

ACCESS, ADEQUACY AND EQUALITY: THE CONSTITUTIONALITY OF SCHOOL FEE FINANCING IN PUBLIC EDUCATION

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ABSTRACT

This article explores the question of whether charging school fees for public education violates s 29 or s 9 of the Constitution. The article concludes that fees may be unconstitutional, for two reasons. First, charging school fees may violate learners' rights to basic education under s 29, because a fee-based financing system creates problems with both *access* and *adequacy*. Despite the availability of exemptions for the poor, the school fee regime of financing appears to completely bar access for some learners. It also unconstitutionally burdens the right to access for others by requiring families to expend significant portions of their income on fees. In addition to problems with access, fee-based school financing may also violate s 29 because this model of financing fails to provide a substantively adequate core level of basic education. Fee-poor districts cannot adequately fund school needs through fees, and government currently does not provide sufficient state funding to remedy the shortfall. Second, charging school fees may violate the guarantee of *equality* in s 9 of the Constitution because fees discriminate on the basis of race and class. A school's ability to charge fees – and to provide a learner with greater funding and resources – appears to correlate strongly to the class and race of the community in which the school is located. Research indicates that the practice of charging school fees appears to reproduce apartheid-era disparities in expenditures per learner between poor black learners and middle and high-income white learners.

I INTRODUCTION

In South Africa, as elsewhere, the practice of charging school fees to attend public schools and for other education-related expenses is controversial. Critics charge that these fees jeopardise the right to education, particularly for the poorest families who cannot afford to pay. They note the tension between compulsory attendance and the demand that families pay for learners to attend. They also argue that the system of public school financing, which relies on fees, reproduces much of the inequality in access to education that marked the apartheid era. In particular, they point out that, because historically advantaged schools

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can collect school fees from relatively wealthy parent communities, these schools continue to operate with budgets two or three times those of historically disadvantaged schools.

In contrast, commentators who support fees argue that private contributions from families are essential to supplement an already overtaxed public education system, in order to free up state funds for redress. They argue that those who can afford to pay have a responsibility to bear part of the cost for public education, and point out that fees also provide an important incentive for families to become involved at the local level in public education. Finally, they argue that in the absence of fees, the amount of funding per student would drop sufficiently that middle-class and wealthy families would flee the public education system for independent schools.

At the centre of the debate, the question arises whether school fees are constitutional under the 1996 South African Constitution. Unlike most national constitutions, the 1996 Constitution guarantees to its citizens an affirmative right to basic education. This right, articulated in s 29 of the Constitution, is a 'strong positive right' and imposes affirmative obligations on government to provide access to education for all.¹ In addition to implicating the right to basic education, the school fee system of financing also potentially violates s 9 of the Constitution, which guarantees the right of equality for all citizens, including equality in the right to basic education.

This article explores the question of whether charging school fees for public education violates s 29 or s 9 of the Constitution. The article concludes that fees may be unconstitutional, for two reasons. Firstly, charging school fees may violate learners' rights to basic education under s 29, because a fee-based financing system creates problems with both *access* and *adequacy*. More specifically, school fees may unconstitutionally limit public access to basic education by creating barriers to entry. Despite the availability of exemptions for the poor, the school fee regime of financing appears to completely bar access for some learners, and unconstitutionally burdens the right to access for others by requiring families to expend significant portions of their income on fees.

In addition to problems with access, fee-based school financing may also violate s 29 because it fails to provide a substantively adequate core level of basic education. Fee-poor districts cannot adequately fund school needs through fees, and government currently does not provide sufficient

1 Section 29 of the Constitution of the Republic of South Africa Act 108 of 1996 ('1996 Constitution'). See *In re Gauteng School Education Bill of 1995* (1996) 3 SA 165 (CC) para 9 (right to education creates a positive right that education be provided, not just a negative right); see also RR Kriel 'Education' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (RS5 1999) 38-9 (right to basic education imposes affirmative obligations).

state funding to remedy the shortfall. As a result, many fee-poor schools are not able to provide a minimum core level of basic education for learners.

Second, under the guarantee of *equality* in s 9, charging school fees may violate the Constitution because fees discriminate on the basis of race and class. A school's ability to charge fees – and to provide a learner with greater funding and resources – appears to correlate strongly to the class and race of the community in which the school is located. According to the government's own research, the practice of charging school fees may reproduce apartheid-era disparities in expenditures per learner between poor black learners and middle and high-income white learners.

The following discussion develops these central points. Section II of this article provides a brief overview of the regulatory framework governing the user fee system, including the legislative and regulatory provisions that address financing and school fees. This section discusses the law on setting and administering fees, legal provisions that regulate exemptions, and those provisions that allocate state funding. At the heart of the paper, sections III and IV discuss whether the fee-based financing violates the Constitution. Section III addresses whether charging fees violates s 29(1)(a), the constitutional right to basic education. This section reviews the underlying law and empirical research and discusses a potential constitutional challenge under s 29. Similarly, section IV discusses a potential constitutional challenge under s 9, the right to equality. Section V considers whether, under s 36, (the limitations clause), government limits on the right to education and equality might nevertheless be reasonable and justifiable. This section discusses in depth the argument that government has met its constitutional obligations by undertaking reasonable measures within constrained resources to progressively realise both the right to education and to equality. Finally, section VI considers potential remedies to constitutional problems with fee-based financing, and takes up concerns relating to separation of powers connected to the question of remedies.

II AN OVERVIEW OF THE REGULATORY FRAMEWORK

In 1996, Parliament passed the South African Schools Act ('SASA').² Two years later, the Department of Education issued accompanying subordinating legislation, the Norms and Standards for Public School Financing ('Norms and Standards').³ These two sources of law constitute the central components of the regulatory scheme for public school financing. Read together, SASA and the Norms and Standards

² South African Schools Act 84 of 1996.

³ National Norms and Standards for School Funding under South African Schools Act 84 of 1996 and National Education Policy Act 27 of 1996, Government Gazette 19347 (12 October 1998).

regulations create a system that relies on funds from two sources: (i) parent fees and other contributions; and (ii) state funds, some of which are equitably targeted to effect redress.⁴

Under the relevant legislation and accompanying regulations, a portion of funding comes from private resources contributed by parents and local communities, primarily in the form of school fees. Section 39 of SASA provides:

- (1) Subject to this Act, school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting referred to in s 38(2).
- (2) A resolution contemplated in subsection (1) must provide for-
 - (a) the amount of fees to be charged; and
 - (b) equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees.
- (3) The governing body must implement a resolution adopted at the meeting contemplated in subsection (1).
- (4) The Minister must, after consultation with the Council of Education Ministers and the Minister of Finance, make regulations regarding the equitable criteria and procedures referred to in subsection (2)(b).

(a) School fees and school governing bodies

As the following sections will discuss, a number of the foregoing provisions may potentially be vulnerable to constitutional challenge. SASA vests discretion in whether to charge fees, and how much to charge, in parents.⁵ Section 39(1) of the legislation authorises schools to charge school fees when a majority of parents attending the school budget meeting adopts a resolution to do so.⁶ In addition, these parents are given discretion over how much to charge – under s 39(2), parent bodies are authorised to determine both ‘the amount of fees to be charged’ and ‘specific equitable criteria’ to exempt those parents who are unable to pay fees.

Parents are given some legislative direction on how to assess fees according to the wealth of the community. SASA itself does not provide any direction on the process of fee assessment or on assessing the wealth of the community. But para 127 of the Norms and Standards provides

⁴ See s 34 of SASA (must fund public schools from public revenue in order to ensure the proper exercise of rights of learners to education and the redress of past inequalities in education provision). See also s 36 (governing body must take all reasonable measures within its means to supplement the resources supplied by the state in order to improve the quality of education provided by the school to all learners at the school).

⁵ Under SASA, the law leaves governing bodies no discretion as to whether to raise private funds. Section 36 of SASA mandates that a school governing body ‘take all reasonable measures within its means to supplement the resources supplied by the state in order to improve the quality of education provided to all learners at the school’. The legislation gives SGBs a range of choices in terms of how to go about raising private funds, including corporate sponsorships and charging private parent fees. At the same time, parents – and not school governing bodies – are vested with discretion over whether to charge fees.

⁶ Ibid para 39.

that '[s]ince fee revenue is determined both by the fee level and by the number of fee payers, the norms relating to exemption are designed to assist parent bodies to make *appropriate and equitable* decisions about the fee level and the exemption thresholds' (emphasis added).

The Norms and Standards explain the reasoning behind charging fees:

The SASA imposes a responsibility on all public school governing bodies to do their utmost to improve the quality of education in their schools by raising additional resources to supplement those which the state provides from public funds (s 36). All parents, but particularly those who are less poor or who have good incomes, are thereby encouraged to increase their own direct financial and other contributions to the quality of their children's education in public schools. The Act does not interfere unreasonably with parents' discretion under the law as to how to spend their own resources on their children's education.⁷

Parents control the spending of resources via local school governing bodies (SGBs), which are charged with administering and allocating school fees. Section 16 of SASA codifies the governing powers of this autonomous administrative body, which is staffed by teachers, parents, community members and learners.⁸

Under SASA, SGBs are in charge of administering and controlling the use of fees for operating purposes.⁹ Section 21 of SASA permits school governing bodies to apply to be allocated additional functions, including the direct purchase of books, materials and equipment and the payment of services to the school.¹⁰ In contrast, non-s 21 schools must purchase equipment through a provincial education department.

It is important to note that school fees are not collected for the benefit of the public, nor are they administered as part of any collective fund among several schools. Rather, the law directs that fees be used only for the benefit of the specific school collecting such fees. In particular, s 37(2) of SASA requires that '[s]ubject to subsection (3), all money received by a public school including school fees and voluntary contributions must be paid into the school fund'.

Within the province of the individual school, the legislation does not really restrict the SGB in using school fees. Schools can use both fees and privately collected contributions for many purposes. An amendment to SASA specifically permits SGBs to use fee funds to hire additional

⁷ Ibid para 45.

⁸ Sections 16-23 of SASA describe the jurisdiction and composition of school governing bodies.

⁹ SASA s 16-21.

¹⁰ Section 21(1) of SASA provides that: '[s]ubject to this Act, a governing body may apply to the Head of Department in writing to be allocated any of the following functions: (a) To maintain and improve the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable; (b) to determine the extra-mural curriculum of the school and the choice of subject options in terms of provincial curriculum policy; (c) to purchase textbooks, educational materials or equipment for the school; (d) to pay for services to the school; or (e) other functions consistent with this Act and any applicable provincial law'.

teaching personnel.¹¹ Those SGB-funded educator posts are controlled by the SGB. Teachers in these posts report directly to the school governing body, and not to a government entity.

(b) Fee exemptions

In an effort to ameliorate the discriminatory impact of fees, legislation and regulations provide exemptions for poor learners. Section 39(1)(b) of SASA requires that parent bodies determine 'equitable criteria and the procedures for determining total, partial or conditional exemptions for parents who are unable to pay fees'. The procedure for implementing exemptions is to be found in the accompanying regulations. Pursuant to s 39(1)(b), the Norms and Standards require partial or full exemptions for families who cannot afford to pay user fees.¹² Under paras 129-34 of the Norms and Standards, 'if the combined annual gross income of the parents is less than 10 times (10X) the annual school fees per learner, the parent qualifies for full exemption'. For partial exemptions, 'if the combined annual gross income of the parents is less than 30 times (30X) but more than 10 times (10X) the annual school fees per learner, the parent qualifies for partial exemption'.¹³ Partial exemptions are granted at the discretion of the governing body.¹⁴ However, if parental incomes are more than 30 times the fee, parents cannot qualify for any exemption.¹⁵ The regulations also provide for conditional exemptions, under which families can plead special circumstances relating either to a parent's ability to pay fees or her ability to collect information about income.¹⁶

The Norms and Standards provide more detail about how to apply for exemptions. Under s 4 of the Exemption of Parents From the Payment of School Fees regulation, parents wishing to qualify for an exemption must apply in writing, or in person if desired.¹⁷ According to s 4, when submitting an application, parents must provide evidence of income, assets and liabilities, and other information requested by the school governing bodies.¹⁸ Schools must notify parents of the availability of exemptions,¹⁹ and parents are entitled to assistance in filling out exemption requests.²⁰ Governing bodies must render a decision within

11 See the Education Laws Amendment Act 100 of 1997 (amending s 20 of Act 84 of 1996) Government Gazette 18480 (28 November 1997).

12 Norms and Standards paras 125-40.

13 Ibid paras 129 (full exemption); 131 (partial exemption).

14 Ibid para 132.

15 Ibid para 133.

16 Ibid para 134.

17 Exemption of Parents From Payment of School Fees Regulations, Government Gazette 19347 (12 October 1998) ('Exemption Regulations').

