

DRAFT

**The Right to an ‘adequate’ and ‘equal’ education in South Africa:
An analysis of s. 29(1)(a) of the South African Constitution and the right to equality as
applied to basic education**

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March 2011

Part I: Background

1. It is customary to begin a memorandum such as this one by sketching something of the historical background upon which subsequent legal arguments and submissions are based. It is normal to discuss the law relevant to a topic within a factual context.
2. However, for various reasons having to do with available space and time, there will be no presentation of the research which has been carried out on the state of public school education in South Africa.¹
3. Suffice to say that the history of apartheid education has had a profound effect in shaping the current public school system—for all South Africans.
4. The racial fracture which ran through the whole of society included education in its path. Marked not simply by separation but also by a determination to provide only a rudimentary schooling for black people, apartheid education was

¹ While most of the following sources are not discussed herein, they have been reviewed and have informed this writer's understanding of the public school system in South Africa: Taylor, N. 2008. 'What's Wrong with South African Schools?'; Bloch, G.. 2009. *Toxic Mix: What's Wrong with South Africa's Schools and How to Fix It*; van der Berg, S. 2009, 'The Persistence of Inequalities in Education'. in *South African Economic Policy under Democracy*; "The A factor: Coming to terms with the question of legacy in South African education", Crain Soudien (2007); Report of the Public Hearing on the Right to Basic Education, SAHRC (2006); Report to the Minister: A review of the financing, resourcing and costs of education in public schools (DoE) (2003); Plan of Action: Improving access to free and quality basic education for all DoE (2003); PART B Action Plan to 2014: Towards the realisation of Schooling 2025 DoE (1 June 2010); Equal Education Comment on Action Plan 2014 (2010); Education Roadmap: Focus on schooling system [PP] (DBSA) (2008); The Organisation, Governance and Funding of Schools: A Draft Policy Document for Discussion (Draft Education *White Paper II*), General Notice 1229 of 1995 (DoE) (1995); "DRAFT National Minimum Norms and Standards for School Infrastructure" (DoE) (2008); "Do Public Expenditures Improve Child Outcomes in the U.S.? A Comparison Across Fifty States", Harknett et al. (2003); "Eastern Cape education system in Crisis", Equal Education (2011); "Basic Education: *Where are we going?*" Graeme Bloch (2010); Action Plan to 2014: Towards the Realisation of Schooling 2025, (DoE) (2010); Access to Education: Technical Report of the National Household Survey (December 2009); "White Paper on Education and Training" ("*White Paper I*") (DoE) (March 1995); The Constitution in the Classroom: Law and Education in South Africa 1994-2008, Woolman and Fleisch (2009); Schooling 2025: An Action Plan for Improving Basic Education Nkosinathi Sishi PP (May 2010); Parliamentary Briefing on "Action Plan to 2014: Towards the Realisation of Schooling 2025"; "The Draft National Policy for an Equitable Provision of an Enabling School Physical and Teaching and Learning Environment"; Draft Minimum Norms and standards - school infrastructure-1; Education Roadmap: Focus on schooling system PowerPoint Presentation (DBSA, 2008); Towards a National Dialogue: The State of the Nation Truth Conference: "Education in SA", Prepared by the Education Focus group led by Dr Neville Alexander; Final report on World Conference on education for All Meeting basic learning needs (March 1990) Jomtien Thailand; "Infrastructure Provisioning in Schools and the Right to Basic Education", Wildeman (2002), "Low Quality Education as a Poverty Trap", Servaas van der Berg et al (March 2011)

extraordinarily poor. Education formed a part of the world view in which black people were seen as not needing an education of any quality. Their role, under this schema, was to perform menial domestic service or unskilled labour. Indeed, the struggle which eventually brought apartheid to an end took its own toll on learners as schools became yet another site for the struggle.

5. Since 1994, the situation has improved for black people—but not by much. The main findings of outcome surveys are twofold:
 - i. Compared to white learners, black learners perform extremely poorly on national examinations;
 - ii. Compared to their cohort in other sub-Saharan countries, learners in South Africa perform at or near the bottom of the rankings;
6. Learners at predominantly black schools are frequently subject to inadequate infrastructure, materials, teachers and school management as well as inadequate support for learners who require accommodation of their disadvantages.

Part II

The right to ‘a basic education’

The wording of Section 29(1)(a)

7. Section 29(1)(a) of the Constitution reads as follows:

29. Education.—(1) Everyone has the right-
(a) to a basic education, including adult basic education;

The Scope of everyone’s right to a ‘basic education’

8. When the right to a ‘basic education’ was first constitutionalized in 1994, it was not a term that meant anything to 99.9% of educators. It was not part of their lexicon let alone a recognized stage of the schooling system in South Africa. For the most part, it remains that way.
9. What does the right to a basic education include? Does it mean just primary or also secondary education? Does it mean free education? Does it mean a proper school with sanitation, a library, textbooks for all and a computer lab? Does it include a child’s right to quality instruction by a teacher who is on the job each and every school day? Does it include a school nutrition program or free uniforms or transport to school where required?

10. As can be appreciated, there are no end of profoundly important questions that arise in the real world relating to the constitutional right to ‘a basic education’. However, it is well beyond the scope of this paper to take up these matters in any comprehensive way. To do so would require a book of, possibly, encyclopedic length. Even then, a critic might well say that such a tome would simply be one person’s opinion on a range of issues and, in any event, what is far more important is what a court would say, what a court would *require* of government.
11. What may be of greater use to readers, therefore, would be to think of the types of questions raised above as important ingredients that, taken together, combine to produce an *adequate* basic education. Under this view, a learner requires, for example, an adequate school *and* an adequate supply of books *and* readers; an adequate teacher *and* an adequate way of getting to school.
12. The primary focus of this memo, therefore, will be to argue that the constitutional obligation imposed by s. 29(1)(a) is that the right to ‘a basic education’ = the right to ‘an *adequate* education’.² Stated differently, if one’s education is adequate, it is because one has adequate infrastructure, teachers, equipment and faces no access barriers.
13. It is hoped that the legal principles and arguments presented here regarding the right to an *adequate* basic education will be applicable to a full range of specific issues which groups may want to press and, possibly, litigate in the future. That is, whether the issue is one of infrastructure, textbooks or teachers, many of the same legal arguments and authorities relating to adequacy can be brought to bear.

An Outline of the Remainder of the Memorandum

14. What follows in Part III is a discussion of the primary legal sources that relate to the issue of adequate education. This is carried out in the more specific context of the question of how much education is a ‘basic education’. The latter was chosen because of the apparent importance it holds and, more importantly, because it can illustrate a mode of analysis which may have more general applicability. To that end, the roots of the term ‘basic education’ are uncovered in an effort not just to understand where it came from but also to gain, thereby, a better grasp of its meaning. An exploration of the interpretive sources is also laid out in the hope that they may, in the future, be useful when litigating the scope and content of s. 29(1)(a). From there, an extended discussion of the *purposes* of education is

² This is the position of many of the scholars who have explored s. 29(1)(a): Berger at 615 *et seq.*, Woolman and Fleisch, Woolman and Bishop, Liebenberg, Socio-economic rights (2010)

presented via domestic, international law and foreign law sources. These, too, carry the potential to enrich a legal claim founded on educational adequacy. The next part pursues the adequacy theme in greater detail, again using domestic and international sources. Briefly put, the *purposes* and *adequacy* discussions are the crucial interpretive means of providing the required substance to the excruciatingly brief wording of s. 29(1)(a) itself.

15. The analysis then moves from the macro to the micro level with a traditional close analysis of the wording of s. 29(1)(a) when viewed in the context of the neighboring socio-economic provisions. Particular focus is paid to the unqualified nature of the government's obligation.
16. The possible applicability of the limitations provision (s.36) is discussed next in order to take up possible ways in which the right to, what is argued to be, an adequate education might be limited by government or the courts.
17. Finally, there is something of a remedial discussion reading the kinds of considerations that ought to be borne in mind when framing litigation.
18. Part IV is comparatively shorter. It takes up a possible equality rights claim based on the manifest disparities in the quality of education offered to black and white learners. It is accompanied by a s. 36 analysis which, too, is shorter though for doctrinal reasons—most commentators take the view that the nature of the test for establishing a s. 9 violation is such that s. 36 is left without any additional work to do. A concluding discussion considers some of the pros and cons of pursuing litigation which is so openly framed on race-based comparisons.
19. This memorandum is considerably longer than usual. It has been drafted in a deliberately fulsome way in order to put on display, as it were, the cornucopia of sources and authorities which may be drawn upon by those attempting to launch a full-scale attack on the inadequacies of basic education in contemporary South Africa.

Part III

Legislative History: "Basic Education"—Origins of a Term

20. It is useful to begin by gaining an understanding of where the term "basic education" as used in s. 29(1)(a) comes from. What is its history? We know that it is of comparatively recent usage. When first contained in the *Interim Constitution*, the term 'basic education' was virtually unheard of in South African education circles.

21. In 1999, the UN Special Rapporteur on the right to education noted an evolution in the terminology used by education specialists:
- “The language of international educational strategies shifted from primary to basic education, different from the continued use of primary education in human rights. The term basic education was introduced by the 1990 Jomtien Conference³ and influenced the subsequent international and domestic strategies and statistical categories.”⁴
22. The 1990 Jomtien Conference concluded with the adoption of the *Declaration on Education for All* which, it is submitted, served an inspirational role for the drafters of s. 29,⁵ sets out a commitment by countries to the principle which was later expressed as a human right in the South African *Constitution*: “Basic education should be provided to all children, youth and adults.”⁶
23. The March 1990 *World Declaration*, which had introduced and adopted the term “basic education”, was followed within four months by the *African Charter on the Rights and Welfare of the Child* (July 1990).⁷ In its thematic discussion of education, the *Charter* sets out the obligation on States Parties to “provide free and compulsory basic education.”⁸ In September 1990, the UN convened the “World Summit for Children” which, in its final declaration, provided that: “The provisions of basic education and literacy for all are among the most important contributions that can be made to the development of the world’s children.”⁹
24. The Technical Committee that supported the 1993 negotiations that led up to the Interim Constitution (which came into force in April 1994) first made mention of “basic education” in its fifth progress report (11 June 1993). The Committee suggested a provision that every person shall have the right, *inter alia*, to “basic

³ The March 1990 Jomtien, Thailand Conference resulted in the *World Declaration on Education For All* which used the term “basic education” throughout the document. Accessed at: http://www.unesco.org/education/pdf/JOMTIE_E.PDF

⁴ *Preliminary report of the Special Rapporteur on the right to education*, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33 E/CN.4/1999/49 13 (January 1999) at para. 15. (accessed at: <http://www2.ohchr.org/english/issues/education/rapporteur/annual.htm>)

⁵ The Department of Education’s *White Paper on Education and Training* (“*White Paper I*”, March 1995) characterizes the *Declaration* as “authoritative” (para. 13). See also, “The right to education: Lessons from *Grootboom*”, Mandla Seleokane (2006) at pp. 6-7.

⁶ *World Declaration* at article III(1).

⁷ *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), article 11(3)(a)

⁸ *African Charter on the Rights and Welfare of the Child*, article 11(3)(a)

⁹ The World Summit for Children adopted the *World Declaration on the Survival, Protection and Development of Children* (September 1990). (accessed at: <http://www.unicef.org/wsc/declare.htm>) See para. 13.

education and to equal access to educational institutions” which, it noted, was an “amplification”¹⁰ from the previous version which had simply proposed to protect equal access to state-funded educational institutions. The report fails to mention any sources for its use of the term “basic education” though this is also true for all but one (equality) of the other rights proposed for inclusion in the Constitution.

25. When it came to the inclusion of education rights in the *Constitution* of South Africa, the seminal *World Declaration* and the proliferation of subsequent international authorities which contained commitments in relation to “basic education” were key sources during the 1990-1993 negotiations, which resulted, *inter alia*, in the *Interim Constitution*. In the end, “basic education” found expression in section 32(a) of the *Interim Constitution*, the drafting of which was completed in November 1993 and proclaimed after successful elections in May 1994:

“Every person shall have the right(a) to basic education and to equal access to educational institutions”.

