Procedure or Principle: The Role of Adjudication in Achieving the Right to Education

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At first glance, the three major right to education cases in the SA Constitutional Court in 2013 yielded surprising results. In *Welkom*,[1] two pregnant learners were excluded as a result of a pregnancy policy in their respective schools. The head of the provincial education department (HOD) intervened on their behalf on the grounds that policies excluding pregnant learners were unconstitutional. The schools contested the intervention. The Constitutional Court held in favour of the schools.

In *Rivonia*,[2] a learner was told that the school, in an affluent part of Johannesburg, was full, and she was placed on the waiting list. The HOD, having looked at the intake of the school and its capacity, intervened on her behalf on the grounds that the school did indeed have capacity. The school contested the intervention. Again, the Court held in favour of the school.

In *KZN Liaison Committee*,[3] the provincial government, having had its budget slashed, withdrew its promise of a subsidy to independent low fee schools in its area. Once more, the Court held in favour of the schools, to the extent that the first tranche of the subsidy, whose date had already fallen due, should be payable.

In all these cases, the Court stressed the importance of proper procedures, of consultation and co-operation, and chided the HOD. In the meanwhile, despite a protracted litigation campaign, large numbers of learners in the Eastern Cape are still in mud schools, in scandalous conditions, without furniture, toilets, or textbooks, while teachers remain unpaid or are paid by the local community. Provincial authorities ignore court orders and settlements remain unfulfilled, to the extent that litigators are forced to impound local government assets, such as official cars, in an attempt to achieve compliance. Even more broadly, despite a strongly worded and immediately realisable constitutional right to basic education, South Africa's educational outcomes are woeful, especially in relation to the budgetary allocation. Although we have achieved very high enrolment figures, and parity for girls and boys at least at primary level, outcomes measures by educational attainment are some of the worst in the world. Other indicators, including gender based violence, are equally disappointing.[4]

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[1] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25, 2014 (2) SA 228 (CC), 2013 (9) BCLR 989 (CC).

[2] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34, 2013 (6) SA 582 (CC), 2013 (12) BCLR 1365 (CC).

[3] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* [2013] ZACC 10, 2013 (4) SA 262 (CC), 2013 (6) BCLR 615 (CC).

[4] Transparency International 'Mapping Transparency, Accountability and Integrity in Primary Education in South Africa' (2011) 40, available at http://www.un.org/en/ecosoc/newfunct/pdf/luxembourg_tisda_south_africa_report_web.pdf.

The aims of this article are twofold. The first is to examine and critically assess the principles behind the Court's approach to these cases. Is the Court ultimately declaring that procedures are more important than substance, and that its primary role in this contested field is to ensure that a potentially unruly executive plays by the rules of the game? Is its view rather that its role is to facilitate and encourage democratic engagement, and that disputes are best addressed by judicial exhortation to key actors to co-operate in a spirit of partnership in the achievement of the constitutional mandate? Or can these cases be understood instead as furthering a reflexive law approach by facilitating experimentalism, under the wonderfully revealing title of polyarchic deliberative democracy?

The second aim of this paper is to examine more broadly the potential and limitations of the role a court can play in relation to a right, such as the right to education, which presents many difficult choices as to priorities of expenditure, and where rights of learners themselves may be in conflict with each other in conditions of resource scarcity or institutional capacity. Given that the Court is required to adjudicate the dispute in the form presented to it in the litigation, and given its limited capacity to consider the dispute in its broader context, is the court justifiably limiting its role to insisting that proper procedures be followed and leaving substantive outcomes to other decision-makers, provided they fall within a broad ambit of rationality? Or is it a serious abdication of its judicial responsibility to insist that the right to education is respected, protected and fulfilled for each and every individual learner? The discussion below analyses each of the three cases closely, in an attempt to address both these aims simultaneously.

I WELKOM

The decision of the narrow majority in *Welkom* is the most difficult to decode in the light of the starkness of the facts. The case concerned the exclusion of two pregnant learners from the Welkom and Harmony schools in the Free State. Both exclusions were pursuant to pregnancy policies requiring pregnant learners to remain out of school for a defined period. The policies were extremely invasive. For example, the Welkom school policy required a learner to inform a teacher as soon as she discovered she was pregnant.[5] Furthermore, if a learner suspected that another learner might be pregnant, this should be brought to the attention of a member of staff. Moreover, the effect on the learner's schooling was drastic. The Welkom policy provided that the learner was not permitted to return to school in the year her child was born. It explicitly provided that 'a matriculant who falls pregnant and delivers her baby in June will not be allowed to write the matric final exams. If a learner delivers a baby in December, she will only be allowed to return to school in the second January following the birth, i.e. if the baby is born in December 2008, the learner may only return in January 2010.' The grade of the learner was irrelevant: 'Matriculants will not enjoy preferential treatment because it is their final year at school.' The age of the learner was also irrelevant: 'which means that if the learner, after the leave of absence is too old to attend school at a secondary school level, recommendations for adult education will be made.' So far as her studies are concerned, the code stated that it would be 'the responsibility of the learner to keep up to date with the school work, and educators will assist only if they see that the said learner is doing her part.'

The Welkom code made a small gesture towards parental responsibility of the father, but one which was heavily biased against the mother. Thus the father would be given 'leave of absence of one year to assume his parental duties' but only if the pregnant learner could prove that the father of the unborn baby was attending Welkom High School. The Harmony code did not even go so far as to refer to male learners who are responsible for pregnancies.[6] In both cases, male

[5] All references to the Welkom Code are taken from *Welkom* (note 1 above) at para 176.

[6] *Welkom* (note 1 above) at para 113

learners who were responsible for pregnancies of learners not at the same school were not held accountable in any way and permitted to continue their studies.

The Welkom code ended with the declaration that 'this management policy does not suspend or expel a learner but ensures that learners take responsibility for their actions and make informed choices.' However, as Khampepe J acknowledged, although in theory they are entitled to return to school, many learners simply cannot afford to add an extra year to their studies. This effect was clearly known to the schools. Khampepe J referred to statistics from Harmony which showed that two-thirds of the learners subject to the pregnancy policies before 2010 never returned to complete their secondary-school education. [7] The Welkom code had been in effect since 2009. There is no record of how many learners had been excluded during this period.

The expulsion of pregnant learners has been an issue of growing concern among the human rights community. From her earliest report, the UN Special Rapporteur on Education, Katerina Tomasevski, consistently drew attention to the pervasiveness of the exclusion of pregnant learners from school, highlighting the practice as a breach of the right to education and non-discrimination.[8] More recently, the Committee on the Rights of the Child, noting the pervasiveness of such practices, made it clear that 'discrimination based on adolescent pregnancy, such as expulsion from schools, should be prohibited, and opportunities for continuous education should be ensured.'[9] This has also been a common refrain on the part of the CEDAW committee, which on numerous occasions has expressed concern at exclusion of pregnant learners and urged states to ensure that they are able to stay in school.[10] A particularly emphatic declaration by the Supreme Court of Colombia underlined that 'the conversion of pregnancy … into a ground for punishment violates fundamental rights to equality, privacy, free development of personality and to education.'[11] The practice has not, however, abated. According to a 2014 Report by the Centre for Reproductive Rights, mandatory pregnancy testing and expulsion of pregnant school girls continues in a number of African countries including Tanzania, Ghana, Kenya, Nigeria, Sierra Leone, Uganda and Zimbabwe.[12]

It is thus deeply disturbing to note the existence and continued endorsement of such policies in democratic South Africa.[13] There is a high prevalence of teenage pregnancy in South Africa. A

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[7] Ibid at para 114

[8] Statement by Special Rapporteur on the right to education, Commission on Human Rights, Geneva, (22 March – 30 April 1999, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2185&LangID=E; UN Commission on Human Rights *Preliminary Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomaševski* UN Doc. E/CN.4/1999/49 (1999).

[9] Committee on the Rights of the Child *General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)* UN Doc. CRC/C/GC/15 (2013) at para 56.

[10] See, e.g., CEDAW Committee *Concluding Observations: Chile* U.N. Doc. CEDAW/C/CHL/ CO/5-6 (2012) at para 29(a); CEDAW Committee *Concluding Observations: Saint Lucia* U.N. Doc. CEDAW/C/LCA/6 (2006) at para 28.

[11] *Crisanto Arcangel Martinez Martinez y Maria Eglina Suarez Robayo v Collegio Cuidad de Cali* No. T-177814 (11 November 1998), cited by K Tomasevski 'Girls' Education through a Human Rights Lens: What can be Done Differently, What Can be Made Better' (2005) 5, available at http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4349.pdf (accessed 24 Feb 2015)

[12] Centre for Reproductive Rights *Submission for Half-Day of General Discussion and Draft General Recommendation on the Right to Education* (2014), available at http://www.ohchr.org/Documents/HRBodies/CEDAW/WomensRightEducation/CenterForReproductiveRights Contribution.pdf.

[13] It appears that the two schools were not alone – the Measures for the Prevention and Management of Learner Pregnancy (Measures) issued by the National Department of Education in 2007 stated that no learner should be readmitted in the same year that they left school due to pregnancy: See *Welkom* (note 1 above) at para 154. But cf *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* GN 776 in *Government Gazette*

review of teenage pregnancy in South Africa published in 2013, found that approximately 30 per cent of teenagers report 'ever having been pregnant'.[14] Of the teenage girls who fall pregnant, only about a third remain in school and return after giving birth. For the majority of teenage girls, as the report points out, 'falling pregnant has a devastating effect on their secondary schooling with consequent negative impacts on their lives.'[15] A recent study found that in Limpopo province, 3 per cent of learners were pregnant, the highest figure among the provinces. Matlala, Nolte and Temane cite newspaper figures, which they regard as a reliable source, as showing that one school in Mpumalanga had as many as 70 pregnancies.[16]

It was in these terms that the uncle of the pregnant learner at the Welkom School wrote to the Minister of Basic Education in the Free State and pleaded for help in reinstating the learner at school. When contacted by an official in the department, the chair of the School Governing Body (SGB) defended its actions by stating that the school had not expelled the learner. Instead, it had 'interrupted the academic progress of the learner to the benefit of all concerned.' The Free State HOD then instructed the principal to allow the learner back to school. A similar chain of events and similar intransigence on the part of the Harmony SGB led to intervention by the HOD. Both schools challenged the intervention of the HOD in court. The High Court, the Supreme Court of Appeal and a majority of the Constitutional Court held in favour of the SGB. The High Court and SCA did not deal with the constitutionality of the exclusion. The Constitutional Court did so, but would only declare that the exclusion of pregnant learners was prima facie unconstitutional. Rather than declaring it unconstitutional as such, the Court ordered the SGBs to reconsider the policy in the light of the judgment and to meaningfully engage with the other parties.

