How far will the courts go in ensuring the right to a basic education?

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1 Introduction

Gazing into the crystal ball of socio-economic rights jurisprudence in 1998, former Chief Justice Ismael Mahomed speculated about a difficulty the courts may face in adjudicating socio-economic rights. The difficulty that he identified was that enforcement of the relevant right may not only involve a negative protection against the violation of a particular right, but also the duty to deliver that right.[1] A court order of this nature might compel the legislature to reorganise their priorities or budgets in a manner that affects the rights of others. He selected a hypothetical example in the field of education law.

> An order, for example, that primary education at state expense be accorded to all children under the age of sixteen, might compel the state to prioritise that right over the right to deliver nutrition to dying infants in hospitals who are entitled to primary health care. The objection to that kind of constitutional objectivism is that it might give to a court, which does not have the burden of political accountability, the power to make orders in areas in which it has no greater expertise than the legislature or the executive and that it invades the guarantee inherent in the separation of powers upon which a legitimate constitutional democracy is premised.

President Jacob Zuma alluded to the separation of powers in his address to the *Access to Justice Conference* organised by the Office of the Chief Justice in July 2011.[2] He stated that there 'is a need to distinguish the areas of responsibility

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[1]The Constitutional Court subsequently confirmed that the right to a basic education creates a positive as well as a negative right: *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) para 45.

[2]Zuma 'Opening Address' *Access to Justice Conference: Towards delivering accessible justice for all*, Hilton Hotel, Sandton, 2011-07-8-10.

between the judiciary and the elected branches of government, especially with regard to government policy formulation. The Executive, as elected officials, has the sole discretion to decide policies for the government'. This was a pre-cursor to government's proposal to undertake an 'assessment of the impact of the decisions of the Constitutional Court', a move that has caused alarm in legal circles as an indication of an attempt by government to interfere with the independence of the judiciary. Public interest litigators are particularly concerned about the impact that this might have on the realisation of rights – including the right to a basic education.

The role of the courts in the achievement of every child's right to a basic education will be analysed in this article. The article begins with an explanation of the separation of powers doctrine and its application by the Constitutional Court. Judgments about the right to education are examined against that backdrop, and some assessments are made about the opportunities and possible limitations that face public interest litigators and courts in realising the right to a basic education on the road ahead.

2 Separation of powers

The Separation of Powers doctrine is an implicit principle of the South African Constitution which accords separate powers to the legislature, the executive and the judiciary, with various checks and balances on the exercise of power.[3] All three branches of government must play a role to ensure that the benefits promised by the Bill of Rights in the Constitution are realised. The judicial power of the Constitutional Court to strike down laws as invalid if they are in conflict with the Constitution is an essential part of a constitutional democracy. In order to play this role effectively, the judiciary must enforce the law impartially and must enjoy independence from the other arms of government.[4] The separation of powers is not absolute. The Constitutional Court has made it clear that the South African model of separation of powers is a system of checks and balances that avoids too much power being wielded by any arm of government. This system 'anticipates the necessary or unavoidable intrusion of one branch of government by another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest'.[5]

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[3] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC), 1996 10 BCLR 1253 (CC) (hereafter *Certification* case). It has been argued by Johan Van der Vyver (in 'The separation of powers' (1993) *SAPR/PL* 177, 185) that although there was a formal distinction between the three branches of government prior to 1994, this was not in essence a real system of mutual checks and balances based on the principle of separation of powers, because Parliament was sovereign and superior to the other branches of government.

[4] *Certification* case (n 3) para 123.

[5] *S v Dodo* 2001 3 SA 382 (CC), 2001 5 BCLR 423 (CC) para 8.

The fact that the judiciary can – and does – venture into the other domains of power does not imply that there are no constraints on the courts. On the contrary, the Constitutional Court has indicated that restraint is required on the part of the judiciary. The courts are sometimes faced with situations where it is difficult to determine what problems should be resolved by the executive or the legislature, and what problems should be determined by the judiciary. As Sachs J cautioned: 'The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity'.[6] This relates to the fact that if the courts' powers are used in an untrammelled or irresponsible way, the courts' own institutional legitimacy may be undermined, and the other spheres of government will no longer respect the authority of the courts.[7]

A feature of South Africa's separation of powers jurisprudence, relating to the taking of 'timely measures', is that the courts have been careful about not inhibiting the executive and the legislature to take the necessary steps to carry out their mandate.[8] This is reflected in an early judgment of the Constitutional Court in *Premier, Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal* [9] where the court held:

> In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in the common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly.

In the adjudication of socio-economic rights, the Constitutional Court has been particularly inclined to adopt a position of deference to the other spheres of government.[10] This has led to the court developing a different standard of review

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[6] *Prins v President of the Cape Law Society of the Cape of Good Hope* 2002 1 SACR 431 (CC).