18 Ibid; see also Annexure A to Exemption Regulations.

19 Norms and Standards para 125.

20 Exemption Regulations (note 17 above) s 8.

14 days of the request, and if the governing body denies a request for exemption, parents have the right to appeal.²¹

It is not clear from the regulations whether exemptions are to be based only on attendance fees or on total education-related expenses. The regulations themselves appear to separate out many types of secondary fees – fees for transport, uniforms, textbooks, PTA fees, exam fees, activity fees, and special equipment and programmatic expenses. Although the regulations do not explicitly define what constitutes primary or secondary fees, s 6 of the Norms and Standards (which addresses only fees and subsidies to independent schools) contains an instructive footnote:

For the purpose of this national policy, ‘fees’ means any form of payment for registration and tuition made by a parent in relation to a learner’s enrolment or attendance at an independent school . . . Additional costs associated with the normal course of instruction which learners are expected to follow are to be considered fees, even if they are not formally called fees. However, payments for extra items or services, or for school materials that are procured by the school instead of having to be purchased by the parent, are not to be considered fees, as long as the cost of such items is similar to their open-market value.²²

Because the regulations do not clearly define ‘fees’ for purposes of exemption, SGBs are left to determine for themselves whether they are to include other education-related expenses in determining a learner’s eligibility for exemption. For example, it is up to the individual SGB to determine whether transport fees are ‘associated’ with normal instruction or whether they are ‘extra services’.

SASA expressly prohibits SGBs from excluding learners who cannot pay fees. Section 5(3) provides that ‘no learner may be refused admission to a public school on the grounds that his or her parent (a) is unable to pay or has not paid the school fees determined by the governing body under s 39’. However, parents can be sued for failure to pay fees. Section 40(1) of SASA provides that ‘[a] parent is liable to pay the school fees determined in terms of s 39 unless or to the extent that he or she has been exempted from payment in terms of this Act’. Similarly, s 41 states that ‘[t]he governing body of a public school may by process of law enforce the payment of school fees by parents who are liable to pay in terms of section 40’.

(c) State funding

For specific categories of state expenditure, the government’s regulatory model takes into account school fees when assessing how much state funding a school will get in particular categories. Fees collected at the wealthier schools lessen the need for state funding at those schools.

²¹ Ibid paras 5-7.

²² Norms and Standards, s 6 fn8.

Government can then apply the savings to schools in need, where educating poor learners is more expensive because of the need for redress.²³

As a preliminary matter, SASA allocates national money to provinces in a lump sum that includes not only education but also health care and welfare. Provinces then divide the money between education, health and welfare according to their own priorities and formulas. Provinces can, and sometimes do, top up national money with their own tax revenues.²⁴ As might be expected, provinces vary widely in the allocations that they make between health, education and welfare.²⁵

With regard to education, provinces allocate money to individual schools by one of two mechanisms described above: directly to so-called 's 21 schools' (who have demonstrated financial ability to manage resources), and via the provincial education department for non-s 21 schools.²⁶ Historically, schools attaining s 21 status have largely been the ex-model C schools, although that profile appears to be changing.²⁷

SASA and the accompanying Norms and Standards do distribute certain types of state funding on the basis of need. The law classifies the money allocated by the Department to provinces into three categories – non-personnel and non-capital funds (NPNC), personnel funds and capital funds. With regard to the NPNC funds,²⁸ SASA and the Norms and Standards require provinces to target schools on the basis of need. More specifically, the law directs provincial governments to target a disproportionate amount of non-personnel funds towards the schools most in need – to give 60 per cent of available non-personnel resources to the poorest 40 per cent of schools.

With regard to NPNC funding, the law requires equitable distribution. Section 34(1) of SASA instructs that '[t]he 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'. Pursuant to this mandate, s 4 of the Norms and Standards directs provincial officials to assess and then rank a school on the basis of need.²⁹ Using these rankings, the regulations then

23 Department of Education *Report to the Minister on Review on Cost, Resourcing and Financing of Public Schools* (hereinafter 'Report to the Minister on Financing') (February 2003) 67.

24 Ibid.

25 For a full discussion of inter-provincial disparities, see *ibid* 18-26.

26 Ibid 36-7; 60.

27 Ibid 60.

28 Non-personnel expenses include the costs for facilities, equipment and learning materials, etc. It is important to note that non-personnel costs make up only about 8-10 per cent of a school budget. See generally S Vally & C Tleane 'The Rationalization of Teachers and the Quest for Social Justice in Education in an Age of Fiscal Austerity' in E Motale & J Pampallis (eds) *The State, Education and Equity in Post-Apartheid South Africa: The Impact of State Policies* (2002).

29 Norms and Standards paras 8-101 (to target schools for redress on the basis of need, provincial officials are to rank schools and allocate funds according to resource targeting table).

set up a 'resource targeting table', which requires that provincial education districts (PEDs) vary the allocation of funds to schools based on their resource targeting ranking.³⁰

According to the targeting table, the poorest quintile of school districts receives about 35 per cent of available non-personnel funds, while the richest 20 per cent receive only 5 per cent of resources.³¹ Capital funds are similarly directed equitably in various ways to addressing existing backlogs – each province directs its capital investment at backlog, but with no prioritisation among provinces.³²

It is very important to note that this targeting and offsetting only takes place with regard to non-personnel funding and capital funds, which make up only 10 per cent of school operating costs. In contrast to NPNC and capital costs, funding for personnel costs has historically not been allocated equitably, despite the fact that such costs make up between 90-95 per cent of a school's budget.³³ The earlier drafted Norms and Standards explicitly did not address norming for personnel costs.³⁴ Although the regulations did acknowledge significant historical inequities in personnel,³⁵ and began the practice of allocating teachers on the basis of straight enrolment, they left the crafting of equitable redeployment to negotiation between the Ministry of Education and teachers' unions.³⁶

Such negotiations failed to equalise personnel spending in any meaningful way. In 1996, the teachers' union negotiated an agreement with government to try to equalise educator-teacher ratios by redeploying teachers to the areas most in need. The initial redeployment effort failed quite dramatically, primarily because teachers were unwilling to be redeployed elsewhere.³⁷ In addition, the Cape High Court ruled that the Ministry of Education did not have the authority to order schools to hire teachers from other schools.³⁸ In the wake of the ruling and teacher resistance to redeployment, government passed the Education Laws Amendment Act, which permitted the national government to determine

30 Ibid fig 2 (Resource Targeting Table).

31 Ibid. The Resource Targeting Table allocates 5-15-20-25-35 for Quintiles 1 through 5 respectively.

32 Report to the Minister on Financing (note 23 above) 97.

33 As alluded to earlier, personnel costs make up approximately 90 per cent of an individual school budget. Report to the Minister on Financing (note 23 above) 30; Vally & Tleane (note 28 above).

34 Norms and Standards para 34.

35 Ibid paras 34; 37.

36 Ibid paras 31 (teaching personnel funding left to agreements between national teacher unions and Ministry of Education); 38 (committing the Ministry of Education to work on norms for non-teaching personnel).

37 Large numbers of teachers elected to retire with attractive voluntary severance packages. Beyond enabling excess teachers to retire, government did little to facilitate the redeployment of teachers to understaffed areas. See generally Vally & Tleane (note 28 above).

38 *Grove Primary v Minister of Justice* CPD 2757-97 (20 June 1997) (unreported).

requirements for the appointment of teachers, but the momentum for redeployment had largely passed.³⁹

Recognising the difficulty in attempting equitable re-distribution without taking into account personnel funding, in 2002 the government adopted new national post provisioning norms, to provide a pro-poor weighting of personnel posts.⁴⁰ The new norms allocate more teaching posts to poor schools, according to a formula that both weights learners according to a variety of factors (ideal class size, particular learning area, poverty of school, the number of language mediums of instruction in the school) and ranks schools according to the same resource targeting table that governs school funding norms for non-personnel funding. Provincial education departments are instructed to set aside 5 to 10 per cent of personnel posts for redress. Currently, this adjustment sets aside only 2 per cent of educator posts for redress, though the government's projections are that this figure will rise to 5 per cent in the near future.⁴¹

Perhaps most importantly, no provision in either the SASA or Norms and Standards allocates any money to pay for the so-called secondary fees related to education: transport, uniforms, textbooks, excursion fees and other related expenses. Families are expected to bear these fees out-of-pocket, and, as described above, those expenses often do not form part of the calculation of eligibility for attendance fee exemptions.

(d) Recent history: School fees in operation

Currently, nearly all South African public schools charge some amount of fees. Most schools do not collect much, and 55 per cent of schools are not able to raise more than R10 000 per year in total collected from fees.⁴² In contrast, public schools in the wealthiest communities are able to charge as much as R10 000 *per learner*; many good township schools charge as much as R6 700 per year, and good suburban schools as much as R15 480 per year.⁴³

Despite the availability of exemptions, evidence indicates that school fees create barriers to access for some families, and perpetuate systemic inequalities in the allocation of funding among learners. A report on school financing, issued by the Department of Education to the Minister in February 2003, indicates that fees may create problems with equality and access. According to the report, the wealthiest communities with fee-rich schools allocate 50 per cent more per learner in total funding (private

39 Education Laws Amendment Act 100 of 1997 ss 4-5 (amending s 20 of Act 84 of 1996); Government Gazette 18480 (28 November 1997).

40 Amendment of Regulations for Distribution of Educator Posts in the Provincial Department of Education, amending Employment of Educators Act 76 of 1998; Government Gazette 24077 (15 November 2002).

41 Department of Education 'Plan of Action' (15 June 2003) ('Plan of Action') 9.

42 Ibid.

43 *Sunday Times* (4 March 2001).

plus state) than do their poorer counterparts.⁴⁴ For schools that serve the wealthiest quintile, fees supply as much as 35 per cent of the total expenditures for school needs. In contrast, annual fees for the poorest 60 per cent of schools make up only between 0.5 per cent and 2.5 per cent of total expenditures.⁴⁵

Beyond inequality, the report suggests problems with regard to access as well. In particular, the report documents that some schools do not inform families of their eligibility for exemptions, deny eligible learners exemptions, and/or deny learners access on the basis of their inability to pay fees (which is illegal under SASA). The report also notes that schools subtly and overtly marginalise poor learners by stigmatising them in various ways. Finally, the report documents the fact that the families of the poorest learners spend 2 per cent of their income on school fees, while middle and high-income families spend only 1 per cent of their income.⁴⁶

In the wake of the report, and in response to increased public attention on the issue of school fees, the Department of Education has very recently issued a 'Plan of Action' designed to address the deficiencies of public school financing. In its plan of action, the government makes several new commitments and proposed changes to the regulatory model. The highlights of these proposals and findings will be discussed in detail in VI below.

III THE RIGHT TO BASIC EDUCATION: ACCESS AND ADEQUACY

This section addresses the constitutionality of the user fee system, as codified in SASA and the Norms and Standards.⁴⁷ First, this section concludes that a public school financing model that relies on charging fees may create constitutional problems with regard to access and to adequacy. More specifically, the school fee system may violate s 29(1)(a), the right to basic education, because charging fees restricts or impedes access to basic education for the poor. Similarly, because the financing model relies on private resources, and because the state does not provide adequate state funding to supply basic needs for poor schools in the absence of private fees, the fee-financing regime appears to provide a substantively inadequate basic education for learners in fee-poor schools.

Second, this section concludes that user fees may violate s 9, the right to equality, because the user fee system discriminates on the basis of race

⁴⁴ Report to the Minister on Financing (note 23 above) 78-9. These differences can be traced both to differences in fees and discrepancies in state funding that favour wealthier districts. In terms of school fees, the mean annual fees per learner for the country's wealthiest 20 per cent of schools ranges between R300 and R2700, compared to R100 for the poorest 60 per cent of schools. Families also pay their fees at the relatively higher rate of 65 per cent in wealthier schools, compared to 50 per cent for poorer schools. *Ibid.*

⁴⁵ *Ibid.* 78-79.

⁴⁶ *Ibid.*

⁴⁷ This section does not consider the constitutionality of any of the proposed revisions under the recently issued Plan of Action. None of these changes have yet been enacted.

and class in guaranteeing access and adequacy in education. More specifically, expenditures per learner for fee-rich schools, which are predominantly white, are significantly greater than expenditures for fee-poor schools, which are predominantly black.

(a) Preliminary concepts: What is ‘basic education’?

Section 29(1)(a) of the 1996 Constitution establishes ‘the right to a basic education, including adult basic education’. In *Motala v University of Natal*, the Supreme Court held that the interim Constitution’s guarantee of ‘basic education’ did not include tertiary or other forms of higher education.⁴⁸ Interpreting the phrase even more narrowly than the Court, the Department of Education has consistently defined ‘basic education’ to mean only compulsory primary education, ranging from Grade 1 to Grade 9; it defines secondary education and higher education to constitute ‘further education and training’, which must only be progressively realised under the Constitution.⁴⁹

The Department’s narrow interpretation, however, appears to be inconsistent with other language in s 29, particularly in the reference to ‘adult basic education’. The phrase ‘adult basic education’ is rendered nonsensical if one defines ‘basic’ to include only compulsory primary education. In fact, the phrase ‘basic education’ has been interpreted by most international instruments to refer substantively to minimum skills needed to equip learners with necessary knowledge and skills to function as citizens.⁵⁰ This definition provides a coherent meaning for the phrase ‘adult basic education’, and is more consistent with international law.