Khampepe J (with whom Moseneke DCJ and Van der Westhuizen J concurred), spent the first 105 paragraphs of her opinion determining the respective powers of the HOD and school governing body, concluding that the Free State HOD acted unlawfully in purporting to usurp the schools' power to formulate policy, including pregnancy policies. The courts below were therefore correct to grant the interdictory relief restraining the HOD from interfering in the schools' policies: 'At all times the HOD was obliged by the rule of law and the carefully crafted partnership imposed by the South African Schools Act (Schools Act)[17] to adhere to the mechanisms provided for in the statute. Otherwise, he was obliged to approach a court in order to have the allegedly unconstitutional policies set aside.'[18] Although the rights of pregnant learners must be protected, promoted and fulfilled, 'this must be done lawfully.'[19] Having found that the Schools Act authorises the SGB to promulgate a pregnancy policy under its powers to formulate codes of conduct, she asked what the Schools Act empowers the HOD to do when faced with what he or she regards as policies which offend the Constitution. The answer, in her view, was that

> the Schools Act does *not* empower an HOD to act as if policies adopted by a school governing body do not exist. Rather, the Act obliges the HOD to engage in a comprehensive consultative process with the relevant governing body regarding the particular policies and then, if there are

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18900 (15 May 1998)(stated that a learner who falls pregnant should may not be prevented from attending school. *Welkom* (note 1 above) at para 158.

[14] Samantha Willan *A Review of Teenage Pregnancy in South Africa – Experiences of Schooling, and Knowledge and Access to Sexual & Reproductive Health Services* (2013), available at http://www.rmchsa.org/wp-content/uploads/2013/08/Teenage-Pregnancy-in-South-Africa-2013.pdf.

[15] Ibid.

[16] SF Matlala, AGW Nolte & MA Temane 'Secondary School Teachers' Experiences of Teaching Pregnant Learners in Limpopo Province, South Africa' (2014) 34(4) *South African Journal of Education*.

[17] Act 84 of 1996.

[18] *Welkom* (note 1 above) at para 105.

[19] Ibid at para 105.

> reasonable grounds for doing so, to take over the performance of the particular governance or policy-formulation function in terms of section 22, in order to give effect to the relevant constitutional rights and the objectives of the Schools Act. Of course, the other avenue always open to an HOD is to approach the courts for appropriate relief, for instance to obtain an urgent interdict in respect of the application of the policies or to have the policies reviewed and set aside.[20]

Only then did she turn to consider the constitutionality of the pregnancy policies. The schools had argued that the pregnancy policies were not before the court: this was wholly a dispute about the power of the HOD to interfere with the SGB. The courts below had accepted this position. Khampepe J disagreed. Citing *Ermelo*,[21] she was prepared to attempt to identify the actual underlying dispute between the parties.[22] At the same time, 'the respondent schools have declined to make submissions on the constitutionality of the pregnancy policies, asserting that the issue has not properly been placed before this Court. We are therefore ill-placed at present to make a conclusive determination on the substantive content of the policies.'[23] Thus the Court's consideration of the issue was limited to its power to grant equitable and fair remedies. Taking this path, she found only a prima facie violation of the learners' rights to equality and education. The policies expressly differentiated on grounds of pregnancy; and also on the grounds of sex, by placing more onerous conditions on the pregnant learner than on the father,[24] but this meant that there was only presumptively unfair discrimination on grounds of pregnancy and sex. Similarly, the learners' fundamental rights to basic education were 'limited'[25] rather than breached. Again the fact that the codes obliged pregnant learners to report to the school authorities when they believe they were pregnant as well as requiring other learners to report on them only prima facie violated their rights to human dignity, privacy and bodily and psychological integrity.[26] Finally, the inflexibility of the policies 'may' violate the Constitutional requirement in s 28(2) that a child's best interests are paramount.[27]

Her decision as to the remedy was also shaped by the fact that she was 'very much alive to the fact that the respondent schools have not presented argument in justification of the policies'.[28] Thus while she was prepared to grant an order in favour of the schools that the HOD acted unlawfully, she believed that since the respondents had not made submissions justifying the constitutionality of the policies, it was 'appropriate for this Court to refrain from making a declaration of invalidity' of the pregnancy policy. Instead, her approach was to order the school governing bodies to review their pregnancy policies in the light of her judgement. Despite their recent intransigence (only a few paragraphs earlier, Khampepe J rebuked the SGB for threatening to 'go to the media' when instructed to change their policy[29]), she continued to regard school governing bodies as 'a democratically constituted body representative of the interests of the school community' and therefore 'best placed to fashion policies which take into account the needs of their schools.'[30] The schools were further ordered to report back to the court on 'reasonable steps they have taken to review the pregnancy policies'.[31] Finally she

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[20] Ibid at para 72.
[21] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC).
[22] *Welkom* (note 1 above) at para 107.
[23] Ibid at para 110.
[24] Ibid at para 113.
[25] Ibid at para 114.
[26] Ibid at para 115.
[27] Ibid at para 116.
[28] Ibid at para 118.
[29] Ibid at para 120.
[30] Ibid at para 125.
[31] Ibid.

ordered meaningful engagement between the parties in order to give effect to the remedy. It was this co-operative requirement that was stressed in the concurring opinion of Froneman and Skweyiya JJ (with whom Moseneke DCJ and Van der Westhuizen J also concurred).

Whereas the main judgement dealt with the dispute over the relative powers of the SGB and the HOD as if they were unrelated to the substantive issue of the constitutionality of measures excluding pregnant learners, the dissenting judgment of Zondo J (Mogoeng CJ, Jafta J and Nkabinde J concurring) viewed the two issues as integrally related. This was not simply a case of a disagreement between two rival powers. Instead, it was a question of the whether an unconstitutional policy should be regarded as valid. From this starting point, the logic looks very different. The real questions become firstly, whether the SGB ever has power to make a policy which is inconsistent with provisions of an Act of Parliament or the Constitution; secondly, whether such a policy prevails in the absence of or pending an order of the court; and thirdly, whether the HOD has the power to instruct the principal of a school not to implement a learner pregnancy policy where this will be inconsistent with an Act or the Constitution. Looked at from this direction, as Zondo J pointed out, the main judgment, like those of the High Court and the Supreme Court of Appeal, seem to imply that until a court order or the revocation of the function of making a learner pregnancy policy is revoked, the SGB's policy prevails even if it is inconsistent with an Act or the Constitution. He took a different view: an SGB cannot make a policy which is unconstitutional; and therefore, where there is a conflict, the Constitution or statute prevails. In such a circumstance, the HOD clearly has power to instruct a school principal not to implement a policy which is inconsistent with an Act or the Constitution.[32]

Zondo J also took a different view of the constitutionality of the pregnancy policies at issue in the case. For him, there was no question of a potential justification of the exclusion of pregnant learners. This is because, under the limitation clause in s 36(1), a right can only be limited by a law of general application. A pregnancy policy was not a law, and therefore could not legitimately be relied on to justify an intrusion of the right.[33] For Zondo J, then, there was an unequivocal breach of the pregnant learners' rights. 'The exclusion of the learner from school against her will and that of her parents as a result of her pregnancy was an unjustifiable limitation of the learner's right to a basic education and, therefore, an infringement of that right.'[34] From this position, it was straightforward to determine the lawfulness of the HOD's actions. Firstly, the HOD was correct to decide that the exclusion violated her rights, and therefore he was obliged under s 7(2) of the Constitution, to protect her rights by instructing the principal to allow her back to school.[35] Moreover, the SGB, as an organ of the State, also had an obligation to respect, protect and promote the rights entrenched in the Bill of Rights. Regardless of whether it had the power to make a learner pregnancy policy, it acted in breach of its s 7(2) obligations by violating the pregnant learners' rights.[36]

How then can we make sense of the main and concurring judgments and their reluctance to authoritatively declare an unconstitutional policy to be unconstitutional? There are three themes that appear to run through these judgments. The first, most prominent in Khampepe J's judgment, is that the Court's function is not necessarily to determine the substantive issue, but to assert the rule of law and ensure it is followed. The second, endorsed in both the main and concurring judgments, is that the essence of the Court's role is to facilitate co-operation and engagement, modelling, in Moseneke DCJ's words in *Ermelo*, the spirit of democratic co-operation for learners. The third resonates with the spirit of experimentalism set out in Chuck

[32] Ibid at para 171.
[33] Ibid at para 205.
[34] Ibid at para 206.
[35] Ibid at para 207.
[36] Ibid at para 208.

Sabel's work and developed in Stuart Woolman's work. While these are all laudable aims, and might well be salient in many disputes over education, the *Welkom* case pushes them to their limits. Is there a hard edge to constitutional rights in that, regardless of who has power over what, or how a dispute is presented, a court would be abdicating its duty not to assert the violation straightforwardly? Should a respondent who chooses not to put its justification for such a violation be given the benefit of the doubt, as Khampepe J would have it, or should this simply be regarded as a failure to provide adequate justification?

A The Rule of Law

As we have seen, the main thrust of Khampepe J's judgement is her insistence that the HOD can only act within the boundaries of the powers granted to him or her by the Act, or at least, by her construction of the Act. Thus, she stated: 'The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.'[37] Where internal remedies are available, an organ of state must use them. 'The rule of law does not authorise self-help.'[38] For her, the rule of law required strict adherence to the mechanisms provided for in the statute. This procedural insistence was at least as important as the substantive protection of individual rights. Indeed, it arguably took priority over those rights. Thus she stated: 'There is no doubt that the rights of pregnant learners to freedom from unfair discrimination and to receive education must be protected, promoted and fulfilled. But this must be done lawfully.'[39]

This, however, is problematic for at least three reasons. First, it meant, as Zondo J forcefully put it, that the pregnancy code remained valid until the SGB reconsidered it or it was set aside by a court in new proceedings brought precisely for that purpose. Given that Khampepe J had left open the possibility that the schools' actions might be justified in proper proceedings, finding only that there were prima facie breaches of the rights in question, the case did not come to a definite conclusion that the SGB's actions were unlawful. This has wide ramifications, especially for the many pregnant learners who had been excluded over the years, who deserve recompense for the breach of their fundamental rights.

Secondly, it assumes an exaggerated clarity and precision about the statutory procedure. There were clearly other ways of interpreting the statutory framework. As the dissenting judgment shows, the HOD as the employer of the principal of the school clearly had the power to instruct the principal to decline to follow instructions of the SGB which were unlawful. In addition, it was clear that any exclusion or expulsion had to be referred to the HOD or the MEC to determine. The decision by the HOD to follow the route he did, rather than that suggested by the Court, seems not to be unreasonable given that the dissent regarded it as valid. Moreover, the alternative approaches which the majority decision suggests, namely taking over the power of the SGB or going to court, do not necessarily deal with the issue. Again, as the dissent pointed out, this might well leave the policy intact and valid. The majority was highly dismissive of the HOD's view that these two other options were heavy handed and extreme.[40] Yet on the basis of the statutory framework, this was certainly not an unreasonable interpretation of the range of available powers.

