational contexts

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## 1 Introduction

Government authority can be described as the power to prescribe and the power to enforce such prescription.<sup>1</sup> The term 'power' is often used as a synonym for 'authority', for example, when referring to the separation of powers doctrine. A contentious issue in the history of Western political thought is the problem of how to control governmental power. Although governmental power is essential to the realisation of certain values in societies, such as justice, freedom and equality before the law, every government may deteriorate and become destructive of the values it was intended to promote.<sup>2</sup> The fundamental place of parliament in a democratic constitutional system is undisputed; its real role and influence, however, is more debatable. The question that arises is whether parliaments should be regarded as rubber-stamp chambers for the majority party?

A constitution like South Africa's limits the power of the government by imposing structural and textual limitations on power and through the operation of a Bill of Rights. The government may not use its power in such a way as to violate any of the rights guaranteed in the Bill of Rights and, moreover, the Constitution further limits government by imposing a duty to use its power to protect and promote those rights. An important founding provision in the South African Constitution is the rule of law.<sup>3</sup> The rule of law requires state institutions to act in accordance with the law. It also means that the state cannot exercise power over anyone unless the law permits it to do so.

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<sup>1</sup>Rautenbach and Malherbe *Constitutional law* (2009) 77.

<sup>2</sup>Zoethout, van der Tang and Akkermans (eds) *Control in constitutional law* (1993) 91.

<sup>3</sup>Section 1(c) of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution').

The aim of this paper is to use the theory of legitimation<sup>4</sup> to examine the notion of political control and judicial control of education rights in South Africa. The theory of legitimation argues that in a democratic society based upon the rule of law, any act performed, and any decision taken by education authorities pertaining to the right to a basic education should meet the conditions for the act or decision being accepted as lawful and legitimate. 'Lawful' is meant in the sense that the competence to perform such an act or make such a decision has a legal basis in the Constitution.

This article proceeds in three subsequent parts. Part I explains how constitutionalism controls government power and discusses constitutional control of education rights. Part II substantiates the arguments raised in Part I about political control of education by giving examples of violations of education rights in South Africa. Part III details the need for judicial enforcement of education rights.

## 2 Constitutional control of education rights

The sources of constitutional law, as of any branch of the law, are legislation, common law and case law. The constitution is the most important statutory source of constitutional law. The South African Constitution (1996) contains the most important rules of law in connection with the constitutional system of the country. These include rules of dealing with the state, the government bodies of the country, their powers and how they must exercise those powers. In other words, the Constitution defines government authority and regulates and limits its exercise.<sup>5</sup>

Implementation of the right to education, and access to education is a useful touchstone for assessing the democratic quality of a particular society. The history of comparative constitutional law shows that there is always a clear link between the transformation of a non-democratic regime into a democracy and educational rights.<sup>6</sup>

Control of power is a basic objective of constitutional law.<sup>7</sup> Therefore, the relationship between government and the individual members of a society should be regulated in such a manner that it leaves the individual's basic rights and freedoms unimpaired. In South Africa, everyone has the right to basic education, including adult basic education and to further education which the state must, through reasonable measures, make progressively available and accessible.<sup>8</sup> Furthermore, everyone has the right to receive education in the official language or languages of his or her choice in public institutions where that education is reasonably practicable.<sup>9</sup>

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<sup>4</sup>Bax and Van der Tang 'Theses on control in constitutional law' in Zoethout, Van der Tang and Akkermans (n 2) 87.

<sup>5</sup>Rautenbach and Malherbe (n 1) 25.

<sup>6</sup>Glenn and De Groof *Finding the right balance: Freedom, autonomy and accountability in education* vol 1 (2002).

<sup>7</sup>Bax and Van der Tang (n 4) 87.

<sup>8</sup>Section 29(1) of the Constitution.

<sup>9</sup>Section 29(2) of the Constitution.

Constitutionalism means not only that there are rules creating legislative, executive and judicial powers,<sup>10</sup> but that these rules impose limits on those powers. Often these limitations are in the form of individual or group rights against government, rights to things like free expression, association, equality and just administrative action.<sup>11</sup> Constitutionalism is the idea that government can/should be limited in its powers and that its authority depends on its observing these limitations. A constitution limits the power of the government in two ways. First, it imposes structural and procedural limitations on power. Second, through the Bill of Rights, substantive limitations are imposed.<sup>12</sup> This means that the state may not use its powers to violate any of the rights contained in the Bill of Rights, but must use its power to protect and promote those rights.