In particular, art 4 of the World Declaration on Education for All specifies that ‘basic education’ should be focused on qualitative criteria rather than years of completion in education:

[T]he focus of basic education must . . . be on actual learning acquisition and outcome rather than exclusively upon enrolment, continued participation in organised programmes and completion of certification requirements.

Similarly, the UN Committee on Economic, Social and Cultural Rights has set forth specific criteria to define basic education. General Comment 13 to the International Convention on Economic, Social and Cultural Rights (ICESCR) specifies that government must provide education that exhibits the following four features: availability, accessibility, acceptability and adaptability:

(a) Availability – functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. . .

⁴⁸ 1995 (3) BCLR 374 (D).

⁴⁹ Report to the Minister on Financing (note 23 above) 14. See also Department of Education *White Paper* (15 March 1995).

⁵⁰ See T Roux ‘Comment on Department of Education’s Report to the Minister, *Review of the Cost, Resourcing and Financing of Education in Public Schools*’ (30 April 2003) 8.

(b) Accessibility – educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds . . .

Physical accessibility – education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a ‘distance learning’ programme);

Economic accessibility – education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available ‘free to all’, States parties are required to progressively introduce free secondary and higher education;

(c) Acceptability – the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality)

. . .

(d) Adaptability – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

Thus, the concept of basic education in international law focuses on substantive criteria of minimum adequacy. As the next section will discuss, the guarantee of a substantive concept of ‘basic education’ forms the cornerstone of potential constitutional arguments relating both to access and adequacy.

(b) The right to access

(i) The legal right to access under the Constitution

Section 29(1)(a) guarantees to all people ‘the right to a basic education, including adult basic education’. To define the scope of this right, the Constitutional Court will likely look to several sources of legal authority: (i) the historical and social context of the right; (ii) other provisions in the Bill of Rights and the Constitution that may be relevant in context; and (iii) international law and foreign jurisprudence.⁵¹

Those sources appear to hold that, at a very minimum, the right to basic education guarantees access to education for all, including those who cannot pay fees. In previous decisions addressing the right to housing and health care, the Constitutional Court has held that, at a minimum, these rights guarantee access for those who cannot afford to pay. In *Government of the Republic of South Africa v Grootboom* (*Grootboom*), the Court held that, under s 26, the state’s housing policy

⁵¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 47 (CC) paras 21-33. Section 39 of the Constitution requires any court to consider international law when interpreting the Bill of Rights. See *S v Makwanyane* 1995 (3) SA 391 (CC) paras 36-7.

was unconstitutional because it did not provide relief for those in desperate need.⁵² In its decision, the Court recognised that the state has a particular and special obligation to provide housing for those who cannot afford to provide for themselves, as a question of access.

For those who can afford to pay for adequate housing, the State's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both groups. The poor are particularly vulnerable and their needs require special attention.⁵³

Likewise, in *Minister of Health v Treatment Action Campaign (No 2) (TAC)*, the Court addressed the question of access for those who cannot afford to pay for medical care.⁵⁴ In that case, the Court held that s 27 guaranteed the right to AIDS drugs and treatment (specifically, Nevirapine for pregnant mothers) for those patients who could not pay for medication or treatment on their own.

In dealing with these questions it must be kept in mind that this case concerns particularly those who cannot afford to pay for medical services. To the extent that government limits the support of Nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences.⁵⁵

Based on the analysis in these decisions, the Constitutional Court is likely to read s 29(1)(a) as guaranteeing access to basic education to those who cannot afford to pay fees. These cases establish at minimum the principle that an affirmative socio-economic right guarantees the right of access for those unable to pay.

Similarly, international law supports the claim that the state must provide access to basic education for those who cannot pay fees. The African Charter on the Rights and Welfare of the Child, which South Africa has signed and ratified, requires government to 'provide free and compulsory basic education'.⁵⁶ In addition, the Convention on the Rights of the Child, which South Africa has also signed and ratified, requires the government to 'make primary education compulsory and available free to all'.⁵⁷ Article 26 of the Universal Declaration on Human Rights, which is not binding but is regarded as customary international law by many, also

52 *Grootboom* (note 51 above) para 68.

53 *Ibid* para 36.

54 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721(CC).

55 *Ibid* paras 70-1.

56 Article 11(3)(a) of the African Charter on the Rights and Welfare of the Child 1990 OAU Doc CAB/LEG/24.9/49 (signed by South Africa on 10 October 1997; ratified on 7 January 2000).

57 Article 28(a) (Convention signed by South Africa on 29 January 1993; ratified on 16 June 1995).

demands that '[e]ducation shall be free, at least in the elementary and fundamental stages'.

Finally, and perhaps most importantly, the ICESCR sets forth the requirement that education be free for all learners. Article 13(2)(a) provides that 'primary education shall be compulsory and available free to all'. Article 14 requires that within 2 years of signature and ratification, state parties unable to comply with the immediate demand for free primary education work out and adopt a plan to progressively implement the principle of a free primary education.

In General Comment 11 to art 14 of the ICESCR, the Committee expressed a strong commitment to providing access to education.

The nature of this requirement ['free of charge'] is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child's parents or guardians. Fees imposed by the government, the local authorities or the school, and other direct or indirect costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are often highly regressive in effect. Their elimination is a matter that must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents . . . or the obligation to wear a relatively expensive school uniform, can also fall into the same category.

It is important to note here that the 1996 Constitution does not contain an express commitment to provide free education for all. The current version of the Constitution does not contain the word 'free'. In an early draft of the Constitution in 1991, the South African Law Commission (SALC) had included the provision that everyone had the right to 'free education' up to the end of primary school.⁵⁸ However, in its final report in 1994, the SALC had omitted the reference to free education, to include only a right to basic education and equal access to educational institutions.⁵⁹

Even so, given the previous Constitutional Court decisions, the Constitution at the very least can be read to support a guarantee of access to basic education for those who cannot pay. The next section discusses the empirical question of whether fees bar access to poor learners.

(ii) Do school fees restrict access to those who cannot pay?

As discussed above, the South African Schools Act and the Norms and Standards together create a school fee system that authorises fees and that permits school parent bodies to determine their own fee rates, with minimum guidance to parents on how to assess fees. In particular, s 39 of SASA permits parent bodies at individual schools to determine 'the amount of fees to be charged'. Paragraph 127 of the Norms and

58 See SALC *Interim Report on Group and Human Rights* Project 58 (1991) 346. See also B de Villiers 'Education Rights: The Interim Report of the SALC and the Future of Education' (1992) 3 *Stellenbosch LR* 85 (reporting on draft Article 21).

59 See SALC *Final Report on Group and Human Rights* (1994) para 32.

Standards instructs parent bodies to make ‘appropriate and equitable decisions’ about the amount to be charged. Section 41 of SASA conveys to the school governing body the right to ‘enforce the payment of school fees’ against a learner’s family if they do not pay. No provisions allocate any funding for the payment of secondary fees – transport, textbooks, uniforms and other education-related expenses.

This section argues that these foregoing provisions, taken together, may be unconstitutional because they create a school fee system that impedes access. This is so for two reasons. First, the practice of charging school fees and enforcing them under ss 39, 40 and 41 may impede access for those learners who do not attend and/or who do not enrol because they cannot afford to pay. Second, charging school fees under the relevant legislation and regulations may impose an unconstitutional limit on the poor who do pay fees, because fees require families to spend too high a portion of family income.⁶⁰

According to economic experts, education is treated as a public good precisely because the market is not likely to supply adequate education on the basis of a learner’s ability to pay. Poor families who cannot afford to pay fees cannot obtain the necessary capital or credit to pay fees; poor families are also not likely to have access to the information needed to correctly assess the benefits of education, and are more likely to be (rationally) averse to the long-term risks involved in investing in education. For these reasons, most experts conclude that education must be supplied by the state and not by the market, and should not be based on a family’s ability or willingness to pay.⁶¹

Accordingly, research suggests that school fees rationally affect a family’s decision whether to enrol a child in school or to permit the child to continue attending. Many international studies conducted in African countries other than South Africa demonstrate a clear correlation between charging fees and lowered enrolment rates. For example, a recent Oxfam study in Tanzania, Ghana and Zambia confirms that the

60 As a preliminary note, it is important to distinguish between attendance rates and enrolment rates. Enrolment figures (which are quite favourable for primary education – 97 per cent – according to the recent Report to the Minister on Financing) do not necessarily reflect actual attendance rates – families who enrol their children often withdraw them from attendance for inability to pay fees and other reasons. Recent figures from the Report to the Minister on Financing reflect a net enrolment rate of 97 per cent for primary education as of 2001 (Report to the Minister on Financing (note 23 above) 13), but do not reflect actual attendance. For the argument that enrolment should be distinguished from attendance, see S Wilson ‘Relocation and Access to Schools in Sol Plaatje’ unpublished research report for the Centre for Applied Legal Studies (May 2003) section 2.5 (measuring attendance rather than enrolment, and noting the importance of distinguishing between the two).

61 See, for example, Roux (note 50 above) 18 (citing C Colclough ‘Education and the Market: Which Parts of the Neoliberal Solution are Correct?’ (1996) 24 *World Development*; R Venugopal ‘Oxford University Development Seminar’ Queen Elizabeth House (2002); World Bank *World Development Report* (1995)).

practice of charging fees reduces enrolments in primary school education.⁶² Similarly, studies conducted by the World Bank and other agencies demonstrate that enrolment rates have dropped in Zimbabwe, Malawi and Cote d'Ivoire after the introduction of school fees.⁶³ In Niger, a new requirement to charge user fees, implemented as part of structural adjustment between 1986 and 1988, produced a significant decline in primary school enrolment rates. After rising from 17 per cent in 1978 to 28 per cent in 1983, the rate decreased to 20 per cent in 1988.⁶⁴ Perhaps most importantly, the international evidence indicates that the limit imposed by fees falls most heavily on those most at risk – the poor and working class – because they are disproportionately more price-sensitive than their wealthier counterparts. This is particularly true where families must travel to attend school, because richer households can more easily afford the fees associated with higher transport costs.⁶⁵

Although no national studies on the link between fees and enrolment or attendance have been conducted in South Africa, available statistics indicate that the link between fees and attendance in South Africa resembles that of other African countries. Figures from South Africa's 'Education For All' self-assessment in 2000 indicate that for those children who were out of school in 1996, fees were a bar to access. According to the report, significant disparities existed with regard to attendance rates – non-attendance was highest in rural areas and among black South Africans. More importantly, according to the EFA assessment, inability to pay school fees and fees for uniforms and transport were among the primary causes for non-attendance.⁶⁶

The second point focuses more on the burden of fees for the poor. For those poor families who do choose to enrol their children at fee-paying schools, the burden of paying fees on those families, together with other education-related expenses that the state does not provide for, may be so great that it constitutes an unconstitutional limit on a learner's right to basic education. Anecdotal reports from research conducted by the

62 Oxfam Briefing Paper 'Education Charges: A Tax on Human Development' (12 November 2001).

63 J Vandemoortele 'Absorbing Social Shocks, Protecting Children and Reducing Poverty' (2000) *UNICEF Staff Working Papers*, Evaluation, Policy and Planning Series EPP-00-001 14.

64 According to a recent UNICEF study, student enrolment in primary schools in Malawi jumped by about 50 per cent almost overnight – from 1.9 million to 2.9 million pupils – after the country eliminated school fees and uniform requirements in 1994. Ibid. Similarly, the introduction in Ghana of fees for primary school in 1992 produced a decline of over 4 per cent in enrolling students in the first year of primary education, and families cited school fees as the primary reason for dropping out. S Reddy & J Vandemoortele 'User Financing of Basic Social Services: A Review of Theoretical Arguments and Empirical Evidence' (1996) *UNICEF* 20 (citing a 1993 World Bank Study).

65 Reddy & Vandemortele (note 64 above) 19.

66 Department of Education, 'Education For All: The South Africa Assessment Report' (2002) s 4.1.1.

Alliance for Children's Entitlement to Social Security reveal that fees (both primary fees for attendance and secondary fees for transport and uniforms) create a significant and substantial burden on the family budget. Poor families also voiced this complaint at the Hearings on Poverty conducted by the South African Human Rights Commission (SAHRC) in 1999.⁶⁷ In a recent study commissioned by the SAHRC, Vally and Dalamba reported the expenses of one single parent, who spent 59 per cent of his net income on school fees, even after qualifying for partial exemption.⁶⁸

Similarly, Vally and Ramadiro have reported results from the case study of the community of Rondebult in the East Rand. Their data indicates that for families with an average of 2.5 learners and an average income of R800 per month, education related expenses (including fees for attendance, transport, uniforms and textbooks) constituted 33 per cent of the average family's gross income. Primary fees alone constituted 2 per cent of gross income, while uniforms and other miscellaneous expenses were 16 per cent, textbooks were 3 per cent and transport was 12.5 per cent.⁶⁹

The government's own recent review reveals that the burden of fees falls disproportionately on the poor. Poor families pay twice as much in portion of income in fees as middle and high-income families.⁷⁰ The Department of Education's Report to the Minister on the Review of Financing, Resourcing and Costs in Public Education (hereinafter 'Report to the Minister on Financing') in 2003 indicates that the poor pay 2 per cent of income towards primary fees, as compared to 1 per cent for middle and high income families.⁷¹

(iii) Do exemptions provide sufficient access for the poor?