26. More will be made of this later but, in the drafting process, the Technical Committee did make mention of the significantly different obligations on the state which were being attached to ‘basic education’, on the one hand, and ‘further education’, on the other.¹¹
27. Leaving aside other differences, the only change between the *Interim Constitution* and the *Final Constitution* was the insertion of the article “a”, changing the text from the right to “basic education” to the right to “a basic education” and the inclusion of “adult basic education”.¹² The final text of the provision is as follows:

29. Education.—(1) Everyone has the right—
(a) to a basic education, including adult basic education;

Purpose(s) of the Right: Substantive Adequacy to permit Self-fulfillment and Social Participation

28. The Constitutional Court (“CC” or “the Court”) has consistently held that a primary means of determining the scope of constitutionally enshrined rights is to

¹⁰ Technical Committee on Fundamental Rights during the Transition: Fifth Progress Report (11 June 1993), page 2.

¹¹ Constitutional Committee, Sub-Committee, Draft Bill of Rights, Explanatory Memoranda, (October 1995), page 171.

¹² Even though the right to a basic education was expressed as being granted to “everyone”, the Technical Committee recommended the addition of “including adult basic education” in order “to put the matter beyond doubt.” Theme Committee 4: Fundamental Rights Report at page 171.

assess their purpose—the ‘purposive approach’.¹³ What, then, is the purpose or purposes of protecting the right to ‘a basic education’?

Purposes of a Basic Education: Domestic Sources

29. In the *White Paper on Education and Training* (March 1995), the “goals” of basic education are said to be several-fold and echo the democratic, participatory and self-fulfillment oriented goals which, as we will see, have long been recognized internationally:

- i. to enable a democratic, free, equal, just and peaceful society to take root and prosper in our land, on the basis that all South Africans without exception share the same inalienable rights, equal citizenship, and common national destiny;
- ii. active encouragement of mutual respect for our people's diverse religious, cultural and language traditions, their right to enjoy and practice these in peace and without hindrance, and the recognition that these are a source of strength for their own communities and the unity of the nation
- iii. The education system must counter the legacy of violence by promoting the values underlying the democratic process and the charter of fundamental rights, the importance of due process of law and the exercise of civic responsibility, and by teaching values and skills for conflict management and conflict resolution, the importance of mediation, and the benefits of toleration and co-operation.
- iv. The curriculum, teaching methods and textbooks at all levels and in all programmes of education and training, should encourage independent and critical thought, the capacity to question, enquire, reason, weigh evidence and form judgments, achieve understanding, recognise the provisional and incomplete nature of most human knowledge, and communicate clearly.¹⁴

Purposes of a Basic Education: International Law

30. Section 39(1)(b) of the *Constitution* provides that any court which is interpreting s. 29 “*must consider international law*”.¹⁵ Indeed, s. 233 may well mean that the

¹³ See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (4) BCLR 665 (CC) at para 9.; *S v Mhlungu and Others* at para. 8; *Soobramoney* at paras 16-17.; *Khosa* at para. 47,

¹⁴ *White Paper on Education and Training* (*White Paper I*) Department of Education, (March 1995), paras, 13, 14, 16 and 17.

¹⁵ In *Grootboom*, the CC stated: “Section 39 of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights.” (para. 26).

CC “must prefer” any reasonable interpretation of s. 29(1)(a) “that is consistent with international law over any alternative interpretation that is inconsistent with international law.”¹⁶

31. It will be seen from the following survey that the goals and purposes of education are focused around the substantive attainment of sufficient learning to enable a person to participate as a citizen, contribute to society and derive self-fulfillment, sufficient to enjoy one’s dignity. In this light, the question of the purposes of an adequate education can only be determined in light of the goals sought to be achieved. The underlying principles can be seen as early as the *Universal Declaration of Human Rights* (1948).¹⁷
32. Woolman and Bishop in CLOSA (along with many others) locate the purposes of the right to a basic education in the 1966 *International Covenant on Economic, Social and Cultural Rights*¹⁸ together with the General Comment on Education issued by the UN Committee on Social and Economic Rights (“CESCR”).
33. International human rights law identifies the right to education, somewhat uniquely among human rights, as both an end in itself and also a means of realizing and promoting other rights. Article 13(1) of the *ICESCR* provides:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the *full development of the human personality and the sense of its dignity*, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that *education shall enable all persons to participate effectively in a free society*, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

¹⁶ While s. 233 ostensibly applies to the interpretation of “legislation” consistently with international law, Chaskalson CJ in [Kaunda](#) at para. 33 stated that s. 233 “must apply equally to the provisions of the Bill of Rights and the Constitution as a whole.”

¹⁷ Article 26(2) of the *UDHR* provides: “Education shall be directed to the *full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms*. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.”

¹⁸ [G.A. res. 2200A \(XXI\), 21 U.N.GAOR Supp. \(No. 16\) at 49, U.N. Doc. A/6316 \(1966\), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.](#)

34. In the CESCR's *General Comment on Education*,¹⁹ the Committee further explained these dual goals underlying the right and its unique role in enabling the realization of other rights:

Education is both a human right in itself and an indispensable means of realizing other human rights. As *an empowerment right*, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But *the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.*

35. General Comment 13 endorsed several authoritative sources which both updated and effectively expanded the substantive content of the *ICESCR*.²⁰ Among these instruments was the 1990 *World Declaration on Education for All*,²¹ which, as suggested above, may well have served an inspirational role for the drafters of s. 29 in their choice of the term 'basic education'.²² The *World Declaration* set out a similar, if more elaborate, statement of the purposes of education:

1. Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs.

¹⁹CESCR [General Comment No. 13 \(The Right to Education\)](#)

²⁰ "The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in article 13 (1), as interpreted in the light of the *World Declaration on Education for All* (Jomtien, Thailand, 1990) (art. 1), the *Convention on the Rights of the Child* (art. 29 (1)), the *Vienna Declaration and Programme of Action* (Part I, para. 33 and Part II, para. 80), and the *Plan of Action for the United Nations Decade for Human Rights Education* (para. 2)...These new elements are implicit in, and reflect a contemporary interpretation of article 13(1). The Committee obtains support for this point of view from the widespread endorsement that the previously mentioned texts have received from all regions of the world." (GC 13, para. 5).

²¹ [World Declaration on Education for All](#) (*supra*)

²² The Department of Education's *White Paper on Education and Training* ("*White Paper I*", March 1995) characterizes the *Declaration* as "authoritative".

[Basic learning tools and content are] required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.²³

36. Another of the international sources adopted by the CESCR as valid interpretive sources vis-à-vis the right to education was the 1990 *Convention on the Rights of the Child* (“*CRC*”). The *CRC* lays out the most comprehensive statement in international law as to the objectives of child education.²⁴ Its almost universal ratification supports the view that it can also be regarded as the most universally accepted standard in this field.

37. The Committee on the Rights of the Child, in its General Comment on the aims of education, emphasizes that the purpose of education must be such as to empower the child:

Article 29 (1)...insists upon the need for education to be child-centred, child-friendly and empowering, and it highlights the need for educational processes to be based upon the very principles it enunciates. The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child’s capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values.²⁵

38. Commenting on the purposes of education in the wake of the ratification of the *CRC*, Manfred Nowak surveyed the scene in terms of international law and stated: ...one may conclude that there exists today at least a fairly broad universal consensus on the major aims and objectives of the right to education: a) to enable a human being to freely develop his or her personality and dignity; b) to enable a human being to actively participate in a free society in the spirit of mutual tolerance and respect for other civilizations, cultures and religions; c) to develop respect for ones parents, the national values of one’s country and the natural environment; and d) to

²³ In *White Paper I*, we find the following after this passage: “The Ministry of Education associates itself with this statement.” (para. 14)

²⁴ “The right to education from a developing country perspective”, (2006) Alessandra Lundström Sarelin, at page 6.

²⁵ Committee on the Rights of the Child, General Comment No. 1: The aims of education, article 29 (1) (2001), CRC/GC/2001/1, 2001, para. 2

develop respect for human rights, fundamental freedoms and the maintenance of peace.²⁶

Purposes of a Basic Education: Foreign Law

39. Bearing in mind, the legitimate interpretive role played by “foreign law”,²⁷ regard may be had to the landmark American case of *Brown v. Board of Education*. In *Brown*, the U.S. Supreme Court took the opportunity to comment on the purpose of public education. The passage is widely cited and is included here for reference:

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.²⁸

40. These international sources refer, in short, to two general purposes, self-fulfillment/realization and democratic, social and economic participation. A public school education must enable everyone to become literate, skilled, analytically enabled and enlightened as well as being able to meaningfully participate and contribute to society. It is submitted that this goes beyond mere literacy and contemplates a fuller concept of education, one that includes analytical skills and the ability of each person to become fulfilled and capable of civic participation.

Purposes of Education: Conclusion

41. The *purposes* of education are to equip everyone with a level of knowledge and ability to realize their human potential and to participate (socially, economically,

²⁶ Manfred Nowak, “The Right to Education”, in: Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Second Revised Edition, (Dordrecht: Martinus Nijhoff Publishers, 2001), pp. 245-271, at pp. 245-246.

²⁷The use of which is contemplated by s. 39(1)(c) of the *Constitution*.

²⁸ *Brown v Board of Education of Topeka* 347 US 483, 493 (1954) (emphasis added)

politically and culturally) in their society. These contemplate an education well beyond a *de minimis* level of exposure to some literacy but, rather, seek to equip all persons with an adequate education.

Adequacy: The standard of achievement required for a basic education—the text “everyone”

42. To begin with, and whatever may turn out to be the right’s actual content, it is noteworthy that the right to a basic education is that of “everyone”, that is, all people; South Africans as well as those who are not.²⁹ It is the right of people of all ages—children and adults. It may or may not involve something different for people with disabilities, and almost certainly would involve accommodative measures, but the right is no less their right as it is the able-bodied. As stated in s. 7(1) of the *Constitution*, the constitutionally protected rights are “the rights of all people in our country.”³⁰

“a basic education”

43. A discussion of the content of the right to ‘a basic education’ must address the threshold question of how much education, what quality of education. Does it mean primary school, does the entitlement come to an end with the end of compulsory schooling (grade 9 or age 15 whichever comes first)—in other words the GEC. Does it extend through matriculation? If the goals and principles underlying a basic education are focused on individual development and the democratic norm of facilitating participation, a reasonable question soon emerges, what quality standard of achievement does this point to?

44. Neither within s. 29, elsewhere in the Bill of Rights, nor anywhere in the constitution is there any guidance on what is meant by ‘a basic education’. The earlier discussion of the goals/purposes of education and what follows, will make clear that while there is no bright line that can be drawn as to what grade level or even, how much education meets the standard of ‘a basic education’, the available

²⁹ See the Constitutional Court judgment in: *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) wherein it was held that the right of “everyone” to social security [s. 27(1)(c)] would include permanent residents. See also *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) where, at para 9, the Court stated: “Section 32(a) creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.” Indeed, in the case of children who are non-citizens, their apparent entitlement to a basic education under s. 29(1)(a) would be strengthened not just by virtue of the equality rights guarantee in s. 9 but also because of the stipulation in s. 28(2) that ‘in every matter concerning the child’, his/hers best interests are “of paramount importance”.

³⁰ Section 7(1) was cited by the Constitutional Court in *Khosa* to reinforce the point that when a right is written as belonging to “everyone”, it means just that.

principles and objectives serve as the criteria, the benchmarks against which any proposed level of education must be measured.

45. Interestingly, the term “basic education” never appears in the *South African Schools Act* or *Regulations* made under it.³¹
46. The *Employment of Educators Act* refers to “adult basic education” a number of times, leaving no clue, however, as to its meaning. The *Regulations* make no reference to the term.
47. On the other hand, the *Adult Basic Education and Training Act* statutorily defines ‘adult basic education’—at least for purposes of the *Act*—in an intriguing way. Section 1 provides:

“adult basic education and training: means all learning and training programmed for adults from level 1 to 4 where level 4 is equivalent to -
 a) grade 9 in public schools; or
 b) National qualifications framework level 1 as contemplated in the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995)”
 [“SAQAA”] (white paper ch 5, para. 14???)