The rule of law requires state institutions to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts.<sup>13</sup> This means that various organs of state must obey the law, and that these organs of state cannot exercise power over anyone unless the law permits them to do so. The substantive component of the rule of law dictates that government must respect the individual's basic rights. Many provisions in the Bill of Rights requires differentiation to be rationally connected to a legitimate government purpose.<sup>14</sup> The equality right does not prevent the government from treating some people differently to others. This is because the principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same from a moral point of view.<sup>15</sup>

### **3 Political control of education rights**

The right to education limits government power in two ways. First, government is forbidden from interfering which means government discretion is limited. Second, government must perform a positive act to promote education.<sup>16</sup> From the standpoint of the learners the right to education may include the right to attend the school of choice; the right to suitable, quality education which is adapted to the needs of the child; the right for successfully completed studies to be validated; the right to financial support from the government; the right to psycho-medical-social guidance during the time spent at school.<sup>17</sup>

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<sup>10</sup>The separation of powers are implicit in the text of the Constitution.

<sup>11</sup>Constitution, ss 9, 16, 18, 33.

<sup>12</sup>Currie and De Waal *The Bill of Rights Handbook* (2005) 8.

<sup>13</sup>*Id* 10.

<sup>14</sup>Section 9(1) of the Constitution.

<sup>15</sup>*Id* (n 5) 239.

<sup>16</sup>De Groof *Comparative and supra-national education law* (1994) 33.

<sup>17</sup>*Id* 34.

In South Africa two trends govern the developments in the national education system. On the one hand it focuses on the equality of every learner in education<sup>18</sup> and on the other hand it emphasises that the variety of cultural life be reflected in the education system.<sup>19</sup> Major educational debates and court judgments attempt to strike a balance between ideological, political and philosophical interests.<sup>20</sup>

The South African Schools Act 84 of 1996 (Schools Act) aims to provide for a uniform system for the organisation, governance and funding of schools. It furthermore aims to provide 'an education of progressively high quality for all learners and to promote the participation and acceptance of responsibility for the organisation, governance and funding of schools by the parents in partnership with the State.'<sup>21</sup> The Schools Act is clearly not perfect and some legislative reform should therefore not be regarded as remarkable or undesirable in principle. However, the Schools Act does provide a practical legal framework in terms of which school education may function and be managed in pursuance of the objects of section 29 of the Constitution,<sup>22</sup> which

<sup>18</sup>Section 9(1) of the Constitution guarantees that everyone is equal before the law and has the right to equal benefit of the law. This is followed by s 29 that guarantees that everyone has the right to basic education and to further education which the state must make progressively available and accessible. The preamble of the South African Schools Act 84 of 1996, clearly states that this act aims to redress past inequalities through a national system for schools. This envisages that an education of progressively high quality will be provided.

<sup>19</sup>Sections 30 and 31 of the Constitution speak about the right of everyone to use the language and participate in the cultural life of their choice; and furthermore, persons belonging to a cultural or linguistic community may not be denied the right to enjoy their culture with other members of that community. The Schools Act in ss 6 and 7 gives school governing bodies the power to determine a school's language and religious policies.

<sup>20</sup>*Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC); 2000 10 BCLR 1051 (CESA); *Middelburg Laerskool en die Skoolbeheerliggaam van Middelburg Laerskool v Hoof van Departement, Departement van Onderwys, Mpumalanga* 2003 4 SA 160 (T); *Seodin Primary School v Northern Cape Department of Education* 2006 1 SA 154 (NC); *Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2005 3 SA 436 (SCA); *Governing Body of Mikro Primary School v Western Cape Minister of Education* (2005) JOL 13716 (C); *Hoërskool Ermelo v The Head of Department of Education: Mpumalanga* (219/08) [2009] ZASCA 22; *MEC for Education in KwaZulu Natal v Pillay* 2008 1 SA 474 (CC).

<sup>21</sup>Preamble of the Schools Act 84 of 1996:

WHEREAS this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State.

<sup>22</sup>Section 29 of the Constitution guarantees that:

- (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

provides for certain rights and expectations in the field of education. The Schools Act must thus generally be seen as a progressive development for which the government may justly take credit. A cornerstone of the Schools Act is the meaningful role it accords to democratic school governing bodies.

