CONCRETISING THE RIGHT TO
A BASIC EDUCATION

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This article argues that the s 29(1)(a) right to a basic education affords an unqualified right to adequate school facilities. This argument builds on the Constitutional Court's recent judgment in Governing Body of the Juma Musjid Primary School & others v Essay NO & others, which affirms that the right to a basic education is an unqualified right, distinct from the textually qualified socio-economic rights in the South African Constitution, and strongly suggests that a basic education is a substantive standard of education. Drawing on recent litigation, we proceed to argue that must be understood to include a right to adequate school facilities: facilities that are conducive to effective teaching and learning and do not threaten the health, safety and dignity of learners and teachers. We then explore some of the possibilities and challenges involved in the judicial enforcement of this unqualified right to adequate facilities. We argue that the unqualified right affords litigants a number of advantages, and the challenges it presents can be overcome without stripping the right of its content or force.

"[A] measure of our humanity is inextricably related to how we treat our children. Apartheid tried to rob us of our humanity. By condemning every black child to a life of deprivation, they sought to deprive us of our dignity... Everyone involved in education has a responsibility to restore the humanity and dignity in the way we treat our children."^1

I INTRODUCTION

This article addresses a simple question: does the s 29(1)(a) right to a basic education in our Constitution afford a right to adequate school facilities? For far too many children in South Africa this question needs an urgent answer.

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There are at least 395 ‘mud schools’ in the Eastern Cape alone.³ While the plight of these schools grabs headlines,⁴ the conditions in other state schools are often little better: 3544 have no electricity; 2402 have no access to water while a further 2611 have an unreliable water supply; close to 1000 schools have no toilet facilities, while over 11 000 rely on pit latrines.⁵ Only seven per cent of schools have stocked and functioning laboratories; five per cent have functioning laboratories and only ten per cent have working computer facilities.⁶

Surely these conditions deprive learners of their s 29(1)(a) right? Surprisingly our courts have not yet had to grapple with this question. This reflects the general paucity of educational rights litigation in South Africa. To date, there has been only a trickle of reported judgments, with most involving disputes over language policy.⁷ There are now signs of a change. The emerging education adequacy movement⁸ is increasingly turning to litiga-

³ ‘Mud schools’ are constructed using traditional methods, using mud bricks and a wooden frame, plastered with mud mixed with cow dung. Some are plastered with cement. While there is nothing inherently wrong with these traditional methods of construction, most mud schools are in a poor state. This statistic is taken from the answering affidavit of Adv Mannya, the erstwhile Director General of the Eastern Cape Department of Education, in Centre for Child Law & Others v Government of the Eastern Cape Province & Others (ECD) unreported case no 504/10 of 2011, available at http://dl.dropbox.com/u/21390912/Child%20Law/10Answering_Affidavit.pdf, accessed on 19 May 2012.
⁵ Department of Basic Education National Education Infrastructure Management System Report (2011) available at http://www.education.gov.za/LinkClick.aspx?fileticket=hHaBCAerGXi%3D&sthash=338=1802, accessed on 19 May 2012. These statistics include ‘ordinary’ and ‘special’ schools, of which there were 24 793 ordinary schools and 359 special schools as of March 2011.
⁶ Ibid.
⁸ The most active and visible proponent of this movement is Equal Education, an organisation currently based in the Western Cape. See Equal Education ‘What is EE?’ available at http://www.equaleducation.org.za/what_is_EE, accessed on 19 May 2012.
tion as a means to improve conditions in South African schools, with an initial focus on school facilities.

This article draws on two examples of this emerging trend: Centre for Child Law & others v Government of the Eastern Cape Province & others (Centre for Child Law) and School Governing Body of Amasango Career School v MEC for Education, Eastern Cape (Amasango). Both cases involved severely under-resourced schools in the Eastern Cape Province. In both, the applicants argued that the lack of adequate facilities in their schools was a violation of the learners’ right to a basic education. Both resulted in substantial settlements. Had either case produced a judgment this would have marked an important milestone in the development of South Africa’s nascent education rights jurisprudence. In the absence of a judgment, we will use the substantial body of research, legal argument and comparative law analysis developed for these cases to inform our argument in this article.

We will argue that the right to a basic education provides an unqualified right to adequate school facilities. This argument builds on the Constitutional Court’s recent judgment in Governing Body of the Juma Musjid Primary School & others v Essay NO & others (Juma Musjid) which affirms that the right to a basic education is an ‘unqualified’ right, distinct from the other textually ‘qualified’ socio-economic rights in the Constitution. We argue that this entails that s 29(1)(a) affords a right to a basic education, not merely a right to have the state take reasonable steps over time and within its available resources to progressively realise this right. Furthermore, Juma Musjid strongly suggests that ‘a basic education’ requires an education with a substantive content, not merely a place in a school for a prescribed period of time. On this basis, we will argue that the right to a basic education must include a right to adequate school facilities. Here we understand school facilities to include school infrastructure, basic services, and learning and teaching support materials, as these terms are understood in s 5A(2) of the

9 At the time of writing, at least two cases were in progress: Equal Education & others v Minister of Basic Education & others (ECB) case no 81/2012 (an application to compel the Minister of Basic Education to promulgate norms and standards for the provision of school infrastructure) and Centre for Child Law & others v Minister of Basic Education & others (ECG) case no 1748/2012 (addressing the failure to fill teaching posts in Eastern Cape schools). At the time of writing, written judgment is pending in Section 27 & others v Minister of Basic Education & another (GNP) case no 24565/12, in which Kollapen J held that the national and provincial governments’ delay in providing textbook to learners in the Limpopo Province was a violation of their s 29(1)(a) right and ordered the Department of Basic Education and the Limpopo Department of Education to provide textbooks in conjunction with a ‘catch-up’ programme to compensate for the effects of this delay.

10 (ECB) case no 504/10.
11 (ECG) case no 3838/2009.
12 2011 (8) BCLR 761 (CC).
13 Ibid para 37.
South African Schools Act. Furthermore, these facilities should be adequate, meaning that they should create an environment conducive to a basic education. While our argument focuses on school facilities, we hope that it will provide broader assistance in understanding and enforcing the right to a basic education, in anticipation of the further education adequacy litigation to come.

At the outset, we must stress that the unqualified right to a basic education does not mean that the state will be required to provide adequate facilities immediately, irrespective of budgetary and capacity constraints or other urgent demands on its resources. Where the state has failed to provide adequate facilities, this will be a limitation of the right. However, as we will explain below, it is open to the state to justify this limitation under s 36 of the Constitution or, if the limitation is not justified, to argue that immediate relief is not ‘just and equitable’. As a result, the unqualified right to a basic education does not necessarily translate into an immediate obligation on the state to provide adequate facilities. However, we will argue that the unqualified right presents litigants with important advantages when compared with the enforcement of the qualified socio-economic rights in the Constitution.

Our argument also proceeds with an acknowledgement of the limits of litigation over school facilities. Litigation alone will not fix the systemic problem of inadequate school facilities or the broader problems in the education system. Better facilities are also no guarantee of a better education. Nevertheless, we proceed on the assumption that the responsible use of litigation over school facilities can help to spur on systemic change, can secure improvements for those in greatest need and can contribute to the creation of school environments that are conducive to effective teaching and learning.

This article will consist of four parts. In part II, we provide a brief overview of the litigation in Centre for Child Law and Amasango. In part III, we outline the nature of the right to a basic education, focusing on the Constitutional Court’s recent judgment in Juma Musjdi. In part IV, we argue

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14 Act 84 of 1996. Section 5A(2) indicates that ‘infrastructure’ includes physical structures such as classrooms, libraries, laboratories, perimeter security, sport and recreational facilities; as well as basic services such as electricity, water, sanitation and electronic connectivity. ‘Learning and teaching support materials’ include items such as stationery and supplies; science, technology, mathematics and life sciences apparatus; electronic equipment; furniture and other school equipment.


that the right to a basic education must be understood to include adequate school facilities. Here we will consider the empirical link between educational inputs and outcomes, and the interpretative guidance provided by other constitutional rights, international law and comparative law. Finally, in part V, we address the possibilities and challenges involved in the judicial enforcement of this right.

II OVERVIEW OF LITIGATION

Nomandla Senior Primary School is located in Mabheleni Village in the former Transkei region of the Eastern Cape. Its learners are drawn from one of the most impoverished communities in the country — nearly 80 per cent of local households earn less than R1000 per month. Although it is a state school, the community provided almost all of the funding for the construction of the school’s three mud rondavels and three cinder block structures.

Despite the community’s best efforts, the conditions at the school were dire. Its 323 learners crowded into classrooms with no electricity, with the result that the only light came from small windows and holes in the roof and walls. During the wet summer months, water poured through the holes, turning the dirt floors into a sea of mud. In the winter months, icy winds whipped through the classrooms. There were only 43 chairs in the school, forcing many learners to squat on the floor or perch on beer crates and tree stumps brought from home. The school had no running water, save for two rainwater tanks that stood empty during the dry winter months. There was no staff room or administrative facilities for the teachers — the principal used a pit latrine as his office. Conditions worsened in 2009 when two of the mud classrooms were destroyed in a series of storms, resulting in the entire foundation phase (grades R to three) relocating to nearby homes. Appeals for assistance to the Eastern Cape Department of Education (ECDOE) were met with vague promises and, more often than not, stony silence.¹⁷

In *Centre for Child Law*, the Legal Resources Centre (LRC) and the Centre for Child Law assisted the parents of learners at Nomandla Primary School and six similarly placed ‘mud schools’ in the surrounding area in taking the national and provincial governments to court over their failure to provide the schools with adequate facilities.¹⁸ This resulted in a far-reaching settlement. The national Department of Basic Education (DBE) pledged R8.2 billion toward a programme for the nationwide improvement of school buildings and the eradication of mud schools between 2011 and 2014. This included an


undertaking to spend an average of R12 million on each of the seven schools involved in the litigation for the construction of permanent school buildings and the provision of basic services. Construction was to begin in May 2011.\textsuperscript{19} In addition, the ECDOE undertook to provide the schools with temporary prefabricated classrooms, water tanks and sufficient desks and chairs. These temporary structures and resources have since been delivered and, after some delay, the national DBE has begun construction of the permanent school buildings.