48. What is noteworthy is that the *SAQAA* Level 1 qualification (referred to in the paragraph immediately above) requires demonstrated ability in several significant literacy and numeracy and analytical skills.³² Despite these encouraging hints from the adult basic education legislation, there remain many questions as to the scope of a basic education.
49. Finally, the *National Education Policy Act*, refers to ‘basic education’ just once. It provides that the National Education Policy should be directed toward the “advancement and protection....of every person to basic education.”³³ This sheds little further light on the content of ‘a basic education’. In the *Regulations*, however, we do find a revealing reference that goes to the nature of the obligation on government (to be discussed later in this paper) or, more to the point, the

³¹ There is no assumption made here that compulsory education (*per* s. 3(1) of the *SASA* is equivalent to ‘basic education’ as contemplated by the *Constitution*.)

³² See the extended definition of Level 1 competence attached to the end of this paper as Appendix “A” (still need the source for these qualifications!!)

³³ *National Education Policy Act*, s. 4(a)(ii). More will be made later of the articulated reference to ‘*a* basic education’ which article is missing in the *NEPA*’s reference to the right.

national government's curious view that the *Constitution* imposes only a duty of 'progressive realization' regarding basic education.³⁴

50. Within the government policy domain, the Department of Education's *White Paper on Education and Training* ("*White Paper I*") (1995)³⁵ takes the position that "since the term basic education is nowhere defined in the Constitution, it must be settled by policy".³⁶ While there is an imperative for the executive to implement constitutional obligations, it is, of course the judiciary which has the role of ultimate constitutional arbiter.
51. For children, the *White Paper* intriguingly states: "the right would be satisfied by the availability of schooling facilities sufficient to enable every child to begin and complete a basic education programme of acceptable quality."³⁷
52. On the key question of whether 'basic education' refers to a specific period of schooling or, alternatively, a standard of educational adequacy, the *White Paper* itself acknowledged that there are two approaches to defining what a *basic* education means: "An important question is whether basic education should be defined in terms of *learning needs and outcomes*,³⁸ or qualification levels, or school grades, and whether the content of basic education needs to be the same for children, youth and adults."³⁹
53. The Department then answered its own question in the following way:

The Ministry's position is that appropriately designed education programmes to the level of the proposed General Education Certificate (GEC), whether offered in school to children, or through other forms of delivery to young

³⁴ In GN 869 of 31 August 2006, section 36 of the *Regulation* states: "An important assumption underlying these national norms is that the national and provincial levels of government will honour *the states duty, in terms of the Constitution and the SASA, to progressively provide resources* to safeguard the right to education of all South Africans." (emphasis added).

³⁵ *White Paper on Education and Training* (1995)

³⁶ *White Paper I*, Ch. 7, para. 12.

³⁷ *White Paper I*, Ch. 7, para. 11; note the reference to "acceptable quality" (elsewhere in the *White Paper*, see also Ch. 13, para 31: "The state is required to ensure that educational opportunities of acceptable quality are available to every child for the General Education period", as well as para. 38 to similar effect)

³⁸ This is the lexicon of the *World Declaration* (*supra*).

³⁹ *White Paper on Education and Training* (1995) at para. 12.

people and adults, would adequately define basic education for purposes of the constitutional requirement.⁴⁰

54. Despite what government contends, does a basic education, as referred to in the ultimate authority—the *Constitution*—mean something other than grade 9/GEC?
55. The point here is that it may well be a mistake to equate the content of the right with what government has either enacted or has chosen to set out in white papers. Notwithstanding the CC’s reasonableness approach in *Grootboom*, *TAC* and *Mazibuko*, the difference in wording between ss. 26-27, on the one hand, and s. 29(1)(a) on the other, support a position which refuses to defer to government’s contentions regarding the scope of the right. Thus, an independent, purposive approach to the content of the right ought to be even more the case with regard to the right to a basic education than the other social and economic rights.
56. Put simply, given that the right to education is drafted in such absolute and unqualified terms, government should not get to effectively decide the qualitative content of the constitutional right by legislatively, let alone via policy documents, set (perhaps deliberately) low norms and standards and have these construed as the content of the constitutional right for the foreseeable future.⁴¹ More will be made of this later, but the right to a basic education in s. 29(1)(a) is drafted in a way that does not refer, let alone defer, to whatever standards government has chosen to commit itself.
57. Leaving aside government’s own claimed content, the text of s. 29(1)(a) itself fails to provide any obvious answer to the question as to the content of the right to a basic education. However, one quick clue can be gleaned from the inclusion of the right to “adult basic education” in s. 29(1)(a). As Roithmayer points out, a claim by some that ‘basic’ education includes only compulsory education (grade 9/age 15 whichever comes first⁴²): “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.”⁴³

⁴⁰ *White Paper I* at para. 15. See also: "The right to education: Lessons from Grootboom", Mandla Seleokane (2006) at pp. 5-8. On the other hand, the Department of Basic Education, in fact, has ministerial responsibility for all schooling from grade R through to grade 12 (see: <http://www.education.gov.za/TheDBE/tabid/54/Default.aspx>).

⁴¹ Indeed, if constitutional litigation were simply about getting government to live up to its own legal commitments, a *Bill of Rights* would be unnecessary and administrative law would be sufficient to get the job done.

⁴² *South African Schools Act*, 1996, s. 3(1).

⁴³ Roithmayr, *Access, Adequacy and Equality...*, (2003) 19 *SAJHR* 382 at 393.

58. Moreover, the provision's use of the qualifying article: 'a' basic education carries with it the implication that the right is oriented to a substantive level of achievement as distinct from that which is achieved by simply marking a set period of time or being 'pushed through' a fixed number of years of schooling. The term 'a basic education' refers to a qualitative fulfillment.

Adequacy: The standard of achievement required for a basic education—international and foreign law

International Law

59. Section 39(1)(b) of the *Constitution* provides that any court which is interpreting s. 29 "must consider international law". A review of the relevant international law makes clear a rejection of a crude approach to the determination of what a *basic* education includes. It is focused, instead, around the substantive attainment of sufficient learning to enable a person to participate as a citizen, contribute to society and derive self-fulfillment sufficient to meet one's dignity.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)

60. The Technical Committee which supported the Constitutional Assembly drafting process referred to the long list of international human rights sources for the right to education, mentioning the *ICESCR* in particular, as having "had an important influence on educational rights in other international declarations and treaties as well as in national constitutions."⁴⁴

61. In its General Comments⁴⁵ on education, the CESCR makes clear that, as with the other aspects of the right, its view as to what a "basic" education is are guided by the right's purposes:

...the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.⁴⁶ They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

⁴⁴ Constitutional Committee, Sub-Committee, Draft Bill of Rights, Explanatory Memoranda, (October 1995), page 165.

⁴⁵ [General Comments](#) are the Committee's interpretation as to the contents of specific provisions of the Covenant, issued for the information of States parties, individuals and others.

⁴⁶ This particular sentiment is rooted in article 26(1) of the *Universal Declaration of Human Rights* (1948) before receiving expression in the *ICESCR*.

62. In 1999, the United Nations Committee on Economic, Social and Cultural Rights issued its General Comment on the right to education. Its discussion is important as it relates to the principles for identifying the content of “basic education” and, therefore, is reproduced here at length (emphasis added):

While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: Primary education is the most important component of basic education⁴⁷....While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities⁴⁸....In general terms, fundamental education [in art. 13 (2) (d) of the ICESCR] corresponds to basic education as set out in the *World Declaration on Education For All*. By virtue of article 13 (2) (d), individuals who have not received or completed the whole period of their primary education have a right to fundamental education, or basic education as defined in the *World Declaration on Education For All*.⁴⁹

63. General Comment 13 goes on to state that the CESCR has effectively incorporated post-Covenant international law sources in guiding its own understating of the right to education. In particular, the Committee refers to the *World Declaration on Education For All*⁵⁰ (1990) which had addressed “basic education” in the following terms:

“basic education”: These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time⁵¹

⁴⁷ CESCR GC 13 para. 9

⁴⁸ CESCR GC 13 para. 12

⁴⁹ CESCR GC 13 para. 22

⁵⁰ [*World Declaration on Education For All*](#) (5-9 March 1990, Jomtien, Thailand)

⁵¹ *Ibid.*, at para. IV.

-and-

The focus of basic education must, therefore, be on actual learning acquisition and outcome, rather than exclusively upon enrolment, continued participation in organized programmes and completion of certification requirements.⁵²

64. It is submitted that the above passage is critical to an appreciation of an adequacy oriented interpretation of s. 29(1)(a). The focus here is on qualitative criteria of adequacy rather than years of completed schooling.⁵³ Woolman and Fleisch see this approach and these criteria as departing from a formalistic understanding of ‘basic education’:

“The *World Declaration on Education for All* de-emphasizes the completion of specific formal programs or certification requirements. Instead it stresses the acquisition of that level of learning necessary for an individual to realize his or her full potential.”⁵⁴

65. The *World Declaration* itself made clear that the definition of basic education “changes with the passage of time.”⁵⁵ This reminder has obvious implications for a largely urban society, one which seeks to be globally competitive.

66. Finally, the CESCRC follows the four-part analytical framework adopted by the Special Rapporteur in the right to education in her Preliminary Report (1999).⁵⁶ In order to meet the requirements of the *Covenant*, public schooling “shall exhibit the following interrelated and essential features” (“the 4-As”):

- i. **Availability:** functioning schools must be available and “are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;”
- ii. **Accessibility:**

⁵² *Ibid*, at article IV.

⁵³ Roithmayer (*supra*) at 393.

⁵⁴ Woolman and Fleisch at 127.

⁵⁵ [*World Declaration on Education For All*](#) at art. 1(1).

⁵⁶ GC 13, footnote 2.

1. education must be accessible to all—especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds;
 2. Physically accessible;
 3. Economically accessible—education has to be affordable to all.
- iii. **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**) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));” (emphasis added)
- iv. **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.⁵⁷
67. The Committee concludes by making clear that in the application of these inter-related criteria, “the best interests of the student shall be a primary consideration.”⁵⁸
68. It is worth noting that the Special Rapporteur on the right to education has further explained what is meant by “acceptability”:
- One important facet of the *acceptability* of education has been highlighted by the addition of ‘quality’ before education in policy documents as of the 1990s, thus urging governments to ensure that education which is available and accessible is of good quality.⁵⁹
69. The Committee on the Rights of the Child is unequivocal in saying: “Every child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs.”⁶⁰

⁵⁷ GC 13, para. 6. See also, *Human rights obligations: making education available, accessible, acceptable and adaptable*, K. Tomaševski (2001), available at: <http://www.right-to-education.org/sites/r2e.gn.apc.org/files/B6g%20Primer.pdf>

⁵⁸ This principle is, of course, replicated in the South African *Constitution*, s. 28(2).

⁵⁹ See Tomaševski (*supra*) at 13.

⁶⁰ [CRC GC1](#) at para. 22. (emphasis added)

70. In its first General Comment, the Committee on the Rights of the Child chose to highlight issues of education quality:

...article 29 (1) [of the *Convention*] underlines the individual and subjective right to a specific quality of education.... Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.⁶¹

71. Apart from formal treaty law, significant direction regarding quality of education is to be found in the *Dakar Framework for Action* (2000) which sought to go beyond priorities regarding universal enrollment and to address questions regarding the *quality* of education which learners were being provided.⁶²

Foreign Law

State Constitutions in the United States

72. Section 39(1)(c) of the *Constitution* provides that any court which is interpreting s. 29 “may consider foreign law”. In contrast to the international human rights law on the right to education, domestic jurisprudence tends to be extremely concrete and issue specific. In the case of the United States, despite the fact that American constitutional protections are generally devoid of economic, social and cultural rights, one exception is the area of education. The United States Supreme Court, in its own landmark judgment in *Brown v. Board of Education* makes clear how fundamental education is in the United States:

Today, education is perhaps the most important function of state and local governments It is required in the performance of our most basic public responsibilities. . . . 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.