There are at least three key role-players involved in exercising direct control over education, namely:

- (a) The officials of the responsible provincial education departments;
- (b) the school principals and the educators; and
- (c) the school governing body.

### ***3.1 Administration and control of public education at national, provincial and school levels***

The public service education sector is hierarchically structured and bureaucratically controlled. The public office bearers include the Minister of Basic Education in the national sphere, nine members of the Executive Committee (MEC) heading the nine provinces of South Africa and numerous categories of employees who report to the Head of Department in each province.<sup>23</sup> The matters on which the Minister of Basic Education may proclaim general education policy are set out in the National Education Policy Act 27 of 1996. The Minister also has the duty to ensure that the policies of the Government (the ruling political party) are implemented. Apart from legislation that applies specifically to the education sector,<sup>24</sup> general public service legislation<sup>25</sup> also applies to public service education. The most important provision regulating the functions of education officials is section 195 of the Constitution. This section contains the basic values and principles governing the public administration.<sup>26</sup>

Education is a concurrent competence in South Africa. The provision of schooling is a provincial matter, subject to the norms and standards as laid down by the Minister of Basic Education in the national sphere. The administration of the provision of education in a province takes place through executives structures situated at the provincial Head Office. A province would typically be divided into regions and/or districts all reporting to Head Office. The main function of officials at district level is to provide support to the schools. The District Manager has the

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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.

<sup>23</sup>National Education Policy Act 27 of 1996.

<sup>24</sup>Employment of Educators Act 76 of 1998, for example.

<sup>25</sup>Public Service Act 103 of 1994.

<sup>26</sup>Section 195 of the Constitution provides for a high standard of professional ethics, efficient, economic and effective use of resources, service that is provided impartially, fairly, equitably and without bias, the needs of the people must be responded to, they must share in decision-making and transparency is essential.

responsibility for the overall levels of education administration within the schools in the district.

In South Africa local government has no direct responsibility for the provision of schooling within its area. The school itself is seen as the unit at which local governance takes place. Schools are juristic persons<sup>27</sup> represented by their school governing bodies,<sup>28</sup> democratically elected in terms of section 23(1) of the Schools Act. The governing body stands in a position of trust towards the school,<sup>29</sup> and acts on behalf of the school with the best interests of the school<sup>30</sup> at heart. The main functions of a school's governing body include the determination of the character and ethos of the school by determining the school's admission policy, language policy, rules for religious observances and adopting the school's code of conduct. The governing body is also responsible for managing, raising and disbursing the school's finances.<sup>31</sup> The Schools Act provides that school governing bodies may apply to the Head of Department to be allocated additional functions such as maintaining the school's grounds, determining the extramural curriculum, pay for services to the school and to purchase educational equipment, materials and textbooks for the school.<sup>32</sup>

### ***3.2 Examples of unconstitutional behaviour by education authorities***

#### **3.2.1 Non-delivery of textbooks in the Limpopo Province**

Faced with several appeals by the Applicants<sup>33</sup> for the delivery of textbooks and the implementation of a catch-up plan to close gaps in the syllabus caused by the late delivery of textbooks, the Limpopo Department of Education has raised several excuses for not delivering textbooks immediately. These are the mismanagement of funds; tender irregularities and the need to place Limpopo under national administration in terms of section 100(1)(b) of the Constitution.<sup>34</sup> The Limpopo Department of Education failed to achieve its own goals and indicators in its annual performance plan and its target setting of 100% in respect

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<sup>27</sup>Section 15 of the South African Schools Act.

<sup>28</sup>Section 16(1).

<sup>29</sup>Section 16(2).

<sup>30</sup>Section 20(1)(a).

<sup>31</sup>Sections 36 to 44.

<sup>32</sup>Section 2.

<sup>33</sup>*In the matter between Section 27 (first applicant), Hanyani Thomo Secondary School, and Tondani Lydia Masiphephethu and Minister of Basic Education and the Member of the Executive Council: Limpopo Department of Education* case no 24565/12 (unreported) (hereafter case 24565/12).