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[37] Ibid at para 86.

[38] Ibid at para 87.

[39] Ibid at para 105

[40] 'During oral argument counsel for the Free State HOD was questioned about his client's failure to employ the available statutory remedy in order to address the perceived problems with the pregnancy policies. In response he merely stated that reliance on section 22 would have been "too drastic" in the circumstances of this case. I fail to see how relying on section 22 would be too drastic where the Free State HOD took the view that the pregnancy policies were clearly unconstitutional.' Ibid at para 89.

Thirdly, there are rival understandings of the rule of law. Khampepe J assumes without question that rule of law should be regarded as following a specific view of the statutory procedure. However, the substantive breach by the SGB could equally be considered to be a violation of the rule of law. Khampepe J's response that this should be considered in separate proceedings ignores the fact that the SGB chose to frame the dispute in this way. Khampepe J made much of the fact that any potential justifications were not before the court and therefore only a prime facie violation could be found. But it was open to the respondents to put their justifications before the court. Their failure to do so should be regarded as conceding the point, rather than giving them the benefit of the doubt. Moreover, it is not clear that the SGBs themselves were following the statutory procedure as they should have done. Despite the fact that schools do not have the power to impose involuntary removal from school, the schools had presumably excluded pregnant learners for some years without referring them to the HOD. This too was a breach of the rule of the law on behalf of the SGB. All through the litigation, the SGBs claimed they had power to prescribe a 'leave of absence' for pregnant learners. Yet because the SGBs' actions were seen as an independent issue, the Court did not see them as justifying the HOD's actions. Instead, the latter was seen as resorting to 'self-help'. Looked at this way round, this is a very odd formulation. The HOD was responding to a valid request for assistance from the most vulnerable party in the dispute, the pregnant learner herself.

B Democracy and co-operation

The rule of law approach on its own does not, therefore, offer a good enough explanation of the majority judgment. A second way to understand the Court's position is from the standpoint of democracy. The main and concurring judgment are peppered with references to consultation, co-operative decision-making and democracy. Strong reliance is placed on *Ermelo*, where the powerfully worded judgment urged all parties to model the spirit of democracy by engaging in co-operative partnership.[41] There are several different ways in which this notion of democracy is formulated. One is a subsidiarity point: the school unit is regarded as the best place to formulate the pregnancy policy because the SGB is best acquainted with the local context. Thus, according to Khampepe J, 'no other partner in the statutory scheme for the running of public schools is empowered, or is as well-placed as a school governing body, to formulate a pregnancy policy for a particular school (at least as a matter of first instance). In other words, this is consistent with the Schools Act's objective of ensuring democratic governance within the public school system.'[42] By contrast, the Minister could only promulgate general policies, which would need to be given particular form to accommodate a school's circumstances.[43] A second formulation is to regard the SGB as 'akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education.'[44]

A third understanding of democracy is in terms of separation of powers. Khampepe J put it this way:

> [P]ublic schools are run by a partnership involving the state, parents of learners and members of the community in which the school is located. Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education services to learners. … [T]he interactions between the partners – the checks, balances and accountability

[41] *Ermelo* (note 21 above).
[42] *Welkom* (note 1 above) at para 66.
[43] Ibid at para 67
[44] Ibid at para 63.

> mechanisms – are closely regulated by the Act. Parliament has elected to legislate on this issue in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education. That detail must be respected by the Executive and the Judiciary.[45]

For Froneman J, the emphasis is on democracy as co-operation. It is central to the concurring judgement that the HoD should have resolved the dispute through consultation and co-operation. This develops the central theme in Moseneke DCJ's judgment in *Ermelo*.

All of these high-minded pronouncements make a good deal of sense as aspirations. However, their implications in the context of this case are not fully worked through. Whichever formulation of democracy is used, this approach does not address the classic democratic dilemma, namely, that the majority might override the rights of the minority, as in this case. Unless there is an external mediating body, the majority might triumph. Khampepe J states that in the partnership involving state, parents of learners and members of the local community, each partner represents a particular set of relevant interests. However, this assumes that each stakeholder represents a homogeneity of interests, and that in cases of disagreement, the majority should rule. What is not clear is who represents the pregnant learners. Clearly, parents and members of the local community had ignored their interests for some years. This reflects a more general pattern. Tomasevski, in her reports as UN Special Rapporteur on Education, observed that parents, teachers and community leaders in many regions tended to support the expulsion of pregnant girls from school, claiming that this upheld the moral norm prohibiting teenage sex.[46]

It is for this reason that the learners turned to the 'state'. This raises the question of what interests the State represents. The reference to 'self-help' suggests that the state is defending its 'own' interests at the expense of others. Yet in this case it was defending the human rights of pregnant learners, which is precisely the function of human rights in a democracy. Similarly, regarding the SGB as the school legislature gives it legitimate authority over school affairs, subject to the constitutional limits. But here too no credence is given to a conflict of interests either within the school constituency or between the school and outsiders.

The resort to subsidiarity is not a full answer either. It is true that devolving power to local decision-making has been at the centre of the transformation of education since apartheid, with the push towards new participatory structures replacing the authoritarian apartheid regime. However, as Motala and Lewis argue, 'there does not appear to be recognition that the representative democracy being promoted through SGBs is a system of competition for power and influence, that is, a decidedly political one.'[47] Most saliently, they argue that decentralisation of democratic governance could in practice deflect class, race and gender conflict from national or provincial arenas. For them the Schools Act and the National Norms and Standards for School Funding (NNSF) are 'conspicuously silent on class, race and gender conflict, but ignoring conflict will not make it go away. This ignoring of conflict extends to the inaccurate conception of representative democracy as a benign collaboration of local actors as partners rather than competitors for power.'[48] They also point to well documented evidence of lack of representativeness of SGBs in terms of race, class and gender.[49] Subsidiarity would certainly be relevant to operationalising the right to education of pregnant learners in the local context. But it should be seen as fleshing out the right, rather than determining whether it exists or not. Leaving SGBs with the potential of justifying a pregnancy exclusion policy is simply not sufficient.

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[45] Ibid at para 49.

[46] UN Commission on Human Rights *Progress Report of the Special Rapporteur on the Right to Education* E/CN.4/2000/6 (2000).

[47] S Lewis & S Motala 'Educational De/centralisation and the Quest for Equity, Democracy and Quality' in L Chisholm (ed) *Changing Class: Education and social change in post-apartheid South Africa* (2004) 121.

[48] Ibid at 126.

[49] Ibid at 127.

A similar point can be made about the duty of consultation. The consultative process looks like deliberative democracy. However, the weakness of consultation is evident from the facts of the case. There was certainly some attempt at consultation, but the SGB in both cases was intransigent. Even the act of resisting the HOD's intervention on the grounds that it was outside of his powers is a symptom of the breakdown of the co-operative spirit. Clearly, cases that get as far as the Constitutional Court are cases where co-operation has broken down. Does an exhortation to a co-operative spirit sufficiently protect the rights of the most vulnerable, who had no voice in the initial decision? It could also be asked what the consultation was to be about. If the Court had laid down that the right had been breached, it is possible that consultation would be used to determine the means to fulfil the right. But given that the Court left open the possibility of a justification being offered by the SGB, was the function of consultation and constructive engagement aimed at reaching some compromise on the right? The school had already offered the explanation that none of the staff was trained to deal with childbirth or complications of advanced pregnancy. Would this have been an adequate justification for an exclusion which extended well after the birth of the child? The reliance on consultation makes it seem as if the outcome of the deliberation is open-ended. In the meanwhile, as the dissent points out, the policy seems to remain valid until the conclusion of the consultations.[50]

It is quite possible to take an alternative but equally democratic view. The provincial and national legislatures surely have just as much legitimacy as the SGB from a democratic perspective, and the subsidiarity principle does not work where wider interests than those of the school are at issue. Moreover, the HOD (and the school) are charged by the Constitution to respect, protect and promote the rights of all. Khampepe J added an important gloss to the HOD's powers under s 7(2), stating that they had to be exercised according to the statute, whereas the dissenting judgment made it clear that all organs of state have Constitutional duties to protect. Moreover, it seems that the internal democracy within the school was not properly exercised. The majority make no mention of the point, stressed by Zondo J, that despite the requirement in s 8(1) of the Schools Act that a code be adopted 'after consultation with the learners, parents and educators of the school', such consultation seemed never to have happened.[51]

C EXPERIMENTALISM

A third way of understanding the majority decision is based on the insights of 'experimentalism', as described by Sabel and others and extrapolated for the South African system by Stuart Woolman. On this view, compliance with human rights obligations in complex social issues necessitates problem-solving and continuing review by actors themselves.[52] For this reason, traditional models of legal enforcement based on formal legal rules are inevitably unsuccessful because of the impossibility of devising appropriate and dynamic solutions for the wide diversity of units required to take steps to achieve human rights goals. This points to the importance of devolved decision-making. Attempts to specify solutions from above are said to stifle local initiative and forfeit the cooperation of local actors. Instead, this approach argues, the heterogeneity of organizations subject to the duties should both be recognized and cultivated in order to find creative and dynamic methods of problem solving.

Viewing the issue in this light opens up the potential to incorporate principles of deliberative democracy into local decision-making. This points us towards the solutions proposed under the label of Directly Deliberative Polyarchy (DDP).[53] DDP recognizes the limits of legal regulation

[50] Welkom (note 1 above) at para 239.

[51] Ibid at para 231.