⁶¹ [CRC GC1](#) at para. 9.

⁶² See [Dakar Framework for Action](#) (2000), *passim*, and the expanded commentary appended to the document.

73. While there is no right to education which has been held to reside in the U.S. Constitution,⁶³ intriguingly, the right to education is enshrined in all state constitutions⁶⁴ and has been held to be both justiciable and substantive regarding rights to educational *adequacy*.
74. The body of jurisprudence and academic writing concerning the right to education is rich. One estimate is that adequacy oriented litigation has succeeded in over 2/3 of the cases initiated.⁶⁵ One of the better known U.S. cases is from Kentucky and was based on the simple wording of that states' constitution which obliges the state to provide for "an efficient system of common schools throughout the state."⁶⁶
75. In *Rose v. Council for Better Education*, considerable expert evidence was adduced before the Kentucky Supreme Court, in its judgment, elaborated what, in its view was meant by an 'efficient school system', stating:

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as

⁶³ *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1973)

⁶⁴ Doron Isaacs has surveyed the scene on education-related provisions in the U.S. state constitutions and concludes:

However, most state constitutions in the United States have education provisions comparable to our own Section 29. For example the State of Georgia's Constitution requires an adequate public education, Maryland's provides for a thorough and efficient system of Free Public Schools and the extension of a judicious system of general education. All state constitutions require the establishment and maintenance of public schools. Twenty state constitutions express the value of public education by recognising the importance of a general diffusion of knowledge or calling education a fundamental goal. Twelve states have constitutional provisions requiring an efficient educational system and sixteen states require a thorough or uniform educational system." Doron Isaacs, "Interpreting, Litigating and Realising the Right to Education in South Africa: Lessons from America" (2011) unpublished manuscript at page 31. SAJHR (forthcoming)

⁶⁵ Michael Rebell, *Educational Adequacy, Democracy, and the Courts* in Christopher Edley et. al., editors, *Achieving High Educational Standards for All* (National Research Council, 2002), pp. 218-268: "plaintiffs have, in fact, prevailed in almost two-thirds (18 of 28) of the major decisions of the state highest courts since 1989."

⁶⁶ *Kentucky Constitution*, s. 183

to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.⁶⁷

76. For purposes of construing s. 29(1)(a) of the South African *Constitution*, one of the most noteworthy aspects of the judgment is that, through a combination of expert evidence and purposive interpretation, the court in *Rose* saw its way to providing very considerable substantive content on the foundational principles underlying an *adequate* education despite the sparse textual foundation for the constitutional obligation.
77. *Rose* resulted in a thoroughgoing reform of Kentucky's public school system and, **not** coincidentally, saw a state which ranked 48th in per-pupil spending, 41st in pupil-teacher ratio, and 38th in average teacher salary turnaround dramatically. By 2005, the state's national rankings for per pupil spending, pupil-teacher ratios and average teacher salary had improved dramatically to 30th, 16th and 34th respectively.⁶⁸
78. Moreover, the precedent in *Rose* has been widely followed in many other states.
79. In New York, the Campaign for Fiscal Fairness relied on that state's very generally worded constitutional obligation regarding education⁶⁹ to challenge the adequacy of the education provided in the public schools. The claim had been that the city's financing of its public school system failed "to afford New York City's public school children the opportunity guaranteed by the Constitution."⁷⁰
80. Rather than following the detailed approach of the Kentucky courts, the New York Court of Appeal found that the obligation on government was to provide "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury".⁷¹

⁶⁷ *Rose v. Council for Better Education*, 790 S.W.2d 186 at 212 (1989). Also, see Cathy Albisa's review of the right to education case law in the U.S.: http://www.escr-net.org/usr_doc/Albisa_-_Legal_Framework_for_ESR_in_US.pdf

⁶⁸ Isaacs, *ibid*, at 327

⁶⁹ *The Constitution of the State of New York*, Article 11, s. 1, provides: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

⁷⁰ *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, (1995)

⁷¹ *Campaign for Fiscal Equity v. State* (CFE II), 100 N.Y.2d 893, 801 N.E.2d 326, 769 N.Y.S.2d 106 (N.Y. 2003)

81. For present purposes, what is crucial is that the court explicitly stated that achieving this standard required minimally adequate physical facilities, access to instrumentalities of learning (such as desks, chairs, and reasonably current textbooks), and minimally adequate teaching of reasonably up-to-date curricula by sufficient and adequately trained teachers.
82. One of the counsel in that case has written about it and, in particular, how the Court interpreted the phrase “a sound basic education”:

In invalidating the Appellate Division’s holding that the constitution required an education that would provide students only eighth-grade level skills, the court held that New York’s schoolchildren are constitutionally entitled to the “opportunity for a *meaningful* high school education, one which prepares them to function productively as civic participants.” In doing so, the court stressed that although in the nineteenth century, when the State’s adequacy clause was adopted, a sound basic education may well have consisted of an eighth-or ninth grade education, “[t]he definition of a sound basic education must serve the future as well as the case now before us.”⁷²

83. The adequacy litigation in the U.S. has been so successful that a clear consensus has emerged—between litigation claimants, courts and legislatures—that an *adequate* education is outcome oriented:

While the term education adequacy seems to connote a very minimal sense of what a basic education should be, courts have arrived at an understanding of adequate that, in essence, means a basic quality education that provides students with the essential skills they need to function productively in contemporary society.⁷³

84. One of the most prominent litigators on the right to education elaborates this consensus in the following terms:

- The *constitutional standard* for a basic quality education is an education that prepares students to (1) function productively as capable voters, jurors and civic participants in a democratic society; and (2) compete effectively in the economy.

⁷²Poverty, Meaningful Educational Opportunity, and the Necessary Role of the Courts, Michael A. Rebell, *NORTH CAROLINA LAW REVIEW* [Vol. 85, page 1467 at 1503 (emphasis added)].

⁷³ Michael A. Rebell & Jessica R. Wolff, *Campaign for Educational Equity, Litigation and Education Reform: The History and the promise of the education adequacy Movement* (2006) at ii.

- The types of *knowledge and skills* that students need to be effective citizens and workers are (1) sufficient ability to read, write, and speak the English language and sufficient knowledge of fundamental mathematics and physical science to enable them to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable them to make informed choices with regard to issues that affect them personally or affect their communities, states and nation; (3) sufficient intellectual tools to evaluate complex issues and sufficient social and communication skills to work well with others and communicate ideas to a group; and (4) sufficient academic and vocational skills to enable them to compete on an equal basis with others in further formal education or gainful employment in contemporary society.
- The *essential resources* students need to acquire this knowledge and these skills are (1) qualified teachers, principals and other personnel; (2) appropriate class sizes; (3) high-quality early childhood and preschool services; (4) adequate school facilities; (5) supplemental programs and services for students from high-poverty backgrounds including summer and after school programs; (6) appropriate programs and services for English language learners and students with disabilities; (7) instrumentalities of learning including, but not limited to, textbooks, libraries, laboratories and computers; and (8) a safe, orderly learning environment.⁷⁴

85. What is just as important is that U.S. case law has also held that students coming from impoverished families need to have that condition taken into account (“accommodated”) in order for them to obtain the same benefit of the public school system.⁷⁵ Most concretely, this has included court-ordered early childhood development programs for ‘at-risk’ learners. This introduces a further dimension to the right to an adequate education; the principle that government must take additional measures to ensure that learners living with disadvantages have their unique needs taken into account so that they will be able to benefit equally from government educational programs—equally enjoy the state constitutional

⁷⁴ Michael A. Rebell & Jessica R. Wolff, *Campaign for Educational Equity, Litigation and Education Reform: The History and the promise of the education adequacy Movement* (2006) at 10.

⁷⁵ Rebell Conference at 228. In an interesting footnote, rebel illustrates the range of special measures that courts have ordered:

See, e.g. *Vincent v. Voight*, 614 N.W. 2d 388, 397 (Wis, 2000). (requiring legislature to take into account districts with disproportionate numbers of disabled students, economically disadvantaged students and students with limited English language skills); *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001) (further elaborating on the education essentials required for a sound basic education by, inter alia, emphasizing the need for adequate resources for students with extraordinary needs and an expanded platform of programs for at risk students; *Hoke County Bd. of Educ. v. State*, 95 C.V.S. 1158, 2000 WL 1639686, slip op. at 30 (N.C. Sup. Ct. Oct. 12, 2000) (holding that at-risk students are constitutionally entitled to a preschool education); *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997) (requiring the state to provide financing sufficient to provide the facilities and equipment necessary to enable students to master the [states] educational goals).

protection for the right to schooling. While this warrants considerable additional discussion, it is sufficient to observe that this goes well beyond providing accommodative measures for students with disabilities and could/should extend to school transportation, school feeding programs and supportive counseling.⁷⁶ This would follow from a reading of the right to a basic education interpreted consistently with the demands of the equality guarantee in s. 9 of the *Constitution*.⁷⁷

86. Rebell concludes that educational reforms resulting from policy developments together with a global realization of the increasingly complex requirements of a technological society have: “resulted in a general judicial understanding of “adequate” that, in essence, means a basic “quality” education that provides students with the essential skills needed to function productively in contemporary society.”⁷⁸

Conclusion respecting international and foreign law

87. For purposes of South Africa’s protection to the right to a basic education, it is very significant that, for example, the courts substantively interpreted New York’s constitutional text as requiring the state to provide “a sound basic education”. Both the similarity to the wording in South Africa’s right to education provision and the fact that the American court interpreted it as having a substantive adequacy guarantee are significant.⁷⁹

88. As importantly, and bearing in mind the CC’s expression of caution, in *Grootboom, TAC and Mazibuko*, about its own institutional limitations regarding social and economic rights, the fact that dozens of courts in the U.S. have waded deeply into the details of public schooling in America, *despite* very similar (and, if anything, even more deeply held) institutional concerns, can and should be used as a way of assuaging the fears of those within the CC who may still have doubts about the viability of robust adjudication regarding the right to a basic education.

⁷⁶ Note that, in Canada, the Supreme court of Canada held that when it comes to public health care, government must ensure that interpretive services for Deaf people are available so that Deaf people can enjoy equal benefit of government services: [Eldridge v. British Columbia \(Attorney General\)](#), [1997] 3 S.C.R. 624 at para. 80 *et seq.*

⁷⁷ See further discussion below on this point under the thematic heading “Equality”..

⁷⁸ Rebell & Wolff (*supra*) at 10.

⁷⁹ See also Daria Roithmayr, "Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education", 19 S. Afr. J. on Hum. Rts. 382 at 404 (2003)

89. In *Grootboom*, the CC cited the lack of discernable standards arising from the wording of ss. 26 and 27 as the basis for moving to the deferential reasonableness standard. In principle the same concern could apply regarding the right to a basic education. That is, in the face of a provision [i.e., s. 29(1)(a)] that sets out virtually nothing by way of objective criteria that could guide the courts, there may well be a judicial inclination to adopt a posture of deference to whatever it is that government has come up with. This could be the case despite the dramatically different wording between s. 29(1)(a) and ss. 26 and 27.
90. It is submitted that the key lesson to draw from both the international and U.S. jurisprudence is that a court can rely on: i) the guiding principles contained in international human rights law as well as ii) the concrete experience of the American case law to confidently wade into the substance of s. 29(1)(a) knowing that others have been there before. Doing so would, as well, be more faithful to the unqualified wording of s. 29(1)(a).
91. While this memorandum has only sought to summarize a few of the principles distilled from the U.S. case law, it is clear from the survey carried out here that, on specific issues, there is a wealth of jurisprudence which can be used to provide support to a court in South Africa that is looking for direction which may be missing from the wording of s. 29 itself.

The nature of the obligation to provide a basic education: the context

92. The Constitutional Court has stressed that rights must be interpreted in context; both within the Bill of Rights and also in their social and historical context.⁸⁰
93. It goes without saying that the Constitutional Assembly deliberately chose to locate the right to a basic education in s. 29(1)(a) quite separately from the right to “further education” in s. 29(1)(b). Additionally, in s. 29(2), there is the additional right to language of choice in schools, and, in s. 29(3), the right to establish independent (private) schools.
94. The partition of s. 29 into discrete thematic provisions—with each sub-section having very different obligations—is significant. It is evident that the drafters wanted not only to address each relevant aspect of education separately but also to attach markedly different positive obligations depending on the nature of the right.