<sup>34</sup>On 2011-12-05, the Limpopo Department of Education, together with a number of other Provincial Departments in Limpopo was placed under administration in terms of art 100(1)(b) of the Constitution. The Department of Education accordingly assumed full responsibility for the obligations of the Limpopo Education Department in order to ensure that the minimum standards for the Department's obligations are met.

of work books and text books for the entire school year, that the failure to provide text books, somewhat midway through the academic year would *prima facie* constitute a violation of the right to basic education.<sup>35</sup>

The textbooks were mainly for grades 1, 2, 3 and 10 with top-ups for the other grades. What is further inexcusable is that school principals were instructed to be 'on standby' to receive the textbooks on Wednesday 27 June. The majority of schools in rural areas do not have facilities to store textbooks and it would be an impossible task to expect learners in grades 1, 2 and 3 to collect their new textbooks during the school holidays to start catching up on the work. Section 27's Heywood said the Department had attempted to *shift the burden of its failure* onto principals, parents and pupils.<sup>36</sup>

During June 2012 large numbers of textbooks were destroyed at a former teacher's college outside Polokwane. The Minister of Basic Education called for the arrest of service providers who allegedly dumped and burned textbooks meant for Limpopo learners. However, the Minister has overlooked the fact that contractors who were burning and shredding textbooks allegedly claimed that they were doing so at the instruction of education department officials. Problems experienced in the Limpopo Department of Education include no money to order books the previous year as a result of mismanagement of the budget by the department; new structures were formed in the districts which were not budgeted for; norms and standards money for the everyday running of schools was not paid over to schools, causing a lot of hardship, especially for rural schools; school transport monies were not paid, school feeding schemes' monies were not paid to contractors, who then stopped their services; markers for the final examinations were not paid on time, nor were people who invigilated during exam time.<sup>37</sup>

Since the government cannot provide all the resources required to ensure properly functioning and high quality public schools, it cannot fairly expect parents to contribute financially unless they have some meaningful and direct say in the way public schools are governed and school fees used. In addition to the general functions allocated to all school bodies,<sup>38</sup> governing bodies who have the capacity may apply to the Department of Basic Education to be allocated additional functions such as improving the school's property and buying textbooks and other learning materials.<sup>39</sup> In the different provinces in South Africa thousands of schools have been allocated these additional functions although their governing

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<sup>35</sup>Case 24565/12 (n 33) para 25.

<sup>36</sup>Available at <http://www.timeslive.co.za/thetimes/2012/06/29/call-for-textbooks-probe> (accessed 2012-06-30).

<sup>37</sup>Available at <http://www.looklocal.co.za/looklocal/content/en/polokwane/polokwane-news-Non-delivery-of-textbooks---Fingers-point--but-who-is-really-to-blame-.com> (accessed 2012-07-05).

<sup>38</sup>Section 20 of the Schools Act.

<sup>39</sup>Section 21 of the Schools Act.

bodies do not have the capacity to fulfil these functions.<sup>40</sup>

Schools that have been allocated section 21 status, thus allowing the school governing body to buy their own textbooks are expected to do well in the exams, pupils from poor rural schools are expected to perform dismally. The extent of the violation of learners' right to education must be considered because only 7.6% of schools in Limpopo have been ranked as Quintile 5 schools.<sup>41</sup> A total of 77% of schools in the Limpopo province are no-fee schools and cannot afford to buy their own learning materials. Hoërskool Pietersburg (a Quintile 5 school) spent about R50 000 making copies of summaries compiled from different textbooks for its 276 grade 10 pupils.<sup>42</sup>

### 3.2.2. Unlawful interference in school management and governance

There have been many official and unofficial public remarks and hints by important political and administrative role-players that it may be necessary to curtail the statutory powers of school governing bodies further, beyond what is already contained in the amendments to the Schools Act.<sup>43</sup> The latest change to the democratic powers of school governing bodies was the decision of the Department of Basic Education to outlaw bonus payments to teachers, for extramural and other work.<sup>44</sup> School governing body associations took legal action over the Department's decision to outlaw bonus payments to teachers saying the move limits the constitutionally guaranteed decision-making rights of school governing bodies. On 17 August 2012, the Minister of Basic Education withdrew the regulations relating to the prohibition of additional remuneration to educators.<sup>45</sup> This example of exercising political power seems to be contradictory to the Minister of Education's speech, at the launch of the governing body elections, in March 2012, when she said 'We need parents to be more involved in school governing bodies if we are going to improve our learners' performance'. She also said that the 'eight million adults' who are parents or guardians of learners are a huge resource that can 'unleash energy and creativity in schools'.

