Policies are stated in general terms and cannot provide for all situations. Our legacy of injustice and mistrust continuously throws up problems which need the wisdom of Solomon to settle. In this protracted transitional period, in which new policies for a democratic society are being developed and implemented, the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognised and corrected. The possibility of damage will be reduced if new policies are based on knowledge of our charter of fundamental rights and on sufficient consultation with those who are affected by them, if conflicts are negotiated, and if principled compromises are sought.

Sibusiso Bengu
A. Introduction

The previous chapter framed the possibilities of experimental constitutionalism rather broadly. It asked whether the South African Constitution can produce the institutions, and whether those institutions have already articulated the doctrines, that make experimental constitutionalism (when wedded to flourishing) a plausible approach to our basic law. The answer is that the rudiments of an experimentalist order certainly exist. However, questions remain as to whether they would qualify as emergent experimentalist institutions and experimentalist doctrines in terms of the existing body of literature on the subject. My hope is that by narrowing our focus to two important and well-ventilated areas of public law – housing and education – we shall place ourselves in a better position to understand the benefits and the limitations of experimental constitutionalism in South Africa.

B. Experimental Constitutionalism in South African Housing Law and Policy

1. Grootboom and the Reconstruction and Development Programme

One way to begin to interrogate the possibilities of experimental constitutionalism is to review the surrounding circumstances of, the Court's opinion in, and the political response to, Republic of South Africa v Grootboom. Kirsty McLean offers the following account:

_Grootboom_ began with an informal community's occupation of private land. The community named their new settlement ‘New Rust’ – and it was, all things being equal, an improvement upon the deplorable conditions of their previous settlement. The owner of the land, however, sought and obtained an order for the community's eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.1 The community then sought shelter on a municipal sports field. After requesting assistance, but receiving none, from the relevant local government authorities, the community sued the local municipality in the Cape High Court for an order granting temporary shelter. In so doing, they relied on FC s 26 and FC s 28. Davis J granted an order in terms of FC s 28(1)(c), instructing the State to provide shelter for the children in the community, as well as their parents. The State appealed against this order to the Constitutional Court. After the intervention of an amicus curiae, the original claim based on FC s 26(1) and (2) was also reargued.2 The Constitutional Court held that the rights in FC s 26 and FC s 28 did not entitle ‘the respondents to claim shelter or housing immediately upon demand’.3 At the same time, the Court emphasized that socio-economic rights are justiciable and that the right to housing is enforceable.4 That enforcement, as a general matter, takes the form of direct regulation of State policy. Proper enforcement, according to the _Grootboom_ Court, required the State to have in place a reasonable plan to realize the right to housing over time and within its budgetary constraints, including a plan to provide relief to those in desperate need. The declaratory order of the _Grootboom_ Court reads as follows:

(a) Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing;

(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide...
relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the State housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.

2. An Immediate Critique of Grootboom

On one view, Grootboom represents a classic instance of judicial deference in the face of extraordinarily difficult institutional reform. As the Constitutional Court made clear, it could not, in good faith, have credited the government response to the housing situation as adequate under the circumstances. At the same time, the Court was concerned about its ability to intercede effectively in the legislative or administrative process for housing delivery. It therefore left the structure of the remedy almost entirely up to the government’s discretion.

As Susan Sturm points out, while a court’s concern regarding its institutional competence is entirely legitimate, that concern ought not dictate deference. The difficulty with structural reform can be addressed through institutional mechanisms such as court-guided negotiation between stakeholders: that is, the creation of a participatory bubble. The immediate criticism of Grootboom is really two-fold. In addition to the government’s failure to address the desperate plight of the homeless, the case raises serious questions about the accountability of those government institutions responsible for housing to those persons most in need. By deferring to the government, by accepting its good faith commitment to put a plan in place, the Court sidestepped the issue of accountability.