In assessing the constitutionality of the school fee system, the Court undoubtedly would consider whether SASA's exemption system adequately guarantees the right to basic education for those who cannot afford to pay. As detailed above, SASA and the Norms and Standards exempts learners from poor families from having to pay some portion of their fees.⁷² Section 39(1)(b) requires parent bodies to determine

67 S Vally & Y Dalamba *Racism, Racial Integration and Desegregation in South African Public Secondary Schools* (1999) 47. A significant portion of school fees included secondary fees such as transport, uniforms and textbooks, and activity fees. Ibid.

68 Ibid.

69 S Vally & B Ramadiro 'The Cost of Education in East Rand: A Case Study' (2002) (unpublished manuscript on file with the author).

70 Ibid.

71 Report to the Minister on Financing (note 23 above) 80. The study points out that fees constitute a smaller expense relative to other basic budget items.

72 SASA s 39(1)(b) requires parent bodies to determine criteria for exemption; paras 125-40 of the National Norms and Standards provide further details.

exemption criteria. Paragraphs 131-34 of the Norms and Standards provide detailed regulations with regard to exemption eligibility for full and partial exemptions. A separate set of exemption regulations, the 'Regulations Exempting Parents from Payment of Fees', give detailed procedures for applying for exemptions and school governing body decisions on such exemptions.

However, as an empirical matter, the exemption system may not adequately provide constitutional access to basic education for those who cannot afford to pay. Although no systematic research has been done on school fee exemptions in South Africa, anecdotal evidence strongly suggests that the exemption regulations do not satisfy the State's constitutional obligations towards many poor learners unable to pay school fees.

Exemptions may be constitutionally inadequate for four reasons. First, many families who might be eligible for exemptions do not apply because of the burden it imposes – ie the process is too time-consuming, the cost in dignity or in spending time to acquire information is too high, or because the school discriminates unfairly against those who are granted exemptions. Most provinces report that very few families apply for, or receive, exemptions.⁷³ Indeed, the government's own figures indicate that the very poorest families are much less likely to qualify for or receive exemptions.⁷⁴

Second, the statutory exemption system in many instances does not cover secondary fees, like uniforms, stationery and transport, which can constitute sizeable expenses. According to the government's own recent report, these 'hidden fees' cost on average 25 per cent of official fees, though the research cited above puts the cost of secondary fees much higher.⁷⁵ As noted above, for purposes of calculating exemptions, the regulations do not appear to include secondary fees.

In failing to specify whether transportation, uniforms and other fees regularly associated with instruction constitute 'fees', the regulations give governing bodies the discretion to define what counts as fees. Accordingly, in many schools where governing bodies consider such expenses as separate, the governing body does not make these secondary fees eligible for exemption, and families are expected to bear these expenses no matter their level of income. Thus, fees for transport, uniforms, textbooks, exams, activities, and special equipment are not covered either in eligibility for exemptions or in money allocated.

73 On difficulties with exemptions generally, see M Seleane 'Implications of the *Grootboom* Case for Social Policy in Education' cited in S Vally 'Fundamentalism and the Fundamentals of Education' (2001) 8 *Q Rev of Education and Training*; Vally & Dalamba (note 67 above).

74 Report to the Minister on Financing (note 23 above) fig 19; 81.

75 Ibid 84.

Finally, evidence indicates that school governing bodies may at times abuse their discretion by failing to inform parents about exemptions and by arbitrarily denying those who have applied for full or partial exemption. As noted in the first section, the government's Report to the Minister on Financing confirms that schools fail to inform parents about eligibility criteria for exemption and then deny learners' access on the basis of their inability to pay fees. According to the report, schools also subtly marginalise learners on the basis of their inability to pay fees.⁷⁶

In general, international research confirms that exemption schemes like SASA's do not work well enough to adequately protect the poor from the impact of fees. Income-based exemption schemes do not accurately measure poverty and ability or willingness to pay.⁷⁷ In addition, exemption schemes are often implemented in informal and ad hoc ways, and are stigmatising and dehumanising, which discourages applications.⁷⁸ In the health care sector, for example, very few of those who are eligible to receive waivers for user fees actually end up receiving the waivers.⁷⁹

If SASA's exemption scheme is similarly ineffective, then exemptions will not resolve constitutional problems of access. Several courts in the US have rejected as unconstitutional exemption schemes that rely on parental requests, because they are inherently under-inclusive and stigmatising.⁸⁰ Likewise, as a matter of South African law, the exemption scheme may not be able to rescue the user fee system from constitutional difficulty.

(c) A right to adequacy

Beyond guaranteeing access to basic education, s 29(1) may also be interpreted to guarantee a substantively adequate level of basic education – in other words, to guarantee the material and pedagogical conditions necessary to respect, protect, promote and fulfil the right to basic

76 Report to Minister on Financing (note 23 above) 54; 90 (illegal marginalisation, which is particularly prevalent in poor schools, includes withholding grade reports, not issuing books, prohibiting attendance and publicising the names of those learners who cannot pay fees). See also *ibid* fig 12.

77 Reddy & Vandemoortele (note 64 above) 49-50.

78 *Ibid*.

79 According to a study conducted by the World Bank Operations Evaluation Department (OED) in Zimbabwe, government waivers for the poor were introduced to minimise the impact of user fees in health care, in the early 1990s. The study reports that fewer than 20 per cent of the eligible poor ended up receiving the waiver. Similarly, on OED site visits to Mali, officials found no examples of fee waivers being granted by community managed health centres, even though a waiver scheme had been established. See <<http://www.worldbank.org>> (visited August 2002).

80 See *Chandler v South Bend Community School Corporation* 312 NE 2d 915, 918 (Ind. App. 1974) (disapproving of waiver scheme in which school provides waiver form to parents who request assistance); *Hartzell v Connell* 679 P2d 35, 43-44 (Cal. 1984) (disapproving waiver scheme because of stigma concerns).

education. The question of whether the Constitution guarantees some 'core content' of the right to education will no doubt be the subject of significant controversy in South African jurisprudence.

As outlined in the above discussion on 'basic education', international and foreign jurisprudence both support the notion that, as with other affirmative socio-economic rights, the right to basic education guarantees some minimum level of substantive adequacy – the minimally essential components of basic education and some minimum level of implementation, efficacy and adequacy. For example, the UN Committee's General Comment 13 on the ICESCR creates concrete minimum requirements with regard to some aspects of education. Notably, all schools '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, [and] teaching materials'.

Foreign jurisprudence also supports the notion of minimum core for substantive adequacy. In the US, state constitutional courts have interpreted the right to education in state constitutions to require substantive adequacy. In *Rose v Council for a Better Education*, the Kentucky Supreme Court held that, under the state's right to education, the state had an obligation to adequately fund education for all learners, as well as to provide an adequate level of education.⁸¹ Like the ICESCR, the Kentucky court went on to hold with great specificity that an adequate education sufficiently developed in each child seven basic capacities: oral and written communication skills; knowledge of social, economic and political systems; knowledge of governmental processes; knowledge of physical and mental wellness; grounding in the arts; adequate training for life work and sufficient academic and vocational training to compete with students in surrounding states.⁸² Several other states have followed Kentucky's lead in finding that the right to education guarantees a right to a minimum level of substantive adequacy,⁸³ and that combination property-tax/state funding financing schemes were unconstitutional because they failed to guarantee an adequate minimum to learners.⁸⁴

Government itself has recognised to some degree the constitutional notion of a minimum core level of adequacy in the right to education. In

81 790 SW2d 186 (Ky. 1989).

82 Ibid 212.

83 These states include Arizona (*Roosevelt Elementary School District No. 66 v Bishop* 877 P2d 806 (Ariz. 1994)); Massachusetts (*McDuffy v Secretary of Executive Office of Education* 615 NE2d 516 (Mass. 1993)); New Jersey (*Abbot v Burke* 575 A2d 359 (NJ 1990)); Tennessee (*Tennessee Small School System v McWherter* 851 SW2d 139 (Tenn. 1993)) and Texas (*Edgewood Independent School District v Kirby* 777 SW2d 391 (Tex. 1981)). Many of these cases draw on state constitutional requirements that the state educational system be 'uniform' or 'efficient', in addition to the notion that the constitution guarantees a right to basic education.

84 Ibid.

its recently issued Plan of Action, government actually calculated and committed to providing a 'basic minimum package' of non-personnel, non-capital funding for each learner (R600-R1000), in part to constitute a benchmark of adequacy.⁸⁵

At the same time, the Constitutional Court appears to have deliberately refrained from defining minimum core as part of the jurisprudence on socio-economic rights. In recent cases, the Court has exhibited significant reluctance to find a minimum core content for either the right to housing or health care. In *TAC*, the Court assessed the scope of the government's duty to distribute Nevirapine to pregnant mothers in order to prevent mother-to-child transmission of HIV. Although the Court found that the government had a duty to distribute the drug, it expressly declined to find that duty as part of a minimum core right to health care, and diverted the question to whether the government had been reasonable:

[T]he socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core is provided to them. Minimum core [in *Grootboom*] was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1). A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.⁸⁶

Earlier, in *Grootboom*, the Court had also expressed reluctance to take up the question of a 'minimum core', again choosing instead to determine whether the government had undertaken 'reasonable measures' or whether its actions had otherwise been reasonable.⁸⁷

Even so, a claim based on the right to education can be distinguished from these two earlier cases, which addressed rights to health care and housing. As will be argued most fully in V below, both s 26 (housing) and s 27 (health care) are qualified in the constitutional text by the language of reasonableness: ss 26(2) and 27(2) both explicitly limit the state's obligations to 'tak[ing] reasonable legislative and other measures . . .'. Similarly, the text for both provisions contains language relating to progressive realisation of the right. In contrast, s 29 has no such

85 Plan of Action (note 41 above) paras 35-6. See also Report to the Minister on Financing (note 23 above) 64.

86 *TAC* (note 54 above) para 34.

87 'The determination of a minimum core in the context of the 'the right to have access to adequate housing' presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable'. *Grootboom* (note 51 above) para 32.

qualifying language. Thus, the core content to the right to education cannot be read against the constitutional requirement of reasonableness. Because the right to basic education is a 'priority' right that is not internally qualified by constraints of 'reasonableness', the Court may define the core content of such a right to give the right full constitutional effect. Accordingly, the Court may choose to define the minimum core content of the right to basic education in much the same way as US state courts and international instruments have done. Indeed, the minimum core of the right to education could be read to incorporate something like the ICESCR requirement that schools maintain safe buildings, water and sanitation, trained teachers with competitive salaries, and adequate learning materials, or the Kentucky Supreme Court's requirements with regard to capacities.

Under such principles, one can strongly argue that fee-based financing violates the right to minimally adequate basic education. Because the state allows schools to charge fees, and because the state does not provide funding to remedy shortfalls from schools that cannot afford to charge fees, many fee-poor schools fail to provide a substantively adequate education. Thus, the school fee system, in conjunction with the state system of financing, produces potentially unconstitutional results.

For example, according to the 2000 School Register of Needs, 35.5 per cent of the country's schools are still without access to any form of telecommunications; 28 per cent of schools have no access to water, and 42.9 per cent have no access to electricity. 34 per cent of schools reported weak or very weak building structures. 70 per cent of schools had no access to computers whatsoever.⁸⁸ These schools tend to be the poorest schools, which are unable to charge significant fees or top up their shortfalls from other resources. Other evidence of educational 'output' indicates substantive inadequacy. For example, matric pass rates in those provinces expending the least per learner in public education are barely over half the enrolled learners: the poorest provinces registered low rates – Eastern Cape registered a pass rate of 51.8 per cent in 2002 and Mpumalanga registered 55.8 per cent in the same year.⁸⁹

By the government's own estimates, most of the country's poor learners currently do not receive an adequate 'basic minimum' funding for non-personnel, non-capital needs. 'From preliminary research we've conducted, we can say that the basic minimum package [of NCPC inputs] costs between R600 and R1000. This amount is well above the current funding levels, even the funding levels for poor learners in the provinces with the best funding'.⁹⁰ Thus, because the state does not guarantee an

88 Department of Education *School Register of Needs Brochure* (2002).

89 'Changing Face of Matric 2002' *Sunday Times* (29 December 2002).

90 Plan of Action (note 41 above) 15.

adequate minimum via state funding, and because poor schools are not able to raise fees to remedy their shortfalls (unlike their wealthier counterparts), fee-poor schools are unable to provide substantively adequate education.

Despite such evidence, the argument under adequacy faces several pragmatic and strategic difficulties. Section VI below discusses in general the separation of powers concerns raised by a finding that public education fails to satisfy the core content of the right to basic education. At a minimum, any decision sustaining an adequacy challenge is likely to have significant budgetary and policymaking implications, far beyond the Court's previous narrow holdings on the right to housing – an order that housing programs require emergency provision for immediate need – or the right to health care – an order that government make good on its previous commitment to distribute Nevirapine.