The reduction of school governing body powers will clearly have to be accompanied by a corresponding increase in the powers allocated to officials of

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<sup>40</sup>Minister of Education's speech at the launch of the governing body elections in March 2012.

<sup>41</sup>National Norms and Standards for School Funding (1998) ranked schools into five quintiles using the physical condition, facilities and physical capacity (or overcrowding) of the school and the relative poverty of the community around the school. Quintiles 1, 2 and 3 are declared no-fee schools and receive 100% subsidies from the provincial government. A Quintile 5 school receive only 5% subsidy from the provincial department of education and has to supplement this income by charging school fees.

<sup>42</sup>Govender 'Suffer the children' *Times Alive* (2012-05-27) (accessed 2012-06-30).

<sup>43</sup>Sections 9, 16A, 39, 58A and 59B of the Schools Act.

<sup>44</sup>Section 38A of the Schools Act and the 'Regulations relating to the prohibition of the payment of unauthorised remuneration or the giving of financial benefit' GG vol 1043, 2011-12-15.

<sup>45</sup>GN 662 of 2012.



education departments. However, one may be forgiven for viewing with scepticism such increase in powers in view of the generally poor track record of certain senior education officials and education departments.

Executive authority is the power to execute rules of law. In a constitutional democracy the activities and actions of executive bodies such the Minister of Basic Education, members of the executive councils (MECs) of provinces and heads of departments in the provinces are in all respects bound by the law and subject to the legislature. Their main functions include developing and implementing national policy and co-ordinating the functions of state departments. According to section 92(2) of the Constitution the members of the executive are accountable collectively and individually to parliament for the exercise of their powers and the performance of their functions. Responsibility entails a duty to:

- account to parliament on how powers and control have been exercised and performed;
- acknowledge that a mistake has been made and to promise to rectify the matter; and
- resign if personal responsibility has been proved.<sup>46</sup>

Currently, education authorities demonstrate an incapacity to respect, protect, promote and fulfill the basic right of education. It seems as if there is an attempt to compensate for breaches of law through conscious manipulation of facts and blaming others. Some examples are:

- In March 2011, the collapse of the school nutrition programme and learner transport scheme and the termination of 4000 temporary teaching contracts in the Eastern Cape Province led to Cabinet, invoking section 100(b) of the Constitution, to provide the Department of Basic Education with the legal authority to take responsibility for the Eastern Cape education functions.
- In May 2012, the Legal Resources Centre filed an application in the Eastern Cape High Court, acting on behalf of the Centre for Child Law, the governing bodies of four Eastern Cape schools and the Bethelsdorp School Governing Body Unit, which represents 17 schools. The application deals with 'the failure of the respondents to implement the 2012 educator post establishment in the Eastern Cape, the consequent failure to appoint teachers to vacant substantive posts and the failure to appoint temporary teachers to these posts pending the implementation of the 2012 post establishment'.<sup>47</sup>
- Equal Education (EE) filed papers in the Bhisho High Court against the Minister of Basic Education, the Minister of Finance and the nine provincial MECs for Education on 8 March 2012. As the EE Coordinator explained, the

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<sup>46</sup>Rautenbach and Malherbe (n 1) 193.

<sup>47</sup>Available at: [www.lrc.org/judgments](http://www.lrc.org/judgments) (website of Legal Resource Centre) (accessed 2012-06-30).

papers sought an order to compel Minister Motshekga to prescribe minimum norms and standards for school infrastructure. This is the most far-reaching court case about the right to basic education to have been launched in democratic South Africa. 'The [Eastern Cape] has spent only 28% of its R1.45-billion school budget because Minister Motshekga has failed to exercise the powers she has – as set out in section 5A of the South African Schools Act – to prescribe minimum norms and standards. At present around 3 600 schools operate without electricity while 600 schools in KwaZulu-Natal have no toilets. EE argued that 92% of schools do not have proper libraries and 395 schools in the Eastern Cape operate in mud classrooms'.<sup>48</sup>

## 4 Judicial control of education rights

Judicial control of government power does not permit it to transgress the boundaries of the law, while Parliament and administrative control may find an opportunity to combine or blur the legal standards with political standards and considerations. Judicial decisions have legitimacy being applications of the law in controversies by an independent and impartial institution.