This case comes on the back of another LRC-assisted constitutional challenge in \textit{Amasango}. The Amasango Career School in Grahamstown is a special needs school catering to ‘extrinsically disabled’ learners: children and young adults whose learning difficulties are caused by socio-economic deprivation rather than physical and mental disabilities. Most of the learners have been abandoned by one or both parents and make a living on the streets. The school’s 130 learners are taught in six small, dilapidated classrooms on premises rented from Transnet, South Africa’s transport parastatal. The school has no counselling rooms, no staff room, no library, no sick bay and no sports field or playing space. These cramped, run-down and inadequate conditions compound the challenge of managing the learners’ severe behavioural and learning difficulties.\textsuperscript{20}

The school was initially placed on a priority list for planned construction of new school buildings, but was inexplicably removed from the list in 2007. As in \textit{Centre for Child Law}, all efforts to engage with the ECDOE came to naught. As a result, the school’s governing body instituted legal action, arguing that the provincial department was in violation of the learners’ s 29(1)(a) right to basic education.\textsuperscript{21} This resulted in two consent orders, recording the ECDOE’s undertaking to provide the school with temporary facilities and to develop a reasonable plan in consultation with the school to provide it with adequate permanent facilities.\textsuperscript{22} At the time of writing, the department had supplied the school with temporary classrooms but no progress has been made in the provision of permanent facilities. A contempt of court application has since been filed against the ECDOE.


The task of ensuring full compliance with the settlement agreement in Centre for Child Law and the court orders in Amasango is likely to drag on for some time. Nevertheless, the fact that the national and provincial departments were so quick to settle is indicative of the power of the argument raised in both cases: that the s 29(1)(a) right to a basic education affords an entitlement to adequate facilities.

III THE RIGHT TO A BASIC EDUCATION

Section 29(1) of the Constitution provides:

‘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.’

Academic commentators have long speculated over the nature and content of the s 29(1)(a) right to a basic education. This speculation has focused on two questions: first, what to make of the absence of the textual qualifiers found in s 29(1)(b) and other socio-economic rights provisions; and, secondly, what is the constitutionally-mandated content of ‘a basic education’? Amasango and Centre for Child Law were litigated without any guidance from the courts. The Constitutional Court’s recent judgment in Juma Musjid goes some way towards providing an answer.

This matter reached the court as an appeal against an eviction order obtained by a private landowner, the Juma Musjid Trust, for the removal of a public school from its premises. While the court ultimately allowed the eviction to proceed, it delivered a stinging rebuke of the KwaZulu-Natal Member of the Executive Council for Education (MEC) for failing to take appropriate steps to protect the rights of the school’s learners. The MEC had failed to enter into a statutorily-required agreement with the Trust to allow the school to operate on its premises and, for over a decade, had failed to pay rent or maintenance costs. The court held that the MEC was in breach of her

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24 Supra note 12.

25 Prior to Juma Musjid, the court’s only real engagement with the right to a basic education was an obiter comment in Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng Education Bill of 1995 1996 (3) SA 165 (CC) para 9, where it confirmed that the right to a basic education includes positive and negative rights.

26 See s 14 of the Schools Act.
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constitutional duty to provide the learners with a basic education and her statutory duty to ensure that there are sufficient places in the province’s schools for all children of school-going age.\textsuperscript{27} In reaching this conclusion on the MEC’s positive obligations, Nkabinde J provided the most extensive analysis of the s 29(1)(a) right yet to emerge from our courts.

\textit{(a) The unqualified nature of the right}

First, Nkabinde J confirmed that the right to basic education is an unqualified right, distinct from the other socio-economic rights:

"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.”\textsuperscript{28}"

This recognises that the absence of textual qualifiers sets the right to a basic education apart from the textually qualified s 26(1) right of access to housing; the s 27(1) right of access to health care services, sufficient food and water, and social security; and the s 29(1)(b) right to further education. The significance of this distinction can only be fully appreciated with an understanding of the court’s ‘reasonableness’ approach to the enforcement of these qualified rights.

The ‘reasonableness’ approach developed out of the court’s interpretation of the text of ss 26 and 27.\textsuperscript{29} The court held that the scope and content of the positive rights\textsuperscript{30} to the provision of socio-economic goods outlined in

\textsuperscript{27} Section 3(3) of the Schools Act.
\textsuperscript{28} Juma Musjid supra note 12 para 37 (footnotes omitted).
\textsuperscript{29} Section 26 provides, in relevant part:

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right . . . .

Section 27 provides:

1. Everyone has the right to have access to —
   a. health care services, including reproductive health care;
   b. sufficient food and water, and
   c. social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

\textsuperscript{30} In Jaffa v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 (CC) paras 31–34, the court held that the reasonableness approach does not apply to the negative rights contained in ss 26(1) and 27(1), restraining the state or other persons from interfering with the enjoyment of these rights.
subsecs 26(1) and 27(1) do not give rise to stand-alone entitlements, but are tightly circumscribed by the subsec (2) qualifications, requiring the state to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of these rights.\(^{31}\) This interpretive move was summarised in *Minister of Health & others v Treatment Action Campaign & others (No 2) (TAC)*:\(^{32}\)

‘[S]ection 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to “respect, protect, promote and fulfil” such rights.’

The implication is that individuals do not have a right to the provision of these socio-economic goods, but are merely entitled to have the state take reasonable steps to provide these goods progressively, within its available resources.\(^{33}\) In simple terms, the fact that a person is homeless,\(^{34}\) has insufficient food or water,\(^{35}\) has limited access to health care,\(^{36}\) or social security\(^{37}\) is not sufficient to establish a limitation of her ss 26 and 27 rights. A limitation of these positive rights will have occurred only if the state's programmes to provide access to these goods are found to be unreasonable.\(^{38}\)

\(^{31}\) See *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC) para 11; *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) paras 38 and 95; *Khosa & others v Minister of Social Development & others; Mahlaule & others v Minister of Social Development & others* 2004 (6) SA 505 (CC) para 43; *Mazibuko & others v City of Johannesburg & others* 2010 (4) SA 1 (CC) paras 46–50.

\(^{32}\) 2002 (5) SA 721 (CC) para 39.


\(^{34}\) See *Grootboom* supra note 31 para 95: ‘Neither s 26 nor s 28 entitles the respondents to claim shelter or housing immediately upon demand. . . . However, s 26 does oblige the State to devise and implement a coherent, co-ordinated program designed to meet its ss 26 obligations.’

\(^{35}\) See *Mazibuko* supra note 31.

\(^{36}\) See *Soobramoney* supra note 31 and *TAC* supra note 32.

\(^{37}\) See *Khosa* supra note 31.

\(^{38}\) This is not to suggest that entitlements to goods cannot be derived from the reasonableness approach. For example, the court's jurisprudence on evictions suggests that, in the majority of cases, reasonableness will require the state to provide temporary alternative accommodation where an eviction order would render individuals homeless. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 28; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2010 (3) SA 454 (CC) para 170; *City of Johannesburg Metropolitan Municipality v Blue Moon*
The court has outlined a number of considerations that must be taken into account in determining whether the state’s programmes are reasonable. Reasonableness requires, among other factors, that programmes be conceived and implemented in a way that is ‘comprehensive’, ‘coherent’ and ‘coordinated’, allocating responsibilities appropriately between the various spheres of government; they must be balanced and flexible; appropriate resources must be made available for their implementation; they should be transparent and the public should be made aware of them; they should not discriminate unfairly; and they should not exclude those who are most vulnerable and whose needs are most urgent.

Another important feature of the reasonableness approach is that it departs from the traditional ‘two-stage’ limitations analysis in which the applicant must establish a limitation of the right, requiring the state to prove that the limitation is reasonable and justifiable under s 36(1) of the Constitution. As the court has recognised, the reasonableness analysis incorporates many of the considerations that would ordinarily arise in the s 36 justification analysis. This is reflected in the fact that the court often bypasses the s 36 analysis where it has found that the state’s programmes are unreasonable. Consequently, the two-stage limitations analysis is largely bundled into the first stage. The result is that there is no clear division between, on the one hand, determining the interests and values that the right protects, the impact on the claimants and whether this amounts to a limitation of the right, and, on the other hand, determining whether this limitation is justified. This has the further implication that the applicants bear the heavy burden of proving that...

light Properties 39 (Pty) Ltd & another 2012 (2) SA 104 (CC). See further Stuart Wilson ‘Breaking the tie: Evictions from private land, homelessness and a new normality’ (2009) 126 SALJ 270 at 289, who describes this as one of the ‘new normalities’ of eviction law. However, this does not change the fact that socio-economic deprivation, by itself, is insufficient to establish unreasonableness and a limitation of the unqualified rights.

39 Grootboom supra note 31 paras 39–41.
40 Ibid para 43.
41 Ibid para 39.
42 TAC supra note 32 para 123; Mazibuko supra note 31 paras 70–71.
43 Khosa supra note 31 para 44.
44 Grootboom supra note 31 para 44.
46 See Khosa supra note 31 paras 83–4. Mokgoro J noted that ‘[t]here is a difficulty in applying s 36 of the Constitution to the socio-economic rights entrenched in ss 26 and 27 of the Constitution’ but left open the question whether s 36 can be bypassed.
47 See for example Grootboom supra note 31; TAC supra note 32; and Blue Moonlight supra note 38.
48 It is of course possible for the court to craft an independent role for the s 36 analysis. See for example Carol Steinberg ‘Can reasonableness protect the poor? A review of South Africa’s socio-economic rights jurisprudence’ (2006) 123 SALJ 264 at 282–3, who argues that ‘reasonableness’ under s 36 should be interpreted as having different content to ‘reasonableness’ in s 26(2) and 27(2) and s 29(1)(b).
the state’s programmes are unreasonable — something to be discussed in greater detail in part V of this article.