[7] Seedorf and Sibanda 'Separation of powers' in Woolman *et al* (eds) *Constitutional law of South Africa* (2008) (2nd ed, original service: 06-08) 12-56.

[8] O'Regan 'Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution' 2005 *PER* 5.

[9] 1999 2 SA 91; 1999 2 BCLR 151.

[10] For a comprehensive discussion of this issue, see McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009). McLean is of the view that the deferential approach of the courts has led to a lower standard of review and weak remedies. See further Quinot and Liebenberg 'Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa' 2011 3 *Stell LR* 639. The authors compare 'weak reasonableness' – aimed at exclusion of unfair or irrational consequences and 'strong reasonableness' which involves a proportionality analysis.

for socio-economic rights. The Constitutional Court's now well-established approach to these rights is to measure the 'reasonableness' of the plans and measures that the other arms of government have taken towards fulfilment. This self-imposed restraint has been criticised, particularly the Court's refusal to involve itself in determining the core content of socio-economic rights,[11] preferring instead to apply a rationality review that focuses on a justification analysis without a detailed analysis of the right.[12] However, criticism notwithstanding, the Court has reiterated in the case of *Mazibuko*[13] that it will not engage in detailed debates about the content of rights. What it will do is call upon the government to explain why the policy is reasonable and to disclose how the policy was formulated – including what investigation and research was undertaken, what alternatives were considered and why the particular option was selected. The Court also stated that the Constitution does not hold government to impossible standards of perfection, and that the courts will not take over tasks that in a democracy should be left to other arms of government.[14] The Court has, however, also begun a slightly different discourse in relation to the law of evictions. In these cases the Court has encouraged the parties to engage meaningfully with one another in order to solve the problems that caused them to come before the court.[15] These two approaches are relevant to possible litigation relating to the right to a basic education.

3 The Constitutional Court's interpretation of the right to a basic education

This article starts from the premise that the right to a basic education is a socio-economic right. However, it differs fundamentally from most other socio-economic rights.[16] It is not qualified by any aspirational language. Most socio-economic rights provide the rights bearer with 'access' to the required goods or services.[17]

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[11] Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations of future socio-economic rights jurisprudence (2003) 19 *SAJHR* 1.

[12] Quinot and Liebenberg (n 10) 639 at 657-659.

[13] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); 2010 3 BCLR 239 (CC).

[14] Isaacs (in 'Realising the right to education in South Africa: Lessons from the United States of America' (2010) 26 *SAJHR* 356, 384) has criticised the *Mazibuko* judgment. He is of the view that interpreting the text of the Constitution requires that content be given to the right under consideration, which is not the same as entering into a core content debate.

[15] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

[16] Section 29(1)(a) is similar to s 28(1)(c) of the Constitution, which provides children a right to basic nutrition, shelter, basic health care services and social services.

[17] Section 26(1) provides everyone 'the right to have access to adequate housing' and s 27(1) provides the 'right to have access to (a) health services, including reproductive health care services; (b) sufficient food and water; and social security including, if they are unable to support themselves and their dependents, appropriate social assistance'.

Section 29(1) guarantees 'the right to a basic education', and not merely 'access to' the right. The state must provide education, and not merely take 'reasonable legislative and other measures, within available resources, to achieve the progressive realisation of this right'.[18]

This interpretation of the right to a basic education has been clearly enunciated by the Constitutional Court in the recent case of *The Governing Body of the Juma Musjid Primary School v Essay (Centre for Child Law as Amici Curiae)*,[19] where the court stated the following:

> It is important, for the purposes of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'.[20]

This expansive language is encouraging, but it was written in a context where there was no direct cost or 'price tag' to the State. The *Juma Musjid* case was primarily about the horizontal application of the right to a basic education. It concerned a public school on a private property, and the case arose from an appeal against a High Court decision to evict the school from the premises. The government had failed to conclude an agreement with the Trust that owned the property, setting out the terms and conditions of tenancy, as required by section 14(1) of the Schools Act.[21] The Court found that the primary responsibility to provide the children with a basic education rested with the MEC for the Department of Basic Education in the province,[22] but that the Trust also had a negative duty not to interfere with the children's rights to education.[23] The court that had ordered the eviction was found to have failed to properly consider the rights of the children in terms of sections 28(2) and 29(1)(a) of the Constitution, namely their best interests and their right to a basic education.[24] The Court gave a provisional order aimed at an agreement being reached through meaningful

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[18] See sections 26(2) and 27(2).
[19] 2011 7 BCLR 651 (CC) (hereafter *Juma Musjid*).
[20] Paragraph 37.
[21] Act 84 of 1996.
[22] See (n 19) para 57.
[23] This duty arises from s 8(2) of the Constitution which provides that a right in the Bill of Rights can bind a juristic person, depending on the nature of the right and the duty.
[24] See (n 19) para 66.

engagement between the parties to keep the school open. Attempts to reach agreement having failed, the Court granted an eviction order, which was based on an undertaking by the MEC to close the school by the end of 2010 and transfer children to other schools, where it had been established that they could be accommodated.[25] The children were accommodated within existing schools which meant the expense to the state of placing them in those schools was negligible.