⁸⁰ *Grootboom* at para. 22

'further education'

95. Section 29(1)(b) creates a constitutional obligation on the state “through reasonable measures, [to] make progressively available and accessible” further education.

96. What is immediately apparent is that, *unlike* the right to basic education in s. 29(1)(a), two qualifiers attenuate the right to *further* education; i) the entitlement is only to “reasonable measures” and ii) the constitutional entitlement is one of progressive realization. In contrast, the Constitutional Assembly chose to have neither of these qualifications attached to the right to basic education in s. 29(1)(a).

Constitutional Context: the state's unqualified obligation arising from Section 29(1)(a) contrasted with its attenuated obligations regarding the other social and economic rights, ss. 26-30

97. In *The Executive Council of the Province of the Western Cape*, the CC stated: “A provision in a Constitution must be construed purposively and in the light of the constitutional context in which it occurs. Our history, too, may not be ignored in that process.”

98. The right to a basic education is situated within the social and economic rights provisions of the *Bill of Rights*. However, what stands out, starkly, are the dramatically different obligations imposed on the state regarding basic education.

99. While rights to housing, health care, food, water and social security in ss. 26 and 27 are all significantly qualified by limitations on the state's obligations,⁸¹ **none** of these limitations are attached to the unqualified and ‘positive right’⁸² to basic education. That this profoundly important distinction was intended is clear not only from the careful wording of the provisions but is confirmed by the drafting note of the Technical Committee which supported the drafting process.⁸³

⁸¹ *Per* Liebenberg in *CLOSA, Grootboom* and *TAC* mean that the state is constitutionally obliged to ensure realization of the rights *only* to the following extent: (a) the obligation is to take reasonable legislative and other measures; (b) to achieve the progressive realisation of the right; and (c) within available resources (ch. 33.5).

⁸² While the wording of s. 29(1)(a) makes plain that a positive right is created, this reading is confirmed in the otherwise slim jurisprudence from the CC in *Ex Parte Gauteng Provincial Legislature*: at para. 9 “Section 32(a) creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.”

⁸³ The Technical Committee highlighted the fact that the “unqualified right to basic education enjoys support by all the parties.” On the other hand, the separate duty respecting “further education” was discussed in the following terms:

The progressive provision of education beyond basic education proposed by the ANC and PAC could be accommodated by an internal qualification to this right. The government would be under a

100. Simply put, it is very difficult to conceive how the government's positive obligations regarding basic education could be more different than its obligations regarding housing, health care, food, water, social security or, indeed, "further education".

The Historical and Social Context

101. The history of apartheid era public schooling education is notorious. Characterized by dramatically inferior funding, teaching, expectations and outcomes, schooling during this era was deliberately oriented around reproducing subservience and dependency. The racism that pervaded government's approach to public schooling sought to ensure that social transformation was impossible.⁸⁴

102. South Africa's report to the UN Committee on the Rights of the Child (1997) provides the following historical, if revealing, portrayal of schooling in South Africa:

In reporting on education, the legacy of the apartheid era, and in particular the devastating effects of the Bantu Education Act, cannot be underestimated. The *White Paper on Education* (March 1995) states that: "millions of South African children and youth are learning in school conditions which resemble those in the most impoverished States." It states further that access to technological and professional careers requiring a strong basis in mathematics and science is denied to all but a fraction of the age cohort, largely because of the chronic inadequacy of teaching in those subjects. At the same time, South Africa provides education for the privileged minority at full first world standards.⁸⁵

103. Woolman and Bishop, writing as the thematic authors on education in CLOSA, link their robust reading of s. 29(1)(a) to South Africa's past:

Education's status as an empowerment right might well explain why it receives, on its face, greater protection than other socio-economic rights: housing, healthcare, food, water and social security. The Constitutional Assembly apparently believed that an adequate education provides the quickest route to a polity of a creative, productive and self-sufficient

constitutional duty to take all reasonable and appropriate measures, particularly the adoption of legislation to ensure that secondary and higher education becomes generally available.

Theme Committee 4: Fundamental Rights Report at page 171.

⁸⁴ *The Right to Education under the South African Constitution*, Eric Berger, (2003) 103 Columbia Law Review 614 at 616 *et seq.*

⁸⁵ State report of South Africa to the UN Committee on the rights of the Child, (1997) at page 69, para. 381.

population of citizens—and not a country in which the majority of decisions relied on some form of state largesse.⁸⁶

104. Woolman and Fleisch, in *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* also see the comparative strength of s. 29(1)(a) as both a recognition of the wrongs of the past as well as a comment on the role of education in remedying them:

The absence of an internal limitation for the right to a basic education makes sense when viewed through the lens of Apartheid-era funding inequalities. The drafters wanted to reaffirm the primacy of education in a social democracy and to undermine any attempt to perpetuate unequal levels of state funding. The historical context and aspirational content of the South African Constitution requires a more nuanced reading of the absence of the internal limitation in [FC] s. 29(1)(a). In short, the section should be read as a reminder that the state may never again use education as a vehicle for the reproduction of -- and must make every effort possible to eliminate all vestiges of -- apartheid-era patterns of inequality.⁸⁷

105. Liebenberg sees a slightly different rationale for the “heightened protection accorded to the right to basic education [it] can be justified on the basis that it is the foundation of all further learning, and is crucial for the development, effective functioning and ability of people to earn a living in contemporary societies.”⁸⁸

Scholarly writing regarding the strength of the right to a basic education

106. Woolman and Bishop carry out a close review of the right to a basic education and cite four separate reasons for their conclusions on s. 29(1)(a): “Whatever the nomenclature, the phrasing of FC s 29(1)(a) reflects a strong right,

⁸⁶ Woolman and Bishop, Chapter 57 “Education” in *Constitutional Law of South Africa* at XXX. The authors also observe: “In addition, the post-apartheid State inherited an education system that purposefully tried to ensure that the majority of the population could not be anything more than hewers of wood and drawers of water. This historical gloss on FC s 29(1)(a) emphasizes the restitutive character of the right of education.” (CLOSA at XXX) See also, Roithmayr, *Access, Adequacy and Equality...*, (2003) 19 *SAJ H R* 382 at 421-2: “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.” Roithmayr also cites the *Plan of Action: Improving access to free and quality basic education for all*, (2003) Department of Education for the point that: “education is the cornerstone of any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults.” (para. 5).

⁸⁷ *The Constitution in the Classroom: Law and Education in South Africa 1994-2008*, Woolman and Fleisch (2009) at page 125.

⁸⁸ See also Liebenberg, S.. 2010. *Socio-Economic Rights: Adjudication under a transformative constitution*, Ch. 5.3.1 “Basic Education”, at page 244.

unqualified by any of the promises or aspirational language found in FC ss. 26 and 27.”

- i. Bearing in mind that the provision is not framed in terms of ‘access’ to basic education (unlike the rights in ss. 26 & 27), “the absence of ‘access’ in FC s 29(1)(a) must “mean that the State itself must provide a basic education to everybody.”⁸⁹
- ii. The absence of the obligation being qualified by a requirement to create ‘reasonable legislative measures’ is the basis for the authors’ conclusion that, (unlike ss. 26 & 27), “29(1)(a) cannot be satisfied unless everyone receives a basic education....[it] can only be fulfilled by the provision of classrooms, teachers and textbooks.”
- iii. “Third, FC s 29(1)(a) is not contingent on the availability of resources. As Seloane notes, whether the State has enough resources to fulfill its constitutional obligations does not release the State from the duty FC s.29 imposes.”⁹⁰
- iv. Fourth, the right to basic education is not subject to progressive realization; “basic education is not a good that can be made gradually available to more people ‘over time’”.⁹¹

In sum, the authors conclude, “the text of FC s 29(1)(a) indicates that, unlike the ‘traditional’ socioeconomic rights, the right to basic education and adult basic education is: (a) not subject to a reasonableness standard; (b) not dependent on the availability of resources; and (c) the source of a direct, immediate and specific entitlement.”

107. Scholarly assessments regarding the unequivocal strength of the right expressed by s. 29(1)(a) are of one voice.⁹² Berger refers to the right to basic education as creating a strong positive right which he contrasts with “some weak positive rights like housing”: “The Constitution creates basic education as a strong positive right without reference to governmental resources. Housing, by

⁸⁹ It will be recalled that in *Grootboom*, the CC had held that “access” to housing meant that the State could fulfill its constitutional obligations by ‘enabling’ people to provide their own housing”

⁹⁰ See M Seleane ‘The Right to Education: Lessons from *Grootboom*’ (2003) 7(1) *Law, Democracy and Development* 137, at 140.

⁹¹ See Seleane *infra* at page 5: “The right to basic and adult basic education, unlike the right of access to adequate housing, is immediate. It is not subject to progressive realisation. Therefore the state has to act immediately in order to give full effect to the right.” See also Report of the Public Hearing on the Right to Basic Education, SAHRC (2006) at 8.

⁹² In addition to the others mentioned, see also Liebenberg, S.. 2010. *Socio-Economic Rights: Adjudication under a transformative constitution*, Ch. 5.3.1 “Basic Education”, pp. 242-247: “The lack of internal qualifiers or limitations suggests that the right to basic education in s. 29(1)(a) requires direct realization.”

way of contrast, is a weak positive right that requires the government to take "reasonable" measures "within its available resources, to achieve the progressive realisation of this right."

108. Berger notes: "As a matter of grammatical and constitutional interpretation, section 29(1) strongly suggests that the government has an absolute duty to provide basic education. Whereas the state only has to make further education "progressively available and accessible" "through reasonable measures," no such clause limits the obligation to provide basic education."⁹³ From the perspective of simple statutory interpretation, one can reasonably assume that when the Constitutional Assembly adopted the right to a basic education, it must have been intended that the right was to an adequate education; any lesser standard of protection would imply legislative folly. Given the Constitution's adequate education requirement and the remarkably poor education provided to many learners, the Court should therefore hold that the government needs to provide better basic education immediately, regardless of its other budgetary concerns."⁹⁴

Conclusion

109. A purposive reading of s. 29(1)(a) of the *Constitution*, supported by considerable scholarly opinion makes clear that the right to a basic education is a positive right, of immediate and unqualified effect. None of the defences open to government under the other social and economic rights in ss. 26 & 27 (e.g., available resources or progressive realization) are available to it under s. 29(1)(a). It creates an immediate right to an adequate education.

110. In the face of what can be safely assumed to be a wide range of systemic shortcomings in the South African public school system, it can be reasonably concluded that a trial court would agree that, on a whole range of possible issues,

⁹³ To similar effect, see: *The right to education: Lessons from Grootboom*, Mandla Seleane at page 3: "The right to basic and adult basic education is stronger than the right of access to housing in three respects. It is not subject to available resources, it is immediate and it is direct." Seleane, in turn, cites Bekker for the point that resource constraints "would not be applicable in determining the content of the right to education". To similar effect, see

⁹⁴ Berger points out a further distinction between the structure of the right to housing of the right to housing (and which, because of the identical wording, is equally applicable to the rights to health care, food water and social security) in ss. 26 & 27 and the right to a basic education in s. 29:

"By way of contrast, section 29(1) (b)'s limitations contain no such explicit reference to section 29(1)(a); unlike section 26, there is no clear indication in section 29(1) that the state need only make basic education "progressively available" using "reasonable measures." Had the framers intended the state only to make basic education "progressively available" "within its available resources," they surely would have phrased section 29 differently. They either could have included a whole separate subsection qualifying the entire right, as they did in section 26, or they could have tinkered with their punctuation and grammar to link the qualifying clause in section 29(1)(b) to the right in section 29(1) (a). That they did neither strongly suggests their intention to make "basic education" an absolute right that government must provide immediately.

learners' rights to 'a basic education' are violated. This could include infrastructural issues, school materials deficiencies (both libraries and laboratories), school nutrition as well as shortcomings in both teacher quality and school management).