Instead of deferring entirely to the government, the Constitutional Court could have taken a more forceful stance. A judicially monitored structure that created cognizable ‘destabilization rights’ for the Grootboom community might have secured the applicants at least some of the relief that they sought. Had the Court retained jurisdiction, it could have appointed representatives for affected citizens in the Grootboom community and enjoined government agencies, both national and local, to engage in earnest engagement about an effective solution. Using a structural injunction to create such a participatory bubble would have had several beneficial consequences:

1. Government agencies would have had to come up with a remedy particularly tailored to the needs of the Grootboom community.
2. This participatory bubble could have become the model for other similarly situated groups around the country. By multiplying such bubbles, the public and the private actors charged with responsibility for housing policy would be required to take into account the saliency and the variance of the housing needs of different groups. The information gathered would allow government to allocate, more efficiently, scarce available resources and to fulfil the FC s 26 rights violated in Grootboom.
3. Such a polycentric process would generate experimentalist responses to the resource constraints confronted by both government agencies and those persons most in need of adequate housing. A structural injunction coupled with the replication of participatory bubbles throughout the
country would give the Court, the government and the public the ability to share information about the kinds of strategies that work to alleviate homelessness.

The *Grootboom* Court did make a modest contribution toward developing an experimentalist model of fundamental rights adjudication. It charged the South African Human Rights Commission with the responsibility of monitoring compliance and facilitating information gathering. The SAHRC’s enhanced supervisory role was designed to allow for flexibility in the implementation processes in various locales, ensure participation by stakeholders in such processes, guarantee compliance with the basic norms articulated by the *Grootboom* Court and permit constant forward- and lateral-looking comparison in housing policy outcomes around the country. In other words, as an information-gathering and pooling body in this nation-wide experiment, the South African Human Rights Commission would report on local housing initiatives and publicize best practices.

As the aforementioned benefits should make clear, the most compelling consequence of an experimentalist revision of *Grootboom* would be its systemic effect. *Grootboom* would come to represent a classic example of citizens securing government accountability through court and Chapter 9 Institution oversight. We might then have seen a *Grootboom* effect. That effect would flow from its trend-setting use of innovative injunctive relief to create participatory bubbles that facilitate wide-spread experimentation. The revised *Grootboom* would place other government agencies responsible for delivering basic necessities or transforming social institutions on notice. The revised *Grootboom* would tell government agencies that they are best served by finding stakeholder representatives to secure the necessary feedback on the community’s needs before the government agencies design new and better forms of service delivery.

But as Billy Joel writes: ‘That’s just a fantasy, it’s not the real thing.’ An honest appraisal of *Grootboom* must acknowledge that the Court issued a detailed order setting out the facilities that ought to be provided to the *Grootboom* residents. Nothing happened. The SAHRC failed to monitor adequately the Court’s order. The conditions for the *Grootboom* community never improved.

3. **Breaking New Ground: The Reformation of Housing Policy in Light of Grootboom**

Despite this criticism, and the failure of many a municipality to effect co-ordinated and comprehensive programmes to address severe housing crises, *Grootboom* and its legacy have not been an unmitigated disaster. As McLean notes, ‘[f]rom 1 April 1994 until December 2005, the South African government subsidized the construction of 1 916 918 houses and in so doing, at an average of 4.1 people per household, provided housing to approximately 7 859 363 people in South Africa.’ As of the end of December 2010, the government claims to have created 2.7 million homes and given shelter to 13 million people. (The annual spend on housing increased from R4.8 billion in 2005 to R10.9 billion in 2010.) Such accomplishments could only be achieved, as Kecia Rust contends, because:

South Africa has tackled issues of housing finance, social housing, and consumer protection. It has institutionalised the concept of 'people's housing', made space for women in the construction
industry, and supported the role of emerging builders. It has built a single, non-racial department of housing out of a previously fragmented and inefficient system. And, perhaps most importantly, it has entrenched the right to adequate housing in its constitution. Each of these developments is a significant achievement. Their combination, especially given South Africa’s history, is unparalleled.\textsuperscript{17}

This extremely good news must be read against the background of the lived reality of millions of South Africans who remain homeless. So, as Rust notes elsewhere, while the financial year ending in 2011 saw 121,879 subsidized units added to a housing market in which a \textit{truly remarkable} 24\% of all registered housing units have been created via subsidy, informal settlements have tripled in the last decade (to 2,628) and the backlog of housing units in 2012 stands at 2.1 million units.\textsuperscript{18} Delivery is currently insufficient to meet demand.\textsuperscript{19}