An interesting question is whether the Court will be tempted to limit their own expansive interpretation in *Juma Musjid* if faced with a case that involves a positive application of the right, which does have significant cost implications for the state. Berger[26] has examined the problem that even if there is an unqualified right in the law, it might not be possible to achieve this right immediately in practice. Berger posed the question whether, in such a situation, a court would be likely to make an order for immediate fulfilment which it knew would be unlikely to be achieved, or would prefer to draw the right more narrowly. The latter option seems quite likely, given that when court orders are not complied with it is likely to bring the authority of the Court into question and, most importantly, will not deliver anything tangible to the intended beneficiaries.

Woolman and Bishop's textual reading of the right to basic education concluded that it is not subject to a reasonableness standard, not dependent on availability of resources and is therefore a direct, immediately enforceable rights entitlement.[27] However, Woolman and Bishop were sceptical the Court would interpret the right this way. Their analysis was written prior to the *Juma Musjid* judgment, but when faced with a future challenge that has significant financial implications for the State, the Court may have to make hard choices, thus the authors' projections are still worthy of examination. Woolman and Bishop have speculated about the ways the Court might limit the interpretation of the right. Firstly, they suggested that the Court might go the route that they used to deal with the unqualified nature of children's right to shelter in section 28(1)(c) in the *Grootboom* case – namely, by placing primary responsibility for children's education on the parents, and only where parental care is lacking, on the State.[28] However, this is unpersuasive because the right to education is easily distinguishable from the right to housing. A house or home is shared by a family and a rudimentary version of it can be built by a family. By contrast, the right to

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[25] *Id* paras 74-77.

[26] 'The right to education under the South African Constitution' (2003) 103 *Columbia LR* 614.

[27] 'The right to education' in Woolman *et al* (eds) *Constitutional law of South Africa* (2007) (2nd ed, original service 11-07) 57-11 to 57-15. Similar views are expressed by Woolman and Fleisch *The Constitution and the classroom: Law and education in South Africa 1994-2008* (2009) 120-126; I have referenced Woolman and Bishop due to the earlier date of that publication.

[28] This idea was first postulated by Seloane 'The right to education: Lessons from *Grootboom*' (2003) 7/1 *Law, Democracy and Development* 137.

education pertains to the child as a separate rights bearer. Furthermore, education can in most cases not be effectively provided by the parent – public schooling requires the involvement of the state.[29] A corollary to this approach, also suggested by Woolman and Bishop,[30] is another *Grootboom* tactic – the court may rule that the 'carefully constructed constitutional scheme would make little sense if it could be trumped' by the right to education and the right to education must therefore be read within the broader scheme.[31] This *Grootboom*-type construction is unlikely now that the *Juma Musjid* court has set out the nature of the right in such certain terms.[32] The judgment expressly differentiates between the right to education and other socio-economic rights, making it clear that this is not part of the general 'scheme' which has to be progressively realised.

The second prediction of Woolman and Bishop was that the Court might try to apply the limitations analysis in terms of section 36 of the Constitution to limit the right – and thereby be persuaded by the state (with whom the duty to prove the justification lies) that in some situations the state's failure to provide basic education might be reasonable and justifiable. This prediction holds water, given that the *Juma Musjid* court states that the right to a basic education can be limited

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[29] This was one of the major differences between the *Grootboom* case and the *Treatment Action Campaign* case. Housing (or shelter) could be provided by parents, whilst nevirapine could not. See Proudlock 'Children's socio-economic rights' in Boezaart (ed) *Child law in South Africa* (2009) 298.

[30] See (n 27) at 57-12.

[31] This is similar to the Court's interpretation of the right to 'shelter' read with the right of all persons to 'housing'. This has been the subject of much criticism; see, eg, Sloth-Nielsen 'Children' in Davis and Cheadle (eds) *South African constitutional law: The Bill of Rights* (2002) 421; McLean 'Housing' in Woolman *et al* (eds) *Constitutional law of South Africa* (2005) 55-52; Wesson '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284, 304; Bonthuys 'The South African Bill of Rights and the development of family law' (2002) 119 *SALJ* 748; Pieterse 'Reconstructing the private/public dichotomy? The enforcement of children's constitutional social rights and care entitlements' (2003) 1 *TSAR* 1; Liebenberg 'Taking stock: The jurisprudence on children's socio-economic rights and its implications for Government policy' (2004) 5/4 *ESR Review* 2.