The court has tended to adopt this reasonableness approach even when dealing with textually unqualified socio-economic rights, such as the s 28(1)(c) rights of children to basic nutrition, shelter, basic health care services and social services. In Grootboom, Yacoob J argued that s 28(1)(c) does not give rise to direct entitlements to these socio-economic goods as this would be out of step with the ‘carefully constructed constitutional scheme for the progressive realisation of socio-economic rights’.49 This approach was tacitly endorsed in Minister of Health v Treatment Action Campaign (No 2),50 where the court dealt with children’s s 28(1)(c) right to basic health care services as part of its broader analysis of the reasonableness of the state’s policy for the provision of Nevirapine.51

In Juma Musjid, the court confirmed that the s 29(1)(a) right to a basic education is different. It is a right to a basic education. Anything less is a limitation of the right. This strongly suggests that learners and their parents (or adult learners, in the case of the right to adult basic education) can approach the courts arguing that they are not being provided such an education. If they make out a prima facie case, then the state will bear the onus of demonstrating that this limitation is reasonable and justifiable under s 36 of the Constitution. Therefore, this right differs from the qualified rights in the Constitution in at least two important respects. First, it is primarily defined as an entitlement to a good (a basic education) rather than to an action (reasonable state measures to progressively realise the right within available resources).52 Secondly, claims must be determined using the conventional two-stage limitations analysis.

In part V we will explore the significance of these differences for the enforcement of the s 29(1)(a) right. However, two points must be noted at this stage. First, Juma Musjid has not necessarily settled the interpretation of s 29(1)(a). While it would be exceedingly difficult to explain away Nkabinde J’s emphatic statement that the right is unqualified, the court could conceivably go back on this approach by reading in qualifications to this right. We will argue that there are good reasons why it should not, and need not, do so. Secondly, the fact that the right is unqualified does not entail that the state is under an immediate obligation to provide a basic education on demand. The state could justify its failure to provide under s 36(1) or it could present arguments to demonstrate that immediate relief would not be a ‘just and equitable’ order under s 172(1)(b). Nevertheless, as we argue below, this does not strip the right of its force.

49 Supra note 31 para 71.
50 Supra note 32 paras 74–9.
51 See Liebenberg Socio-Economic Rights op cit note 23 at 235–8 for a discussion of this approach.
52 On the distinction between rights to ‘goods’ and rights to ‘actions’ see Fredman op cit note 33 at 88–90.
These caveats aside, an important implication of defining the right as ‘a right to a basic education’ rather than ‘a right to have the state take reasonable steps over time to realise this right’ is that it will require courts to give close attention to the nature of ‘a basic education’.

(b) The nature of ‘a basic education’

Woolman & Fleisch suggest that there are at least two plausible interpretations of ‘a basic education’: it could refer to a ‘period of schooling’ or it could refer to a ‘standard of schooling’.\(^{53}\) The first construction is narrow and formalistic; the latter is substantive, requiring an education of a certain content. \(^{53}\) Juma Musjied\(^{54}\) gives a strong indication that the court will favour this substantive interpretation in future cases.

There was a danger that the court would opt for the narrow construction of ‘a basic education’. Nkabinde J seems to have been tempted by this approach, at first appearing to suggest that ‘a basic education’ is synonymous with the statutory defined period of compulsory schooling:

‘Section 3(1) of the [Schools] Act, following the constitutional distinction between “basic” and “further” education, makes school attendance compulsory for learners from the age of seven years until the age of 15 years or until the learner reaches the ninth grade, whichever occurs first.’\(^{54}\)

However, the passages that follow this remark seem to reject a strict one-to-one identification of a basic education with this compulsory period of schooling. After reviewing a range of education guarantees in international\(^{55}\) and regional\(^{56}\) human rights instruments, Nkabinde J concluded that ‘a basic education’ has several important purposes:

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\(^{53}\) Woolman & Fleisch op cit note 23 at 127. The ‘White Paper on Education and Training’ — the document that heralded the post-apartheid reforms of the education system — echoes these options, suggesting that a basic education can be defined in terms of ‘learning needs and outcomes’ or in terms of ‘qualification levels, or school grades’. Department of Education ‘White Paper on Education and Training’ GN 196 GG 16312 of 15 March 1995, ch 7 para 12.

\(^{54}\) Juma Musjied supra note 12 para 38 (emphasis supplied). See further L Arendse ‘The obligation to provide free basic education in South Africa: An international perspective’ (2011) 14 Potheftoom Electronic Law Journal 97 at 117, who interprets the judgment as restricting the right to a basic education to the statutorily required period of compulsory schooling.


The significance of education, in particular basic education, for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.57

This purposive interpretation of the right suggests that it is a right to an education with substantive content: the type of education capable of achieving the primary goals of individual and societal development. On this approach, the statutorily-determined period of compulsory schooling is only contingently related to a basic education; the mere fact that a learner attends school for this period is no guarantee that he or she will have had the opportunity to receive such an education. This reading is reinforced by Nkabinde J’s reflection on the transformative potential of education, seeing it as an important means to address the legacy of apartheid. If the right were interpreted as a mere entitlement to a place in a school for a defined period then it would have little or nothing to say about the inadequacy of that schooling or the stark inequalities that remain in the education system. Nkabinde J and the court clearly expect more from this right, as is consistent with the court’s insistence that constitutional rights must be given transformative content, directed at promoting social justice.58

This interpretation of the right to a basic education is further reinforced by the distinction between ‘primary’ education and ‘basic’ education in international law.59 The 1990 World Declaration on Education for All60 (1990 Declaration) was instrumental in introducing the concept of ‘basic education’ into international human rights discourse. Katarina Tomaševski (the

57 Juma Musjid supra note 12 para 42, emphasis added; footnotes omitted.
58 See Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others 2001 (1) SA 545 (CC) para 21: ‘The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.’ (Emphasis supplied.) See also Minister of Finance & another v Van Heerden 2004 (6) SA 121 (CC) para 25. See further Karl E Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 SAJHR 146.
59 Section 39(1)(b) of the Constitution provides that ‘[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law’. This requirement applies to both binding and non-binding international law: see S v Makwanyane 1995 (3) SA 391 (CC) para 35.
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former UN Special Rapporteur on the Right to Education) notes that in its wake, the language of international education strategies shifted from 'primary education' — as found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC), among other instruments — towards 'basic education', influencing subsequent international and domestic education strategies.61 Undoubtedly it also had an influence on the wording of the right to education in South Africa's interim62 and final Constitutions.

The essential difference between these concepts is that 'primary' education is defined as a period of compulsory schooling while 'basic' education refers to an education with a substantive content. In General Comment 13, the United Nations Committee on Economic, Social and Cultural Rights noted that a primary education ought to be directed at providing a basic education. In most cases, primary education is the 'main delivery system' for such an education.63 However, basic education can and should be provided in other ways, including adult education.64 This is reflected in s 29(1)(a), which provides that the right to a basic education includes 'adult basic education'.65 Therefore, 'primary' education and a 'basic' education are interrelated concepts but they are not synonymous.66 Interpreted in this light, the s 29(1)(a) right is more than just a right to a period of schooling.

What is the content of a basic education? Art 1 of the 1990 Declaration explains that the right to basic education is a guarantee that:

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

Simply stated, a basic education is an education capable of satisfying individuals’ basic learning needs which are identified with reference to the broader purposes of education. This is an inherently flexible standard, as art 1 of the Declaration goes on to state that 'basic learning needs and how they

62 Section 32(a) of Constitution of the Republic of South Africa Act 200 of 1993, which provided: 'Every person shall have the right . . . to basic education and to equal access to educational institutions.'
63 CESC 13 - The Right to Education (art 13)’ UN Doc E/C 12/1999/10 para 9, citing art 5 of the 1990 Declaration.
64 Ibid.
65 See Daria Roitman ‘Access, adequacy and equality: The constitutionality of school-fee financing in public education’ (2003) 19 SAJHR 382 at 393, who argues that the inclusion of ‘adult basic education’ in this right is 'rendered nonsensical if one defines “basic” to include only compulsory primary education’.
66 Tomaševski op cit note 61.
should be met’ will vary with the context and circumstances in each country and will ‘[change] with the passage of time’. They will also differ depending on learners’ capacities. For example, in Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa, the Western Cape High Court noted that a basic education for severely mentally-challenged learners may be very different to that provided to learners in mainstream schools; what is important is that the learner receives an education that ‘will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be’.68

This purposive understanding of the right must extend to the range of educational inputs — both pedagogical and physical — required to satisfy individuals’ basic learning needs.69 Furthermore, these inputs should be adequate, meaning that they should be of sufficient quality to create a teaching and learning environment capable of satisfying these needs.

As a result, identifying the substantive content of the right involves a three-fold inquiry: first, identifying the broad purposes of education; secondly, identifying learners’ basic learning needs in light of these purposes; and, thirdly, identifying the inputs required to meet these basic learning needs. We now turn to demonstrate that these inputs must include school facilities of an appropriate quality.

IV BASIC EDUCATION AND ADEQUATE SCHOOL FACILITIES

(a) The empirical link between facilities and outcomes

Educationalists and economists have long debated the role of physical resources in producing positive educational outcomes. Production function analyses have provided mixed results, with some early studies suggesting that investment in infrastructure and other school facilities has little or no effect,70 while more recent studies suggest that it makes a substantial contribution, particularly in developing nations.71

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67 2011 (5) SA 87 (WCC). This case is another example of LRC-assisted litigation.
68 Ibid para 25, quoting the Irish Supreme Court decision in O’Donoghue v Minister of Health & Others [1996] 2 IR 20 (SC) at 65.
70 See for example Eric A Hanushek ‘Interpreting recent research on schooling in developing countries’ (1995) 10 World Bank Research Observer 227, one of the most widely cited studies on educational inputs and outputs, which finds that resources make a limited contribution to educational performance. However, Hanushek recognises that there are significant differences between developed and developing countries, noting that a majority of studies find a clear link between quality facilities and achievement in developing countries (at 231).
71 See F Crampton “Spending on school infrastructure: does money matter?” (2009) 47 Journal of Educational Administration 305, which finds that infrastructure is
While these technical debates are valuable, we contend that a healthy measure of common-sense is required. Infrastructure and physical resources alone can never be sufficient for effective teaching and learning. Much depends on educators’ skills and commitment, the quality of curricula and the effectiveness of school administrators, to name but a few of the necessary inputs. However, decent school facilities are, in the vast majority of cases, an important prerequisite for teaching and learning that is capable of satisfying basic learning needs.

The plight of the schools in Centre for Child Law and Amasango bears out this logic. The desperate conditions in the seven mud schools left teachers and learners demoralised, caused severe disruptions to teaching and learning and often rendered schooling impossible. In Amasango, the cramped and under-resourced conditions at the school compounded the challenge of educating learners with severe extrinsic learning difficulties. These cases demonstrate that the absence of an adequate physical environment makes the provision of a basic education extremely difficult, if not impossible.