These reports from the NGO sector and various social movements have placed the state on notice of both (a) the crisis associated with the delivery backlog; and (b) the specific manner in which the current housing subsidy policy creates an affordability gap that effectively excludes many workers (350,000) and their families from entering the market. The Department of Human Settlement and the Office of the Presidency have responded with a ‘triad of interventions’ to ‘address the “gap” market – the 20\% too rich to afford a subsidy, but too poor to afford a house on the open market’.\textsuperscript{20} These innovative responses to feedback from the market and potential homeowners embrace (a) a ‘New Finance Linked Individual Subsidy … for households earning between R3,501 and R15,000 a month’; (b) a tax incentive for developers to promote delivery of housing units costing less than R300,000; and (c) a ‘R1 billion mortgage insurance initiative’ administered by the National Housing Finance Corporation designed to enable wholesale financiers to take on greater risk with the respect to the provision of capital to non-bank housing lenders (micro-financiers) who target ‘low-income earners’.\textsuperscript{21} The state is listening to those persons who seek affordable housing (think participatory bubbles) and adroitly responding to previous mistakes by altering both means and ends (sounds very much like reflexivity).

The last several years of the post Grootboom-era also signal the capacity of the South African state to meet (some of) the doctrinal demands of shared constitutional interpretation. The state and the Constitutional Court appeared, for some time after Grootboom, to fail to engage one another in a systematic fashion about much-needed reformation of housing law and policy. As matters currently stand, and as the aforementioned developments evince, a pragmatic, empirically grounded dialogue – based upon successful and unsuccessful action – has begun to take place.

Recall that the Grootboom Court held that to be found reasonable, a comprehensive and co-ordinated programme to realize access to housing (and the other socio-economic rights found in FC s 26 and FC s 27): (1) must ensure that ‘the appropriate financial and human resources are available’; (2) ‘must be capable of facilitating the realisation of the right’; (3) must be reasonable ‘both in their conception and their implementation’; (4) must attend to ‘crises’; (5) must not exclude ‘a significant segment’ of the affected population; and (6) must ‘respond to the urgent needs of those in desperate situations’.\textsuperscript{22} Evidence for the claim that the National Housing Department has responded to Grootboom’s call can be found in the recent
promulgation of a policy document long held in abeyance, Breaking New Ground, and an array of new amendments to the national Housing Code. McLean writes:

Since 2000, and the decision in Grootboom, several shifts have occurred in housing policy. First, ‘sustainability’ has emerged as a key concept and within the national Department of Housing. Second, as the Medium Density Housing Programme reflects, Grootboom has been the catalyst for two significant policy developments: the recognition that the State must cater for ‘all’ housing needs (which resulted in the addition of Chapter 12 of the Housing Code ‘Housing Assistance in Emergency Housing Circumstances’ and Chapter 13 of the Housing Code ‘Upgrading of Informal Settlements’); and the State’s commitment to use both market-driven and non-market-driven mechanisms to diversify housing delivery.

Additional evidence for the evolution (as opposed to revolution) of housing policy in response to Grootboom can be found in an amendment to the Housing Code that aims to ‘provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of emergency situations of exceptional housing need’. Finally, the Grootboom Court’s nostrum that a ‘reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available’ is reflected in a more recent document entitled ‘Accreditation Framework for Municipalities to Administer National Housing Programmes’. The programme is designed to enable local government to carry out their housing responsibilities by providing accreditation and long term financial support.

4. The Constitutional Court’s Novel Commitment to Meaningful Engagement

Does the initial give and take (between various branches and spheres of government) on South Africa’s housing policies immediately after Grootboom satisfy the requirements of an experimental constitutional order? Probably not. That the government eventually responded to Grootboom is all to the good. However, neither the Court’s first few subsequent decisions nor the government’s initial policy responses can be described as a part of a robust, reflexive system designed to effect a normatively more legitimate and information-rich set of rolling best practices. To make the point more poignant, Mrs Grootboom died almost a decade after the judgment without an appreciable improvement in her housing conditions.

As we have seen, however, Mrs Grootboom’s fate is only part of the story. Over the past several years, the Court, the government, the NGO housing community, impact litigators and social activists have stepped up their activities. The Constitutional Court itself has grown increasingly bold, in terms of its interventions in, and construction of, the space in which housing law, policy and reality take shape. However, as the Court’s first post-Grootboom effort in Minister of Public Works & Others v Kyalami Ridge Association & Another suggests, its development of doctrine has been quite deliberately paced.

The gravamen of the complaint in Kyalami Ridge was that the committee charged with finding appropriate space and building necessary shelter had created a transit camp on the Leeuwkop prison farm to accommodate flood victims in Alexandra Township (in Johannesburg). The respondent, an association that represented residents in the vicinity of Leeuwkop, challenged
the committee’s decision. It contended that the transit camp would adversely affect property values and the long term habitability of the surrounding environment.