Section 36: Limitations of s. 29 violations

111. Analytically, violations of substantive rights in s. 29 are subject to consideration as to whether the violations can be 'saved' under s. 36 of the *Constitution*:

7. Rights

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

36. Limitation of rights

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

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

112. Section 36 is, in general terms, where the state may be able to justify violating one of the rights in the *Bill of Rights*. Section 36 is about balancing the rights infringement against other valid state interests. In carrying out the balancing, the courts are, in effect, being asked to determine whether the legitimate interests of government (including competing human rights concerns) outweigh the harm caused by violating the *Bill of Rights*.

113. Both the internal structure of the *Bill of Rights* and the interpretation it has been given by the CC⁹⁵ contemplate a two-step judicial analysis for rights claims.

⁹⁵ See *S v Zuma & Others*: 'Fundamental rights analysis under IC Chapter 3 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?'; *Makwanyane* (supra) at 707; *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1, 26 (CC) ('*Ferreira*'); *Mamabolo* (supra) at para 1 ('The first issue

114. First, a determination is made as to whether the substantive rights provision has been violated followed by an analysis as to whether the violation can be saved under s. 36 of the *Constitution*.
115. An important corollary, when it comes to the *unqualified* right to a basic education in s. 29(1)(a), is that the substantive rights provision must be given its full content by the courts before *any* consideration is given to justificatory factors in s. 36.⁹⁶ To permit *any* justifications to be considered within s. 29(1)(a), not only deprives the right of the full content which the Constitutional Assembly intended but also affords the government two kicks at the justificatory can—once in s. 29(1)(a), and again in s. 36.
116. Finally, it is both analytically and strategically important to keep justificatory considerations separate for reasons related to the onus of proof. That is, given that the rights claimant will bear the full onus of proof at the stage of proving a rights violation under s. 29, it is important that that party not have to negative any possible justifications for the rights infringement—this job properly belongs to the government at the s. 36 stage.⁹⁷

Applicability of Section 36: Limiting provision must be a law of general application

117. The threshold question as to whether s. 36 has *any* applicability is whether the rights infringement has come about as a result of, to use the words of s. 36, “a law of general application”.
118. In CLOSA, Woolman and Botha point out that this requires that the limiting measure be a) a law—as opposed to official/administrative action⁹⁸ and b) one of “general application”. While the second requirement—and its attendant discussion—may well be both relevant and important, (and has been the subject

was whether the law . . . limited the right to freedom of expression vouchsafed by the Constitution. The second is whether the procedure recognised and sanctioned by our law . . . fell foul of the fair trial rights guaranteed by the Constitution. . . . In respect of each of the first two issues, a finding that the law does indeed limit the fundamental rights in the respects contended for, will in turn require an enquiry whether such limitation is nevertheless constitutionally justified.’)

⁹⁶ See, e.g., the Canadian Supreme Court judgment in *R. v. Turpin*, [1989] 1 S.C.R. 1296 at page 1325, (para. 37): “In defining the scope of the . . . rights it is important to ensure that each right be given its full independent content divorced from any justificatory factors applicable under s. 1 of the *Charter*.” See also: “The right to education: Lessons from Grootboom”, Mandla Seleokane (2006) at pp. 4.

⁹⁷ See Woolman and Botha, CLOSA Ch. 34.6

⁹⁸ See Woolman and Fleisch at page 125 regarding the applicability of s. 36 with respect to limitation on the right to a basic education: “If the source of the limitation is mere government policy, or obstruction by particular schools, it will not be possible to justify the limitation.”

of some jurisprudence,⁹⁹) it is so situation-sensitive that elaboration of the jurisprudence, in the absence of a specific factual/legal matrix, would be of limited value here.

A Note on Rights Infringing Laws and ESCRs

119. With respect to the first requirement above, i.e., that the infringement have come about as a result of an infringing law, a more general observation is relevant. In considering violations¹⁰⁰ of the right to basic education, it is important to immediately consider that the structure of s. 36 (and section 1 of the *Canadian Charter of Rights and Freedoms*¹⁰¹ on which it is modeled¹⁰²), are based on a drafting assumption that rights violations will arise primarily as a result of infringements of civil and political rights. That is, the state will have taken positive steps, i.e., *done* something legislatively, to overstep its constitutional boundaries. Most specifically, the s. 36 analysis is oriented around a consideration of whether ‘the infringing legislative measure’¹⁰³ can be justified. Under this thinking, s. 36 is concerned with whether the state’s rationale for its actions (i.e., in having violated someone’s rights) can, nonetheless, be justified. In short, it generally contemplates *positive* actions by the state.

120. It will be appreciated that to the extent that the limitation provision is founded on assumptions about civil and political rights violations, s. 36 may not *work* well, i.e., may not have much to say about social and economic rights violations that occur as a result of the government’s *failure* to take action. Its

⁹⁹ See Woolman and Botha in CLOSA, Ch. 34.7 and I Currie & J De Waal, *The Bill of Rights Handbook* (5th Edition, 2005), Ch 7.2(a)(ii) at page 169 *et seq.*

¹⁰⁰ Remember that this is the *status quo* at the point where the analysis has reached s. 36.

¹⁰¹ [Section 1](#) of the Canadian *Charter* reads:

Guarantee of Rights and Freedoms in Canada

Rights and freedoms
1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

¹⁰² See Woolman and Botha’s chapter on “Limitations” in CLOSA (Ch. 34.2(b): *Drafting History: Foreign Influences*); and Bill of Rights Handbook, Chapter 7.1, “Limitations” at 165: “The principal model for the South African Bill of Rights is the *Canadian Charter of Rights and Freedoms* which contains a list of rights and a general limitation clause governing the limitation of those rights.”

¹⁰³ On this point, see the Supreme Court of Canada judgment: [RJR MacDonald v. Canada, \[1995\] 3 S.C.R. 199](#) at para. 144:

The objective relevant to the s.1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised (emphasis in original).

failure to discharge its positive obligations under the constitution will very often *not* come about as a result of specific ‘infringing measures’—indeed, the whole point of the *Bill of Rights* problem will, most often, be that government has failed to act and, as a result, there will seldom be an infringing measure to put onto the s. 36 scales for a court to balance. From the perspective of the two-step analysis under the *Bill of Rights*, the emergent point is that in many social and economic rights cases, s. 36 may simply have no applicability.

121. While not a social or economic rights case, *August v. Electoral Commission* was a case where government’s failure to discharge the positive obligations imposed on it by the right to vote provisions in s. 19, left it unable to rely on whatever limitations s. 36 might have offered. Government’s failure was in *not* having taken any actions:

In reality no provision has been made either in the 1998 Electoral Act or in the Commission Act or in the regulations of the Commission to enable the prisoners to exercise their constitutional right to register and vote. Nor has the Commission made any arrangements to enable them to register and vote.¹⁰⁴

122. The consequences for government of having done nothing were fatal for whatever explanations or justifications which it sought to have the court consider:

In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners’ rights in terms of section 36 of the *Constitution* as there was no law of general application upon which they could rely to do so.¹⁰⁵

123. This leads to another point. Strategically, it is clear that advocates will, welcome the idea that s. 36 would not be available for use by government. By failing to act, government goes into a constitutional claim with one-arm tied behind its back. Should a violation of s. 29(1)(a) be established, the analysis would, in cases where s. 36 is not applicable, proceed directly to remedial considerations.

124. This has obvious advantages for rights claimants; government has deprived itself (as a result of its failure to act) from being able to justify its position.

¹⁰⁴ *August v Electoral Commission* 1999 (3) SA 1 (CC) at para. 22.

¹⁰⁵ *August (supra)* at para. 23

125. On the other hand, real world considerations must be taken into account. In the context of what, on its face, is ‘an unqualified, absolute positive entitlement to an adequate basic education now!’, one can safely say there will be a judicial willingness to grant government some kind of flexibility.
126. This assessment is based on the CC’s experience in the area of economic and social rights—especially ones that will carry significant costs. Courts will *naturally* be inclined to give government some space and this will result in them finding ways to bring that about. Imagining such judicial deference as a bubble or weakness on a bicycle inner tube, we can say that while it may be difficult to predict exactly where the deference bubble will appear, we know that it will show up somewhere.
127. Assuming this to be correct, the strategic question is how this reality should be approached. The judiciary’s willingness to accommodate government vis-à-vis basic education can manifest itself at three discrete points in the analysis; at the rights stage, through s. 36 or on questions of remedy.
128. At the rights stage, a deferential CC could interpret s. 29(1)(a) in a manner which either narrows the scope of the entitlement or somehow allows government a measure of flexibility. How this would be achieved is a matter of conjecture, though, courts everywhere have proven themselves remarkably innovative when they feel pressed into an uncomfortable position. The way in which the CC might effectively narrow the right needs to be anticipated and made a matter of serious consideration.
129. Section 36, the limitations provision, is worded in a sufficiently open ended way (‘a law of general application’) that it would be open for a court to interpret it so as to permit government a range of ways of limiting the right to a basic education. Thus, rights violations which have their roots in resource shortages, might prompt the CC to create a special category within the s. 36 jurisprudence specifically for such situations.¹⁰⁶ On this point, it is conceivable that resource problems emanating from national or provincial government school funding will be found by the CC to be rooted in ‘laws of general application’ i.e., budget legislation.¹⁰⁷ This would result in s. 36 becoming the terrain on which budget battles between experts is waged.

¹⁰⁶ Woolman and Bishop in Ch. 57.2 of CLOSA note, without further explanation, that “The State will be able to raise resource constraints and the need to fulfill other constitutional obligations in showing that the limitation is ‘reasonable and justifiable’.”

¹⁰⁷ On this point, see: Berger (*supra*):

130. Finally, remedial powers leave courts with wide scope to recognize rights violations while leaving governments ample space to respond. That is, courts may issue remedies (e.g., a bare declaration of a rights violation) which leave it fully open to government to decide how and when to respond (in the case of temporarily suspended remedies).

Remedy

131. People who don't have access to basic education or, as likely, adequate basic education will be seeking exactly that. Their advocates ought to seek the same. The key will be the fashioning of a remedial menu that both responds in an effective way to the rights violations while not being so ambitious so as to sink the ship on which the claim is based.
132. Under s. 172 of the *Constitution*, a court has a virtually free hand in designing remedies that fully vindicate the rights violations.
133. Careful consideration needs to be given to crafting remedies that will respond to the violations in a way that does not prompt a court to
134. In terms of practical considerations, there is a sense that the few basic education cases that have been filed centred on the right to a basic education have fairly quickly settled as the government has obviously been aware of just how poorly the educational system is functioning in certain parts of the country and, as well, has been anxious to avoid having a precedent set that others may be able to use for their own cases. As a result, no jurisprudence is created. From the point of view of obtaining some guidance from the courts on these matters, one consideration which counsel may want to bear in mind will be to 'set the bar high' in framing the remedial request making it more unlikely for the government to concede—where the cost will be great. Conversely, more modest remedial claims will be all the more easy to settle.
135. A further remedial consideration has to do less with questions of liability for rights violations and more to do with what can be styled remedial rule of law considerations—implementation issues. That is, assuming that a violation has

The government's best counter argument is probably not that the worst schools pass muster, but rather that under the section 36 Limitations Clause the government need not allocate resources it does not have. Here the Limitations Clause might allow the government to justify a limitation on education spending that under section 29 would be *prima facie* unconstitutional, if that limitation served a pressing public interest. In other words, though section 29(a) treats basic education as a strong positive right, the government might not have an absolute obligation to provide it, if it can point to a compelling government reason not to do so, such as severe budget problems.

been found and, in situations where there is a pattern or history of the government in either failing to carry out its obligations or where a previous government or court directive has itself been ignored, serious consideration can be given to seeking a supervisory order from the court.¹⁰⁸ Such a structured order would not simply maintain jurisdiction with the court to ensure that its order is being carried out but could well include a reporting schedule which—depending upon the case—would require the government to return to court to indicate what progress is being made in fully implementing its order.