Given the difficulty of defining 'core content', the Constitutional Court would probably prefer to avoid deciding the question of 'core content' and adequacy, and choose instead to decide on the basis of the foregoing access argument, or an equality argument, which is explored in the next section.

IV THE RIGHT TO EQUALITY

The school fee system is potentially vulnerable to challenge not only for violating the affirmative right to education, but also for violating the right to equality. Under the equality clause in s 9, school fee legislation potentially could constitute unfair discrimination because the school fee system creates disparities in expenditures per learner that discriminate against learners on the basis of race and/or class.

Section 9 of the 1996 Constitution prohibits unequal treatment and unfair discrimination. Section 9 provides in relevant part:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

Most commentators interpret the equality clause to give support to the other provisions in the Bill of Rights. That is, the equality provision must at a minimum be read to guarantee that citizens are entitled to the full and equal enjoyment of other fundamental rights.⁹¹ Thus, in the present

91 J Kentridge 'Equality' in Chaskalson et al (eds) (note 1 above) 14-26.

case, the equality clause must be read to guarantee learners the right to full and equal enjoyment of the basic right to education.

(a) Government's discriminatory conduct

As a preliminary matter, for purposes of legal analysis, it is important to define precisely the differentiation that the government has imposed, and in what way that action discriminates between groups of people. SASA's vesting of discretion in parent bodies, together with the direction that fees be set according to the wealth of the community, might be the most vulnerable to challenge, because these regulations create the potentially unconstitutional disparities in school funding. In particular, as detailed above, s 39 of SASA authorises parent bodies to charge fees, and most importantly, to decide 'the amount of fees to be charged'. In addition, para 127 of the regulations provides that: '[s]ince fee revenue is determined both the by the fee level and by the number of fee payers, the norms relating to exemption are designed to assist parent bodies to make appropriate and equitable decisions about the fee level and the exemption thresholds'.

These provisions permit rich communities to charge significant school fees, while poor black communities are unable to charge sufficient fees to provide the same sort of quality in schooling. Because this legislation creates and authorises a differentiation between fee-rich and fee-poor schools, and tends to reproduce the racial stratification in education of the apartheid era, it may be vulnerable to constitutional challenge.

In a recent status report, Minister of Education Kader Asmal appeared to acknowledge that the user-fee system perpetuates, rather than rectifies, inequality:

Inequality in education, and more generally, continues to be one of the most vexing issues for the Education Ministry. Income inequality is simultaneously an object of equity strategies and a factor that mediates these strategies. Wealthier parents are able to maintain relative privilege in schools through school fees; poorer parents cannot.⁹²

(b) The legal case under s 9

A legal challenge to school fees under s 9 must show one of two important elements: (1) that the government's action irrationally differentiates between people or groups of people, or (2) that the government's action unfairly discriminates between people or groups of people. It is important to note that showing either irrational

⁹² K Asmal 'Education, Transformation and Change in South Africa' (2001) available at <<http://www.pwv.gov.za>> .

differentiation or unfair discrimination is sufficient to make out a claim under the equality clause.⁹³

(i) Do school fees irrationally differentiate between categories of people?

The first step focuses on whether the government differentiates between people and whether it does so rationally. Under s 9(1), the Court must determine whether the government's choice to rely on school fees differentiates between people or categories of people for a legitimate purpose. If it does, the Court must determine whether the differentiation bears a rational relationship to some legitimate government purpose. If there is no rational relationship between school fees and some legitimate government goal, then the government's action is irrational and therefore unconstitutional.

The Constitutional Court has interpreted s 8(1) of the interim Constitution, the predecessor to s 9(1), as prohibiting irrational differentiation between groups of people, particularly naked preferences or arbitrary preferences for certain groups of people over others.⁹⁴ The Court does not require very much to prove a rational relationship between government policy and its purposes. That is, the question is not whether government could have achieved its purposes more effectively in a different manner, or whether regulations or conduct could have been more closely connected to its purposes. The test is simply whether there is a reason for differentiation that is rationally connected to government purposes.⁹⁵ To the extent that the government policy does not itself differentiate, but authorises other government bodies to differentiate, a court is even less likely to find a violation of s 9(1).⁹⁶

As will be discussed more fully below, it would be difficult to argue that the user fee system is not rationally related to a legitimate government goal.⁹⁷ In particular, user fees may serve two important

93 *Harksen v Lane* 1998 (1) SA 300 (CC) para 44.

94 *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25. Most of the Constitutional Court's equality jurisprudence deals with s 8 of the interim Constitution, but the Court has assumed that such jurisprudence applies equally to s 9 of the 1996 Constitution 'notwithstanding certain differences in the wording of the provisions'. *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 15.

95 *East Zulu Motors v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC).

96 In *Gerber v Kommissie van Waarheid en Versoening* 1988 (2) SA 559 (T) the Transvaal High Court addressed an allegation that the TRC's Amnesty Committee had treated litigants unequally. In that case, the relevant government statute, the Promotion of National Unity and Reconciliation Act did not differentiate between litigants, but provided general guidelines authorising the committee to differentiate. The court held that because the statute authorised the exercise of judgment and discretion by the committee, it was difficult to lay down rigid rules about how such judgment was to be authorised, and thus difficult to find a violation of s 9(1).

97 This argument is laid out in full in V below, but is discussed here to the extent that it relates to the issue of rationality.

government interests. First, school fees provide a source of additional funds to enable government to deliver adequate basic education to the public. Because of the government's budget constraints, charging school fees asks those who can afford to pay to contribute to their children's public education.⁹⁸

Second, as the government has pointed out, school fees permit local communities to some degree to exercise local control, civic responsibility and community involvement. Making decisions about fees encourages parents to become active and engaged in charting the direction of the particular school their child attends, and in ensuring the continued welfare of public education generally. According to commentators, such control may provide for efficient choices about both resources and quality at the level of the individual school.⁹⁹

At the same time, however, the concept of local control may have little meaning for families who cannot afford to pay significant fees. As the California Supreme Court pointed out in *Serrano v Priest*, '[f]or poor districts, control is an illusory concept'.¹⁰⁰ Because SASA creates the differences between fee-rich and fee-poor schools, it distributes local control unequally on the basis of race and class. Even so, it is difficult to argue that school fee differentiations are completely irrational. As a matter of common sense, school fees seem on their face to constitute a rational attempt by government to supplement funding shortfalls by charging fees to those who can afford to pay, and to provide local communities with an incentive to participate in public education.

(ii) Does the school fee system of financing unfairly discriminate?

Beyond assessing whether the state has irrationally differentiated between groups of people, a court will determine secondly whether the state has engaged in unfair discrimination under s 9(3). More specifically, the Court will ask whether the government's action discriminates in a way that adversely affects persons in their human dignity. If discrimination is

98 See Department of Education 'Memo to Portfolio Committee on Education and Council of Education Ministers on Draft School Finance Policy' (26 February 1996) 8 (noting an inevitable drop in allocation to historically advantaged schools and the risk of defection by middle- and high-income families from public education); L Crouch 'Consultant's Report: School Funding Options and Medium-Term Budgeting for Education in South Africa' (November 1995) 9.

99 See Report to the Minister on Financing (note 23 above) 36 (SASA allocates greater democratic participation to local communities, and to efficiency, but does not expect them to provide resources alone); Department of Education Memo (note 98 above) 6 (noting that user fees 'can contribute to efficient management of resources in public facilities and can exert a healthy influence on economic choices made by households').

100 *Serrano v Priest* 487 P2d 1241, 1260 (1971) (rejecting the argument of local control as justification for property-tax based systems of financing).

on the basis of a specified ground the Court presumes that discrimination is unfair. If discrimination occurs on an unspecified ground, then complainants must prove that the discrimination is unfair.¹⁰¹

An argument that school fees constitute unfair discrimination under s 9(3) must establish two elements. First, the government's decision to rely on school fees must constitute discrimination on prohibited grounds, either a ground that is specified in the statute (eg race, gender, etc) or an unspecified ground. Second, such discrimination must be unfair, in other words it must adversely affect certain groups of people in a way that significantly diminishes their dignity. Courts have interpreted s 9(2) to require substantive, rather than formal, equality. Formal equality would merely require that government treat all individuals in an identical manner, regardless of their pre-existing circumstances. In contrast, substantive equality requires that government take differing and unequal circumstances into account to ensure a full equality.¹⁰²

(aa) Grounds: Fees discriminate on the basis of race and class

Race

A strong argument can be made that the school fee system discriminates on the basis of race. More specifically, the school fee system appears to create discriminatory differences in expenditures per learner and in the types of resources available to the learner, and these differences correlate to the wealth or poverty of a community, and in turn to the race of the community. In *Pretoria City Council v Walker*, the Constitutional Court upheld an argument that differentiation on the basis of geography constituted discrimination on the basis of race. The Court found that the city council had discriminated indirectly on the basis of race when it charged flat utility rates to the townships of Atteridgeville and Mamelodi, but charged metered rates to 'old Pretoria'. The Court noted that the city council's decision differentiated between residents on the basis of geography, which in turn correlated directly to race because of segregation patterns in housing. Langa J explained:

The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one that differentiated in

101 Section 9(5) sets out this presumption.

102 See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41. See also J De Waal et al *The Bill of Rights Handbook* (4ed 2001) 200-01.

substance between black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this.¹⁰³

Like the discrimination in *Walker*, the user fee system appears to discriminate on the basis of race, because it creates differentiation on the basis of the wealth or poverty (and to an extent geographical location) of a community, which in turn is inextricably linked to race. A recent study conducted by Edward Fiske and Helen Ladd in the Western Cape confirms that race, geography, poverty and fees are strongly correlated, in three ways. First, with some slight exception, race still very strongly determines which school a learner attends. Indeed, almost all Western Cape learners continue to attend the same schools that they formerly were required to attend by virtue of their race. Blacks attend former DET schools, coloureds attend former HOR schools, Indians attend former HOD schools and whites attend former HOA schools or Cape Education District schools.¹⁰⁴

Second, because of historical discrimination in land ownership and employment, the former racial category and geographic location of a school (eg a former DET school) is strongly correlated with the wealth or poverty of the community.¹⁰⁵ Third, in some part because of differences in personnel spending, state funds expended per learner are significantly higher for non-black schools than for black schools. Indeed, public funds expended per learner for formerly white schools and formerly Indian

103 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 32. The first part of this passage reads: 'It is sufficient for the purposes of this judgment to say that this conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race. It would be artificial to make a comparison between an area known to be overwhelmingly a "black area" and another known to be overwhelmingly a "white area", on the grounds of geography alone'.

104 EB Fiske & HF Ladd 'Financing Schools in Post-Apartheid South Africa: Initial Steps Toward Fiscal Equity' (prepared for International Conference on Education and Decentralisation: African Experiences and Comparative Analysis, Johannesburg, 10-14 June 2002) (manuscript on file with the author). According to the authors, 79 per cent of the African primary learners remain in former DET schools, 94 per cent of coloured students remained in former HOR schools, and essentially 100 per cent of white students remain in HOA or Cape Education Department schools, which formerly served the white community exclusively. *Ibid* 20.

105 *Ibid*. The study found that, predictably, former DET schools serve predominantly poor communities, former CED schools serve the richest communities, and HOR and HOD schools serve communities falling somewhere between the two ends of the spectrum. 3 out of 4 learners served by the former DET schools were in the poorest quintile of community wealth, and 7 out of 10 CED students were in the top quintile. The study measured the wealth of the communities by referring to the community poverty component of the Norms and Standards assessment of need for its resource targeting tables.

schools were respectively 28 per cent and 38 per cent greater than state expenditures for blacks.¹⁰⁶

Fourth, and perhaps most importantly, the amount of school fees charged varied significantly according to the racial category of the school and corresponding wealth of the community. Fees charged ranged from an average of R45 per year for the former black African schools, R99 for formerly coloured schools, R327 for formerly Indian schools, and R2 077 for formerly white schools.¹⁰⁷ Thus, Fiske and Ladd's study confirms the notion that race very much correlates both to the geographic location and wealth of the community and to the ability of the community to charge fees.

This evidence indicates that school fees unfairly discriminate against those who are most vulnerable and at risk, namely, poor black learners who do not have access to quality education. Fee-rich schools continue to employ more teachers, and make available to their learners state of the art computers, cutting edge laboratories and first-rate textbooks. In contrast, many formerly disadvantaged schools continue to operate without even the benefit of electricity, running water, operational toilets or basic learning materials. Indeed, the so-called 'tree schools' operate without the benefit of any physical facilities whatsoever.¹⁰⁸ Because race correlates with class and school attendance (as it correlated with geography in *Walker*), the government-created distinctions between fee-rich and fee-poor schools create distinctions on the basis of race.

To be sure, the correlation is not a perfect one. A number of middle-class and poor black learners have enrolled in former Model C schools. Most commentators agree that Model C schools enrol (usually at a maximum) somewhere around 30 per cent non-white students.¹⁰⁹ However, even if there is some migration at the margins of middle and high-income blacks to fee-rich schools, such migration would be unlikely to negate a finding of racial differentiation, particularly if the statistics in Cape Town accurately reflect the national picture.