This link is recognised in the national DBE’s 2010 National Policy for an Equitable Provision of an Enabling School Physical Teaching Environment (National Policy on the Physical Teaching Environment). In the foreword, the Minister acknowledges that “[i]nfrastucture differentials are so large in South Africa and . . . the infrastructure so inadequate that it is inconceivable that it [does] not impact on learner performance”. The policy proceeds to identify a number of ways in which the physical environment affects teaching and learning:

Poor learning environments have been found to contribute to learner[s’] irregular attendance and dropping out of school, teacher absenteeism and the teacher and learners’ ability to engage in the teaching and learning process . . . Extreme thermal conditions of the environment are found to increase annoyance and reduce attention span and learner mental efficiency, increase the rate of learner errors, increase[d] teacher fatigue and the deterioration of work second only to human capital in contributing to academic achievement. See also D Branham ‘The wise man builds his house upon the rock: The effects of inadequate school building infrastructure on student attendance’ (2004) 85 Social Science Quarterly 1112. For an overview of South African studies on the subject see Brahms Fleisch Primary Education in Crisis: Why South African Schoolchildren are Underachieving in Reading and Mathematics (2008) ch 4; and Equal Education ‘Submissions to Parliamentary Portfolio Committee on Basic Education – Comments on how to improve basic education’ (2010) 4–5 available at http://www.equaleducation.org.za/sub-pc-be, accessed on 19 May 2012. South Africa recently began administering standardised tests at various grade levels: the Annual National Assessment (ANA). See Department of Basic Education Report on the Annual National Assessments of 2011 (2011). However, it not yet possible to use these results to make a connection between school facilities and educational outcomes.

72 See founding affidavit in Centre for Child Law op cit note 18.
73 See founding affidavit in Amasango op cit note 20.
74 GN 515 GG 33283 of 11 June 2010.
75 Ibid at 4.
patterns, and affect learning achievement. Good lighting improves learners’ ability to perceive visual stimuli and their ability to concentrate on instructions. . . . Good acoustics improves learner hearing and concentration, especially when considering the reality that at any one time, 15 percent of learners in an average classroom suffer from some hearing impairment that is either genetically based, noise-induced or caused by infections. Outdoor facilities and activities have been found to improve formal and informal learning systems, social development, teamwork and school-community relationships.\textsuperscript{76}

This touches on the complex interplay between the physical environment and teaching and learning, ranging from the appearance of school buildings to classroom acoustics. The policy goes on to detail a litany of other interactions, from the impact of overcrowding on teaching and learning,\textsuperscript{77} to the effects of inadequate toilet facilities on girl children’s school attendance.\textsuperscript{78}

In the light of this close connection between the physical environment and teaching and learning, s 5A of the Schools Act provides that the Minister of Basic Education may issue regulations establishing minimum norms and standards for school infrastructure, capacity and the provision of learning and teaching support materials. In 2008, the Minister published Draft Minimum Norms and Standards for School Infrastructure\textsuperscript{79} (Draft Norms and Standards) which were drafted with the express goal of identifying the mix of physical inputs required ‘to create a physical teaching and learning environment that facilitates effective delivery of curricula and co-curricula activities.’\textsuperscript{80} The National Policy on the Physical Teaching Environment indicated that these Draft Norms and Standards were to be enacted as regulations in time for the 2010/11 financial year. Despite this undertaking, the Norms and Standards remain in draft form. The Minister’s position is that she does not intend formalising them as enforceable regulations\textsuperscript{81} and has subsequently published non-binding Guidelines Relating to Planning for Public School Infrastructure (Guidelines).\textsuperscript{82} This position is currently being challenged in further LRC-assisted litigation in \textit{Equal Education \& others v Minister of Basic Education \& others}.\textsuperscript{83} Regardless of how this litigation will play out, the existence of the Draft Norms and Standards and the Guidelines is further acknowledgement that a basic education requires adequate facilities.

\textsuperscript{76} Ibid at 7, para 1.2; see also at 27–9.
\textsuperscript{77} Ibid at 18.
\textsuperscript{78} Ibid at 27.
\textsuperscript{79} GN 1439 GG 31616 of 21 November 2008.
\textsuperscript{80} Ibid para 2.28.
\textsuperscript{81} Correspondence on file with authors.
(b) Section 29(1)(a) and the broader Bill of Rights

The importance of quality school facilities is reinforced by reading s 29(1)(a) in light of other important rights and values in the Constitution. This entails that the teaching and learning environment should promote the human dignity of learners and teachers (s 10), it must not threaten their freedom and security (s 12) and it should not be harmful to their health and wellbeing (s 24(a)), all of which require school facilities of a certain quality. These rights require school facilities of a certain quality irrespective of whether these improvements would impact on teaching and learning. However, it is difficult to imagine situations in which hazardous, unsafe and demeaning school facilities would not hamper learners' ability to receive a basic education.

The s 9 right to equality also has an important role in the interpretation of s 29(1)(a). Reading these rights together, the right to a basic education is also a right to an equal education. Not only does this prohibit the state from unfairly discriminating in the provision of educational opportunities, but it also requires the state to take positive steps to undo the systemic patterns of disadvantage created by the apartheid education system. This system was characterised by vastly skewed state spending, with white learners receiving much more than black learners. As O'Regan J observed in MEC for Education: KwaZulu-Natal v Pillay, while 'things have improved somewhat...the pattern of disadvantage engraved onto our education system by apartheid has not been erased'. These inequalities are most visible in the

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84 Section 39(1)(a) provides that when interpreting the rights in the Bill of Rights courts 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. This affirms that 'constitutional rights are mutually interrelated and interdependent and form a single constitutional value system': De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & others 2004 (1) SA 406 (CC) para 55; Matatiele Municipality & others v President of the Republic of South Africa & others 2007 (1) BCLR 47 (CC) paras 36–7.

85 See Minister of Home Affairs & others v Watchenuka & another 2004 (4) SA 326 (SCA) where the Supreme Court of Appeal held that regulations which prohibited asylum seekers from studying in South Africa unjustifiably limited the right of 'everyone' to a basic and further education.

86 The Constitutional Court has consistently recognised that the right to equality requires the state to take 'remedial and restitutinary measures', particularly in the education system. See National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 112 (CC) paras 60–2; Hoeskool Emelina supra note 7 paras 47–8. For further analysis of the positive duties flowing from the right to equality see Freedman op cit note 33 ch 7; and Sandra Liebenberg & Beth Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 SAJHR 335.

87 For example, in 1994, the final year of apartheid-era budgeting, R5403 was spent per white child, R4687 on every Indian child, R3961 on every coloured child and a mere R1715 on every black child. Department of Education Report of the Committee to Review the Organisation, Governance and Funding of Schools (1995) 15 cited in Wilson op cit note 15 at 426.

88 2008 (1) SA 474 (CC).
condition of schools' facilities. Former 'Model C' schools continue to enjoy comparatively lavish facilities and resources while the majority of black children are still educated in decrepit, crowded and unsafe buildings with few resources and limited access to basic services.

A commitment to undoing these inequalities is evident in s 34(1) of the Schools Act, which provides that the state must 'fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision'. This commitment is further evident in the National Policy on the Physical Teaching Environment, which places equal stress on the provision of school facilities that are 'enabling' and 'equitable'.

The concept of an 'equal education' presents a host of possibilities and challenges that merit far greater consideration than we can provide here. Nevertheless, it has the undeniable implication that the state must take urgent steps to improve facilities in the most underprivileged schools.

(c) International law

International law provides further direction in the interpretation of s 29(1)(a). While the major international human rights instruments do not expressly mention school facilities, they are viewed as an essential component of the right to education in these instruments.

The Committee on Economic, Social and Cultural Rights has adopted the '4-As' approach in its interpretation of the art 13 right to education in the ICESCR. On this interpretation, education at all levels must be made available, accessible, acceptable and adaptable. While all four of these requirements have a bearing on the quality of school facilities, this is made explicit in the Committee's articulation of the requirement of availability:

'[F]unctioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require

89 The term 'Model C school' is commonly used to refer to historically white schools that enjoyed preferential funding and resources under apartheid. The term has its origins in the Education Affairs Amendment Act 88 of 1991, which allowed white schools to become semi-autonomous, state supported entities with the ability to raise their own funds.

90 Emphasis added. Authors such as Wilson op cit note 15 at 427 make much of the distinction between 'equity' and true 'equality'. For our purposes it is not necessary to address this conceptual debate.


92 See s 39(1)(f) of the Constitution.

93 See instruments cited at notes 55 and 56 above.

94 'General Comment 13' op cit note 63 para 6. The '4-As' approach was first developed by the UN Special Rapporteur on the Right to Education, Katarina Tomasevski, in her 1999 Preliminary Report op cit note 61 para 50. See further Katarina Tomasevski Human Rights Obligations in Education: The 4-4 Scheme (2006).

95 South Africa has signed but not yet ratified the ICESCR. However, in light of the dictum in Makuwanyane supra note 59 para 35, courts must take into account binding and non-binding international law.
to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.

This non-exhaustive list highlights five key elements of resource provision: school buildings that, at bare minimum, protect educators and learners from the elements; sufficient sanitation facilities that are also gender appropriate; safe drinking water; adequate teaching materials and access to facilities that enhance the quality of education, including libraries and computer facilities.

The Committee on the Rights of the Child has echoed these sentiments in its interpretation of the art 28 right to education in the CRC, stating that it affords an entitlement 'to receive an education of good quality which in turn requires a focus on the quality of the learning environment'. In its report on the implementation of the Convention in South Africa the Committee expressed its concern over 'the extent of overcrowding in some areas; ... poorly maintained infrastructure and equipment; [and] shortages of textbooks and other materials' in South African schools.

(d) Foreign law

Turning now to comparative jurisprudence, the United States and India provide useful guidance in drawing the link between the right to education and school facilities.