[52] This section draws from S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008)

[53] J Cohen & C Sabel 'Directly-Deliberative Polyarchy' (1997) 3 *European Law Journal* 313.

but also rejects the view that free enterprise within the market is the only alternative. The aim is to find a democratic solution to the need for creative problem-solving both within and between units. This approach is particularly aimed at situations in which there are too many sites to monitor through centralized compliance mechanisms; or where the diversity of sites means that different means are appropriate in each case. It also aims to address situations in which the complexity of the problem to be solved requires continuous review and reflection, and where cooperation between units is necessary to achieve the desired outcome.[54]

DDP harnesses the energy and knowledge of local actors by granting them autonomy to experiment with solutions of their own devising within broadly defined areas of public policy.[55] The focus is on finding ways to stimulate problem solving, encouraging organizations to identify ways in which to carry out their duties which are most appropriate to their own context. Instead of insisting on specific actions, the thrust of the compliance mechanism would be to facilitate deliberative procedures, whereby the decision-makers in an organization are able to work out the appropriate response. Deliberation is more than discussion or consultation; it aims to achieve a problem-solving dynamic where participants are ready constantly to review and revise their conclusions in the light of their exposure to their own and others' experience and perspectives. This in turn generates a greater likelihood that local norms will be developed which will be real and effective. This operates within a regulatory framework in which the role of legislation is to set general goals and to facilitate deliberation; the role of the administrative bodies is to provide the infrastructure for the exchange of information; and the role of the courts is to require decision-making to proceed in a deliberative way.[56]

This approach looks promising in many respects. However, there are at least three sources of tension. The first is that, in the context of human rights, deliberation or experimentalism is not open-ended in terms of the goals to be secured. Because it is based in a human right, it is targeted at securing the exercise of the right. Secondly, deliberation must lead to action. This puts particular weight on the ability of deliberative structures to reach decisions. As Black points out, it is by no means inevitable that deliberation will lead to conclusions. Thirdly, close attention needs to be paid to the participants in the process. Internal power structures mean that potential participants do not have equal power so that the ways in which participants to deliberation are identified is crucial. This manifests itself too in the nature of the communication process itself. While Habermas assumes that language is an unambiguous medium of communication, Young shows that this conceals a particular view of rationality, which privileges speech that is formal and general, and values assertive and definitive approaches rather than that which is tentative or exploratory. This in turn can operate as a form of power, silencing or devaluing the speech of those who do not engage on these terms.[57] As Black concludes:

> We have to recognise the possibility of forms of communication that do not correspond to the ideal of communication that Habermas posits, in which there may not be orientation to mutual understanding, to public reason, and a commitment to take on obligations arising from the interaction … We have to allow for manipulation by communicants, for insincerity, for lack of trust and belief in the others' motives, or quite simply for the fact that people may not be interested in communicating at all.[58]

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[54] Ibid at 321, 334.

[55] O Gerstenberg & C Sabel 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in Christian Joerges & Renaud Dehousse (eds) *Good Governance in Europe's Integrated Market* (2002) 291.

[56] Cohen and Sabel (note 53 above) at 334–335.

[57] I Young 'Communication and the Other: Beyond Deliberative Democracy' in S Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 127–128; I Young 'Justice and Communicative Democracy' in R Gottlieb (ed) *Radical Philosophy: Tradition, Counter-Tradition, Politics* (1993) 130.

[58] J Black 'Proceduralising Regulation, Part II' (2001) 21 *Oxford Journal of Legal Studies* 33, 47.

It is therefore necessary to find the right balance between external imposition of the goal to be achieved and local autonomy as to how to achieve the goal. Effective monitoring of the priorities set by local decision-makers is necessary to prevent the process becoming one of pure discretion. But at the same time, deliberation should not be stifled by tying deliberators to particular outcomes. This is further complicated by the permeability of means and ends. The interpretation of the means to achieving the right bears closely on the meaning of the right itself, so that while the right anchors deliberation, deliberation also shapes the right and the consequent duty. Similarly, the duty requires action, but action must continually be deliberatively reviewed to better achieve the right. Finally, deliberation requires equality among participants, both in their presence and their ability to present their perspective and this is a key aspect of deliberative democracy.

This discussion suggests that, in designing compliance mechanisms, it is necessary not only to understand the conditions under which a deliberative process takes place but also to affirmatively create them.[59] Unless the usual ways of reacting within the organisation are altered, it is unlikely that compliance will be achieved. Decision-making within organizations is not necessarily deliberative or democratic; in fact, it is more often autocratic or bureaucratic. Therefore, regulation should be fashioned in a way which reflexively leads to an alteration in internal structures, creating the conditions for deliberation among relevant actors, so that they can reach a mutual understanding of the goal to be reached, and the most effective means of reaching it. In particular, participants must be willing to revise their initial perceptions in the light of the discussion. There also needs to be a regular process of review, where further deliberation takes place in the light of experience of the workings of any given solution, with a crucial role being played by the differing perceptions of various participants. Experience has shown that this does not happen without some external triggers, in the form of incentives or sanctions. Attempts at voluntary codes have proved that, while some organizations may readily respond, others will simply ignore attempts at change which have no ultimate sanction or incentive.[60] The challenge is to find a way to establish a relationship between internal deliberation and external incentive or deterrent structures, while at the same time being responsive to different organizational dynamics.

Black explores further ways in which deliberative structures might be harnessed to achieve compliance. To enlist deliberation, which can lead to action in respect of positive duties, might require active mediation by a regulator which has the ability to overcome some of the obstacles identified above. The difficulties of communication even between participants in the same system require a regulator who is capable of translating the different languages used by participants in a way which all can understand. This is more difficult than it seems, because the blockage is not simply one of using different words as signifiers of the same concept, but of the different logical and motivational underpinnings of the discourse. For example, it is necessary to recognize non-rational forms of communication, such as storytelling and rhetoric together with 'rational' approaches. Even more important, as Black argues, if translation is to facilitate the inclusion of all those who want to deliberate, it cannot be a translation into one dominant language. Instead, it must be multiple, from the language of each to that of the others.[61] The influence of the regulator's own frame of reference and 'language' should not be ignored.

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[59] O de Schutter & S Deakin 'Reflexive Governance and the Dilemmas of Social Regulation' in O de Schutter & S Deakin (eds) *Social Rights and Market Forces: is the Open Coordination of Employment and Social Policies the Future of Social Europe* (2005) 3.

[60] B Hepple, M Coussey & T Choudhury *Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (2000).

[61] Black (note 58 above) at 51.

Stuart Woolman has argued that the experimental approach is the best explanation of the SA Schools Act.[62] Certainly, there is much in the majority and concurring judgments which suggests that the Court is interested in facilitating experimentalism at local level. However, the extent to which this approach can address hard edged breaches of constitutional rights is questionable. By ordering meaningful engagement, and directing the respondent schools to reconsider the exclusion in the light of the judgment, the majority gives the impression that the issue is still open ended and open for negotiation. Indeed, it clearly indicates that there could be possible justifications for the exclusions. While of course, as Khampepe J states, there could be many different ways of accommodating pregnant learners, and the school may be best equipped to determine how to do so, such experimentalism should not extend to exclusion of pregnant learners in any shape or form. This is a clear example of an organization which remains hierarchically organized. Pregnant learners as well as those who might become pregnant, have no effective voice in the deliberation. The only body in the mix which was prepared to speak for the pregnant learners, namely the HOD, was rebuked for doing so. This is precisely when the role of human rights comes into its own: to insist on protection of rights when the deliberative process does not do so. In this context, therefore, the failure of the majority of the court to clearly assert that the learners' rights had been breached, and that part of the policy was therefore void, was an abdication of its role.

This is not to say that experimentalism does not have a role to play once it is clear that pregnant learners have a right to remain at school. The duty not to interfere with the pregnant learners' rights to remain at school comes hand in hand with a positive duty to facilitate and fulfil that right by finding ways of catering for their needs. There are obvious challenges in relation to managing the health needs of the pregnant learner, and many educators are understandably anxious about having to play a role for which they have no training. A study in 2010 found that some teachers were unwilling to permit pregnant learners to remain in school, echoing the concerns expressed in *Welkom* that schools were not meant for pregnant learners and were not equipped to deal with their needs. Other schools simply ignored pregnant learners, making no attempt to cater for their needs.[63] There have been cases reported in local newspapers of pregnant learners giving birth on secondary school premises without the assistance of a skilled birth attendant. It is here that a duty of close co-operation between SGBs, educators and the Departmental HOD is essential to formulate workable solution which can also be owned by the school. Studies have shown that the provision of skilled birth assistants is an affordable intervention which can reduce maternal mortality and morbidity dramatically.

The inadequacy of health care for pregnant learners at school is not, however, the only reason given by educators for the reluctance to retain pregnant learners at school. Studies have also found that some educators perceive pregnant learners to be a disturbance of the learning environment,[64] and this is backed up by Ngabazi and Shefer's research in 2013 showing that schools are intolerant of pregnant learners.[65] Some educators' negative attitude towards pregnant learners has even led them to mistreat these learners until they dropped out of school.[66] There is well established evidence that teenage pregnancy is considered morally wrong and stigmatised in

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[62] S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 353.

[63] N Mpanza & D Nzima 'Attitudes of Educators towards Teenage Pregnancy' (2010) 5 *Procedia Social and Behavioural Sciences* 431.

[64] D Bhana et al 'South African Teachers' Responses to Teenage Pregnancy and Teenage Mothers in Schools' (2010) 12 *Culture, Health and Sexuality: An International Journal for Research, Intervention and Care* 871.

[65] S Ngabaza & T Shefer 'Policy Commitments vs. Lived Realities of Young Pregnant Women and Mothers in School, Western Cape, South Africa' (2013) 21 *Reproductive Health Matters* 106.

[66] Mpanza & Nzima (note 63 above).

South Africa.[67] One serious implication is that learners do not disclose their pregnancies to teachers, if they can help it.[68] The most recent study, carried out by Matlala et al, which examined teachers' experience of pregnant learners in three township schools in Limpopo province, found that pregnant learners' attempts to hide their pregnancies made it difficult for teachers to discern pregnancy, and that once they did become aware, some teachers found it difficult to accept the pregnant learners in school.[69] There were some teachers who felt strongly that learners should be held accountable for their actions, for example through suspension from school. It is for this reason that, even from an experimentalist's perspective, *Welkom* should have contained a strong statement from the Court that the right to remain at school is fundamental, and the role of the relevant actors is to find ways of making this happen.

II RIVONIA

The *Rivonia* case is more complex, since it touches directly on how to achieve equity in resource allocation in the education field, particularly in relation to the quality of education. Mhlantla AJ, giving the lead judgment, began by noting the continuing disparities in accessing resources and quality education, which perpetuate socio-economic disadvantage, thereby reinforcing and entrenching historical inequity. 'The question we face as a society,' she went on 'is not whether, but how, to address this problem of uneven access to education. There are various stakeholders, a diversity of interests and competing visions. Tensions are inevitable. But disagreement is not a bad thing. It is how we manage those competing interests and the spectrum of views that is pivotal to developing a way forward.'[70]

Nevertheless, here too, the dispute was presented as centrally concerned with the allocation of powers as between the SGB and the provincial education department. In this case, the learner was told that the school was full and she was placed on a waiting list. The learner's parent, having had several interactions with the school, then appealed to the HOD. Due to various administrative delays, the school year had already begun when the HOD turned his attention to the matter. He found that the school policy was to admit 120 learners to five Grade One classes, although in this case it had admitted 124. This meant that there were 25 or 24 learners per Grade One class. He took the view that there was therefore capacity to admit the learner in question and purported to overturn the school's decision to refuse the learner admission and instructed the school to admit her immediately. However, when the mother arrived at school with the learner in full school uniform, the principal refused to admit her. The next day, the Gauteng HOD purported to withdraw the principal's admission function and the Department's representatives physically placed the learner in one of the school's Grade One classrooms, seating her at an empty desk that had been installed for a learner with attention and learning difficulties.