Class

Alternatively, an equality challenge could be framed in terms of class. Although class is not listed as one of the specified grounds under s 9(2), it

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 35, Table 11.

¹⁰⁸ Tree schools are most prevalent in the country's poorest provinces – Limpopo, Northwest and Eastern Cape – where thousands of learners study under trees and schooling is affected by changes in the weather. 'Asmal Urges End to "Tree" Classrooms' *Business Day* (21 January 2002) 3. Not coincidentally, these provinces spend the highest portion of their education allocation on personnel salaries and do not have funds for building school facilities. Ibid.

¹⁰⁹ Interview with Brahm Fleisch, Senior Lecturer at Educational Policy Unit, University of Witwatersrand (February 2002).

could be argued that socio-economic class is an unspecified ground that potentially creates a predicate for discrimination. In *Harksen v Lane*, the Constitutional Court found that a person's status as the solvent spouse of someone who is insolvent qualified as an unspecified ground, because it had 'the potential to be used to demean persons in their inherent humanity and dignity'.¹¹⁰ By analogy, socio-economic status potentially could be used to demean a person's dignity in a discriminatory way, far more so than an attenuated marital relation to insolvency (which is, after all, a species of socio-economic status). As Justice Yacoob recently noted, '[h]uman beings tend, sometimes subconsciously, to associate the dignity of other human beings with their socio-economic position. . .'.¹¹¹

Framing the argument as discrimination based only on class may be a more difficult argument to sell. Courts may hesitate to declare class as an unspecified ground of discrimination, primarily because of the precedent such a decision might set for areas outside of school financing. Indeed, if class, income or wealth constitutes a ground for potentially unfair discrimination, many government statutes and legislation affecting the poor and wealthy differently might be subject to constitutional scrutiny, though US courts have distinguished such cases successfully from cases involving education and class.¹¹² Alternatively, it might be possible to argue that race and class, as a combination, together constitute an unspecified ground for unfair discrimination. The Court in *Harksen* recognised that possibility:

There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria[,] which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.¹¹³

Similarly, the Court has recognised that 'grounds of discrimination can intersect, so that the evaluation of discriminatory impact is done not

¹¹⁰ *Harksen v Lane* (note 93 above) para 62.

¹¹¹ Z Yacoob 'Some Perspectives on the Movement Towards and the Struggle For Equality in Our Context' Keynote address delivered at the Conference on Equality: Theory and Practice in South Africa and Elsewhere; University of Cape Town (January 2001). See also Report to the Minister on Financing (note 23 above) 54 (society sees the poor as a threat).

¹¹² See, for example, *Van Duzart v Hatfield* 334 FSupp 870, 875 (D. Minn. 1971) (distinguishing wealth as suspect class in case involving right to education from other cases based on argument that education is unique right).

¹¹³ *Harksen v Lane* (note 93 above) para 50. See also *President of the RSA v Hugo* (note 102 above) (court found executive order to release mothers of young children from prison discriminated on the basis of a combination of gender and parentage of young children, and that the combination was substantially related to gender).

according to one ground of discrimination or another but on a combination of both'.¹¹⁴

Certainly, the grounds of race and class together have served as the predicate for apartheid-era patterns of disadvantage in education. In particular, many apartheid era policies relating to the Bantu education system targeted certain groups on the basis of both class and race. The apartheid government created separate educational systems by arguing that poor blacks and other non-whites were not capable of sufficient intellectual advancement to make them fit for higher-income jobs. Arguing on the basis of the historical link between education and race/class minimises concerns relating to categorising class as a potential ground for unfair discrimination. Even more strongly than with race, the data indicate that fees create discrimination on the basis of a combination of race and class, or class alone. Indeed, all available data confirm the notion that school fees 'almost perfectly mimic patterns of historical privilege'.¹¹⁵

The recently issued Report to the Minister on Financing demonstrates significant differences in fees and expenditures per learner, for the wealthiest schools. Figure 17 of the report is a graph recording average per-learner fees according to income, which illustrates a relatively flat, low line through the first four quintiles of parental income and a sharply upward sloping curve through quintile 5. The report notes the strong correlation between the level of fees and the level of expenditures for wealthy learners relative to the rest of the country. In particular, the report notes that what is striking about the graph is 'how much more parents pay in school fees in Quintile 5 (the 20 per cent of the country's wealthiest schools) than in any other quintile':

Overall, fees in 2002 contributed some R3.5 billion to R5 billion to schooling . . . This means that some 8 to 11 percent of all expenditure on public schools was from private sources. However, private contributions are concentrated within quintile 5, where possibly as much as 35 per cent of total expenditure on public schooling is from fees. In the three poorest quintiles, fees contribute between 0.5 per cent and 2.5 per cent to total expenditure. Importantly, we cannot, on the basis of these figures, make a comparison between 65 per cent coverage by the state for quintile 5 and around 98 per cent for the other quintiles. Total state expenditure in current terms . . . on every quintile 5 learner is not very different to total state expenditure on every quintile 1 learner, though the implementation of the School Funding Norms and amended post provisioning norms is changing this in favour of the poor. *What should be remembered is that total public plus private expenditure on quintile 5 learners is some 50 per cent higher than for other learners* (emphasis added).¹¹⁶

114 *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 94 above) para 113.

115 K Porteus 'The Personal and the Global: Grinding Gears?' (2000) 7 *Q Rev of Education and Training* 17, 19.

116 Report to the Minister on Financing (note 23 above) 79-80.

In other words, although the state supplies roughly the same amount of money to quintile 5 learners as to quintile 1 learners, state funding makes up only 65 per cent of available funds for the wealthiest learners. The rest of funding comes from private fees that top up state funds, and these fees create relative differences in expenditures per learner on the order of 50 per cent. The government's own model demonstrates that, so long as middle and high-income communities can charge fees, fee-rich schools will expend significantly more per learner than fee-poor schools.

Similarly, in a study conducted by the University of Witwatersrand's Education Policy Unit in the Gauteng province, researchers concluded that the disparity in ability to charge user fees contributed significantly and dramatically to inequalities in expenditures per learner.¹¹⁷ In this regard, the study confirmed several relevant facts.¹¹⁸ First, the vast majority of Gauteng schools receive no or negligible income via school fees.¹¹⁹ Not surprisingly, these schools are located in communities that rank in the bottom three quintiles of the government's assessments of community poverty. Comparatively, formerly advantaged schools raise a significant amount of money via fees. More specifically, schools located in communities that rank in the top two quintiles of community wealth obtain a very high proportion of their budgets through parent contributions.¹²⁰

Second, and most importantly, the research data from Gauteng illustrates that the additional funding provided by school fees creates dramatic disparities in funding available per learner, even after government attempts to redistribute and create equity are taken into account.¹²¹ The research compares the levels of funding per learner before fees are taken into account and after fees are taken into account. The results graphically demonstrate the dramatic difference that school fees create for learners in middle class and wealthy communities.

Likewise, the Budget Information Service of IDASA illustrates the differential impact of a school's ability to charge fees on its budget for learners. IDASA's research compares the annual budget for a hypothetical 'rich' and 'poor' school with the same number of learners and teachers. Their calculations assume that the 'rich' school charges R2500 annually per learner, while the 'poor' school charges only R50 per learner. According to the calculations, even after taking into account the targeted allocations towards the poor school for non-personnel costs, the

117 K. Porteus; F. Patel; B. Fleisch & T. Ruth 'Budget Analysis for the Education Portfolio Committee of the Gauteng Provincial Legislature Budget Statement 2001/2002: Vote 5 Budget for the Gauteng Department of Education' (manuscript on file with author).

118 Ibid 24.

119 Ibid.

120 Ibid.

121 Ibid 22-4.

rich school spends R4178 per learner, while the poor school spends less than half that, R2046 per learner.¹²²

Third, the research also indicates that disparities in funding for personnel are far greater when one considers the teaching posts that are funded at historically advantaged schools via school fees. Those schools enjoy far better learner to educator ratios, because fee-rich school governing bodies can (and do) use school fees to hire significant numbers of additional teachers.¹²³ The government's Report to the Minister on Financing confirms that fee-rich schools hire more SGB-funded posts.¹²⁴ Similarly, learner to classroom ratios and matric rates follow the same sort of pattern, favouring those schools that can supplement their state budgets with significant funding from school fees.¹²⁵

Government's recently proposed changes to fee-setting – namely, the decision in the recently issued Plan of Action to prohibit or strongly discourage poor schools from charging fees – potentially could exacerbate the difference between fee-rich and fee-poor schools.¹²⁶ Under the proposal, although the state tops up funding for poor schools to the guaranteed national minimum, these schools are prohibited from choosing to raise additional funds from private resources, while nothing prevents middle and high-income schools from raising the level of private resources even higher beyond the nationally guaranteed minimum.

Authorising middle and high-income schools to raise fees but prohibiting poor schools from doing so at the same time on its face appears likely to perpetuate inequality. Although poor schools are receiving more money from the state, under the Plan of Action, fee-rich schools are not limited in the amounts they can raise, as are the poorer schools. Thus, the wealthier schools are permitted to top-up state funding to an unlimited level, but poor schools are prohibited from doing so through fees.

(bb) Is the discrimination unfair? Three factors to assess fairness

If school fees discriminate on the basis of race, s 9(5) then presumes that such discrimination is unfair. To rebut such a presumption, government would have to demonstrate that the school fees policy does *not* adversely affect certain groups of people in a way that diminishes or demeans their dignity. In *Harksen*, the Constitutional Court assessed unfairness on the basis of the following three factors: (i) the position of complainants in society and whether they have suffered in the past from patterns of

122 IDASA *Intergovernmental Fiscal Review – Education* (Prepared by IDASA BIS, November 1999).

123 Porteus et al (note 117 above) 24.

124 Report to the Minister on Financing (note 23 above) 78 (quintile 5 parents pay more in order to reduce the learner to educator ratio through privately funded posts).

125 Porteus et al (note 117 above).

126 Plan of Action (note 41 above) para 60.

disadvantage; (ii) the nature of the provision or power and the purpose sought to be achieved by it; and (iii) the extent to which the discrimination complained of impairs the complainant's fundamental human dignity or other human interest.¹²⁷ The following discussion adopts the same analytical framework.

The first factor – the position of complainants as vulnerable members of society who have suffered from discrimination in the past – appears to weigh in favour of a finding of unfairness. Poor black learners can rightly claim to be the most vulnerable of society's members, particularly given the history of this group under apartheid public education.¹²⁸

The second factor – the nature of the school fee system and the purpose sought to be achieved – weighs more strongly *against* a finding of unfairness, as will be discussed most fully in the following section on the limitations clause. On the face of it, the practice of charging fees may reasonably be designed to supplement state funding shortfalls, promote the fiscal health of public education and to promote local control and participation. If one takes into account the exemption provisions of SASA, which are designed at least in theory to mitigate the impact of fees on poor learners, school fees appear potentially more reasonable.

However, this factor requires a court to balance the underlying purpose of government's school fee model with the values that underpin the constitutional rights to basic education and equality. As will be discussed most fully in V below, as a matter of constitutional law, the state's fiscal interests may not justify limiting unqualified 'priority' constitutional rights like the right to basic education. Indeed, the 'priority' right to basic education may prohibit government from justifying a limit to that right on the grounds of funding shortfalls, fiscal health or local control.

The third factor – the extent to which the discrimination complained of impairs the complainant's fundamental human dignity or other human interest – weighs most strongly in favour of a finding of unfairness. The differences between the most under-resourced schools (for example, the so-called 'tree schools') and the most well-resourced former model C schools demonstrate the impact that inequality has on the dignity of a poor, black learner. By replicating apartheid-era inequalities with regard to race and class, the user fee system is likely to reproduce the very same

127 *Harksen v Lane* (note 93 above) para 51.

128 *Pretoria City Council v Walker* (note 103 above) para 46 ('differentiation made on the basis of race was a central feature of those divisions and this was a source of grave assaults on the dignity of black people in particular. It was however not human dignity alone that suffered. White areas in general were affluent and black ones were in the main impoverished. Many privileges were dispensed by the government on the basis of race, with white people being the primary beneficiaries. The legacy of this is all too obvious in many spheres, including the disparities that exist in the provision of services and the infrastructure for them in residential areas. Section 8 is premised on a recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with'.)

injury to individual worth, integrity and dignity experienced under the Bantu education system. Even more importantly, if education is indeed part of the engine that drives the process of transformation, reproducing educational inequality tends to undercut the constitutional transformation that the Bill of Rights was meant to support.