[32] In *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 61, Moseneke DCJ said that the power to determine language policy 'must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress'. This statement of the Court was somewhat concerning. Writing elsewhere I have speculated, pursuant to the *Juma Musjid* interpretation, that the *Hoërskool Ermelo* reference to making education progressively available and accessible to everyone attaches to s 29(2) of the Constitution, and not s 29(1)(a). See Skelton 'The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical evaluation of recent education case law' (2012) *De Jure* (forthcoming).

only in terms of a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[33] However, a question arises as to whether the failure in the field of education is likely to manifest itself through a law of general application. It seems more likely that the failure will come about through government incompetence in delivering on its mandate. In such situations it is questionable whether the government could take refuge in raising a reasonable and justifiable limitation.[34]

A third way that Woolman and Bishop proposed that the Court may avoid a full, unqualified interpretation of the right to a basic education in section 29(1)(a) is through remedy. Whilst the court may find that the right is immediately realisable, it might nevertheless, due to real-life constraints, make a declaratory order coupled with a suspended order or supervisory order to monitor compliance.[35] The authors observe that the benefit of this remedial approach is that it simultaneously affirms the right to education, but allows the government 'sufficient room to manoeuvre'. This certainly is a route that remains open to the Constitutional Court in the future, as it would allow the Court to leave its *Juma Musjid* interpretation intact, whilst at the same time allowing for remedies that are realistic.

Isaacs has expanded on the possibility of remedies being used to find solutions, if not immediate ones.[36] He makes proposals for how courts might frame remedies that contribute to actual change in education, without involving the court in the 'day-to-day reorganisation' of the Department of Basic Education's mandate. Isaacs considers the problem of courts either being concerned about entering the terrain of the executive on the one hand, or alternatively taking control of the problematic systemic issues through a supervisory order. He suggests that there is a third approach which is referred to in the United States as 'non court-centric judicial review'.[37] This is similar to the South African courts' use of 'meaningful engagement' which has found expression in housing and

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[33] See (n 19) para 37.

[34] Calderhead 'The right to an adequate and equal education in South Africa: An analysis of s 29(1)(a) and the right to equality as applied to basic education', draft paper prepared for Section 27 and Equal Education, March 2011, available at http://section27.org.za .dedi47.cpt1.host-h.net/2011/04/26 (accessed 2012-07-01). Calderhead observes (36) that most failures in education law are due to failures to act and the government is, in that event, prevented from being able to justify its position.

[35] South African superior courts dealing with constitutional issues enjoy flexible remedial powers that allow them to make any order that is just and equitable. The Constitutional Court has furthermore indicated that the courts must 'forge new tools' and 'shape innovative remedies to ensure effective relief'; see *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69; *Bel Porto School Governing Body v Premier Western Cape* 2002 3 SA 265 (CC), 2002 9 BCLR 891 at paras 181 and 186.

[36] Isaacs (n 15).

[37] *Id* 374.

eviction cases[38] and was also attempted in the *Juma Musjid* case, which brought together eviction and the right to a basic education. By issuing this type of order, courts become central to a normative debate, based on detailed information about the actual problems in the education system. The courts can be part of the solution, but will draw on the parties and even other civil society role players to find solutions and to monitor the outcomes of court decisions. An example of this kind of order was handed down by the Eastern Cape High Court in a matter called S v *Z and 23 Similar Cases*,[39] which dealt with the fact that there were no reform schools in the Eastern Cape, causing children sentenced to such facilities to serve their sentences in prison. The court ordered that the Eastern Cape Department of Education should report back on its progress towards compliance with its own plan to build a separate wing for sentenced children at a school of industry. The reports were to be made not directly to the court, but to the Judge President, the Inspecting Judge of Prisons, the Legal Resources Centre, Grahamstown, and the Centre for Child Law at the University of Pretoria. The building was built on time but stood empty due to no staff being appointed. An application to court by the Centre for Child Law, represented by the Legal Resources Centre, Grahamstown, got the plans back on track, and the facility was subsequently staffed and utilised. Woolman points to the case of *Centre for Child Law v MEC for Education Gauteng* as 'an invitation' by the court that goes far beyond the standard form of a structural interdict.[40] The court found that the school of industry at the centre of this case had failed to provide the most basic living conditions for the children, and thus violated sections 28, 10 and 12 of the Constitution. Murphy J's order required immediate provision of sleeping bags to keep the children warm, and then an order that required a range of actions by the state, from perimeter fencing to a quality assurance process to be carried out at the school, as well as psychological and therapeutic support, with a requirement to report back to the court. The judgment, in Woolman's view, is a good example of what he calls 'a paradigmic participatory bubble' because the judge left it up to the parties, albeit under his supervision, to work out the solutions.