The SGB took the dispute to court, arguing it had the sole power to determine the school's maximum capacity.[71] The High Court rejected the claim, holding the power to determine the maximum capacity of a public school in Gauteng vested in the Department. The Department was empowered to intervene where necessary to ensure that children threatened with being

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[67] S James, D VanRooyen & J Strümpher 'Experiences of Teenage Pregnancy among Xhosa Families' (2011) 28 *Midwifery* 190.

[68] Ngabaza & Shefer (note 65 above).

[69] S Matlala, A Nolte & M Temane 'Secondary School Teachers' Experiences of Teaching Pregnant Learners in Limpopo Province, South Africa' (2014) 34 *South African Journal of Education* 1, 5.

[70] *Rivonia* (note 2 above) at para 2.

[71] Ibid at para 17.

deprived of access to schooling may be accommodated. On the facts of the present case, the Court was satisfied that the Department had acted fairly and reasonably.[72] The SCA reversed this decision, holding that the SGB, having the power of admission, necessarily includes the power to determine the capacity of the school and any powers of the HOD must be exercised in accordance with the school's admissions policy. Indeed, it went even further and held that the Department could not have the power to use the additional capacity at Rivonia Primary, because that capacity had been created through additional funds raised by the Rivonia Governing Body. 'It would be a disincentive for parents to contribute to school funds if the increased capacity created by these funds could be used to accommodate more learners than the Rivonia Governing Body wanted to admit.'[73] It declared that the instruction given to the principal to admit the learner, contrary to the school's admission policy, was unlawful, as was the placing of the learner in the school.

The Constitutional Court, by a majority, rejected the HOD's appeal, although on different grounds from that of the SCA. In her judgment for the majority, Mhlantla AJ (Moseneke DCJ, Bosielo AJ, Froneman J, Khampepe J, Nkabinde J and Skweyiya J concurring) reinstated the role of the Department, reflecting the clear statutory scheme giving the latter ultimate control over the implementation of admissions decisions.[74] This made it untenable to regard the Gauteng HOD as rigidly bound by a school's admission policy, which could only serve as a guide to decision-making.[75] However, although the Gauteng HOD was lawfully empowered to admit learners to Rivonia primary, the HOD had breached the requirement to act in a procedurally fair manner. The principal should have been consulted and given another opportunity to explain her refusal to admit the learner. Although she had previously been asked to give her reasons for refusing to admit the learner, the facts had changed in the intervening three months. The court therefore declared, firstly, that the Gauteng HOD was empowered to issue an instruction to the principal of Rivonia Primary School to admit the learner in excess of the limit in its admission policy. Secondly, however, the HOD must act in a procedurally fair manner. Thirdly, in this case he did not act in a procedurally fair manner. (The school had agreed to allow the learner to remain, so this question no longer arose.)

How then can we understand this case? Here again, we see the court addressing the issue on the basis of procedure rather than substance. The underlying substantive issues are, to be fair, extremely complex. The end of apartheid brought with it the enormous challenge of achieving equity in a school system which had been racially stratified, with dramatically inferior resources allocated to education for the black majority as compared with their white counterparts. In abolishing racially divided schooling, and making education compulsory for the first time for South African Africans, the newly elected government nevertheless made the decision to depart from the principle that that education should be free. This was despite the fact that free compulsory education is enshrined in international human rights law and had been the ANC's own declared policy during the final years of apartheid. Instead, the State made it clear from the start that it could provide the basic minimum, but anything beyond was the responsibility of parents.[76] The result was an explicit decision to encourage public schools to supplement funds provided by the State with school fees,[77] with fee waivers for those who could not afford to pay. This was partly due to the limited availability of funds, and the desire to decentralise. But the

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[72] Ibid at para 18.

[73] Ibid at para 25. See *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* [2012] ZASCA 194, 2013 (1) SA 632 (SCA), [2013] 1 All SA 633 (SCA) at para 49.

[74] *Rivonia* (note 2 above) at para 52.

[75] Ibid at paras 52-7.

[76] Lewis & Motala (note 47 above) at 118.

[77] E Fiske & H Ladd 'Balancing Public and Private Resources for Basic Education: Shool Fees in Post-apartheid South Africa' in Chisholm (note 47 above) 57.

primary reason was to deter white flight to private schools by maintaining the standards of previously white Model C schools. The Schools Act requires the SGB to 'take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school'.[78] This is largely done by setting school fees. Once the SGB has approved a fee, all parents must pay. Parents may, however, apply for a full or partial exemption based on income and verified through means testing. Automatic exemptions apply to orphans and abandoned children as well as to parents receiving a poverty-linked state social grant. A school may not deny a learner admission because of their parents' failure to pay fees. However, parents can be sued by the SGB for non-payment.

This inevitably leads to inequalities between schools. Schools with higher numbers of non-fee paying learners will fare worse than schools whose parents able to supplement the school's budget. Moreover, there are substantial variations in fee levels as between schools. Schools serving more affluent communities are able to set higher fees and thereby protect and enhance their position. This is borne out by Fiske and Ladd's research. They show that, unlike other developing countries, fees have not deterred learners from attending school. However, because fees vary between schools, class has begun to replace race in determining access to the formerly white schools. Even more seriously, they conclude: 'Fees have reinforced the advantages enjoyed by the formerly white schools without at the same time increasing the resources available to schools serving historically disadvantaged students.'[79] Similarly, Motala and Sayed describe the South African public schooling system as 'characterised by a vast number of distinctly disadvantaged schools and a small pocket of highly privileged schools.'[80] This difficulty is exacerbated by the fact that fee exemptions for poor learners in non-poor schools are not compensated by extra resources for the school. Not only does this provide an incentive for SGBs to find ways to exclude poor learners; it also raises the difficult question of whether it is fair for some parents to subsidise poor learners in fee paying schools, when this is arguably the function of the State.[81] Fiske and Ladd show that although schools have to be careful not to discriminate unlawfully against students eligible for fee exemptions, 'there is little doubt that many schools consider a family's likely ability to pay their fees when making admissions policies.'[82]

Partly because of the recognition that a two tier education system had developed in South Africa, with disadvantaged schools remaining almost entirely black, government policy was changed to designate the most disadvantaged schools as no fee schools.[83] From 2007, the schools in the lowest two quintiles were given the opportunity to apply to the Provincial Education Department to be declared 'no fee' school. Because of concerns that the schools located in the middle of the table, or third quintile schools, might be squeezed through lack of fees and lack of public subsidy, provincial education departments have more recently provided schools in this category with the opportunity to be declared 'no fee schools.'[84] No fee schools receive larger state allocations per learner, and a higher allocation for non-personnel, non-capital expenditure to compensate for lack of fee revenue. In other schools, parents may continue to apply for exemptions from fees.

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[78] Schools Act s 36(1).

[79] Fiske & Ladd (note 77 above) at 57-8.

[80] S Motala & Y Sayed "No Fee' Schools in South Africa' (August 2009) 7 *Consortium for Research on Education, Access, Transitions and Equity (Create) Policy Brief* 2.

[81] Ibid. See also Fiske & Ladd (note 77 above).

[82] Fiske & Ladd (note 77 above) at 72.

[83] Education Laws Amendment Act 2005; 2006 National Norms and Standards

[84] R Mestry & R Ndhlovu 'The implications of the National Norms and Standards for School Funding Policy on Equity in South African Public Schools' (2014) 34 S*outh African Journal of Education* 1, 3.

While the no-fee policy has been welcomed as a pro-poor intervention, it remains the case that public schools which can bring in high levels of private income through fees attract better qualified teachers, have smaller class sizes and can offer better infrastructural resources.[85] In their 2014 quantitative study, Mestry and Ndhlovu found that although the state was making concerted efforts to achieve equity in public schooling, the policy of increasing funds for no fee schools in quintiles 1, 2 and 3 and reducing funding for quintile 4 and 5 schools has not led to the improvement of educational outcomes and learner achievement, especially for rural, poor and illiterate children.[86] They argue that the reduction of state funding in affluent schools has been more than compensated for through school fees and other fundraising initiatives. This is borne out by the study by Transparency International, which found that, despite the laudable aims behind the no fee schools policies, 40 per cent of educator respondents in their study believed that learners in no fee schools received a lower quality of education than students in other types of school.[87] Nor is the quintile system an accurate reflection of the student body. They found that some schools may be ranked as quintile 5 and receive the lowest level of funding because they are situated in an affluent area but in fact cater mainly for poor learners from outside its feeder area. Such schools are 'in a diabolical situation: They raise school fees and then adopt a hard-line approach to granting exemptions to learners who have difficulty in paying these exorbitant fees.'[88] Thus, they conclude, despite the emphasis on redress and equity, the school funding provisions 'appear to have worked thus far to the advantage of public schools patronized by middle-class and wealthy parents of all racial groups.'[89]

Faced with such complex polycentric issues, what should the role of a court be? Should it be confined to procedural issues, such as insisting on the rule of law, facilitating local democracy and encouraging experimentalism, thereby devolving the decision as to substance to another decision-maker? Or should the court make the substantive decision itself? In *Rivonia*, as in *Welkom*, the procedural route was followed.

A RULE OF LAW

The strongest theme in *Rivonia* is, again, the rule of law. As in *Welkom*, the dispute was presented to the court as primarily about the division of powers between the province and the SGB. This meant that the Court could focus on the statutory allocation of roles and procedures, turning the challenge into a rule of law issue. The overriding emphasis on procedural fairness takes the rule of law approach even further. There was an understandable concern to make it clear that the inappropriate behaviour of officials of the HOD in physically placing the learner in the classroom could not be condoned. Behind this too was a strong sense that the HOD should not be permitted to abuse his powers by helping friends and allies jump the queue to gain a place at a sought-after school in Johannesburg.

However, the focus on the failure to consult leaves the matter painfully in limbo. If the principal had been given a further right to be heard, what would she have legitimately added to the debate? There is no indication of which reasons should be acceptable to the HOD and which should not. Thus, had the HOD asked the principal for a further explanation, she would probably have repeated the view adopted by the SCA; the extra capacity in the school belonged to the parents who had raised the funds for it, rather than to the HOD to distribute among other

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[85] Motala & Sayed (note 80 above).

[86] Mestry & Ndhlovu (note 84 above).

[87] H Døssing, L Mokeki & M Weideman 'Mapping Transparency, Accountability and Integrity in Primary Education in South Africa' (2011) 41.

[88] Mestry and Ndhlovu (note 84 above).