In a complex matter in which the right to housing played but a supporting role, the Court held (again) that the rights of the displaced persons in need of urgent shelter and housing after the occurrence of a national disaster trumped other considerations. Ought the Court to have done more? Without displacing the more detailed commentary that appears in Chapter 8, the primary problems with the judgment – from an experimentalist perspective – are three-fold.

First, the Court notes, without comment, a lack of engagement by the government with other affected actors: ‘No discussions were held with residents in the vicinity of Leeuwkop.’

But the Court made little of this lack of meaningful engagement. Second, Chief Justice Chaskalson rather laconically remarks that

It may have been better and more consistent with salutary principles of good government if the government had found an appropriate method to inform the neighbouring residents of its intentions before contractors went onto the site, and if it had engaged them in discussion and the planning at an early stage of the project. However, for the reasons that I have given, the absence of such consultation and engagement did not invalidate the decision.

Third, the Court writes:

When the proceedings were commenced the government contemplated that the flood victims would be accommodated on the prison farm temporarily and that they would be allocated permanent accommodation elsewhere within 6 to 12 months. Later it was said that the time would at most be 12 to 24 months. Nearly a year has passed since then. In the meantime the flood victims have been living in deplorable circumstances, and there is no word as to when permanent accommodation will become available. It is time that attention be paid to their needs.

Yet the Court still does not put the government or other actors on discernable terms: via structural injunction or a substantive, automatic remedy for a rights violation. From an experimentalist perspective, Kyalami Ridge fails in two important respects: (a) to bring all the affected parties together in order to reach as optimal an outcome as possible; and (b) to ensure that the government respects the norms articulated by the Court so that all the affected parties – in the present and an easily imagined future – might benefit from the Court’s otherwise thoughtful judgment.

The result in Port Elizabeth Municipality suggests more of the same in FC s 26 matters. The Port Elizabeth Municipality sought an eviction order against 68 persons living in shacks on privately owned land. The occupants agreed to move to ‘suitable alternative land’. However, the space offered by the Council – in Walmer Township – provided no security of occupation and was controlled by criminal networks. The municipality contended that no other alternative existed and that making a special exception for the occupiers would be tantamount to ‘queue jumping’ with respect to the municipality’s comprehensive and co-ordinated housing scheme.

This background and the municipality’s failure to take any steps – let alone all reasonable steps – to solve this polycentric problem meant that the municipality had failed to discharge its constitutional obligations. Given this abdication of responsibility, the Court held that it...
was neither just nor equitable for the eviction order to be granted. Port Elizabeth Municipality looks like a quintessentially easy case. Not so.

The Constitutional Court noted, relatively early in its judgment, that the polycentric nature of the problem – homeless persons in need of shelter, private land owners who wished to use the occupied land, municipalities charged with creating a coherent housing scheme for all its inhabitants, sheriffs charged with executing an eviction, inhabitants of other communities to which the homeless persons might be moved – posed significant challenges for the Court:34

The court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and orders it might make.35

The Court first appeared as if it might rise to the challenge. It suggested that cases that affected the lives of so many parties might be best resolved through face-to-face discussions – what it describes as ‘mediation’. The Court writes:

[O]ne potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.36 … Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.37

Despite these largely unassailable observations, the Port Elizabeth Municipality Court balks when it comes down to ordering mediation and retaining jurisdiction to ensure that a just and equitable outcome occurs. Port Elizabeth Municipality reflects an opportunity for shared constitutional interpretation and the aggressive use of a participatory bubble gone to waste.

However, mediation as a mechanism for the resolution of polycentric conflicts in housing cases clearly remained firmly in the minds of various members of the Constitutional Court. Thanks in large part to the continued, irrepressible efforts of housing advocates at the Centre for Applied Legal Studies, and now SERI, neither the Court nor the public remained stuck in the post-Grootboom purgatory of a court-dictated planning requirement without court-enforced delivery mechanisms.

In Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others, the Court was asked to determine whether the City of Johannesburg had acted constitutionally in attempting to evict residents from derelict – and dangerous – inner-city buildings.38 In some instances, the eviction notice came without any plan to provide comparable housing. In other cases, the eviction notice contemplated the forced removal of a building’s residents to the city’s outskirts.
The 51 Olivia Road Court’s initiatives at the outset of the hearing distinguishes the matter from virtually all of its predecessors. Rather than impose a decision on the parties framed by Grootboom-based criteria, the Court ordered the residents and the City of Johannesburg to repair to the negotiating table in order to reach a settlement that would lead to a more optimal outcome for both sides. The parties did. Their settlement then became an order of the Court. The fact that Court facilitated negotiation by all the relevant stakeholders – and more informed parties – constitutes a dramatic break with its previous rubric for housing rights analysis.