4 Impediments to a basic education

If *Juma Musjid* was a case without a significant 'price tag', then the *Centre for Child Law and Seven Others v Government of the Eastern Cape Province*, often referred to as the '*Mud Schools*' case, must be acknowledged as the case with

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[38] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Occupiers of 51 Olivia Road and 197 Main Street v City of Johannesburg* 2008 3 SA 208 (CC); *Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 BCLR 847 (CC).

[39] 2004 2 SACR 410 (E) para 17.

[40] *The selfless constitution: Experimentation and flourishing as the foundations of South Africa's basic law* LLD Thesis, University of Pretoria (Pretoria) (2009) 183-185.

the largest price tag in South African education litigation history.[41] The seven schools (amongst others) had battled for almost a decade to get any attention from the provincial department about their severe infrastructure problems. The National Department of Basic Education has a policy that requires schools to be maintained in a condition that makes teaching and learning possible.[42] The Legal Resources Centre, on behalf of the Applicants, launched an application in the Grahamstown High Court. The complaints included firstly, dilapidated mud buildings (in some cases roofs missing and classes being held in neighbourhood dwellings), secondly, no running water or sanitation and thirdly inadequate seats and desks for the number of learners attending the schools. The matter was settled, resulting in a far–reaching 'memorandum of understanding' which pledged a total of R 8.2 billion over a 3 year period, specific amounts earmarked for the seven schools, a plan for infrastructure to be managed by the National Department of Basic Education, undertakings about interim arrangements such as prefabricated buildings and the installation of water tanks. An important term of the agreement provides that if there should be a serious breach of the agreement, the parties can, upon giving two weeks' notice, go back to court to force compliance.

In a settlement process, the executive comes to the table as a willing party. It is interesting to ponder whether the applicants would have achieved as wide-ranging an order from a court, had the matter not been settled. On the *Juma Musjid* interpretation of section 29(1)(a), the logical answer to this is in the affirmative. If the right to a basic education is unqualified and immediately realisable, no financial constraint arguments could, on the face of it, have been invoked to excuse the drastic impediments to the fulfilment of the right presented by the infrastructure backlogs, particularly where a budget had been provided.[43] The agreement, set out over a three year period, and subject to monitoring by the parties and the possibility of returning to court in the event of non-compliance, mirrors the kind of remedy the courts might 'fashion' to ensure that the children's right to a basic education is realised in a time bound manner, if not, due to practical realities, immediately.

Many of the cases in the process of litigation at the time of writing relate to impediments to children's right to a basic education. The right to a basic education promised by section 29(1)(a) 'can only be achieved through the provision of

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[41] *Centre for Child Law and 7 others v Government of the Eastern Cape Province*, Eastern Cape High Court, Bhisho, case no 504/10. The memorandum of understanding between the parties was signed on 2011-02-14.

[42] Department of Basic Education *The national policy for an equitable provision of an enabling school physical teaching and learning environment* (2010) 9.

[43] In *Federation of Governing Bodies of SA Schools v MEC for the Department of Basic Education, Eastern Cape* 2011 6 BCLR 616 (ECB) Eksteen J held that government was obliged to fill the posts that were budgeted for, and could not raise budgetary constraints arguments in that regard.

classrooms, teachers and textbooks'.[44] Infrastructure needs are being dealt with through an application by Equal Education and the Legal Resources Centre to force the Minister of Basic Education to use the discretion provided to her by section 5(1) of the Schools Act to develop norms and standards for infrastructure. The setting of norms for standards regarding infrastructure would identify standards which give specific meaning to the right to a basic education, against which the government's performance can be measured. The Minister's notice of an intention to defend the application suggests that she lacks confidence in the government's ability to conform to standards, even though they will be set by the department, and not by the court.

The problem of non-delivery of textbooks sprang to prominence in June 2012 when the organisation Section 27 brought an urgent application before the North Gauteng High Court[45] to compel the Minister of Basic Education[46] to ensure that the textbooks were delivered by a specified deadline to schools in Limpopo. The court declared that the failure to deliver textbooks was an infringement of the right to a basic education,[47] made an order to compel effective delivery and directed the Department of Education to make a 'catch up' plan to ameliorate the effects of the failure on learners. Teachers in class, on time, teaching. This was the rallying cry to teachers at the Polokwane ANC conference prior to the 2009 elections.[48] However, a lack of appropriately qualified teachers in schools has plagued the Eastern Cape. The Centre for Child Law and several schools in the Eastern Cape, represented by the Legal Resources Centre in Grahamstown launched an application to force the Minister of Basic Education[49] to complete the post provisioning process for 2012 and to set in motion the process for 2013. The central demands were that the vacant posts should be filled by a specific date, and that temporary teachers who had been employed by school governing bodies against vacant posts should be paid by a specific date, and that steps should be taken to declare and implement the post provisioning process for 2013. The majority of orders sought were granted in a settlement agreement obtained at the

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[44] Woolman and Bishop (n 27) 57-10.