### 4.1 *Examples of where the judiciary had to prevent education officials from acting unlawfully by the misuse of their powers*

There is a perception that the actions of certain officials in education departments are driven purely by political agendas instead of legal principles and sound education policies.<sup>49</sup>

Examples include:

- Education officials acting unilaterally and against the wishes of school governing bodies by instructing schools to change their language policies. The Schools Act authorises only the governing body to determine the language policy of an existing school.<sup>50</sup> In *Laerskool Middelburg*,<sup>51</sup> Departmental officials forced the Afrikaans primary school to admit 26 learners to grade 1 to receive education in English. The High Court held that the language policy issue was inordinately politicised to the detriment of education and that the Department of Education's decision ignored the provisions in the Schools Act and that their administrative actions were unfair. In a similar case in the Western Cape concerning Mikro Primary

<sup>48</sup> Available at: <http://www.equaleducation.org.za> (accessed 2012-06-30).

<sup>49</sup> Visser 'Some thoughts on legality and legal reform in the public school sector' (2006)2 *TSAR* 359-366.

<sup>50</sup> Section 6 of the Schools Act.

<sup>51</sup> *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T).

School<sup>52</sup> the Western Cape High Court held that the determination of the language policy of a public school is the function of the governing body and not that of the Department of Education. The Court further held that the value of legality requires that the state should obey the law. The Western Cape Minister of Education appealed against this finding. The Supreme Court of Appeal rejected their interpretation that everyone has the right to receive education in the official language of his or her choice at each and every public education institution where this is reasonably practicable. Again, the departmental officials in the Mpumalanga Province repeated their unlawful actions, this time by withdrawing the functions of the governing body of Hoërskool Ermelo<sup>53</sup> and by appointing an interim committee to change the language policy of the school. In his judgment, Judge Snyders concluded that the Head of Department's withdrawal of the governing body's function to determine the language policy of the school was unlawful; that the Head of Department's appointment of the interim committee was unlawful; and that the decision taken by the unlawfully appointed interim committee was invalid. The Constitutional Court held that 'This misapprehension of his powers strikes at the heart of the lawfulness of the conduct of the interim committee and infects with unlawfulness also his recourse to section 22(1)'. Simply put, the HoD had no power to constitute the interim committee.<sup>54</sup>

- The Constitutional Court had to admonish the Head of the Limpopo Department of Education for his failure to comply with cost orders given against him by the High Court.<sup>55</sup>
- The High Court had to set aside irregular decisions by the Mpumalanga Department of Education to suspend a school principal and to dissolve a governing body.<sup>56</sup> This was a case of the employer confusing the roles played by principal and senior deputy principal in capacities as members of the school governing body and as employees employed in terms of the Employment of Educators Act 76 of 1998.
- Departments of Education had to be ordered by the High Court to effect the appointment of educators recommended by the school governing bodies.<sup>57</sup>

<sup>52</sup> *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 2 All SA 37 (C).

<sup>53</sup> *Hoërskool Ermelo and Governing Body of Hoërskool Ermelo and Head of Department, Mpumalanga* case no 219/2008 (unreported).

<sup>54</sup> *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* (CCT40/09) [2009] ZACC 32; 2010 2 SA 415(CC); 2010 3 BCLR 177 (CC)(2009-10-14).

<sup>55</sup> *Head of Department of Education, Limpopo Province v Settlers Agricultural High School* (2003) 11 BCLR 1212 (CC) para 14.

<sup>56</sup> *Schoonbee v MEC for Education, Mpumalanga* 2002 4 SA 877 (T).

<sup>57</sup> *Observatory Girls Primary School v Head of Department of Education, Gauteng* 2003 4 SA 246 (W); *Carnavon High School v MEC for Education of the Northern Cape* 1999 4 SA 590 (NC); *Douglas Hoërskool v The Premier of the Northern Cape Province* 1999 4 SA 1131 (NC); *FEDSAS*,

As a result of these defeats, the Department of Education resorted to amending the legislation and thus curbing the powers of governing bodies. The Education Laws Amendment Act, 2005 now provides that the governing body may submit a list of three names, but that the HoD has the right to appoint any suitable name on the list, without regard to the governing body's order of preference. In cases where candidates are appointed to pacify the demands of teachers' unions or to effect transformation in certain schools it could be contrary to the best interests of the child.