[89] Ibid at 2.

learners. Would this have been a good enough reason? The SCA thought it was. The Constitutional Court gave no guidance on this. Similarly, the principal and SGB might have repeated their view that the HOD should make provision for other learners by building more schools, rather than by placing the cost of provision on themselves. They preferred to keep their privileged position as insiders to themselves. The HOD might have retorted that schools in the privileged position of Rivonia should share their bounty, at least up to a maximum class size of 26 in this case. Was the HOD's position more acceptable than that of the school? The Court did not begin to deal with these issues. Indeed, it gives no credence to the very fundamental conflict of interests at the heart of the dispute: that the SGB will inevitably give the interests of 'insiders' priority over 'outsiders' and that unless there are extra resources, giving to some might take away from others. Thus a mere duty to give a hearing to the other side simply resurrects the underlying conflict. Moreover, given that the HOD had ultimate power to make the decision, the failure to give any guidance on the outcome of the consultation inevitably defaults back to the discretion of the HOD. A duty of consultation as a mere rule of law exhortation does not seem to bear the weight the court placed on it.

B DEMOCRACY

The explanation from democracy might bear more fruit. Here the duty to consult is not simply in order to follow the procedure laid down in the statute, but to elicit greater participation and meaningful engagement between the State and individuals or other bodies. But here again, it is hard to see how mere exhortation by the Court, without any substantive guidance, will lead to a meaningful engagement when there is a fundamental conflict of interests. The dissenting judgment charts some of the acrimony between the SGB and the HOD over the admission of the learner. ('Request: Rivonia Primary provide Mrs. Cele with a reviewed number. Reply: Our instructions are that the request to review the received waiting list number was rejected with the contempt it deserves. . . . Rivonia Primary and [its governing body], will not be part of any underhand activities.')[90] The parties would not have landed up in court if they had been willing to be co-operative. To trigger further engagement, some extra affirmation by the Court of the substantive principles at stake is required.

The case also casts doubt on the utility of using local democracy to deal with issues such as this. The SGB, by definition, is accountable to its parent body and local community and will therefore make decisions to further their interests. Learners who are not admitted to the school do not have a voice in this process. The natural tendency of the SGB is to favour the 'ins' and resist attempts to incorporate the 'outs'. This is to some extent countered by the statutory allocation of responsibility for systemic issues to the provincial government. Thus the HOD has the duty under the statute to ensure that all learners have a place at school by establishing a sufficient number of schools. The HOD also has power to intervene on behalf of any individual learner. However, while every learner has a right to a place at some school, there is no provision made for equity in the quality of education. Quality is therefore dealt with by each individual school according to its available resources. So far as quality of education is concerned, therefore, the democratic process is structured in such a way as to favour the privileged. The court in *Ermelo* attempted to counter this tendency by emphasizing that, while it was primarily the responsibility of the SGB to be concerned with the interests of the school, the needs and interests of all other learners could not be ignored. 'The governing body of a public school must . . . recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the broader community in which the school is located, and in the light of the values of our

[90] *Rivonia* (note 2 above) at para 115.

Constitution.'[91] The *Rivonia* decision, however, fails to give any substantive guidance on the principles by which to ensure the interests of outsiders are also considered. If the Court cannot give clearer guidance to the decision-makers about the overall values or the issues to be considered, who can?

C *EXPERIMENTALISM*

The third possibility canvassed in this paper is that the Court's role is to facilitate an experimental approach. Woolman argues that there has been a healthy experimentalism between national government, provinces and SGBs in the education field. He gives as an example the fee-free regime. Having seen that fees did not improve quality of schools, but constituted a major impediment to some learners, the regime was changed. As he puts it:

> Reformation of the schools fee regime is a good example of a halfway decent compromise. National government was under substantial public pressure (from NGOs) to eliminate fees entirely. The provinces – without independent sources of raising revenue – asked how they were going to make up for the significant shortfall. (Many provincial departments of education and SGBs were on the same page on this issue.) The result, after much discussion between these three entities, was an agreement that only the poorest three quintiles of schools became fee free.[92]

The difficulty with experimentalism in this case is that the focus of each party on a particular set of interests might prevent more imaginative solutions from presenting themselves. This is aggravated by the lack of capacity to think through such solutions. Experimentalism, as we have seen, requires an alteration in the usual ways of reacting within the system. This is especially the case where, as here, decision-making may leave out the very people affected by the decision (the outsiders) and where the participants are not willing to revise their initial perceptions in light of the discussion. As argued above, significant investment in the process of experimental deliberation might be required to make it really work. This might include introducing a facilitator who is capable of understanding the blockages and translating each party's position to the other. There also has to be some change in the external environment which is entrenching the conflict. In *Rivonia*, the amicus made the valuable suggestion that if the HOD wished to place more learners at the school, it should provide funding to cover their costs. This of course has been central to the problem all through, namely that no funding is forthcoming from either the province or the national government to compensate for no-fee pupils.[93] Unless there is some structural change, possibly in the form of different budgetary allocations, the parties might well be stuck within their existing frame of reference. The possibility of free compulsory education, where school fees are funded by taxation, could not be a solution available to local experimentalism without significant policy input from national government. Yet, as we have seen, it is the foundational principle of the right to education.

These points become even more salient when seen in the context of the wider picture that emerges from research on the functioning of local democracy in the education system. Lewis and Motala argue that decentralisation had three goals, namely improved equity, greater democracy and better quality of education. In attempting to achieve these goals, however, the emphasis of policy and research has been on the implementation of formal rules and roles rather than substance.[94] Examining the substance rather than the form demonstrated, in their view, that

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[91] *Ermelo* (note 21 above) at para 65.

[92] Woolman (note 62 above) at 353.

[93] It is not clear that in this case, the learner would have been fee exempt in any event.

[94] Lewis & Motala (note 47 above) at 115.

none of these goals has been met, except in resource-rich contexts.[95] In particular, the dominance of the fund-raising function of SGBs builds conflict into the system, both over non-payment of fees by parents believed to be able to afford to pay, and over exemptions. 'In a situation in which a parent representative's success is measured by the ability to raise funds and balance the budget, there is little incentive to promote fee exemptions.'[96]

More recent research by Transparency International casts further doubt on the ability of SGBs to carry the burden of experimentalism, except in resource-rich contexts, as in the case of *Rivonia*. Unless all schools are able to command resources to maintain quality, there will inevitably be competition for places at the better quality schools. Yet Transparency International found that only a third of SGBs interviewed indicated that their members attend regularly. There was considerable variation in the level of knowledge of and respect for rules by SGBs. School fee exemption was an area of particular concern. One of three of the SGB members interviewed considered that the rules were not known; and as many as one of four took the view that the rules were not respected. This was true too for educators: up to half of the educators interviewed believed that the rules relating to fee exemption were not known and respected.[97] Of even greater concern is the finding that only one of two parents believed that the rules for SGB elections and of the roles and responsibility of SGBs were well known and respected. Clearly, issues such as parental language, socio-economic status, education and access to information affect their level and quality of participation. Most importantly, the study notes that 'generally parents, particularly those who are poor and illiterate, lack the skills to successfully engage in decision-making processes relating to school finances and other school planning mechanisms.'[98] They conclude that there are high governance risks in the relations between schools and users.

There is no doubt that the proper role of a court in these cases is challenging. Once a dispute is presented to a court, it needs to respond. Moreover, it is limited by the parties' decision as to how to present the dispute. Here, however, by taking such a strongly procedural position without clear guidelines as to substance, the *Rivonia* Court simply kicked the ball back into play without giving enough guidance as to how the parties should move forward. As in *Welkom*, the role of human rights in this context is to provide a framework of substantive principles, which local democracy can operationalise. The fact that a dispute gets to court indicates that the deep conflicts within the local democratic system created by the statute have surfaced in a way which cannot be resolved without external guidance. It is the responsibility of the Court to provide that guidance by creating a framework of substantive principles to facilitate resolution of such conflicts.

What then should that framework be? Mhlantla AJ rightly reinstated the role of the Department.[99] She also rightly stressed that a decision to depart from a school's admission policy must be exercised reasonably and in a procedurally fair manner.[100] In support, she cited O'Regan J's powerful articulation in *Premier Mpumalanga* of the

> interaction between two constitutional imperatives … the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination …and the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the

[95] Ibid at 116.
[96] Ibid at 128.
[97] Døssing, Mokeki & Weideman (note 87 above) at 33.
[98] Ibid at 38.
[99] *Rivonia* (note 2 above) at paras 52-7.
[100] Ibid at para 58.

first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness.[101]

However, although she dealt with the issue of procedural fairness, the substantive question of a reasonable exercise of power was not revisited. While acknowledging the clear value of co-operation in dealing with complex systemic issues, by itself it did not provide the substantive principles behind that co-operation.

This is not to say that the Court itself should have determined the appropriate distribution of capacity among schools. The Court noted with regret the fact that the State had failed to promulgate national norms and standards in relation to class sizes,[102] thus making it difficult to determine the substantive principles by which to determine the case. Since the judgment, the government has promulgated the National Norms and Standards for School Infrastructure.[103] These provide a maximum class size of 40 learners, with a maximum of 30 for Grade R.[104] Equal Education, among others, has criticised this number as being too high to ensure quality of schooling for learners, and it is certainly far higher than the average class size of OECD countries.[105] The dispute in this case was, however, about minimum rather than maximum class size, and particularly the right of better resourced schools to keep class sizes low by employing more teachers out of SGB funds.

The Court has resolutely set its face against prescribing a minimum core to the socio-economic rights in the Constitution,[106] and in any event, given the contentiousness of this issue, and its broad ramifications for school budgeting, it is difficult to argue that the Court should enter into the fray and set an appropriate class size. Nevertheless, it could have signalled more strongly its rejection of the SCA's notion that requiring well-resourced schools to increase their capacity would be a disincentive to parents to raise funding. As the amicus pointed out, to the extent that relatively well-resourced schools may perceive themselves to be carrying an unfair burden, this should be considered to be a burden that the Constitution requires. This flows directly from the concurring judgment of Sachs J in *Van Heerden* when he said: 'Though some members of the advantaged group may be called upon to bear a larger portion of the burden of transformation than others, they, like all other members of society, benefit from the stability, social harmony and restoration of national dignity that the achievement of equality brings.'[107]

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[101] *Premier, Mpumalanga, and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 1.

[102] *Rivonia* (note 2 above) at para 38.

[103] South African Schools Act 84 of 1996 Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure (published in Government Notice R920 in Government Gazette 37081 of 29 November 2013, reg 9(2)/

[104] This echoes the Charter of Basic Education drawn up by the South African Human Rights Commission, which sets the same goals for class sizes. See SAHRC *Charter of Children's Basic Education Rights* (2012), available at http://www.unicef.org/southafrica/SAF_resources_childrightsbasiceduc.pdf.