[45] *Section 27 v Minister of Education* (24565/2012) [2012] ZAGPPHC 114 (2012-05-17), hereafter *Section 27*. The judgment was marked 'reportable' but was not yet reported at the time of writing this article.

[46] Although the Department of Basic Education is a provincial competency, Limpopo was placed under the authority of the National Minister of Basic Education in terms of s 100 of the Constitution. The textbooks were not delivered by the end of the extended deadline. Various investigations into the debacle have been initiated by the government.

[47] *Section 27*, see court order and para 23 where Kollapen J states that textbooks are an essential and vital component in the delivery of quality learning and teaching.

[48] Bloch *The toxic mix: What's wrong with South Africa's schools and how to fix it* (2009) 20.

[49] As with Limpopo, the Department of Basic Education in the Eastern Cape has been placed under the administration of the National Department, in terms of s 100 of the Constitution.

eleventh hour, and the disputed issue of non-teaching staff was also succesful following argument.[50]

These building blocks of infrastructure, teaching and learning support materials, and sufficient qualified teachers constitute the basics of the right to a basic education. Other important questions remain about the quality of that education. South Africa's education is, on the whole, woefully inadequate. Bloch observes that if there is 'one phrase that summarises the failings of the education system, it is "poor quality"'. He goes on to drive the point home:

> There are different ways of looking at the story of whether the school system is making it. The bits of evidence all point in the same direction. South Africa is the worst performer in maths and literacy, probably in the world. This is even worse when you take into account that learners in many less-endowed and more poorly resourced countries achieve a lot more than our schools do.[51]

5 How basic is basic?

Another obvious way that a Court might curtail the applicability of the right to a basic education is by determining what is meant by the word 'basic'. The *Juma Musjid* court, in defining the parameters of 'basic education', refers to the provisions of section 3(1) of the South African Schools Act 84 of 1996 (hereafter the Schools Act) which makes school attendance compulsory for children from the age of 7 years until the age of 15 years or until the learner reaches the 9th grade, whichever occurs first. The judgment views this legal provision to be 'following the constitutional distinction between "basic" and "further" education'.[52] Writing elsewhere,[53] I have criticised the judgment for linking basic education so closely to section 3(1) of the Schools Act as the courts have not yet pronounced on whether the right of a child who is older than 15 years and beyond Grade 9 is still entitled to enjoy and enforce his or her right to basic education. A court seeking to limit the financial impact of the right to basic education could rely on the *Juma Musjid* interpretation, and find that the state has no positive obligation towards those older than 15 and at a higher level than Grade 9. Even more fundamental is early childhood education, which is also partially excluded by the court's interpretation.

Some have argued that basic education does not relate to the number of years of education to which the child is entitled but rather to the adequacy of the

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[50] *Centre for Child Law v Minister of Basic Education* (1749/2012) [2012] ZAECGHC 60 (2012-07-03). The judgment was marked 'reportable' but was not yet reported at the time of writing this article.

[51] Bloch (n 45) 61.

[52] Paragraph 38.

[53] 'The role of the courts in ensuring the right to education in a democratic South Africa: A critical evaluation of recent education case law' (2012) *De Jure* (forthcoming).

education that the child receives.[54] Does the *Juma Musjid* judgment, which links basic education so clearly to section 3(1) of the Schools Act, make it difficult to sustain such an argument in the future? The *Juma Musjid* court was not required to determine what was meant by 'a basic education' and the remarks may be considered *obiter dicta*; also, whilst the Court has identified the period, or 'quantity', of a basic education, that does not prevent the Court from elaborating on its 'quality' in a future case.

Furthermore, there are international and foreign law arguments that can be used to persuade the court that the right to a basic education includes the right to adequacy. Woolman and Fleisch have argued that international law can be invoked to support an interpretation of 'a basic education' that relates to content, not duration.[55] This is obviously relevant because if the Court has to determine the meaning of any right in the Bill of Rights it must consider international law.[56] The authors specifically point to the World Declaration on Education for All, which refers to the basic learning needs of children, including basic learning tools such as literacy, oral expression, numeracy and problem solving as well as basic learning content, such as knowledge, skills, values and attitudes.