The US has generated a rich body of case law and academic writing on the right to education. While the US Constitution does not contain a right to education, education guarantees are enshrined in most of the states' constitu-

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96 Emphasis added. CESC 'General Comment 13' op cit note 63 para 6.
97 See further CESC 'General Comment 15 on the Right to Water' UN Doc E/C 12/2002/11 paras 12(c)(i) and 16(b), which interprets the art 11 right to the highest attainable standard of living and the art 12 right to the highest attainable standard of health under the ICESCR as giving rise to duties to provide safe and adequate water supplies to schools: '[s]ufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each ... educational institution' and '[p]rovision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency'.
98 The Convention was ratified by South Africa on 16 June 1995.
101 Section 39(1)(c) provides that when interpreting the Bill of Rights courts 'may consider foreign law'.
tions, requiring the creation and maintenance of public schools. The case law on these rights provides important guidance for South Africa for two reasons. First, despite its wealth, the US also has substantial socio-economic inequalities and a history of segregation which have resulted in a gulf in the funding and quality of its schools. Secondly, the US courts are well known for their timidity in recognising and enforcing socio-economic entitlements, given their concerns about their competence and legitimacy in this area. As a result, South African courts should be emboldened by the fact that the US courts have developed a robust understanding of the right to education and have ‘waded deeply’ into education issues despite these concerns.

A distinctive feature of the state-level litigation over education rights is its emphasis on the adequacy of education. The string of judgments that have emerged tend to follow a common pattern in interpreting the right to education, consistent with the approach that we have endorsed above. First, they identify the broad purposes of education; secondly, they outline the content of the education that learners require to be capable of achieving these purposes; and, thirdly, they identify the various inputs, both pedagogical and physical, required to attain such an education.

This approach is most evident in the decisions of the New York Court of Appeals — the highest court in the State of New York — in the series of Campaign for Fiscal Equity cases. Starting in the mid-1990s, a broad coalition of civil society groups litigated against the State of New York, arguing that it was in breach of its constitutional obligation to ‘provide for the maintenance and support of a system of free common schools, wherein all the children of

102 See Doron Isaacs ‘Interpreting, litigating and realising the right to education in South Africa: Lessons from America’ (2010) 26 SAJHR 356 at 379, for an overview of these constitutional provisions.

103 Berger op cit note 23 at 653.

104 See for example the US Supreme Court decision in San Antonio Independent School Board v Rodriguez 411 US 1 (1976) where the Supreme Court heard a challenge to a school funding model based on local property taxes that resulted in schools in wealthier areas receiving significantly more funding than those in poorer areas. The Supreme Court refused to recognise an implied right to education in the US Constitution and rejected the claim that vast disparities in the funding of public schools amounted to a violation of the equal protection clause of the Fourteenth Amendment. The latter finding was in large part motivated by the court’s reluctance to engage in ‘delicate and difficult questions of . . . fiscal policy’ which the court considered itself ill-equipped to address.


this state may be educated’.\textsuperscript{107} In \textit{Campaign for Fiscal Equity v State of New York}\textsuperscript{108} (\textit{Campaign for Fiscal Equity I}), on the first round of appeals, the court held that this constitutional duty required the state to secure an opportunity for a ‘sound basic education’ for all learners. This was held to consist of ‘the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury’.\textsuperscript{109} Furthermore, the court emphasised that this standard of education required the provision of physical resources, including ‘minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn together’ with ‘minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks’\textsuperscript{110}. Thus a clear link was drawn between the goals of education (identified as civic participation and the ability to seek gainful employment), the skills and knowledge required to achieve these goals (basic literacy, calculating and verbal skills) and the physical resources required to support effective teaching and learning of these skills.

The appellate courts in other US states have consistently mirrored this approach. For example, the New Jersey Supreme Court has held that the constitutional requirement that the State Legislature ‘provide for the maintenance and support of a thorough and efficient system of free public schools’ requires the provision of an adequate education. In turn, the court has held that this necessitates the provision of ‘adequate physical facilities’.\textsuperscript{111} In subsequent litigation, the court reaffirmed that ‘deteriorating physical facilities relate to the State’s educational obligation, and . . . adequate physical facilities are an essential component of that constitutional mandate.’\textsuperscript{112} Similarly, the courts in the states of Wyoming,\textsuperscript{113} Idaho,\textsuperscript{114} and Connecticut,\textsuperscript{115} among many others, have consistently affirmed that the right to education in their state constitutions requires adequate school facilities.\textsuperscript{116}

\textsuperscript{107} Article XI, § 1 of the New York State Constitution.
\textsuperscript{108} 86 NY 2d 307 (NY 1995).
\textsuperscript{109} Ibid at 316.
\textsuperscript{110} Ibid at 317.
\textsuperscript{111} Abbott v Burke II 119 NJ 287 (NJ 1990) at 362.
\textsuperscript{112} Abbott v Burke IV 149 NJ 145 (NJ 1997) at 186.
\textsuperscript{113} Campbell County School District v State of Wyoming 907 P2d 1238 (Wyo 1995) at 1275: ‘Safe and efficient physical facilities with which to carry on the process of education are a necessary element of the total educational process.’
\textsuperscript{114} Idaho Schools for Equal Opportunity v State of Idaho 976 P2d 913 (Idaho 1998): ‘[A] safe environment conducive to learning is inherently a part of a thorough system of public, free common schools that Article IX § 1 of our state constitution requires the Legislature to establish and maintain.’
\textsuperscript{115} Connecticut Coalition for Justice in Education Funding, Inc v Rel 295 Conn 240, 245 (Conn 2010) at 314.
\textsuperscript{116} For a comprehensive analysis of the US state courts’ decisions on education and school facilities see the memorandum prepared by M Hency & K Devin from Cornell Law School’s International Human Rights Law Clinic, ‘School facilities and the right to education in the United States’ (2011), available at http://dl.dropbox.com/
The development and interpretation of the right to education in India is also highly instructive.\(^{117}\) Like South Africa, the Indian state faces extreme demands on its limited resources. Despite these constraints, Indian law imposes an extensive range of obligations on the state to provide an adequate education. Article 21A of the Indian Constitution provides that the state ‘shall provide free and compulsory education to all children on the age of six to fourteen years in such manner as the State may, by law, determine’.\(^{118}\) In 2009, the Indian parliament passed the Right to Free and Compulsory Education Act\(^{119}\) in furtherance of this right.\(^{120}\) Importantly, the Act contains extensive norms and standards for the provision of school facilities requiring one classroom for every teacher, administrative office space, gender-appropriate sanitation, safe and adequate drinking water, a kitchen, a playground, security walls or fencing, teaching and learning equipment, play material, games and sports equipment, and a library.\(^{121}\)

The Indian Supreme Court has also drawn a direct link between the constitutional right to education and the adequacy of the school environment. In *Avinash Mehotra v Union of India*\(^{122}\) the court held that the state was in violation of the art 21A right to education, read with the art 21 right to life, for failing to ensure proper fire safety measures in schools. In reaching this conclusion, it emphasised that

‘educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child’s safety’.\(^{123}\)

The court bolstered this interpretation with an argument based on the compulsory nature of education in India:


\(^{118}\) This must be read with the art 21 right to life and the art 41 and 45 education guarantees in the Chapter IV ‘Directive Principles’. See *Mohini Jain v State of Karnataka* AIR 1992 SC 1858 and *Unnikrishnan J P v State of AP* AIR 1993 SC 2178, where the Indian Supreme Court held that the right to education forms a part of the art 21 right to life. For background on this litigation leading to the introduction of the art 21A amendments, see Jayna Kothari ‘Social rights and the Indian Constitution’ (2004) 2 *Law, Social Justice & Global Development Journal* available at http://www.go.warwick.ac.uk/elfg/ljd/2004_2/Kothari, accessed on 19 May 2012.

\(^{119}\) Act 35 of 2009.

\(^{120}\) See further *Society for Un-Aided Private Schools of Rajasthan v Union of India* (Indian Supreme Court) unreported writ petition no 95 of 2010 (12 April 2012), in which the Indian Supreme Court discussed the purpose and genesis of the Act and held that it was constitutionally compliant.

\(^{121}\) Schedule to the Act, items 2, 5, 6 and 7.

\(^{122}\) (2009) 6 SCC 398.

\(^{123}\) Ibid para 30.
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'Parents should not be compelled to send their children to dangerous schools, nor should children suffer compulsory education in unsound buildings. . . . No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and civic duty.'

This argument — that compulsory schooling and its coercive enforcement is legitimate only if the state provides safe schools — has particular resonance in South Africa. The Department of Basic Education recognises that over 15 per cent of learners are taught in 'environments that expose them to danger and potential health hazards', yet their parents or guardians face criminal penalties if they fail to send them to school.

(e) Summary

The empirical link between educational inputs and outcomes and the interpretative guidance provided by other constitutional rights, international law and foreign law suggest that the right to a basic education includes a right to adequate facilities: facilities that are conducive to the provision of a basic education and are not otherwise a threat to the health, safety or dignity of learners and teachers. We now turn to consider how litigants and courts should approach this right.

V ENFORCING THE UNQUALIFIED RIGHT TO A BASIC EDUCATION

In this part we will focus on litigation initiated by parents or other concerned individuals seeking improvements in the facilities at their schools. Here we will draw on the facts in Amasango and Centre for Child Law to ground this discussion. While our focus is on the entitlement to school facilities, much of what is said here applies equally to the judicial enforcement of other entitlements flowing from the right to a basic education.

(a) The different in approach

As discussed in part III, the unqualified s 29(1)(a) right differs from the qualified socio-economic rights in two striking ways. First, individuals have a direct right to a basic education, including adequate facilities, not merely a right to have the state put in place reasonable programmes to realise this right over time and within its available resources. Secondly, the adjudication of these claims will involve the traditional two-stage limitations analysis, rather than compressing this analysis into the assessment of the reasonableness of the state’s actions. These differences in the form of the s 29(1)(a) right offer litigants a number of advantages.