- The Head of Education in the Free State intervened and instructed the principals to act against their governing body policies. The governing bodies adopted policies stating that pregnant learners were to remain at home after having given birth and would only be allowed to return to school at a later stage. The High Court found that the conduct being complained of was that the Head of Education purportedly exercised a power which he did not have in law and that his conduct undermined the functional autonomy of the school governing body.<sup>58</sup>
- On 17 May 2012, Judge Kollapen ruled that the failure of the Limpopo Department of Education to provide textbooks to learners in the Limpopo Province for the start of the school year was a violation of the learners' constitutional right to a basic education.<sup>59</sup> Judge Kollapen ruled that the matter was urgent and ordered the respondents to supply the learners with textbooks by 15 June 2012.<sup>60</sup> The respondents were also ordered to devise a catch-up to help learners who had fallen behind in the curriculum. The Ministry failed to meet the court's deadline and the Minister of Basic Education met with the applicant, Section 27,<sup>61</sup> to move the deadline to 27 June.

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*Limpopo v Department van Onderwys: Limpopo case no 30801/2003 (TPD); Grove Primary School v Minister of Education 1997 4 SA 982 (C); Pudulogo Primary School v MEC of Education, North West Province case no 14754/2005 (TPD) (unreported); Settlers Agricultural High School v The Head of Department, Department of Education, Limpopo Province case no. 16395/02 (TPD) (unreported); Simela v MEC for Education, Eastern Cape 2001 9 BLLR 1085 (LC); Head of the Western Cape Department of Education, JG van der Merwe and JJ Swanepoel and Governing Body of the Point High School case no 584/2007 (unreported).*

<sup>58</sup>*Welkom High School v Head of Department Free State case no 5714 heard in the Bloenfontein High Court (unreported).*

<sup>59</sup>*Section 27 v Minister of Education, case no 24565/2012 (North Gauteng High Court, Pretoria) (2012-05-17) (unreported).*

<sup>60</sup>*Limpopo case (n 59).*

<sup>61</sup>Section 27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. It brings this application in its own name as well as in the public interest.

## 5 Conclusion

Education law in South Africa is always mixed with clashing views on transformation in education, and decentralisation tendencies versus the centralisation of government power. If governmental crisis management fails, it lags behind programmatic demands *that it has placed upon itself*. The penalty for this failure is the loss of legitimacy which refers to acts and decisions that are lawful and legitimate. They are lawful in the sense that the competence to perform such acts or take such decisions has a legal base in the relevant law and they are legitimate in the sense that the act or decision fulfils the requirement of being in accordance with certain values, is materially correct and justified. This concerns not the act or decision itself, but also the planning, implementation and enforcement of the act or decision. The main instrument for securing the legitimacy of acts and decisions is the institution of control – parliamentary, administrative, judicial – or control by the citizens themselves.

Apart from observing the rule of law, the Constitution also requires the government to respect the principle of democracy.<sup>62</sup> One way of defining democracy is that it is ‘government by explaining’ rather than ‘government by force’;<sup>63</sup> that is, that Cabinet members are accountable collectively and individually to Parliament, and members of the provincial executive councils (MECs) are accountable to their respective provincial legislatures.<sup>64</sup> In other words, every decision taken by a public authority should meet the conditions for that act or decision being accepted as lawful and legitimate. Lawful in the sense that the competence to perform such act or decision has a legal base in the relevant law; legitimate in the sense that the act or decision fulfils the requirement of being in accordance with certain values, as being useful and effective, or materially right and justified.<sup>65</sup>

One might conclude that political and judicial control, both in their characteristics and in their capacity of producing legitimacy, supplement each other. While political control may rely on a wide spectrum of control objects and control standards, judicial control is limited in terms of the legislation adopted by Parliament. On the other hand, the legitimacy provided by the judicial decisions may help to overcome the problems and inadequacies of political and administrative control of education. Political and administrative control presupposes only a comparison of the results of any activities with plans and lines of conduct or policies that were set down before the activities took place

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<sup>62</sup>The Constitution, ss 1, 7 and 195.

<sup>63</sup>*Id* (n 5) 17.

<sup>64</sup>*Ibid*.

<sup>65</sup>Zoethout, Van der Tang and Akkermans (n 2) at 91.