136. A further variation that could be considered where implementation may warrant supervision by a non-judicial body with expertise. In the education setting, a court could be asked to convene a multi-party stakeholder working group made up of a range of players in the education sector who would not simply monitor the implementation of issues but lend expertise at specific junctures where such might be warranted.

Part IV

Basic Education and Equal Education

Equality: Substantive Rights and Relative Rights:

137. The simple truth is that educational outcomes in public schooling for black South Africans, especially those located in rural areas, are not very different from what they were under white rule. Another important aspect of the same reality is that white students are doing dramatically better than their fellow black South Africans. Things are not really improving despite the fact that the right to a basic education has been in the constitution for 17 years. Moreover, the infrastructure, facilities, teachers, materials and supportive services are, almost always, poorer for rural black communities than for urban white communities, often markedly so. Regardless of the line of comparison the situation for black learners is simply dreadful. Some make a desperate attempt to escape via the former Model C school system, however, even when successful, the available spaces can only make a shallow dent on the problem and they, themselves, are limited and undergoing deterioration.

138. To this point in this memorandum, very little has been said about race. After all, the right of “everyone” to an adequate education in s. 29(1)(a) doesn’t

¹⁰⁸ Where warranted, the CC has indicated that it will issue supervisory orders: *Sibiya & Others v. Director of Public Prosecutions: Johannesburg High Court & Others*, 2005 (5) SA 315 (CC) at para. 61. The Supreme Court of Canada has also issued supervisory orders (e.g., to ensure the completion of completion of French language schools and educational programs): *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3

care whether South Africans are black or white, or neither. It is an *absolute*, constitutional entitlement of educational adequacy for ‘everyone’—regardless of who they might be.

139. It is sometimes said that with so many socio-economic rights recognized in the *Constitution*, it is not necessary to make equality-based comparisons. While there may be some obvious truth to this, an assessment of post-apartheid South Africa’s education system prompts one to think that a healthy dose of equality may be warranted.

140. An equality-based claim under s. 9 of the *Constitution* would be founded on the *relative* situation of the education system for blacks and whites:

Comparative arguments based on equality amount to relative claims. Non-comparative arguments rest on absolute claims.¹⁰⁹ Depending on the nature of the claim, the relative one based on equality may be the easier to sustain.”¹¹⁰

141. Eric Berger makes a similar point about the strong appeal of certain *relative* claims based on equality—specifically in the context of the dramatic inferiority of the South African public school system for black people:

One advantage of this argument is that it is easier to prove inequality than inadequacy.¹¹¹ Inadequacy is often subjective, relying on general standards. While the democratic principles set out in section 29 provide the foundation for a definition of adequacy, reasonable people could differ over the finer points of that definition. Inequality, by way of contrast, is easier to establish. That a predominantly black province has twice as high a pupil-to-teacher ratio as a predominantly white province is clear evidence of inequality. Similarly, the startling differences between facilities also highlight gross inequities.¹¹²

142. By the same token, the equality-related observations above regarding the shortcomings of education for black people would not be relevant if everyone was in the same boat: “If everyone is treated equally badly, an equality claim is not the appropriate means of challenge. The corollary of equality as a comparative

¹⁰⁹ Here, an ‘absolute’ claim would be one under s. 29(1)(a).

¹¹⁰ *Equality as a Comparative Concept: Mirror, Mirror on the Wall, What’s the Fairest of Them All?*, Dianne Pothier, (2006), 33. S.C.L.R. (2d) 135 at 137.

¹¹¹ ‘Inadequacy’, as referred to by Berger, is to a claim based on the protection to an ‘adequate’ education in s. 29(1)(a).

¹¹² *The Right to Education under the South African Constitution*, Eric Berger, (2003) 103 Columbia Law Review 614 at 641.

concept is that some argument other than equality is needed to attack *universal* bad treatment.”¹¹³

143. The equality guarantee in the *Constitution* can be used to refer to **two** somewhat similar comparisons when it comes to schooling for blacks people in South Africa. Both arguments rely on adverse effect or indirect discrimination; it is not the purpose but the *effect* of neutrally-worded legislation which results in discrimination. It is clear that adverse effects discrimination (or ‘indirect discrimination’ as it is called in section 9) is subsumed within the equality rights guarantee.¹¹⁴
144. The full doctrinal analysis to be followed for claims under s. 9 will be omitted and only an outline of the claim (consistent with the CC’s equality rights jurisprudence¹¹⁵ will be set out). However, the essence of the discrimination test under s. 9 is whether government legislation or action has resulted in distinctions which are disadvantageous for members of disadvantaged groups. Section 9 seeks to promote substantive equality.¹¹⁶

A Note on Indirect Discrimination

145. Should it be assumed that, with the dismantling of apartheid’s formal legal architecture, there is no longer a legislative foundation for a discrimination claim, this could not be further from the truth.
146. The prohibition against discrimination in s. 9 of the *Constitution* includes a prohibition against indirect discrimination. Indirect discrimination occurs when laws or other government action which are facially neutral and which may well carry no intention to discriminate, nonetheless adversely impact on members of historically disadvantaged groups.¹¹⁷

¹¹³ *Equality as a Comparative Concept: Mirror, Mirror on the Wall, What’s the Fairest of Them All?*, Dianne Pothier, (2006), 33. S.C.L.R. (2d) 135 at 136.

¹¹⁴ *Pretoria City Council v. Walker* 1998 (2) SA 363 (CC) and see “Equality” in I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005), Ch. 9.4(f) & (g).

¹¹⁵ See *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) and C Albertyn & B Goldblatt ‘Equality’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006), Chapter 35 and “Equality” in I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005), Ch. 9.

¹¹⁶ C Albertyn & B Goldblatt ‘Equality’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006), Chapter 35

¹¹⁷ See C Albertyn & B Goldblatt ‘Equality’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006), Chapter 35(c) ; and I Currie & J De Waal, *The Bill of Rights Handbook* (5th Edition, 2005), Ch 9.4(f) at pages 260-263.

147. Classically, the government office building that can only be entered using steps (while displaying a banner that says ‘everyone welcome’) clearly does not intend to discriminate but, indirectly discriminates by adversely affecting the access of wheelchair users. Similarly, the public school that has a strict dress code may well indirectly discriminate against Rastafarians.

148. While there is little South African jurisprudence which discusses ‘indirect discrimination’,¹¹⁸ the concept is well known in international human rights law or in foreign law (where it is very often referred to as adverse effect discrimination). In its General Comment on discrimination, the United Nations Human Rights Committee adopted an approach which makes clear that discrimination can occur as a result of either direct or indirect discrimination; either the purpose or effect of government action/inaction can result in a violation:¹¹⁹

...a violation of article 26¹²⁰ can ... result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 ...if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²¹

149. A rule which is neutral on its face results in indirect discrimination or adverse effects discrimination because it puts persons having a status or a characteristic (due to pre-existing inequalities) associated with one or more of the

¹¹⁸ One example is *Pretoria City Council v. Walker* 1998 (2) SA 363 (CC).

¹¹⁹ General Comment 18 at para. 7.

¹²⁰ “[Article 26](#)” is the anti-discrimination provision in the [International Covenant on Civil and Political Rights](#).

¹²¹ UN Human Rights Committee: *Rupert Althammer et al. v. Austria*, 998/2001 at para. 10.2. The CESCR has adopted a similar approach in its recent General Comment 16 on Discrimination: “Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory on its face, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.”

See also UN Human Rights Committee decision in: *Cecilia Derksen v. Netherlands*, Communication No. 976/2001, U.N. Doc. CCPR/C/80/D/976/2001 (2004) Para. 9.3: “The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its **exclusive or disproportionate adverse effect** on a certain category of persons.” (emphasis added)

prohibited grounds at a disadvantage compared with other persons in their equal access to quality education. As the Human Rights Committee has put it, “if the detrimental effects of a [facially neutral] rule or decision exclusively or disproportionately affect persons having a particular race etc.” then, indirect discrimination can result.¹²²

150. The references to neutral legislation which results in adverse effect discrimination by “exclusively or disproportionately” effecting members of disadvantaged groups has been elaborated by Canadian equality-rights scholar Dianne Pothier who discusses recent indirect discrimination cases based on religion and sex. She describes how the two main types of indirect discrimination cases can be understood in terms of the extent of the disadvantage vis-à-vis the members of the claimant group. Thus, all members of a religion may be disadvantaged by neutral rules which adversely impact all co-religionists (categorical exclusion) as distinct from neutral rules or legislation which disadvantage claimant group members disproportionately though not exclusively:

In a categorical exclusion case, all of those not in the claimants category do not face the consequences the claimants are challenging. However, in a disproportionate impact case, there are, by definition, some outside the claimants’ category who face the same consequences¹²³ as the claimants.¹²⁴

151. Thus, an employer’s rule requiring all employees to be available for work on Saturdays, while apparently neutral on its face, has the unintended effect that Seventh Day Adventists are unable to be employed—a case of adverse effects discrimination via *categorical* exclusion; all members of the effected category are disadvantaged.

152. Separately, the concept of indirect discrimination includes and prohibits neutral rules or practices where those disadvantaged are ‘disproportionally’ though not exclusively members of a historically disadvantaged group. Classically, height or weight restrictions for applicants for certain jobs (e.g., police officer) would serve to exclude women or Asians because of the fact that they are generally shorter than men are. A recent Canadian case involved such criteria for applicants wanting to become forest firefighters. In *Meiorin*, the use of

¹²² [Rupert Althammer et al. v. Austria](#) (*supra*) at para. 10.2

¹²³ That is the same disadvantageous consequences.

¹²⁴ "Tackling Disability Discrimination at Work: Toward a Systemic Approach", Dianne Pothier, (2010) 4 McGill Journal of Law and Health 17 at 36.

an aerobic fitness test to screen job applicants resulted in women being disproportionately¹²⁵ (though not exclusively) rejected. The fitness test was found to be discriminatory—particularly taking into account the fact that the expert evidence showed that the achievement standard applied was simply the average for males and that it was, in any event, unnecessary for satisfactory job performance.

153. It will be clear that in cases of adverse effects discrimination on the basis of *disproportionate* impact a *prima facie* case must be founded on statistical evidence in order to prove the disproportionate impact of the challenged legislation of the claimant group.¹²⁶

154. With that, it can be seen that the breathtaking disparities in the enjoyment of public school education serves as the foundation for two separate but related equality arguments as well as a third, interpretive argument.

A. *Equal Benefit of the Law*

155. First, black learners do not enjoy equal benefit of the education law. That is, the legislation which establishes and operates the public schooling system in South Africa. This argument would start with the *South African Schools Act, 1996* and *Regulations* and extend to all the other enactments and delegated legislation that serve to create the architecture of the public schooling system.

156. From there, the argument would be that the legislative structure of general application, while facially neutral, operates and is implemented in a way that *disproportionately* results in blacks receiving an inferior education system compared to whites.

157. To be clear, it would not be claimed that anyone has intentionally created a preferential system for white learners (or, at least not since 1994). Rather, the result of the way in which the system has developed results in white learners receiving a superior education. The *system* disproportionately benefits white people who are the ones who predominantly benefit from the superior education system. Black learners disproportionately receive unequal benefit of the education

¹²⁵ In the sense that some women passed the test and some men failed it.

¹²⁶ *Proving Discrimination in Canada*, (Carswell, 1987) Beatrice Vizkelety at pages 174 & 176 and see: [Syndicat des employés de production du Québec et de l'Acadie v. Canada \(Human Rights Commission\)](#), [1989] 2 S.C.R. 879 at para. 80: “Statistical evidence....is a most precious tool in uncovering adverse discrimination.”

system compared to white learners. The reason that this has resonance as an equality argument is because it is as much a description of social reality as it is a legal, equality-rights claim.

158. This claim to *relative* equality relies not at all on s. 29(1)(a) of the *Constitution*. It could just as easily be made if the *absolute* entitlement in s. 29 was not contained in the *Constitution*. It is founded solely on s. 9 and a comparison of the quality of the public school systems vis-à-vis members of the racial groups. Specifically, the claim is that the quality of public education (or some feature or aspect of the system) provided to white learners is significantly better to what is provided to black learners.