First, the unqualified right to a basic education eases the burden of proof on claimants. Normally, rights claimants must establish that there has been a limitation of their rights and only if a limitation has been proved will the state

124 National Policy on the Physical Teaching Environment op cit note 74 at 18, para 1.18.
125 See s 3(6)(a) of the South African Schools Act.
bear the burden of justifying this limitation. The Constitutional Court has not been clear on whether the same burden of proof applies to claims brought under the qualified socio-economic rights. However, its statements in *Soobramoney*,¹²⁶ *TAC¹²⁷* and *Mazibuko¹²⁸* strongly suggest that the onus remains on the applicant to establish that the state’s programmes are unreasonable. The implication is, as Liebenberg puts it, that litigants must ‘review the whole panoply of government programmes and assess their reasonableness in the light of the resources available to the State’.¹²⁹ ‘This would be a difficult task for most litigants, but it is particularly difficult for those in rural or impoverished areas — such as the litigants in *Centre for Child Law* and *Amasango* — who may lack access to the necessary information and expertise. Dugard & Roux argue that this approach undermines the courts’ role as an ‘institutional voice for the poor’ as it makes it ‘all but impossible for the poor to bring social rights cases without extensive technical and financial support’.¹³⁰ Even with this support, it is exceedingly difficult to demonstrate that state programmes are unreasonable, particularly in provinces such as the Eastern Cape, where information on departmental policies and programmes is not readily accessible. For example, after months of searching the LRC could only obtain a draft copy of the ECDOE’s Infrastructure Plan for 2005–2014, the policy setting out the criteria for prioritising school infrastructure delivery in the province.¹³¹ The unqualified right to a basic education turns the tables. To establish a limitation of the s 29(1)(a) right, litigants must establish that the facilities at their school are inadequate — a topic on which they can most readily contribute. This will then shift the burden to the state to demonstrate that the limitation is justified in terms of s 36 or that an immediate order would not be just and equitable.

¹²⁶ *Soobramoney* supra note 31 para 36: ‘The state has a constitutional duty to comply with the obligations imposed on it by s 27 of the Constitution. It has not been shown in the present case, however, that the state’s failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations.’

¹²⁷ *TAC* supra note 32 para 25: ‘The question is whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their new-born babies fall short of its obligations under the Constitution.’

¹²⁸ *Mazibuko* supra note 31 para 102: ‘[I]t cannot be said that the policy as formulated at the time this matter was heard by the High Court was unreasonable. The applicants’ argument in this regard must fail.’


¹³¹ See founding affidavit in *Centre for Child Law* op cit note 18 para 46.
Secondly, the unqualified right will require courts to give content to the right to a basic education and to assess the impact of poor school facilities on learners and teachers to determine whether the right has been limited. This has two important implications. The first is that the state’s justifications for its failure to provide adequate facilities will be weighed in the light of the importance of this right and the extent of its limitation. The second is that the litigants’ plight is placed at the centre of the inquiry, requiring courts to give their situation proper consideration.

This stands in contrast to the Constitutional Court’s approach to the qualified rights in the Constitution. For all that the court has achieved (and it has achieved a great deal) an abiding criticism of its reasonableness approach is that the focus on the reasonableness of the state’s programmes diverts attention away from the substantive content of socio-economic rights and the deprivation experienced by the litigants. Barring a cursory analysis of ‘adequate housing’ in Grootboom and the importance of social security in Khosa, the court has largely failed to explore the interests and values that underpin these socio-economic rights. In addition, while the court has expressed genuine concern for the effects of poverty and deprivation, when it comes to assessing the reasonableness of state programmes its assessment is often devoid of any real engagement with the litigants’ plight. The court’s recent decision in Blue Moonlight provides a clear example of this. In analysing whether it was reasonable for the City of Johannesburg to exclude persons evicted by private landowners from its temporary housing programme, the court’s assessment of the reasonableness of this exclusion in light of the litigants’ circumstances was relegated to a mere footnote. As a result, numerous commentators have argued that the court’s reasonableness analysis often occurs in a ‘normative vacuum’, threatening to reduce reasonableness to a set of procedural requirements rather than a substantive standard of review that shows real concern for the effects of socio-economic deprivation. This is not to say that the reasonableness approach precludes courts from giving substantive content to socio-economic rights or giving consideration to the litigants’ plight. Most recently, Liebenberg has argued

132 Supra note 31 paras 35–6.
133 Supra note 31 paras 50–2.
134 See for example TAC supra note 32 and Mazibuko supra note 31, where the court failed to engage in any analysis of the nature and purpose of the s 27(1) rights of access to ‘health care services’ and ‘sufficient water’.
135 Supra note 38.
136 Ibid at footnote 88.
138 Liebenberg ibid at 176.
that courts can and should do more to develop it in this direction.\textsuperscript{139} However, the advantage of the unqualified right to a basic education is that these features come built into the framework of analysis that the right demands.

While the s 29(1)(a) right affords a number of advantages to litigants, its enforcement will present courts with two primary challenges. First, the need to give content to the right will raise familiar concerns about the courts’ competence and legitimacy in specifying the content of socio-economic rights. Secondly, there is the challenge of reconciling the unqualified right with the state’s limited capacity and resources. Faced with these challenges, the court may be tempted to revisit \textit{Juma Musjid}, opting to read in reasonableness and progressive realisation qualifications. Alternatively, courts may be tempted to interpret the right to a basic education as narrowly as possible, removing much of its transformative content. However, we contend that these challenges can be overcome without denuding the right of its content and force.

\textit{(b) Giving content to the right}

The Constitutional Court has been reluctant to give precise content to socio-economic rights, as seen in its rejection of the ‘minimum core approach’; the approach that holds there are ‘minimum essential levels’ of socio-economic rights that the state must satisfy immediately.\textsuperscript{140} As the Constitutional Court has consistently argued, it would be democratically inappropriate for unelected members of the judiciary to give fixed content to these socio-economic rights, thereby usurping the role of the legislature and the executive.\textsuperscript{141} Even if it were appropriate, the court lacks the capacity or expertise to make such determinations.\textsuperscript{142} Furthermore, needs are context-specific, making it undesirable to establish universal, context-independent standards.\textsuperscript{143} Similar concerns would arise in determining a standard of adequacy for the provision of school facilities.

It must be emphasised that the court’s rejection of the minimum core is a rejection of attempts to fix precise, ‘quantified’\textsuperscript{144} standards for the provision of socio-economic goods. However, it is possible to give substantive content to the right to a basic education and the entitlement to adequate facilities without engaging in this form of inappropriate standard-setting. As we have argued above, this involves identifying, in broad and general terms, the purposes of a basic education, basic learning needs, and the types of inputs

\textsuperscript{139} See Liebenberg ibid ch 4.
\textsuperscript{141} See Mazibuko supra note 31 para 61.
\textsuperscript{142} See TAC supra note 32 paras 37–8; Mazibuko supra note 31 para 62.
\textsuperscript{143} Grootboom supra note 31 para 32; Mazibuko ibid para 60.
\textsuperscript{144} See Mazibuko ibid.
required to fulfil these needs.\textsuperscript{145} Courts would then be able to identify inadequate facilities on a case-by-case basis, in the light of this substantive content, but would refrain from making fine-grained determinations of what is required to rectify this failure.

This approach was displayed by the New York Court of Appeals in \textit{Campaign for Fiscal Equity}, which was discussed in part IV(d) above. There the court determined that a 'sound basic education' must be directed at achieving a particular set of goals, requiring learners to develop a broad set of skills such as numeracy, literacy and verbal skills which in turn require adequate physical and pedagogical inputs.\textsuperscript{146} In \textit{Campaign for Fiscal Equity II}\textsuperscript{147} the court found that the state's school funding model was failing to provide a sound basic education, but it did not seek to dictate the precise level of funding required for such an education. Instead, the court left it to the legislature to make this determination in light of the broad normative principles outlined in the judgment. As the court emphasised, the judiciary's role is 'to define, and safeguard, rights' but it possessed 'neither the authority, nor the ability, nor the will, to micromanage education [policy].'\textsuperscript{148} The Supreme Court of Washington State came to a similar conclusion in \textit{McLeary v State of Washington},\textsuperscript{149} holding that while the judiciary has primary responsibility for interpreting the right to education, it is for the executive and legislature to determine the precise means of discharging its duties.

A similar approach could be used in determining the adequacy of a school's facilities. For example, it may be argued that, in the light of the purposes of education and the need to foster literacy, a basic education requires access to libraries.\textsuperscript{150} This could be realised through a range of alternative strategies, from providing libraries in every school to less resource intensive strategies such as ensuring better access to public libraries or providing mobile libraries. It is not for the courts to dictate which option should be selected. However, where learners have limited or no access to libraries, then a clear limitation of the right will have occurred. In the absence of a justification, the state may be ordered to take appropriate measures to provide access to libraries, leaving it to the state to select from the range of possible options for delivering this service.

This demonstrates the 'dialogic' approach to adjudication where the

\textsuperscript{145} As Woolman & Fleisch op cit note 23 at 113 put it, this involves identifying the 'contours of the general norm'.

\textsuperscript{146} \textit{Campaign for Fiscal Equity I} supra note 108.

\textsuperscript{147} 100 NY 2d 893 (NY 2003).

\textsuperscript{148} Ibid at 925. See also the court of appeal's most recent judgment in \textit{Campaign for Fiscal Equity III} 29 AD 3d 175 (2006) at 184, where it affirmed this approach.

\textsuperscript{149} 269 P 3d 227 (Wash 2012) para 95--97. Here the court was drawing on its earlier decision in \textit{Seattle School District No 1 v State of Washington} 585 P 2d 71 (Wash 1978).

courts, the legislature and the executive participate in a 'shared process of norm creation' rather than leaving it to the courts to dictate the precise content of the right.\footnote{Woolman & Fleisch op cit note 23 at 155.} This dialogic approach means that the interpretation of the right to basic education

'should be viewed as courts assisting other branches of government to establish the precise content of their obligations rather than as an antagonistic mandate from the judiciary to the legislature and executive'.\footnote{Pieterse op cit note 137 at 406.}

This assistance cuts both ways, as legislation or policy instruments specifying standards for the provision of adequate facilities will be an important source of guidance for the courts.\footnote{See Mazibuko op cit note 31 para 61: 'Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right... This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions... and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.' (Emphasis added.)} While these instruments cannot define the content of socio-economic rights, they can assist the courts in arriving at an interpretation of their content, given the greater expertise that has gone into their drafting. It is hoped that the Norms and Standards (if promulgated) or the non-binding Guidelines will provide this type of guidance.\footnote{For example, the Draft Norms and Standards and the Guidelines require the provision of sports fields and netball courts for all schools — no matter their size — but makes no provision for libraries in all but the largest of schools (Draft Norms and Standards op cit note 48 para 3.30; Guidelines op cit note 82 para 17.1 and Annexure 'B'). This is despite the compelling evidence that school libraries have a substantial impact on learner performance. See Equal Education op cit note 150 ch 2.} They may also spark further institutional dialogue, as litigants can challenge these standards, arguing that they do not give full effect to the right to a basic education.\footnote{Meaningful engagement has been developed in the context of eviction proceedings and has been deployed in three ways: first, the court will consider whether meaningful engagement has occurred in determining whether an eviction is just and equitable (see Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others 2008 (3) SA 208 (CC) paras 9–23); secondly, it has been used as a provisional order, requiring the parties to engage meaningfully over.
**Musjid**, where the court granted a provisional order directing the MEC, the Trust and the school governing body to meaningfully engage over the possibility of the school remaining on the Trust’s premises or, failing that, over the possibility of accommodating the learners at other local schools.\(^{157}\) The consent order in *Amasango* also has traces of meaningful engagement, as the ECDOE was ordered to come up with a reasonable plan for the provision of permanent facilities, in consultation with the school.\(^{158}\) This type of order injects valuable flexibility into the remedy, allowing courts to avoid imposing fixed solutions on the parties. It also allows individuals to have a say over the type of facilities required to satisfy their needs.\(^{159}\)

The complexity involved in giving content to the right to a basic education should not obscure a simple fact: in most cases courts will be able to identify inadequate facilities without needing to develop a detailed account of the content of the right or a clear benchmark of adequacy.