Foreign jurisprudence supports the argument that the school fee system violates s 9. Several US state courts have decided that property tax based systems of public school financing are unconstitutional because they violate the constitutional right to equality. In *Serrano v Priest*, for example, the California State Supreme Court ruled that because property-tax based systems of school financing relied on the wealth of the community in which the school district is located, such systems created unconstitutional inequalities based on class and indirectly on race.¹²⁹ The financing system in that case somewhat resembled South Africa's proposed financing scheme under the Plan of Action – California relied on a combination of property tax and state funding, in which state funding was designed to provide a basic minimum amount of guaranteed support (through a base level and redress funding) to poor learners.¹³⁰

In that financing scheme, despite the existence of guaranteed minimums, the Court found that state aid was nevertheless insufficient to prevent widely varying disparities between rich and poor. Thus, the Court held that this financing scheme violated equal protection because it created significant disparities between rich and poor.¹³¹ In condemning this particular sort of inequality, the Court heavily emphasised the importance of education as a fundamental interest protected by the State constitution: 'Education is a major determinant of an individual's chances for economic and social success in our competitive society. . . [E]ducation is a unique influence on a child's development as a citizen and his participation in political and community life. . . . Education is the lifeline of both individual and society'.¹³²

Likewise, in *Dupree v Alma School District No 30*, the Arkansas Supreme Court struck down a similar scheme because it 'promoted greater opportunity for the advantaged, while diminishing the opportunity for the disadvantaged'.¹³³ Several other state supreme courts have struck down property tax schemes for the same reasons.¹³⁴

Like the property tax based systems in California and Arkansas, the school financing system here makes the quality of education received conditional on the wealth of the learner's family, and of the surrounding

129 487 P2d 1241, 1244 (Cal. 1971).

130 Ibid 1246.

131 Ibid 1253-55.

132 Ibid 1250.

133 651 SW2d 90, 93 (Ark. 1983).

134 *Washakie City v Herschler* 606 P2d 310 (Wyo. 1980); *Horton v Meskill*, 376 A2d 359 (Conn. 1977).

community. Those who historically enjoyed significant advantages under apartheid continue to enjoy those advantages, while those who were most at risk under apartheid remain so.

As will be discussed more fully in VI below, the right to equality need not dictate absolute equality in terms of opportunity for public education. Inevitably, differences between provinces and between schools in a single province will exist even within a system that is constitutional. A court necessarily must judge when differences in allocation of funding per learner are acceptable and when they render a system unconstitutional. Under most reasonable assessments of equality, however, a difference of 50 per cent in expenditure per learner between the top 20 per cent of schools – the country's wealthiest schools – and the bottom 60 per cent, is unconstitutional.

V SECTION 36: ARE LIMITS ON RIGHTS REASONABLE AND JUSTIFIABLE?

Without doubt, the most important part of the analysis in assessing the constitutionality of school fees is under the limitations clause. Even presumably unfair discrimination may nevertheless be justified under the general limitations clause if the government has sufficiently compelling reasons for discrimination.¹³⁵ Similarly, government violations of the right to basic education might nevertheless be constitutional if the limits are reasonable and justifiable in an open and democratic society. Section 36 of the Constitution provides that the government may be able to justify limiting the Bill of Rights under certain conditions: (1) if it does so by way of a law of general application; and (2) if the limit is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Section 36 specifies five factors to be considered when assessing whether a government limit on individual rights is reasonable and justifiable: (a) the nature of the right; (b) the importance and purpose of the limit; (c) the nature and extent of the limit; (d) the relation between the limit and its purpose; and (e) whether less restrictive means are available to achieve the same purpose. In practice, commentators and courts alike have interpreted the limitations clause to require a balancing of the rights of complainants against the interests of government or other third parties.

In assessing whether government's limits are 'reasonable and justifiable in an open and democratic society', account must be taken of three arguments. First, school fees may be reasonable and justifiable in light of

¹³⁵ See *Hugo* (note 102 above) (per Mokgoro J, dissenting – holding that order to release mothers of young children from prison constituted unfair discrimination, but was nevertheless justified under the limitations clause); also *Lotus River, Ottery, Grassy Park Resident Association v South Peninsula Municipality* 1999 (2) SA 817(C) 831B-C (per Davis J – holding that rate increases, which unfairly discriminated on the basis of race, were nevertheless justified on the grounds that the municipality had been put into a difficult financial position after local government restructuring).

the budgetary and political constraints on government resources and decision making, particularly during a transitional period. Second, school fees may be needed to encourage local control and participation. Third, government may already have taken constitutionally adequate steps to progressively realise both the right to education and the right to equality, particularly within the constraints of available resources.

With regard to the first argument, government is likely to stress the reasonableness of asking those who can afford to pay for education to contribute from private resources, particularly given the legacy of apartheid-era deficiencies with which government is faced. Equalising expenditures per learner across the board, and abandoning the fee-based system of financing, would require government to choose between two undesirable alternatives: (i) significantly increasing its budget for education and thereby threatening fiscal health, or (ii) reducing expenditures for middle and high-income families to independent schools, which may trigger their flight to independent schools and thereby risk the health of public education in general.

With regard to the first alternative, South Africa presently spends almost 6 per cent of its GDP on education,¹³⁶ and government is not likely to increase levels of spending on education much beyond this already high level. Most commentators agree that equalising funding at the levels of historically advantaged schools would require the expenditure of an additional two or three percent of the GDP.¹³⁷

Government currently has framed its decisions about spending on education within the framework of GEAR (Growth, Employment and Redistribution), a market-oriented strategy to encourage private investment that requires fiscal austerity and debt reduction.¹³⁸ Indeed, government views economic growth achieved through GEAR as the primary precondition for reducing domestic poverty and inequality. In light of GEAR, the Department of Education has concluded that 'the education budget, for the foreseeable future, will in no way be in a position to fund all schools at the level of the historically most costly. Any equitable distribution of public funds must, therefore, result in a sharp decline in the allocations to the historically better funded parts of the system'.¹³⁹

According to the experts, however, any significant reduction to the historically more well-resourced schools would risk the defection of middle- and high-income families, whose presence in public education is

136 Government Communication and Information Service *South Africa Yearbook* (2003) 189.

137 Equalisation is also complicated by the difficulty in equalising personnel expenditures. As discussed above, efforts at redistribution of personnel have proved very difficult to implement.

138 For a general discussion of the relationship between GEAR and government decision making in education, see Vally & Tleane (note 28 above).

139 Department of Education Memo to Portfolio Committee (note 98 above) 8.

essential for the health of the system.¹⁴⁰ According to Luis Crouch, a US consultant hired to assess the viability of various financing models during transition, government must 'keep [middle and high-income earners] reasonably happy',¹⁴¹ because these 'opinion-makers' and 'budget makers' are the voices who will lobby for appropriate levels of public spending on education.¹⁴² Thus, under this theory, school fees are needed to prevent defections to private schools and corresponding reductions in public spending on education.

Although this theory appeared to justify the choice to retain school fees in the early 1990s,¹⁴³ evidence indicates that, in operation, school fees in fact perpetuate rather than prevent drops in overall levels of funding. As several commentators have noted, because all school fees go directly to benefit only one school, parents who are able to directly pay into the school budget through fees or voluntary contributions have far less incentive to lobby for more government spending on education as a public good.¹⁴⁴ Predictably, as control over education has devolved to the local school governing body and local parent communities, parents have much less connection to, and investment in, education as a regional, provincial or national matter.¹⁴⁵

The second argument, that school fees are needed to encourage local control, is significantly weakened by the notion that school financing can be separated from decisionmaking and control. As the California Supreme Court in *Serrano v Priest* noted, 'no matter how the state decides to finance its system of public education, it can still leave this decision making power in [local] hands. . .'.¹⁴⁶ In addition, as pointed out

140 In a summary report advising the new government to choose the school fee option, international consultants explained that it was necessary to keep middle-class and wealthy families happy with the level of services they received from public education. In their view, user fees were necessary to prevent 'key technocrats and opinion-makers' from transferring their children out of public education to private or 'independent' schools. According to the experts, this group of key people included those at the 'upper end of the income spectrum', not just the very rich, but also the top four or five rungs of civil service, the upper middle-income professions and members of teachers' unions. Crouch (note 98 above) 10.

141 Ibid 10.

142 'It is important to emphasize that the criterion of "prevention of opinion-maker flight" is not based on what some might judge an inappropriately tender concern for the wealthy or the upper middle class. It is based instead on the very real fact that strong redress requires relatively high levels of spending on education, and such levels of spending will only materialize, or remain available to the public sector, if the opinions of budget-makers are favourable to the public system, which means that they must feel personally committed to it'. Ibid 12.

143 For a detailed history of government's choice to retain school fees, see D Roithmayr 'Locked in Inequality: The Persistence of Discrimination' (2003) *Michigan J of Race and Law* (forthcoming).

144 Reddy & Vandemoortele (note 64 above) 20.

145 Y Sayed 'Understanding Educational Decentralization in Post-Apartheid South Africa' in J Negro (ed) *Education* (1997) 354, 361.

146 *Serrano v Priest* 487 P2d 1246.

earlier, if local control is premised on control of financing, such control and participation means little for poor communities; financing systems that create significant disparities between rich and poor actually deprive the less wealthy schools of their interest in local control relative to wealthier schools.¹⁴⁷

In terms of the third argument, government may make a strong argument that it has already taken constitutionally adequate steps to protect both the right to education and the right to equality. As documented by successive versions of the School Register of Needs, government has made steady if slow progress at reducing educational deficiencies on all fronts. Learner to classroom ratios have been lowered (though not learner to educator ratios), significant improvements in the provision of basic facilities and infrastructure, increased matric passing rates and a decrease in the number of schools declared 'unfit for education' document government's progressive realisation of both the right to basic education and the right to equality. Similarly, budgetary increases to education, and to annual allocations per learner, have been significant, particularly over the last five years.¹⁴⁸

Government's most recently issued Plan of Action in particular appears to identify and prospectively address many of the precise issues identified in the foregoing sections. Specifically, as discussed in VI below, the Plan of Action addresses three major areas of constitutional difficulty: the plan promises to revise and tighten the exemption system to eliminate problems of access, it promises to guarantee a national minimum norm to address problems of adequacy, and it commits to providing a free and good quality education for the poor. However, arguments about reasonable measures, available resources and progressive realisation may not be sufficient to justify constitutional limitations with regard to the right to basic education, given its status as a priority right. The language of s 29(1)(a), read against the language of other socio-economic rights, establishes that the right to basic education is of highest priority.¹⁴⁹

In comparison, many of the other affirmative socio-economic rights contain internal qualifications. For example, s 27(2), which governs the right to health care, provides that '[t]he state must take reasonable legislative and other measures, *within its available resources*, to achieve the *progressive realisation* of each of these rights' (emphasis added). The Court in *Grootboom* relied on such language to focus on the reasonableness of the state's measures in vindicating a right to housing.¹⁵⁰

147 Ibid 1260.

148 Department of Education *School Register of Needs Brochure* (2000).

149 Indeed, in its Plan of Action, the government acknowledges that education is 'the cornerstone of any modern democratic society that aims to give its citizens a fair start in life and equal opportunities as an adult'. Plan of Action (note 41 above) para 5.

150 *Grootboom* (note 51 above) paras 30-2.

Similarly, in the recent *TAC* decision, the Court focused on the same limiting language in s 27 to find that the right to health care was constrained by both available resources and progressive timelines.¹⁵¹ In contrast, the limiting language with regard to available resources, reasonable measures or progressive realisation does not exist in the text of the right to education. The textual difference supports the argument that the right to basic education is *immediately* enforceable (as opposed to 'progressively realisable') and of immediate priority (as opposed to constrained by 'available resources'). Moreover, the right to basic education requires that government do more than just undertake 'reasonable measures' to respect, protect, promote and fulfil the right.

As a 'priority' socio-economic right, the right to education therefore triggers a higher degree of judicial scrutiny – the obligation of the state is much more immediate, the right is directly enforceable, and the degree of deference to the state lower.¹⁵² Accordingly, in terms of s 29(1)(a), the state may not be able to justify limits by arguing that it is constrained by available resources or has undertaken reasonable measures to progressively realise the right.

One cannot overstate the importance of this difference, and its implications for the government's duty with regard to education. Under the priority obligation imposed by the right to basic education, the state is obligated to do immediately whatever it must to comply with constitutional requirements. That is, government must prioritise existing resources or generate additional resources (if existing resources are insufficient) to guarantee the rights to basic education.¹⁵³ In terms of an unqualified right to basic education, then, the state appears to have an immediate and urgent obligation to provide access to those who cannot afford to pay, and to provide a minimum core of basic education to learners whose educations currently do not rise to that threshold level.

The argument about resource constraints and reasonable measures to progressively realise the right may be slightly more persuasive in connection with the right to equality. That is, a reasonable government effort to progressively eliminate the apartheid-era inequalities in education within available resources, may be 'reasonable and justifiable in an open and democratic society' engaged in the process of transformation.

151 *TAC* (note 54 above) paras 30-5.

152 See A Sachs 'Reflections on Emerging Themes' (1999) 1(4) *ESR Review* 14 (higher degree of judicial scrutiny for priority rights including the right to basic education); N Haysom 'Giving Effect to Socio-economic Rights: The Role of the Judiciary' (1999) 1(4) *ESR Review* 11-12 (education is a core right that is directly enforceable, compared to qualified rights that are primarily rights of access); C Heyns & D Brand 'Introduction to Socio-economic Rights in South African Constitution' (1998) 2 *Law, Democracy & Development* 153, 161 (where rights are not internally qualified, obligations are a priority and immediate, and can be compared to duties imposed by civil and political rights).