[105] [INSERT REFERENCE] OECD 'Education Indicators in Focus' (2012/09) https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwib9N66jdTMAhVlBsAKHXONCf4QFggoMAI&url=http%3A%2F%2Fwww.oecd.org%2Fedu%2Fskills-beyond-school%2FEDIF%25202012--N9%2520FINAL.pdf&v6u=https%3A%2F%2Fs-v6exp1-v4.metric.gstatic.com%2Fgen_204%3Fip%3D82.13.187.130%26ts%3D1463041273139165%26auth%3Dogakvtu4cio5tk3qj4zhe6dolvcvtp3p%26rndm%3D0.04390040074959300 5&v6s=2&v6t=27844&usg=AFQjCNGTQF9XLp9Q7stq1Rv7Sscn-QUJdw&cad=rja

[106] See *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) ;

[107] *Minister of Justice v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) at para 145.

This is particularly powerful in the field of education, since greater education of each individual contributes powerfully to the development of society as a whole. It is notable that in the recently promulgated Right to Education Act in India, unaided private non-faith schools are required to reserve 25% of their places for disadvantaged learners, with the State compensating them only to the level it would have paid if the learners had attended public schools.[108] While this is clearly not a solution a court could prescribe in the South African context, it could have required the HOD to set a clear norm for minimum class sizes at all schools, based on a reasoned assessment of the balance between quality of schooling and quantity of learners, so that there would have been a framework in place according to which disputes could be resolved in a principled manner. It could also have required a clear timetable and procedure for making decisions about which schools have spare capacity and how they should be filled, to avoid the risk of patronage and the arbitrary use of power by either the SGB or the HOD.

III KZN JOINT LIAISON COMMITTEE

The third education case before the constitutional court in 2013 was equally challenging. This time the dispute concerned the decision of the KZN Department of Education to reduce subsidies to independent schools. The facts were not in dispute. As in previous years, the MEC for KZN had granted a subsidy to independent schools for 2009 in accordance with its discretionary powers under the Schools Act.[109] Pursuant to this grant, KZN Department of Education issued a notice in September 2008 setting out approximate funding for 2009. However, in May 2009, after the due date for payment of the first tranche had already passed, a further circular was sent to independent schools headed 'Reduction of budgets in the 2009/10 MTEF'. The circular stated that as part of the province's 'turn around strategy in dealing with the current cash crisis,' the recipients should 'please expect a cut not exceeding 30% in current subsidy allocation for the financial year 2009/10.' Subsidies were duly reduced by 30% for that year, the first two tranches having only been paid in June. The KZN Joint Liaison Committee, the association of independent schools in KwaZulu-Natal (KZN), brought proceedings against the provincial education department for breach of contract.

The High Court held that the original promise of a subsidy constituted a contractual obligation, but because the promise was only for an 'approximate' amount, the reduction of 30% did not constitute a breach. The Constitutional Court rejected the contractual argument.

Nevertheless, the Court found a way of deciding in favour of the schools, at least in relation to the subsidies which had already become due at the date of the revocation. It did this by casting the issue in terms of an obligation which arises from an undertaking seriously given in the expectation it would be relied on. According to Cameron J (Moseneke DCJ, Froneman J, Khampepe J, Skweyiya J and Yacoob J concurring), the undertaking in this case was seriously given, in the expectation that it would be relied on, subject only to due revocation.[110] Moreover, while the State was not obliged to pay subsidies to independent schools, such subsidies were a legitimate way to fulfil its constitutional obligations to provide basic education. When it decided to withdraw such subsidies, particularly after the due date for payment had passed, the negative right of learners not to have their right to basic education impaired was acutely implicated.[111] Thus although the 2008 notice did not give rise to an enforceable contractual agreement, it

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[108] Right of Children to Free and Compulsory Education Act 35 of 2009, available at http://librarykvpattom.files.wordpress.com/2010/04/india_education_act_2009.pdf.

[109] Schools Act s 48.

[110] *KZN Liaison Committee* (note 3 above) at para 37.

[111] Ibid at para 45.

constituted 'a publicly promulgated promise to pay.'[112] Once the due date for payment of a portion of the subsidy had passed, it created an obligation legally enforceable by the intended beneficiaries.[113] The judgement was carefully crafted to avoid using the concept of legitimate expectation, which related to expected conduct and therefore might bind future arrangements.[114] Rather, the obligation became binding because the date on which it was promised had already passed when it was retracted.[115] This left the State with the discretion to vary the amounts payable for the remainder of the year. Cameron J emphasized that a government promise to pay an approximate amount of subsidies was seldom incapable of retraction or reduction, especially where, as in this case, the Department had to address the knock-on effect of the 7.5% overall budgetary cut for 2009. The letter of May 2009 therefore constituted an 'effective signal by the Department that schools henceforth could no longer rely on the undertaking in the 2008 notice.'[116]

The context of this case is more complex than it first seems. The private schools at issue were not affluent independent schools, but a group of 97 low- and mid-fee KwaZulu-Natal independent schools. Recent research from the Centre for Development and Enterprise (CDE) shows a significant expansion in low-fee independent schooling in South Africa, as parents seek alternatives to state schools.[117] CDE calculates that by 2010, 72% of learners at independent schools were black. Fees are low relative to high fee independent schools, although they are still higher than many poor South Africans can afford. Thus, as the CDE acknowledges, the private low-fee schooling sector is not catering to the very poor:

> Low-fee schools are affordable to many more people than mid- or high-fee ones; however, they are not affordable to the poorest, low-income groups. In South Africa, less than R7 500 per annum is considered very low-fee. That is more than double what is considered low school fees in India, where 'budget' private schools charge annual fees.[118]

The use of private establishments to fulfil the State's duty to provide basic education in South Africa was a deliberate policy choice at the time of transition. Faced with the enormous inequities in schooling put in place by the apartheid regime, the newly democratic state made a conscious decision to harness private resources, whether through fee-paying state schools or subsidised private schools. The Constitution states that that it does not preclude state subsidies for independent educational institutions,[119] and the Schools Act allows the State to grant subsidies to these schools. Subsidies from the State depend on the level of fees payable, with a greater proportion of subsidy going to the schools charging lower fees. In 2013, a school charging less than about R5 500 per annum would be eligible for a State subsidy of 60% of its school fees.[120] This represents about half the average of R11 000 spent on each learner in public schools across the provinces.[121] State subsidies could in practice amount to up to half of an independent school's income. The result is that the boundaries between state and private

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[112] Ibid at para 48.

[113] Ibid.

[114] The existence of substantive legitimate expectations in South African law is a matter of ongoing debate and uncertainty. See, for example, G Quinot 'The Developing Doctrine of Substantive Legitimate Expectations in South African Administrative Law' (2004) 19 *SA Public Law* 543.

[115] *KZN Liaison Committee* (note 3 above) at para 52.

[116] Ibid at para 50.

[117] J Hofmeyr, J McCarthy, R Oliphant, S Schirmer & A Bernstein *Affordable Private Schools in South Africa* (2013), available at http://www.cde.org.za/wp-content/uploads/2013/07/Affordable%20Private%20Schools%20in%20South%20Africa.pdf.

[118] Ibid at 3.

[119] Constitution s 29(4).

[120] *National Norms and Standards School Funding* GN 890, *Government Gazette* 29179 (31 August 2006, as amended).

[121] CDE (note 117 above) at 15.

provision are unclear, with parents paying fees in both sectors (except at the no-fee schools), and both sectors receiving state subsidy. This overlap is reinforced by the fact that State subsidies of independent schools also come with a regulatory cost: to qualify for a subsidy, schools must have audited financial statements, and meet prescribed standards in terms of annual retention rates of learners and pass rates in external examinations. They can be subject to unannounced inspections and must have a governance and financial management plan conforming to national regulations.[122]

The facts presented to the Court regarding KZN were by no means unusual. CDE reports that provincial education departments have been regularly remiss in notifying schools of the amount of expected subsidy for the coming school year in time for schools to draw up sensible budgets and set fees. Nor is it uncommon for the tranches to be paid late, or promised amounts unilaterally reduced. This can cause serious hardship for schools who have already embarked on spending commitments in reliance on the subsidies. Indeed, in 2012, an investigation was launched by the SA Human Rights Commission and Public Protector into five provinces, KZN, Limpopo, Mpumalanga, North West, and Eastern Cape, which had drastically cut subsidies.

In this case, unlike the others, the Court was prepared to find a remedy which addressed both the substantive and procedural issues. Cameron J, in a very imaginative judgement, was able to span both the concerns of the private schools that they should have a reliable budget and those of the education authority, which had to balance these demands against those of others. As we have seen, he held that the first tranche should be payable, but the remainder, with proper notice need not. Governments should be reliable, accountable and act reasonably. Reliability entailed that a government body which has made promises on which others had relied should be held to those promises to the extent of the reliance. Schools could adjust their future outlays, but could not do so in relation to the tranche that had already fallen due. Therefore, although budgetary decision-making remained with the Department, the State needed to act in a reliable manner, so that plans could be made and acted on.[123] Flexibility was only possible with proper warning to the affected schools. Secondly, the State was required to be accountable. Although courts should respect the effect of budget cuts, their impact should be announced as quickly as possible. Thirdly, the State should act reasonably. In the view of the Court, it might be rational, although regrettable, to vary payments promised but not yet due, since those depending on it still had a chance to adjust their behaviour. But because such adjustment was impossible in relation to a date which had already passed, it would not be rational to vary payments after their due date.[124]

This is a clear rule of law position, but one grounded in the substantive recognition of the importance of the right to basic education, whether at a low fee private school or a public school. The judgment did not simply declare that the dispute should be resolved through co-operation or consultation: it recognised that the parties were not equal bargaining partners. Instead, the Court was prepared to lay down a specific and hard edged requirement, as well as clear guidance going forward.

For Zondo J, dissenting, however, this departure from the parties' stated case was unwarranted and gave rise to unacceptable uncertainty.[125] Notably, he directed much of his critique at the aspect of the judgment which required co-operation: setting the amounts payable, which were only referred to as 'approximate' in the original statement. In particular, he took issue with the majority finding that 'the 2008 notice specified exact sums and undertook to pay

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[122] NSSF (note 120 above).

[123] *KZN Liaison Committee* (note 3 above) at para 63.

[124] Ibid at para 65.

[125] Ibid at para 161.

them approximately. That is an obligation that is coherent and legally enforceable. And the Department is obliged to engage with the schools to find finality in complying.'[126] Engagement in his view was of no avail, since the dispute would not have reached the Court had the parties been able to reach a solution through engagement. This was compounded by the majority's suggestion that if the figures agreed on were not sufficiently approximate, the applicants could return to the High Court. Resort to the High Court made little sense because the majority judgment gave no criteria by which to judge the acceptability of either party's case, short of resuscitating the contractual argument which had been rejected in the SCA and the Constitutional Court.[127]

Zondo J's criticism resonates with my criticism of *Welkom* and *Rivonia*. However, the engagement ordered here is of an entirely different character from the open-ended exhortation by the Court to co-operate in *Welkom* and *Rivonia*. The engagement was required to be within the clear framework declared by the Court, namely, that the sums promised were owed after the due date. Indeed, Cameron J gave clear guidance about the meaning of 'approximate': the dictionary definition, namely 'fairly accurate but not totally precise.'[128] A cut of 30% clearly falls outside this definition: indeed, only a small adjustment would be acceptable.