At the most basic level, a limitation will be established where there is insufficient or no school infrastructure — as was the case at Nomandla Primary School, where the foundation phase learners were taught in surrounding homes after their classrooms were destroyed in a storm.\(^{160}\) Furthermore, unsafe school facilities would also be a clear violation of the right. This is recognised in the Draft Minimum Norms and Standards, which specifies a set of ‘safety norms’ — the ‘bare minimum allowable for a school to remain open’ — and cites examples of situations that would breach these norms, including:

- ‘caving structures that pose danger to learners, structures without roofing,
- temporary structures that do not meet South Africa’s health standards, [the] total lack of water source[s], lack of ablution blocks that meet South Africa’s health standards etc.’\(^{161}\)

Conditions at the seven mud schools in *Centrefor Child Law* were clearly in breach of these safety requirements. Each had collapsing school buildings that

potential solutions to the problem (see *Olivia Road* ibid; *Juma Musjid* supra note 12); and, thirdly, meaningful engagement has been used as a component of the eviction order to ameliorate its harsh effects and to ensure that it is responsive to the needs of the evictees (see *Joe Slovo* supra note 38). See further Liebenberg op cit note 23 at 418–23. While meaningful engagement orders have thus far been confined to eviction proceedings, there is no reason in principle why they cannot be extended to litigation over school facilities or other socio-economic rights.

\(^{157}\) *Juma Musjid* ibid para 74.

\(^{156}\) See note 22 above.

\(^{159}\) However, the fact that meaningful engagement is ordered is no guarantee that truly meaningful engagement will occur. This may require courts to scrutinise this process to ensure that the parties engage ‘reasonably and in good faith’ (*Olivia Road* supra note 156 para 20) and that the resulting agreement, if any, does not unduly prejudice the interests of any parties. See further Liebenberg op cit note 23 at 314–15.

\(^{160}\) This would also be in violation of provincial MECs’ statutory duty to provide sufficient school places in terms of s 3(3) of the Schools Act. See note 20 above and accompanying text.

\(^{161}\) Draft Norms op cit note 79 para 2.37.
offered little or no protection from the elements, limited ablution facilities and no access to safe drinking water during the dry winter months, to name but a few of the problems.

Courts will also have little trouble in identifying conditions that severely disrupt teaching and learning or render it entirely impossible. Again, the Draft Norms and Standards list a number of examples, including 'excessive overcrowding that results from an inadequate teaching spaces, and that render teaching and learning very difficult, lack of staffrooms which makes it difficult for teachers to work during school hours when classes are in session or which lead teachers to “chase” learners from classrooms if staff meetings have to be [held] within teaching hours, lack of administration blocks where school principals can sit and work while school is in session, lack of kitchen or cooking space which lead to learners being “chased” out of classes if cooking has to proceed during rainy seasons'.

Similar conditions existed at Amasango School. For example, grades three and four each had over 20 learners ranging in age from nine years to 21 years in classrooms measuring no more than 24 square metres, with desks crammed in so tightly that there was little room to move. This made it exceedingly difficult for teachers to maintain control and to give learners much-needed attention. The lack of a counselling room added further difficulties, as learners who were angry and violent had to stay in the principal’s office, interfering with administrative work. A clearly defined benchmark of adequacy would not have been required to find that these conditions disrupted teaching and learning, amounting to a limitation of the right to basic education.

This is not to say that it will always be easy to determine whether facilities are inadequate. What it does show is that the unqualified right to a basic education does not require the courts to be drawn into institutionally inappropriate standard-setting.

(c) The challenge of feasibility

A more pressing challenge is the task of reconciling the unqualified right to a basic education with scarce resources, limited state capacity and other pressing service delivery needs. In recognition of these constraints, the Constitutional Court has held that the qualified rights to housing, healthcare, water and social security, among others, do not confer direct entitlements to these goods because the state does not have the means to provide everyone with a house, health care, water or social security on demand. Similarly, it would be impossible for the state to provide adequate facilities to all schools immediately. Even if it were possible to realise this right immediately, this would require the diversion of resources and energy from the realisation of

162 Ibid para 2.39.
163 Founding affidavit in Amasango op cit note 20 para 39.
164 Soobramoney supra note 31 para 11; TAC supra note 32 para 35; Mazibuko supra note 31 para 59.
other important socio-economic rights. This would also raise the prospect of 'queue jumping', as schools with access to the resources to litigate (such as former Model C schools) would be able to secure better facilities to the detriment of those without access to the courts. How can the unqualified right be squared with these realities?

The answer is relatively simple. While the failure to provide adequate school facilities is a limitation of the right to a basic education, resource and capacity constraints may be used to justify the limitation or they may have a bearing on the remedy, indicating that it would not be just and equitable to order the immediate provision of these facilities.

(i) Section 36 justification analysis

Where the state has failed to provide adequate school facilities it could argue that this limitation is justified under s 36(1)\textsuperscript{165} by the need to ration scarce resources.\textsuperscript{166} First, the state would be required to demonstrate that the limitation is authorised by a 'law of general application'.\textsuperscript{167} Legislation and regulations are clearly laws and, as a result, the state may be able to justify rationing decisions that have solidified into legislation or regulations (such as the Norms and Standards, if they are eventually promulgated). However, in most cases rationing decisions will not be reflected in legislation or regulations, but in the policies and programmes devised by the state to realise the right. This was the case in Amasango and Centre for Child Law, where the ECDOE argued that its failure to provide the schools with adequate facilities was in accordance with the requirements of its Infrastructure Plan for

\textsuperscript{165} Section 36(1) provides:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.'

\textsuperscript{166} See Road Accident Fund & Another v Mdeyide 2011 (2) SA 26 (CC) paras 75–80, where the Constitutional Court confirmed that financial and capacity constraints may be used to justify a limitation of rights. See further David Bilchitz 'How should rights be limited?' 2011 TSAR 568 for an analysis of Mdeyide and the use of financial constraints in the s 36 analysis more generally. See further Berger op cit note 23 at 636–7.

\textsuperscript{167} See August & another v Electoral Commission 1999 (3) SA 1 (CC) para 23 where the Constitutional Court emphasised that the limitation must flow from the law itself, and that the mere existence of general framework legislation is not enough. See also Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa supra note 67 paras 33–40 where the Western Cape High Court held that the state's failure to provide education services for children with severe or profound intellectual disabilities could not be justified under s 36, as this failure was not directly authorised by a law.
2005–2014.\textsuperscript{168} This could place the courts in the uncomfortable position of finding an unjustified limitation of the s 29(1)(a) right even though the rationing decisions would otherwise have been reasonable and justifiable. In turn, this may lead courts either to read down the content of the right or to read in reasonableness qualifications to avoid this uncomfortable conclusion.\textsuperscript{169}

In response to this problem, Woolman & Botha\textsuperscript{170} argue that when dealing with limitations of positive socio-economic rights, policies and programmes together with their enabling legislation could potentially count as laws of general application. This follows from a purposive understanding of the law of general application requirement. It is primarily a rule of law-based restraint on the state, meant to protect rights against abuses of state power. As a result, this requirement should be strictly interpreted where the state acts to deprive individuals of their rights. However, it would defeat the purpose of this requirement if it was to be an obstacle to the effective realisation and enforcement of positive socio-economic rights.\textsuperscript{171} Therefore, the definition of ‘law’ should be given a more expansive interpretation when dealing with limitations of these positive rights, extending it to include policies and programmes and their broader framework legislation. This interpretation would not deprive the requirement of force, as the state would still need to demonstrate that its failure to provide adequate facilities is a direct result of its adherence to these policies and programmes, as opposed to mere inattention, incompetence or wilful disregard of the problem.\textsuperscript{172} This argument merits more extensive development than we can provide here. Nevertheless, this demonstrates that the ‘law of general application’ requirement should not deter courts from giving substantive content to the s 29(1)(a) right.

At the second stage of the s 36 analysis the state will bear the onus of demonstrating that the limitation is reasonable and justifiable. This inquiry may raise many of the considerations that would ordinarily arise in a reasonableness analysis of the qualified socio-economic rights. However, the important differences are that the state will shoulder the burden of proving that its programmes are reasonable and its justifications must be fully weighed


\textsuperscript{169} See Calderhead op cit note 105 paras 126–130.

\textsuperscript{170} Woolman & Botha op cit note 45 at 34–53n3. Although see Iain Currie & Johan De Waal The Bill of Rights Handbook 5 ed (2007) 169 who conclude that policies and guidelines can never be laws of general application.

\textsuperscript{171} Woolman & Botha ibid.

\textsuperscript{172} See Kent Roach & Geoff Budlender ‘Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?’ (2005) 122 SALJ 325 at 345ff (citing Chris Hansen ‘Indolent, intransigent and incompetent’ in S R Humm (ed) Child, Parent and State (1994) 232) for further discussion of these three ways in which the state may fail to fulfil its constitutional obligations.
against the nature and importance of the right and the extent of its limitation, among the other important s 36(1) requirements.