The most fascinating part of the judgment – from the perspective of experimental constitutionalism – is that the 51 Olivia Road Court held that, in addition to any other duties s 26(2)’s right to access to adequate housing might impose, ‘a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of [its] constitutional obligations’. What does this mean? First, it appears that the courts may not be the right branch of government to determine how some 63,000 persons – living in dangerous conditions – are to be best accommodated when a municipality determines that their current housing constitutes a threat to their lives. Second, having decided that persons who live in dangerous conditions must be removed, the Court also resolved that a municipality must determine where they are to be otherwise accommodated: a right to housing cannot be reconciled with a decision of the state to make people ‘homeless’. Third, in deciding on how to accommodate this endangered class of persons, the city or the state is obliged to engage the affected parties – in this case all 63,000 persons. As Yacoob J writes:

> Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.

The 51 Olivia Road Court held, in addition, that the city had an obligation to engage meaningfully all 63,000 evictees in a systemic fashion and that ‘[e]ngagement is a two-way process’ that ‘will work only if both sides act reasonably and in good faith’. Thus, consistent with the precepts of experimental constitutionalism, the 51 Olivia Road Court places a premium on sharing (or pooling) information and on reaching accommodations that place all parties in a better position than they might find themselves if the Court were to act as the final arbiter in a zero-sum game.

The Court built upon its semi-experimentalist model for dispute resolution in Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others (Joe Slovo I). The Joe Slovo I Court addressed the constitutionality of the state’s controversial N2 Gateway project. The project, as planned, would have moved the residents of existing informal settlements along the N2 highway to Delft – a community some 15 km away. The residents resisted the removal. The government sought support for the removal through an eviction order. As we
shall see in Chapter 8, the *Joe Slovo I* Court split on the question as to whether the state had ‘meaningfully engaged’ the community regarding the removal. For our immediate purposes, the opinion that best connects shared constitutional interpretation between the courts and other branches of government in terms of setting rather rarefied flexible norms with the creation of participatory bubbles that enable greater participation and greater extraction of information relevant for optimal decision-making, is penned by Justice Sachs:

This case compels us to deal in a realistic and principled way with what it means to be a South African living in a new constitutional democracy. It concerns the responsibilities of government to secure the ample benefits of citizenship promised for all by the Constitution. It expands the concept of citizenship beyond traditional notions of electoral rights and claims for diplomatic protection, to include the full substantive benefits and entitlements envisaged by the Constitution for all the people who live in the country and to whom it belongs. At the same time it focuses on the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole. When all is said and done, and the process has run its course, the authorities and the families will still be connected in ongoing constitutional relationships. It is to everyone’s advantage that they be encouraged to get beyond the present impasse and work together once more.45

Even after the participatory bubble of a particular conflict has burst, and the various stakeholders have returned to their regular lives, the residue of active citizenship and responsive government remains: (1) the parties have learned more about the particular problems that forced the immediate litigation and engagement; (2) the state has learned something more about the communities that they govern and the stakeholders have learned more about the political and social processes that govern their lives; and (3) politicians, bureaucrats and citizens throughout the country should take away lessons on housing and evictions that can be profitably applied to future conflicts. So, although Sachs J refers to a two-way street of engagement, the better metaphor is, perhaps, a piazza, where the public meets again and again, shares new information, and reflects upon the community’s collective wisdom – as active citizens and politicians in a republic do.46 In Chapter 8’s discussion of *Joe Slovo II*, we’ll see the community and the state re-entering the piazza and moving beyond the solutions that the Court in *Joe Slovo I* had approved during the original impasse.