Zondo J's concerns were, however, wider than this. For him, 'the main judgment unduly leans over to make a case for the applicant which the applicant neither made in its papers nor asked for and I find this extremely unfair to the respondents.'[129] Given the fact that there was no contractual claim, he held that there should be no obligation on the Department to make any payments, past or future. This contrasts starkly with Froneman J's concurrence. Froneman J took a determined stand against formalism in the law. In his view, the label attached to a claim should not be decisive when the facts were not essentially disputed and no material prejudice flows to any party whatever label is assigned.[130] Thus he would have gone further than the majority judgment, and required the province to pay the whole year's funding. Cameron J took the middle ground. He had no doubt that the case should be decided in the most just and equitable way, even though the claim of breach of contract was unsustainable. He agreed with the amicus that, although the applicant had consistently relied only on a breach of contract argument, there was sufficient evidence on record to lay the basis for a right to be paid the first tranche. There was previous precedent to this effect, and, in his view, there was no prejudice to the respondents.[131]

To what extent are Zondo J's concerns well founded? There is no doubt that this is a highly polycentric issue. Giving a budget to a private school might have implications for other parts of the school system. The difficulty in dealing with the polycentric consequences of the case was certainly aggravated by the fact that the parties had chosen to argue the case in contract alone, and not as an administrative law breach. This meant that the potential budgetary and other issues were not before the Court as they might have been under the Promotion of Administrative Justice Act (PAJA).[132] The question before the Court was therefore whether to craft a just and equitable remedy regardless of the way the case had been presented, or to stick within the limits of the adversarial procedure and leave the parties to find other ways to sort out the problem. In determining that the Court should nevertheless craft a remedy, Cameron J's solution addresses many of the difficult polycentric issues. He was clear that without the record

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[126] Ibid at para 75.
[127] Ibid at para 117.
[128] Ibid at para 74.
[129] Ibid at para 180.
[130] Ibid at para 79.
[131] Ibid at para 68.
[132] Act 3 of 2000.

of budget allocation and decision-making, which would have been before the Court under a PAJA claim, it was not possible for it to consider the claim for payment for the whole 2009 school year. [133] However, he regarded affordability as irrelevant to the obligation that arose in respect of payments whose due date had passed. Indeed, he rejected the request by the parties to present further evidence in relation to affordability. Although affordability was a major issue in governance, this was irrelevant once the payment dates had passed. In such a case, the State was simply not entitled to retroactively reduce subsidies. This was fortified by the fact that the payment date had been laid down in the national norms which were applicable in this case.[134] Cameron J also addressed the problem which had arisen as a result of the fact that, at the behest of the applicants, the Department had added 28 newly registered independent schools to the original 97 to whom the subsidies had been granted. [135] It was partly because of the need to share the original allocation among 125 rather than 97 schools that the subsidies had been cut. Cameron J confined the polycentric implications of his decision by making the first tranche enforceable only in relation to the original 97 schools. This ensured that the Department incurred no extra liabilities.[136]

Cameron J's solution is a sensitive compromise between the competing issues. Given that the Court was not blind to the polycentric implications, Froneman J's approach would have gone too far in sacrificing the unknown and unargued interests of other deserving beneficiaries and rights-holders to the interests of those who happen to present themselves at court. Zondo J's formalism would have gone too far in limiting the Court's purview to what the parties happen to present to it, regardless of the wider picture. However, Cameron J does not avoid all the polycentric implications of his finding. His insistence that budgetary implications were irrelevant for payments for which the due date had already passed ignored some important consequences. s.[137] For instance, there were five provinces which had drastically cut subsidies in the same year. This could give rise to substantial liabilities on the part of provincial departments of education, which might have knock-on effects for schools in the public sector.

Comment [SF1]: I'm so sorry but I have entirely lost track of where this came from.

Even less thought has been given to the equally important question of the direct consequences of the decision for public schools. A recent report by Transparency International on basic education in South Africa highlighted the detrimental effects of pervasive delays in budget allocation delays in the public sector, with many schools receiving their budgets late. Approximately a third of SGB members in the survey reported that schools often or sometimes receive less money from higher administrative levels than originally budgeted, and only 29% of principals interviewed reported that their school funds arrive on time.[138] This has a particular impact on poorer non-fee paying schools.[139] Frequently schools are not informed in a timely manner of delays or reductions. The disruption to public schools due to the lack of reliability, accountability and rationality is equivalent or worse than that for independent schools, particularly in relation to non-fee paying schools who do not have an alternative stream of income. On the basis of the majority judgment, it is clearly arguable that a legally enforceable claim arises in public law as soon as the due date for payment has passed, given the severely detrimental impact on learners' right to basic education.

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[133] Ibid at para 34.
[134] Ibid at para 70.
[135] Ibid at para 114.
[136] Ibid at para 72.
[137] [INSERT REFERENCE]
[138] Transparency International *Mapping Transparency, Accountability and Integrity in Primary Education in South Africa* (2011) 29-30, available at http://www.un.org/en/ecosoc/newfunct/pdf/luxembourg_tisda_south_africa_report_web.pdf .
[139] Ibid at 7.

These extra budgetary consequences do not in themselves mean that the Court should not have come to the conclusion it did. The judgment sends a strong message to public administrators about the need for timely notice if payments are likely to be late or varied. However, it would be important for the conclusion to be reached in full awareness of such consequences. A clear example of the need for more information before polycentric decisions are taken can be seen by considering the way the Court dealt with the relative costs to the State of subsidising private schools rather than providing sufficient State capacity. In his concurring judgment, Froneman J held it was not rational to impede the learners' access to education in independent schools when this would be more costly than accommodating them in the public school system. On the respondent's own view, the cost of accommodating the learners in public schools would increase the budget by at least 5% in KZN alone, as opposed to keeping them in the independent schools.[140] Even though he was proceeding on the respondents' own version, these figures should nevertheless have been subject to further scrutiny. While it may have been more costly to the public school budget, did these figures bring into account how much of that cost had been shifted to learners' families in the form of fees paid? On these bald figures, it would always be rational to subsidise private education, since the State is paying only part of the cost. A much more complex algorithm is needed which would bring into the picture how much extra it costs the learner to be at a low fee paying independent school compared to the cost born by that learner at a public school. For example it is possible that learners paying fees at that level may have been entitled to attend no-fee schools. The fact that parents might have made the choice to pay fees above the level they needed to is irrelevant to the question of whether it is more or less costly to provide subsidies to independent schools than to provide free public education of a sufficient quality, taking into account the cost to the learners as well as that to the State. This taps into a much larger global debate about the merits and demerits of low fee private schools. Indeed, the UN Special Rapporteur on Education devoted his 2015 report to arguing strenuously in favour of regarding education as a public good, rather than a market commodity.[141] This brief analysis suggests that, even agreeing with Froneman J that form should not be blindly adhered to, the absence of a full examination of the budgetary issues on the record is nevertheless a serious impediment to the Court making decisions of a polycentric nature.

V CONCLUSION

All three education cases in the 2013 Constitutional Court's docket were challenging on many levels. Not least was the fact that in all three cases, the substantive issue of the rights to education and equality were not directly before the Court: in the first two, the dispute appeared as a tussle between the school governing body and the provincial education department, and in the third as a contractual claim in private law. This is no coincidence: it demonstrates that the procedures set in place to deal with the underlying disputes were not functioning either to achieve resolution or sufficiently to protect the right. The Court's overriding concern in all three cases was to constrain the executive to remain within the formal powers allotted to it, reflecting an underlying anxiety of the risk of patronage and abuse of power. Thus although the cases concerned socio-economic rights giving rise to positive duties to protect, promote and fulfil, the majority judgments tended to formulate the Court's role as the traditional function of restraining excess of power.

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[140] *KZN Liaison Committee* (note 3 above) at para 89.

[141] UN Special Rapporteur on the Right to Education *Protecting the Right to Education against Commercialization* (2015), available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/29/30&Lang=E.

At the same time, at least in the first two cases, the Court was unwilling to take anything more than a tentative view of the substantive underlying rights to education and equality. Instead, it followed its established pattern of facilitating appropriate procedures for substantive decision-making by what it regarded as more accountable and democratic bodies. In *Welkom* and *Rivonia*, it saw its main function as delineating the relative roles of SGBs and the HOD, and then exhorting these bodies to reach an appropriate solution through co-operation and engagement. I have argued that this did not do enough to create a hard-edge to the rights in question. Local democracy by its nature serves the interests of insiders and majorities; it is not sufficient to leave the resolution of basic human rights to these bodies alone. Nor is it enough to expect co-operation and meaningful engagement on issues which have already triggered fundamental conflict.

Khampepe J in *Welkom* certainly went further than the lower courts in giving an indication of the potential unconstitutionality of policies excluding or suspending pregnant learners, but she stopped short of declaring the policy itself invalid. Instead, she left open the possibility that the SGB could justify continuing to exclude pregnant learners if had it good enough reasons. It is possible that on the facts, schools have taken the message and revised their pregnancy policies; but the refusal to make a declaration of invalidity gave too little credence to the rights of the most vulnerable of those involved, the pregnant learners themselves, and especially those who have been excluded in previous years. Experimentalism and local democracy should be confined to operationalising the right at local level, for example, by providing relevant health care support for staff and learners, not determining the existence of the right.

In *Rivonia*, the Constitutional Court's recognition of the HOD's role in addressing systemic inequalities was crucial. But the exhortation to mere consultation without any further guidance left the underlying substantive conflict intact. While the Court could not on its own determine the appropriate minimum class size or the extent to which parents should be expected to share their privilege with others, at the very least it could have required the HOD to lay down clear and defensible guidelines as to the management of extra capacity in schools, including a timeline to avoid last minute scuffles like the one in question. *KZN Liaison Committee* shows a Court willing to lay down hard-edged guidelines which balanced the needs for flexibility and reliability, although the budgetary implications should have been more openly canvassed before the Court.

It has to be acknowledged that, as these cases demonstrate, the Court's role in adjudicating disputes in this context cannot deal with some of the most intractable problems about fair distribution of resources to achieve an equal right to quality education for all. However, it is disappointing that in the one case in which a clear breach of a fundamental right had occurred, *Welkom*, the Court's concern with procedure rather than substance led it to dilute the protection it afforded to some of the most vulnerable individuals in South Africa.