159. The appeal of framing a case in this way comes from being able to rely on the manifestly superior school system (in most every respect) enjoyed by white learners and being able to use this to possibly lever improved education for black learners. It is a claim that says simply: ‘we want it as good as they have’.

B. Equal Benefit of s. 29(1)(a) of the Constitution

160. Second, a very similar argument could be made—except using s. 29(1)(a) of the *Constitution* instead of the legislation which implements the education system. Thus, it could simply be argued under section 9 that black learners do not enjoy equal benefit of their rights under s. 29(1)(a) of the *Constitution* to a basic education.

161. Again, the argument would be framed not so much as a claim to educational adequacy but, rather, as a claim that, whatever ‘a basic education’ may turn out to include, black learners are getting far less of it than white learners. It is a *relative* claim rather than a case which seeks substantive educational adequacy *per se*.

162. The main difference between the two equality claims is that the second seeks equal enjoyment of a constitutional right rather than simply equality in the enjoyment of enacted programs. As such, it is likely that a court would treat it far more seriously.

The Focus of an Equality Claim

163. As with a case under the right to a basic education under s. 29(1)(a), an equality rights claim could focus on a narrow issue or a combination of issues or, even, on all dimensions of the public school system—assuming that the evidence of disproportionate disadvantage on the basis of race can be obtained.

164. Thus, a claim could be framed around specific infrastructure issues, classroom size, teacher quality, school transport, libraries, nutrition or, indeed, all of these could be brought together in one large-scale, multi-dimensional case.
165. It is noted that most of the education cases that have been filed to this point have been oriented around bricks and mortar infrastructure issues.¹²⁷ While this is, perhaps, natural inasmuch as such tangible problems are not only easier for a court to grasp, with less room for dispute around adequacy standards, there is no reason in principle why this needs to be the case. This is especially the case, as noted earlier, where the claim is based on a relative, equality rights protection.
166. Moreover, a further advantage of a claim under s. 9 of the *Constitution* is that it need not seek simply equal treatment between blacks and whites but can, indeed, must go further than claiming ‘same treatment’. It must seek for Blacks not just comparable schooling with Whites but schooling which accommodates the particular needs that Black learners may have. Thus, for example, because of their comparatively greater poverty, school nutrition programs or free textbooks or uniforms may be accommodative measures required by s. 9.¹²⁸
167. A final tactical advantage of cases filed under s. 9 is that, *per* s. 9(5), once “discrimination” has been established on the basis of one or more of the prohibited grounds, it is presumed to be “unfair” within the meaning of s. 9, unless government can discharge its burden of proving that it is not unfair.¹²⁹ Moreover, this rebuttable presumption¹³⁰ applies equally forcefully in indirect discrimination cases as have been outlined here.¹³¹

Evidence

¹²⁷ The recent litigation focused on the re-hiring of 6,000 temporary teachers in the Eastern Cape is an obvious exception.

¹²⁸ The Supreme Court of Canada has held that: “... the interests of true equality may well require differentiation in treatment.” (*Andrews v. British Columbia (Attorney General)*, [1989] 1 S.C.R. 143, at p. 169 and “accommodation of differences . . . is the essence of true equality”: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 65. See also the discussion of courts accommodating the special needs experienced by students from disadvantaged backgrounds in: Poverty, Meaningful Educational Opportunity, and the Necessary Role of the Courts, Michael A. Rebell, *NORTH CAROLINA LAW REVIEW* [Vol. 85] 1467 at 1503-1505.

¹²⁹ Section 9(5) and see Woolman and Botha at Ch. 34.6 and Catherine Albertyn & Beth Goldblatt, "Overview of the Right to Equality", Ch. 35.2 of CLOSA

¹³⁰ Woolman and Botha at

¹³¹ *Walker (supra)* at para 35.

168. The evidence relied on in both equality cases could be the same since the claim under both approaches is essentially the comparative one of the black educational experience compared to that of whites. Depending on how narrowly or broadly framed the claim would be, the evidence could focus on infrastructure, textbooks, teacher quality or school nutrition—or all of them if the decision was to make a large-scale assault on what is widely seen as a two-tier and discriminatory school system.

169. As mentioned earlier, whatever issue(s) the litigation targets, statistical evidence would be required in order to demonstrate that black learners are disproportionately disadvantaged in the relevant respect. This could be, for example, comparative class sizes, teacher pupil ratios, teacher or principal qualifications, infrastructural shortcomings etc.

C. Equality Used to Interpret s. 29(1)(a): the Equality Lens

170. Apart from using the right to equality in s. 9 as a foundation for a stand-alone claim, it could be used to provide interpretive oomph to the s. 29(1)(a) claim discussed at length above. Equality read into s. 29(1)(a)¹³² would import a *relative* or comparative dimension to the otherwise *absolute* reading of s. 29(1)(a). The point here is to have the provision interpreted and applied in a manner consistent with the requirements of the equality guarantee.

171. Thus, when a court has before it a claim regarding the right to ‘a basic education’ from, say, a poor rural black community, it will be relevant to introduce evidence of the comparable levels at which the right is enjoyed at predominantly white schools. Comparing the standards which obtain at the racially different schools would not only serve to highlight the (in)adequacy aspect of the s. 29 claim but would further the mandate that all provisions of the *Bill of Rights* be interpreted in a manner that best promotes, *inter alia*, equality.¹³³

¹³² Which, of course, must happen *per* s. 39(1)(a) of the *Constitution*.

¹³³ The Supreme Court of Canada has stated that "the section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the Charter." In their concurring judgment in "*JG*", Justices L'Heureux-Dubé and McLachlin referred to the relationship between sections 15 and 7 of the *Charter*:

All *Charter* rights strengthen and support each other (see, for example, *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 326; *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 976) and s. 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7.¹³³

-and-

Thus, in considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in

172. An additional way in which an equality-consistent interpretation can work would be by way of ensuring that the needs of disadvantaged, equality-seeking groups are read into s. 29(1)(a). Thus, for students with disabilities, the interpreted scope of the right to a basic education must be one which accommodates their needs and circumstances. There should be a presumption that students with disabilities are mainstreamed in government's basic education programmes. Whether this means wheelchair ramps into schools, or having educational materials in brail, having attendants for learners who may need them, or ensuring that school feeding or early childhood development programs are available for impoverished communities¹³⁴ are all ways that the scope and content of the right are interpreted and applied in a manner that accommodates "everyone" who wants a basic education. This is an equality-consistent reading of the right; one which must be carried out in order for it to be enjoyed equally by all.¹³⁵

Section 36 and Equality Claims

173. As stated above with respect to claims based on s. 29(1)(a), successfully cases under s. 36 would, in principle, be subject to scrutiny under s. 36 of the *Constitution*. That is, government may seek to persuade the court that there are justifiable limitations that ought to be accepted on the claimants' equality rights.

174. There will be no substantive discussion of the s. 36 analysis because, once again, such discussions are inherently fact-specific.

175. Having said that, because of the requirement in s. 9 that impugned legislation or government action be shown not to just discriminate but to do so "unfairly", some commentators have argued that it will be the rare case indeed that has established unfair discrimination under s. 9 but, under s. 36, is shown to be reasonable. Woolman and Both point out that: "The unfairness assessment required by FC s 9(3) takes into account justifications for discriminatory practices

*promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.*¹³³

¹³⁴ On this point, see: "Low Quality Education as a Poverty Trap", Servaas van der Berg et al (March 2011)

¹³⁵ See the discussion above at paragraph 85 regarding reference to some of the American case law which has ordered that accommodative measures be undertaken by educational officials in order to ensure that learners from disadvantaged circumstances are able to receive a basic education.

at the same time as it requires the court to take cognizance of systemic discrimination and the impairment of the plaintiff's dignity."¹³⁶

Although the courts have been loath to state categorically that a finding of unfairness under FC s 9(3) ends the court's analysis, in not a single Constitutional Court equality judgment has the Court found that unfair conduct or an unfair law -- in terms of FC s 9(3) or FC s 9(4) -- can be justified in terms of FC s 36. The Constitutional Court often goes through the motions of FC s 36 analysis, but, as in *Kabuki theatre*, says nothing. The reason for this artifice is rather clear: the considerations that would be raised to demonstrate fairness under FC s 9(3) would be virtually identical to the considerations raised to demonstrate reasonableness and justifiability under FC s 36.¹³⁷

Equality Remedies: a Challenge

176. It has been said that a discrimination case based on the manifestly inferior public schooling experienced, by black people in South Africa is so self-evident that its 'obviousness' is only matched by the difficulty in conjuring up a viable menu of remedies. That is, while it may be comparatively easy to imagine asking a court to order comparable infrastructure as between blacks and whites, it becomes immediately more difficult to imagine the remedy that would flow after having established, for example, that black learners are, disproportionately, subject to poorer quality teachers compared to white learners.

177. Given the endemic discrimination that black learners have endured and continue to endure, it would be expected and reasonable that a supervisory remedial order would be appropriate in order to ensure the ongoing monitoring and supervision, the remediation, of the public school system that has been found to be discriminatory. Such an order would respond to the history of systemic inequality that is of such a structurally embedded nature that nothing short of ongoing judicial supervision, possibly with the assistance of stakeholders and experts, would be called for.

¹³⁶ Woolman and Botha in CLOSA, Ch. 34.5

¹³⁷ Woolman and Botha in CLOSA, Ch. 34.5. See also the comments of Justice Mokgoro in *Khosa* at para. 80. Ian Currie writes that: "Indeed, it is far from clear whether s. 36 has any meaningful application to s. 9. This is because s. 9 rights are qualified by the same or similar criteria to those used to adjudicate the legitimacy of a limitation of rights in s. 36." I Currie & J De Waal, *The Bill of Rights Handbook* (5th Edition, 2005), Ch 7.2(a)(ii) at page 238. See also, Catherine Albertyn & Beth Goldblatt, "Overview of the Right to Equality", Ch. 35.2 of CLOSA

178. In addition, given that the situation of blacks and whites is being compared, it is important to consider ways to ensure that, whatever remedy is sought or granted, the situation for white learners is not ‘leveled down’ to the inadequate standard of black learners.¹³⁸

179. This is not to say that remedies for equality violations are impossible to fashion or will necessarily intrude on the separation of powers. It is to say, however, that considerable attention will need to be given to designing remedial claims that will be both effective and judicially acceptable. A failure of remedial imagination—either on the part of counsel or the court— should not stand in the way of equal rights to education.

Other Considerations: Possible Disadvantages

180. Despite their advantages, the equality claims are not without their own possible drawbacks— legal, educational and political.

181. First, the first equality claims outlined above says nothing regarding the adequacy of the school system—for either racial group. It simply says that white people have a significantly better schooling experience than black people. In assessing such an equality-rights claim, Berger notes:

Equal education does not necessarily mean adequate education. Predominantly black schools might be “equal” to predominantly white schools, but if neither of those schools offers decent educations, then the victory is a hollow one. The Court should refer to inequalities to highlight the worst schools' inadequacies, but it should remember that merely making white and black schools equal will not necessarily satisfy the standards of section 29.¹³⁹

182. Second, politically, a relative equality claim, that is based on comparing the schooling situation of blacks with that of whites has the potential to engender racial tension. That is, a claim by blacks that they are not getting (from the schooling system) what whites are getting may lead to racial divisiveness.

Final Thought on an Equality Claim

¹³⁸ The CC has already indicated its own distaste for disingenuous responses to equality rights violations which purport to ‘solve’ the problem by removing the pre-existing benefit or advantage so that no group will enjoy it in the future: *Minister of Home Affairs and Another v. Fourie and Another* (CCT 60/04) [2005] ZACC 19 at para. 149.

¹³⁹ Berger (*supra*) at 640, fn. 146.

183. Despite the challenges attendant to an equality rights claim, it nonetheless warrants serious consideration. This is because it accurately captures the current realities of public schooling in post-apartheid South Africa. To ignore the equality dimension is to ignore not just this stark reality but the possibility of leveraging these inequalities into a successful legal claim to improve the learning experience for black students.