153 See Heyns & Brand (note 152 above) 161.

At the same time, when the inequality at issue involves an interest that is of highest priority under the Bill of Rights – here, the right to basic education – the government may be under a greater duty to remedy an inequality involving basic education than to remedy other sorts of inequality. In *Serrano v Priest*, the California Supreme Court accorded the highest degree of scrutiny to government action that appeared to violate the equal protection clause with regard to education.¹⁵⁴ In refusing to grant much deference to the legislature, the Court noted that the equal protection violation involved no ordinary interest but rather the child's fundamental right to education, a basic right protected under the state constitution.¹⁵⁵

Likewise, the inequality described here does not involve an interest like access to electricity or waste disposal. Rather, the inequalities complained of involve a learner's protected constitutional right to basic education. Accordingly, the government may be no more able to offer resource constraints to justify limits on s 9 than it can for a violation of s 27.

Such an argument undoubtedly will be quite controversial. The Constitutional Court may refuse to recognise the difference in language between the right to education and other rights as meaningful, or to accord priority status to rights that are not internally qualified. Nor is it certain that the Court will find that this difference in textual language necessarily invalidates concerns about resource constraints, particularly in view of the language of reasonableness in the limitation clause. It remains to be seen whether the Court would find the absence of limiting language to impose a greater duty on government in a case that focuses explicitly on the right to education.

VI REMEDIES AND SEPARATION OF POWERS CONCERNS

This section discusses potential judicial remedies for the potential constitutional violations associated with a school-fee based financing system. Inevitably, a discussion of remedies raises concerns about the appropriate separation of powers – issues involving the correct degree of deference by the judiciary to the legislative and executive branches of government, and the potential intrusion of the judiciary into the realm of policymaking and budget prioritisation.

It should be clear, however, from the Constitutional Court's discussion of separation of powers in *TAC*, that the Court has authority both to declare a constitutional violation and to provide for appropriate relief:

Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an

154 Note 146 above, 1249.

155 Ibid 1255-59.

intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.¹⁵⁶

(a) The 2003 Plan of Action

In June 2003, the government issued a proposed Plan of Action as follow-up to its report to the Minister released in February of 2003. Highlights of the state's proposals and findings include:

- A commitment to free and quality education for all poor learners;
- A finding that the 'basic minimum package' of NPNC inputs for each learner would cost between R600 and R1000, well above current funding levels for poor learners in several provinces;
- A finding that government currently can afford a R500 basic minimum package for the average learner;
- A commitment to create a 'national minimum norm' requiring provinces to provide the basic minimum package to all poor learners (these national minimum norms will guarantee R450 per learner in 2004, R563 in 2005 and R703 in 2006 and complying with national minimum norms will require the poorest provinces to increase their funding levels by 200 per cent);
- Creation of a 'national resource targeting framework' to rank all schools on a national table in terms of need, to replace provincial resource targeting tables and eliminate inter-provincial inequalities between poor learners;
- A finding that provincial shortfalls in complying with the new national minimum norms and the new resource targeting tables can be remedied by re-prioritising within *existing* budgets.¹⁵⁷

Perhaps most importantly for purposes of this paper, the Plan of Action makes significant changes to the practice of charging fees and to conferring exemptions:

- A proposal to strongly discourage or limit the charging of school fees in quintile 1 and 2 schools (the country's poorest), on the basis of improved public funding;
- A commitment to providing guidelines in fee-setting, to prevent excessively high fees;
- A proposal to revamp the exemption system, to include the costs of hidden fees and uniforms, and to make exemptions automatic where families qualify for welfare grants on the basis of poverty;¹⁵⁸

¹⁵⁶ *Minister of Health v TAC* (note 54 above) para 99.

¹⁵⁷ Department of Education, Plan of Action (note 41 above).

¹⁵⁸ *Ibid.*

Given that the Plan has only recently been issued, none of its provisions have yet been implemented. Nevertheless, commentators have already criticised the new Plan of Action as insufficiently mindful of the government's constitutional obligations. Among other things, they point out that the 'basic minimum norm' relates only to non-personnel, non-capital funding (10 per cent of most school budgets), and the minimum norm does not address personnel expenditures or infrastructure or other capital needs. Moreover, these critics note that the government's basic minimum package was calculated based on unrepresentative data – the funding levels for the minimum norm were set based on the experience of atypical schools that perform well with low levels of resources ('well performing but poor primary schools') rather than representative poor schools.¹⁵⁹

It is beyond the scope of this paper to assess the constitutionality of school fees anew under the Plan of Action. Indeed, until the proposals are implemented and have operated for a sufficiently long period to assess their efficacy, a constitutional analysis is unlikely to be useful. However, in the context of discussing remedies, several important policy points can be made about the Plan of Action.

First, the Plan of Action appears structurally to address the major problems identified by this paper. It addresses lack of access and an inadequate exemption system, by prohibiting fees for schools with concomitant increases in funding, and by making exemptions to some extent automatic for recipients of certain welfare grants. In addition, it addresses substantive inadequacy by guaranteeing a 'basic minimum' package of non-personnel, non-capital funds for poor schools (though not for personnel or capital spending). Finally, the plan indirectly addresses inequality in expenditures per learner by creating a national resource targeting table (to minimise inter-provincial inequality) and by increasing NCPC funding for poorer schools (to minimise intra-provincial disparity).

Second, the very existence of the Plan of Action should minimise separation of powers concerns in choosing among potentially appropriate remedies for existing constitutional violations. To reduce the risk of unwarranted intrusion by the judiciary into policy-making and budget prioritisation, commentators argue that courts should give the state maximum latitude to choose the means by which to remedy constitutional difficulties.¹⁶⁰ Such concerns are lessened if the state has already chosen the means to remedy its own violations, and the court seeks

¹⁵⁹ Roux (note 50 above) 17.

¹⁶⁰ See W Trengrove 'Judicial Remedies for Violation of Socio-economic Rights' (1999) 1(4) *ESR Review* 8-11 (suggesting that separation of powers concerns are minimised in remedies where state is allowed to choose the means to remedy a violation).

merely to hold the state to its own pre-existing commitments, as the Constitutional Court noted in *TAC*.¹⁶¹

Of course, further assessment of the constitutionality of the state's school fee system, at least in terms of access and adequacy, must await full implementation and operation of the Plan of Action. In the event that government does not adequately or timeously implement the Plan of Action, any court order that seeks to enforce the Plan's proposals, or orders a remedy similar to the proposals – eg some version of eliminating fees and increasing funding – raises few concerns that such an order will be overly intrusive or over-reaching.

(b) Choice of remedies

Although the Plan of Action appears to address access and adequacy arguments, and inter-provincial inequalities to a certain degree (by creating a national resource targeting table), the plan seems less well-suited to address intra-provincial inequality. While the plan does reduce the gap between rich and poor somewhat by increasing the amount of funding for the poorest 40 per cent of schools to guarantee a basic minimum package of NCPC funds, the government's own projections demonstrate that the reduction is quite small.¹⁶² In addition, as noted earlier, permitting middle and high-income schools to raise fees without limit, while prohibiting poor schools from doing the same, seems destined to increase and not decrease levels of inequality (even taking into account increased state funding).¹⁶³ Thus, the question of constitutional violation with regard to s 9 may well remain an issue, even if the Plan of Action is perfectly implemented. Discussing potential judicial remedies for intra-provincial inequality – the gap between fee-rich and fee-poor schools within the same province – is therefore useful, not only to substantively address the inequality argument, but also to discuss potential separation of powers concerns in connection with such remedies.

Foreign jurisprudence on remedies for inequality in education suggests some useful solutions to separation of powers concerns. In *Van Duzart v Hatfield*, a US federal district court held that the property-tax based system of school financing in the state of Minnesota violated the US Constitution's federal equal protection clause, because the financing created inequalities based on wealth.¹⁶⁴ In choosing a remedy, the court's concern with the potential for judicial intrusion was accommodated in two ways. First, the court announced a very narrow, negatively framed

161 *TAC* (note 54 above) para 117 et seq.

162 The report assumes that quintile 5 schools keep private contributions at the same level while state funding replaces fees and provides an additional amount for the poorest schools. Report to the Minister on Financing (note 23 above) Table 2, 72.

163 The Plan does address inter-provincial inequalities, by creating a national resource targeting table that ranks schools on the basis of need nationally, rather than provincially.

164 *Van Duzart v Hatfield* 334 FSupp 870, 877 (D. Minn. 1971).

constitutional principle to define the right to equality in education. In particular, it held that Minnesota's financing scheme violated the doctrine of 'fiscal neutrality: the rule that the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole'.¹⁶⁵ Second, the court afforded maximum deference to the state in choosing its own remedy to comply with the doctrine of fiscal neutrality. In particular, it declined to order any specific remedy, and instead deferred to the legislature to come up with a plan to comply with the court's constitutional holding:

Absolute uniformity is not required. The doctrine of fiscal neutrality permits the state to adopt one of many optional funding systems that do not violate equal protection. . . . The Court in no way suggests to the Minnesota legislature that it adopt any one particular financing system. Rather, this memorandum only recognizes a constitutional standard through which the Legislature directs and measure its efforts (emphasis added).¹⁶⁶

In issuing its minimalist order, the court retained supervisory jurisdiction, and deferred further action on the judgment until after the next Minnesota legislative session had expired.¹⁶⁷

The court's holding in *Van Duzart* illustrates both a workable constitutional concept to guide the interpretation of s 9 as it applies to basic education, and the choice of an appropriately deferential judicial remedy. By announcing the doctrine of fiscal neutrality and then putting the selection of financing scheme to the state, the court specified the normative result to be achieved but did not specify the means to achieve it, leaving that to the state. In doing so, the court promoted an institutional dialogue between Parliament and the judiciary, making constitutional interpretation a cooperative enterprise that appropriately accorded each branch its respective area of expertise, rather than an exercise in conflict between the branches.¹⁶⁸ Similarly, if called on to decide the constitutionality of school fee-based financing, the Constitutional Court could craft its own appropriately deferential constitutional principle to define the right to equality in basic education. The Court can likewise defer to government (at least in the first instance) to come up with a school financing scheme that complies with that constitutional principle. It is not necessarily true that judicial enforcement of the right to basic education will require courts to overreach their appropriate boundaries.

165 Ibid 872.

166 Ibid 877 fn14.

167 Ibid.

168 See Sachs (note 152 above) 14; A Gutmann 'The Rule of Rights or the Right to Rule?' in JR Pennock & JW Chapman (eds) *Justification: NOMOS* (1986) 166.

VII CONCLUSION

In many ways, the debate over fees reflects the very same issues raised in the larger debate over the role of judicial review in adjudicating socio-economic rights. First, this issue tests the boundaries of government's constitutional obligations to act affirmatively on its citizens' behalf, and the scope of those obligations. With regard to the right to basic education, is it enough for government to treat its obligations as part of a larger set of institutional demands that require government to allocate resources and energy? Or does the Constitution require government to prioritise the right to basic education in an immediate and urgent way, re-allocating resources where necessary and generating additional resources as well? Similarly, with regard to basic education, what level of inequality based on class and race is acceptable within a constitutional order that relies on education to promote the dismantling of apartheid-era legacies? Does the Constitution require absolute equality?

Second, the issue of school fees brings into stark relief the question of what roles each branch of government should play in enforcing government's constitutional obligations. If government is committed to a program of fiscal austerity in order to promote growth and foreign investment, should courts be permitted to issue orders that require more government spending or a different allocation of spending? What deference does a court owe to government policymakers in a specialised area like education, and what deference should policymakers owe to courts on the subject of constitutional obligations under the Bill of Rights?

With regard to the first set of questions, this article suggests that, under the language of s 29(1)(a), government owes a special duty when it comes to the right to basic education. Because the right to basic education does not contain any internal qualifications, it is a priority right. This means that the right is immediately enforceable, and is a priority towards which all resources should be directed as needed to rectify constitutional deficiencies. Under this view, government cannot justify limiting the constitutional rights of poor learners by pleading a lack of available resources, a need for more time, or an undertaking of reasonable measures, as is true for other second priority rights. Likewise, the apartheid-era inequalities of race and class in basic education must be of highest priority, if the Constitution is to play a meaningful role in promoting real transformation.

In terms of the second set of issues, this article suggests that the judiciary and other branches can work together in cooperative dialogue towards assuring that constitutional obligations are met. Enforcing the right to basic education and to equality in basic education need not pit court against legislature or executive, nor need it threaten government programs designed to pursue economic growth and investment. In many ways, courts can be understood to provide small course corrections,

pointing out where government has yet to fulfil its duties or has overstepped constitutional boundaries in pursuing particular policies.

Time will tell whether government's commitments to rectify its own constitutional shortcomings will be enough to comply with constitutional obligations under ss 27 and 9. It is difficult to imagine a more important and sensitive issue for all sectors of public society – government officials, educators, learners and their parents, judges and legal scholars – to discuss, and ultimately, to resolve. Indeed, the opinion of the US Supreme Court in *Brown v Board of Education* is as true today as it was fifty years ago:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁶⁹

169 *Brown v Board of Education* 347 US 483, 493 (1954).