According to the Declaration, these basic learning needs are required to allow children to develop to their full capacity, to live and work in dignity, to participate fully in development, to improve the quality of lives, to make informed decisions, and to continue learning.[57] Interestingly, the United Nations Convention on the Rights of the Child[58] and the African Charter on the Rights and Welfare of the Child[59] do not refer to 'a basic education', but simply state that a child has the right to an education.[60] The United Nations Committee on the Rights of the Child General Comment no 1[61] on the aims of education states that the child's right to education is not only a matter of access but also content, and that article 29(1) of the CRC underlines the individual and subjective right to a specific quality of education.[62]

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[54] Berger (2003) 103 *Columbia LR* 614 at 625; Woolman and Fleisch (n 27) 127.

[55] See (n 27) 127. See also Roithmayr 'Access, adequacy and equality: The constitutionality of school fee financing in public education' 2003 19/3 *SAJHR* 382 at 393) who argues that the fact that section 29(1)(a) also includes the right to 'adult' basic education, which implies that the right to a basic education is for the education system that is not 'adult education', namely schooling that goes up to grade 12. The division of the former Department of Education into the Department of Basic Education and the Department of Higher Education, with the former delivering services up to Grade 12 level, is a further indication.

[56] See s 39(1)(b) of the Constitution.

[57] Article 1 of the World Declaration on Education for All (1990).

[58] Ratified by South Africa in June 1995, hereafter 'CRC'.

[59] Ratified by South African in January 2000, hereafter 'ACRWC'.

[60] CRC art 29; ACRWC Art 11.

[61] CRC/GC/2001/1.

[62] *Id* para 9: 'Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions, to resolve conflicts in a non-violent manner, to develop

Isaacs has demonstrated that the courts in the United States have been prepared to engage with the issue of quality, and this could be invoked as a foreign law example which our courts may consider.[63] In *Rose v Council for Better Education*[64] the Court ordered that funding must be provided to ensure each child in the state of Kentucky had an 'adequate education'. The Court described an adequate education as oral, written, artistic, academic and vocational skills, combined with sufficient economic, social and political knowledge to function as a citizen. In *Campaign for Fiscal Equity Inc v The State of New York*[65] the Appeal court found that a sound basic education should not be linked to completing a certain number of grades, but rather to a measurable goal. The Court found that education had to enable people to obtain competitive employment and full civil participation. In *Pauley v Kelly*[66] the West Virginia Supreme Court set out a more detailed list dealing with scholastic and societal achievements that a thorough and efficient education system should produce.[67]

Will South African courts get involved in assessing the quality or adequacy of education? Is this an area in which the courts will show deference on the basis that the executive, rather than the judiciary, has the appropriate knowledge to determine adequacy? Will the courts consider this debate to fall into the terrain of 'core content'? There are indicators that are relatively easy for a court to assess, such as child to staff ratios or class sizes. Whilst not fully indicative of the adequacy of education, smaller class sizes are one of the ingredients believed to affect quality. Similarly, standardised test results are an indicator of the adequacy of education – and with South Africa's embarrassing record of under-achieving,[68] it may be easy to convince a court of the government's failure to provide an adequate education.[69] However, diagnosis is the easy part of the process. Finding remedies that can improve the quality of education may prove to be difficult. In one scenario, the courts may defer to the executive in proposing and carrying out solutions. In such

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a healthy life-style, good social relationships and responsibility, critical thinking, creative talents and other abilities which give children the tools needed to pursue their options in life'.

[63] Isaacs (2010) 26 SAJHR 356, 370. In terms of s 39(1)(c) of the Constitution

[64] 790 SW 2d 186 (Ky).

[65] 100 NY 2d 893.

[66] 255 SE 2d 859 (1979).

[67] These included literacy, numeracy, a knowledge of government, self-knowledge and knowledge of the environment, work training, recreational pursuits, creative arts and social ethics. The court spelled these requirements out more fully at page 877 of the judgment.

[68] Bloch (n 45) 17: 'South African children are routinely underachieving – not only among the worst in the world, but often among the worst in the southern African region and in Africa as a whole'.

[69] Woolman and Fleisch ((n 27) 137-144) posit that the evidence supports a finding that the state has failed to provide a basic education. They illustrate this proposition by referring to both cross-national comparative studies and the state's own studies.

instances, the court will require the government to explain why the plan to improve adequacy is reasonable and to disclose the basis on which the plan was formulated – including what investigation and research was undertaken, what alternatives were considered and why the particular options were selected. Another possible scenario might see more public participation, with courts inviting civil society partners to get involved in finding solutions – Woolman describes this possible approach by the courts as 'experimental constitutionalism',[70] and it is echoed in the idea of non-court centred solutions such as meaningful engagement, where the parties to the case are encouraged to come up with their own plan to resolve the particular impasse or problem.[71] As described above, the courts have already embarked on this approach.