Assuming for the sake of argument that programmes or policies are laws of general application in the context of socio-economic rights disputes, the s 36 analysis would require the state to demonstrate, among other factors, that financial and capacity constraints exist; that it has a comprehensive plan for providing schools with adequate facilities within these constraints; that the plan includes transparent criteria for determining which schools get priority; that it is taking steps to implement this plan and that its plan caters for those whose needs are most urgent.\textsuperscript{173} Importantly, the plan must be communicated to schools.\textsuperscript{174} The veil of mystery surrounding infrastructure programmes leaves schools disempowered and unable to take informed decisions on whether they should attempt to raise funds from the community to improve facilities, or wait in the hope that the state will fulfil its promises. Schools are often faced with a further dilemma: act unilaterally to improve conditions, but then run the risk of slipping further down the priority list. A perverse incentive arises for communities to do less rather than more.

In \textit{Centre for Child Law} the state would have had a difficult time satisfying these requirements. Of the seven mud schools involved in the litigation, two were entirely excluded from the ECDOE’s priority list of planned construction for the 2008/9 financial year, five were scheduled for piecemeal work such as fencing and the provision of water tanks, and only one, Sidanda Senior Primary School, was listed for major construction work. However, by the time litigation was instituted in 2009 no major construction work had taken place and the schools had received little or no communication from the department.\textsuperscript{175} To compound matters, there were no clear and transparent criteria for determining which schools appeared on the planned construction list: the ECDOE’s Infrastructure Plan is no model of clarity and was not easily accessible. The schools were often amazed when LRC attorneys showed them the priority lists and ECDOE budgets indicating planned expenditure on facilities at their schools, often for years that had long since passed without any improvements being made. Moreover, given the desperate conditions in mud schools across the province and the severe impact these conditions had on learners, it was not clear that the ECDOE was taking sufficiently expeditious steps to alleviate their plight. This demonstrates that while resource and capacity constraints could be used to justify the failure to provide adequate facilities, this does mean that the state has an easy escape.

\textsuperscript{173} For an overview of the reasonableness requirements see notes 39–44 above and accompanying text.

\textsuperscript{174} In \textit{TJC} supra note 32 para 123, the court emphasised that reasonableness requires openness and communication: ‘In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately.’

\textsuperscript{175} See founding affidavit in \textit{Centre for Child Law} op cit note 18 paras 44–5.
(ii) Remedies

Where an unjustified limitation of s 29(1)(a) has been established, resource and capacity constraints could also influence the remedy. While courts must make a declaratory order, they retain the discretion to make additional orders where this is 'just and equitable'. As a result, a litigant who establishes an unjustified limitation of the right to a basic education is entitled to relief, but that relief 'need not necessarily be an order that the government immediately provide an adequate basic education'. Nevertheless, the remedy must still be 'effective', meaning that it must be directed at vindicating the right.

Determining whether immediate relief is just and equitable calls for a delicate balancing exercise. On the one hand, budgetary and capacity constraints, the disruptive effect that an immediate order would have on the state’s budgeting and planning, and concerns over ‘queue-jumping’ may militate against immediate relief. On the other hand, learners may suffer irreparable harm unless immediate steps are taken to improve the conditions at their schools. Prospective litigants may also be deterred from going to court unless litigation holds the promise of some tangible benefit for their schools. Precisely how this balance will be struck will depend on the circumstances of each case. We will not attempt to address the full range of complexities involved in this task. Nevertheless, the facts in Amasango and

Section 172(1) provides:

When deciding a constitutional matter within its power, a court —

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including —

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

Woolman & Fleisch op cit note 23 at 125.

See Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 69: 'I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.' (Emphasis added.)

See also Hoffmann v South African Airways 2001 (1) SA 1 (CC) para 45; TAC supra note 32 para 102.

See Grootboom supra note 31 paras 81, 92 and 108 and Nkotyana & others v Ekurhuleni Metropolitan Municipality & others 2010 (4) BCLR 312 (CC) para 54.

Child Law indicate that this balance can be struck in a way that does not take the bite out of the right to adequate facilities.

Amasango demonstrates that the factors that militate against immediate relief may often be absent or significantly diminished. The ECDOE claimed that the school remained on the priority list for planned construction, that R2 million had been allocated for the construction of a new school and that the delay in beginning construction of new facilities was due to unspecified capacity constraints.  

However, they initially opposed any court order that would concretise their duty to provide adequate facilities. In situations like this, immediate relief would merely add impetus to a pre-existing undertaking, rather than requiring courts to interfere with delicate rationing decisions.

A more common scenario is that no plans or budgets are in place to provide a litigant’s school with adequate facilities, as was the case in Child Law where only one of the seven schools was scheduled for major construction work. The ECDOE’s initial attitude was that it had a programme for the gradual upliftment of mud schools in the province, that the seven schools were not the worst off and, in effect, that they should wait their turn. It was not prepared to give even the most general of indications as to when they could expect to benefit from this plan. We submit that if a court had found that the conditions at the schools were an unjustified limitation of the s 29(1)(a) right, it would not have been sufficient merely to issue a declaratory order and to allow the ECDOE’s plan to run its course. An effective remedy, aimed at vindicating the right, would have required the state to provide a clear indication of when and how the violation of the learners’ rights was to be addressed, even if credible evidence had been presented that it was impossible to do so immediately.

This indicates another important difference between the qualified socio-economic rights and the unqualified right to a basic education. Because the qualified socio-economic rights afford an entitlement to reasonable state programmes and not a direct entitlement to a socio-economic good, the effective vindication of the right need not always offer the promise of benefits for the individual litigant in the foreseeable future. In some cases the court’s orders have resulted in the litigants receiving access to socio-economic goods, but this need not always be the case. In contrast, we contend that the effective vindication of the right to a basic education requires more than the existence of a reasonable programme for the provision of socio-economic goods on the macro level. The remedy should

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181 Answering affidavit in Amasango op cit note 168 paras 12 and 39.
182 See Geoff Budlender ‘The judicial role in cases involving resource allocation’ (2011) 24 Advocate 35 at 36.
183 See answering affidavit op cit note 3 paras 20–30.
184 See, for example, TAC supra note 32 and Khosa supra note 31, where the litigants stood to benefit from the court’s order to provide nevirapine in state hospitals. See too Blue Moonlight supra note 38.
hold the real prospect of providing relief to the individuals whose rights have been violated, even if that relief cannot be immediate. As a result, even though resource constraints may deny litigants immediate relief, a just and equitable order must offer litigants the prospect of receiving adequate facilities for their schools.

VI CONCLUSION

The appalling conditions in thousands of South African schools require an urgent response. While litigation alone cannot fix these systemic problems, it can provide greater impetus to state action as well as allowing individual litigants to achieve better conditions in their schools. In this article, we have sought to establish the legal grounds for such litigation.

Drawing on the facts and arguments in Amasango and Centre for Child Law, we have argued that the s 29(1)(a) right to a basic education affords an unqualified right to adequate facilities. This argument is greatly strengthened by the Constitutional Court’s judgment in Jiuna Musjid. Not only did it confirm that the right to a basic education is not subject to the qualifications found in other socio-economic rights, but it also strongly suggests that ‘a basic education’ is a substantive standard of education, requiring an education capable of satisfying individuals’ basic learning needs. We have argued that this requires adequate school facilities: facilities that are conducive to meaningful teaching and learning and are not a threat to the health, safety and dignity of learners and teachers. This is supported by the empirical evidence on the link between education outcomes and facilities, other constitutional rights and the substantial body of international and foreign law on the subject.

As we have argued, this unqualified right to a basic education gives litigants a number of advantages when bringing claims for better school facilities. As opposed to the qualified socio-economic rights, it is a right to a basic education, not merely a right to have the state take reasonable steps over time to secure this right. Dilapidated, unsafe and insufficient facilities that make teaching and learning difficult or impossible are clear limitations of this right, thus putting the onus on the state to justify this limitation in terms of s 36. This will place the courts in unfamiliar territory. The unqualified right to a basic education and adequate school facilities requires courts to give content to the right, without being able to retreat to the more fluid standard of a reasonableness review. They will also be required to reconcile the unqualified right with the reality of limited state resources and capacity. We have demonstrated that it is possible for the courts to navigate these difficulties without stripping the right of its content or force.

This is not to say that the task of litigating and adjudicating education rights claims will be easy. We have only scratched the surface of the practical and legal challenges that they claims will raise. What is clear is that these claims are becoming increasingly common as the education adequacy movement continues to grow in strength. Our courts will soon have the opportunity to grapple with these challenges.
BOOK REVIEW


The publication of a tribute to the late Professor Tony Mathews, in the form of a collection of essays written by some of South Africa’s most distinguished jurists, is overdue. The editors and publishers of, and the contributors to, this collection must therefore be commended.

Several generations of lawyers (including those who were not privileged enough to have been his students at the University of Natal) will be familiar with the work produced by Professor Mathews. It is principally for his pioneering publications Law, Order and Liberty in South Africa (1972) and Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society (1986) that he will be remembered by senior lawyers. For those few (of a more recent vintage) who might require an introduction to Professor Mathews’ accomplishments, this work, edited by Marita Carmelley & Shannon Hoctor, includes a complete list of his publications, spanning the period from 1961 until 1993.

It is not only the sheer number of Professor Mathews’ publications that is impressive, nor the fact that it includes several important works on various aspects of the rule of law and civil liberties. (Significantly, these works were published at a time when the prevailing political climate was anything but favourable to the rule of law and civil rights — it was a time, as Dr Catherine Mathews pertinently states, ‘when others around him who antagonised the National Party, such as Richard Turner and Griffiths Mxenge, were “removed”’ (at 19).) What also strikes one about the list of his publications is its range. In particular, it is useful to be reminded that many of his earlier publications dealt with aspects of private law (especially the law of property); although he will be honoured first and foremost as a courageous and incisive human–rights lawyer, it is as well to remember (as Professor John Dugard points out) that Professor Mathews was originally a lecturer in Roman Law (at 3). It is a fact that, perhaps, makes it all the more significant that he gained renown and respect as a champion of human rights, and a reminder (as Professor George Devenish points out in his contribution) that ‘no man is an island’.

It is clear from the corpus of Professor Mathews’ publications that he appreciated the fundamental importance of transparency (to use the modern catchword) in relation to public administration. At a time when this might