6 Equality inextricably linked with quality

Inequality is deeply embedded in the South African schooling system. Research has shown that by the age of eight years there are already very large gaps in the performance of school children in the top 20% of schools, compared with the bottom 80%.[72] If quality in education may be difficult to get the courts to pronounce on and provide remedies for, would equality in education be an easier case to mount? Berger has noted that it is easier to prove inequality than inadequacy.[73] Even if we have not established what a basic education consists of, the fact that some children enjoy a dramatically better standard of education would certainly be simple to demonstrate, based on infrastructure, conditions, class sizes, and indicators such as test scores. The Department of Basic Education would no doubt point to its Norms and Standards on School Funding, which provide that, the costs of personnel aside, the costs at quintile one schools (the poorest) are funded by government at approximately six times more than those in quintile 5 (the least poor schools). However, it is apparent that whilst this mechanism has improved access to education for the poorest children, it has done little to bring about actual equality in education. As with a challenge relating to quality, it is an effective remedy for an inequality challenge that will be difficult to determine. An equalisation must in effect, require increasing the adequacy (or quality) of education for those children who are receiving an inferior education relative to other children. Thus, equality cases bring us circuitously back to the same problems we face when formulating remedies in quality cases. Research by van der Berg *et al* has identified measures such as prioritising managerial efficiency, rewarding effective managers, improving assessment quality and feedback, focussing on core skills, increasing learning and

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[70] See Woolman's thesis, generally, (n 40).
[71] Isaacs (n 15).
[72] Van der Berg *et al* 'Low quality education as a poverty trap' (March 2010) University of Stellenbosch available at http://www.andover.edu/gpgconference/documents/low-quality-education-poverty-trap.pdf (accessed 2012-08-31).
[73] Berger (2003) 103 *Columbia LR* 614 at 641.

homework time, encouraging better curriculum coverage and increasing access to pre-school education. These are complex, multi-faceted solutions that the courts may be reluctant to get involved with, though they might at least measure the reasonableness of policies against such indicators, which they could be called upon to do in the context of both quality and equality cases.

7 Conclusion

The separation of powers doctrine does not create an absolute bar to the courts becoming actively involved in ensuring the right to a basic education for South Africa's children. Whilst the courts exercise constraint in order to ensure that they do not intrude too far into the domains of the other spheres of power, the courts will get involved in policy analysis. With regard to socio-economic rights, this involves interrogating whether the policy is reasonable, how it was formulated, what research was undertaken, what alternatives were considered and why the chosen policy was selected. South African courts can and do get involved in normative discussions, and have made orders that encourage more participatory approaches.

Prior to the case of *Juma Musjid*, there had been much speculation about how the Constitutional Court would interpret the right to a basic education. Although the wording of section 29(1)(a) indicates a direct, immediately enforceable right, academic commentators had doubts regarding the court's preparedness to embrace this meaning. Authors suggested that the court might read the right in a manner similar to the approach it took in the *Grootboom* case – that children's right to education should first be catered for by their parents, and only where parental care is lacking, will this fall on the state. Alternatively, that the overall scheme of socio-economic rights to be progressively realised could not be 'trumped' by children having a preferential right to education, and that right must therefore be read within the broader scheme. The *Juma Musjid* judgment's unequivocal recognition of the right to a basic education as a direct, immediately enforceable right has proved the predictions relating to a *Grootboom* type of interpretation to have been entirely misplaced. However, because the *Juma Musjid* case was one in which there were no major financial implications, the court did not have to pronounce in a context of resource constraints or competing priorities. The article examined the possibility that the Court might yet limit its interpretation, and found that there are two possible avenues open to it. The first of these is a limitation of the right to a basic education in terms of section 36 of the Constitution. Whilst this is compatible with the *Juma Musjid* court's interpretation, it was pointed out that failures in education are likely to arise from practical failures, and not through the operation of a law of general application. This would limit the invocation of a section 36 limitations analysis to only a few cases. The other possible avenue for limiting the scope of the right is through remedy. Whilst

the many impediments to and failures in education are easy to diagnose, their resolution is a more difficult task, all the more so when the problem being tackled is the quality or equality. The courts are likely to be willing to give declarations indicating infringements of the right to education, and to make declarations of invalidity where appropriate.

They are also likely to invoke policy analysis against the reasonableness standard which has been their customary approach to socio-economic rights. It is likely that they will increasingly allow for more participatory models of remedy, such as meaningful engagement or other non-court-centric remedies, to find lasting solutions that ensure the right to a basic education. It is not necessary to pronounce on whether any of these remedies are preferable to others – each remedy must be crafted within its own context. It is simply advocated that the remedies to be fashioned by the courts should aim to broaden and not narrow the scope of the right. The solutions canvassed in this article are possible within the current remedial approaches utilised by South African courts, and are entirely compatible with the separation of powers doctrine as envisaged by the South African constitutional system.