In *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others,* Abahlali Basemjondolo – a radical shack dweller movement – challenged the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act (‘Slums Act’).47 The Act itself seemed little more than a craven attempt to ‘clean up’ Durban prior to the influx of foreign visitors for the 2010 World Cup.48 The Court’s response suggests that the framework for meaningful engagement with bite has, in fact, taken hold. From the perspective of experimental constitutionalism, the most important challenge to the Slums Act flowed from the Act’s willingness to allow eviction without engagement. Because the majority found that the Act could not be reasonably read to *require* engagement, it declared the Act invalid. (Only Yacoob J read the Act in a manner that would require engagement.) As Moseneke DCJ writes:
No evictions should occur until the results of the proper engagement process are known. Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded in situ; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction.\(^5\)

In short, engagement extracts information that might not, as yet, appear in the heads of argument. It requires all of the various stakeholders concerned – and perhaps not just the original parties, given the Court’s generous approach to standing – to put all their cards on the table. Moreover, engagement should make the outcome (the settlement) less contingent on well-drafted heads, voluminous records and courtroom theatrics. What the state and other parties can do – and what the potentially homeless will and will not accept – becomes the measure of a settlement’s mettle. The openness of the negotiation and the settlement process, as Yacoob J notes, makes engagement more than mere window dressing:

If it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful occupiers, [then] the municipality cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process.\(^5\)

At the very least, meaningful engagement would now have to precede any attempt to secure an eviction notice – thus, at first blush, reversing the spin of a statutory scheme designed to sweep communities away or place them out of sight and out of mind.

5. Two Unintended Consequences of Meaningful Engagement

Insufficient time has passed in which to assess the efficacy of the meaningful engagement requirement with respect to scripted housing law and policy. However, indications exist that the Court’s insistence on forcing parties to enter into settlement agreements which are then ratified by the Court, could have a perverse effect on the quality of inner city dwellings.

An easy eviction process would create incentives for landlords to improve housing stock with a view toward increasing the rental price per unit and the overall value of the apartment complex. Tougher eviction laws combined with a requirement that alternative housing be provided in the event of a finding that an eviction ought to take place invariably means that the landlord in possession of apartment stock in need of significant repair has a diminished incentive to make living conditions habitable. The landscape the landlord now sees is one in which it is easier to simply walk away, or extract as much value as can be had from the existing tenants. At least one free-wheeling, high octane High Court judgment, *Emfuleni Local Municipality v Builders Advancement Services CC*, has confirmed these suspicions.\(^5\)

This conclusion requires some teasing out.

Why would meaningful engagement backfire so?

The landlord must first secure an eviction notice from the city. Meaningful engagement by the municipality with tenants and the provision of alternative housing in the event of an eviction notice in the event of a finding of inhabitability means the municipality has little reason to investigate the conditions of a given building: a finding of inhabitability will have the knock on effect of costing the city more than just a well-intended forced removal.
The municipality is now on the hook for finding reasonable alternative housing after what will often require a long and protracted negotiation with groups of tenants who actually want the housing they possess improved and not forced removal to some distant site that possesses neither access to basic services nor easy and inexpensive transportation to work or to school. The expense of the alternative accommodation and the cost of potential likelihood of litigation in the event that the apartment building’s current inhabitants are dissatisfied with the city’s offer of alternative housing generate an incentive to do nothing at all.

Now imagine the scene again from landlord’s perspective. She is faced not only with housing stock of diminishing value, but a municipality that has little interest in initiating eviction proceedings. The landlord must press two sets of parties into proceedings that neither of them wishes to enter. In short, the landlord must be willing to bear the cost (in court) of forcing the city to act and of negotiating (with the disinterested city)(again in court) the removal of the existing tenants to some alternative, acceptable site. As Willis J writes in *Emfuleni*: ‘Why buy or build housing to let to tenants, if the fundamental link between tenancy and the payment of rentals to landlords is undermined? Why invest in property if there is a serious risk that the “investment” will be worthless?’

Town planners, housing analysts and the lawyers for the inner city apartment inhabitants have all taken cognizance of and commented upon the increasing ennui of landlords and municipalities to act under such circumstances. The result – and it remains to be seen whether this initial response is the long-term response – is the further deterioration of many inner city dwellings and a deepening descent into chaos for the apartment buildings’ inhabitants.

Such a turn of events should come as no surprise. Exactly the same unintended consequences followed strict rent control laws in New York City. Landlords refused to attend to buildings from which they could not extract increased rent and which they found themselves unable to sell. Who, after all, wants to purchase a building with depreciating value? (Arsonists perhaps.) While landlords in middle-class neighbourhoods could be pressed into making de minimus repairs, the situation in the city’s poorest neighbourhoods was especially bleak. Certain Bronx neighbourhoods in the 1980s took on a Dresden-like appearance.

South African cities, their landlords and their inhabitants – working off an even lower budget and income base – might expect an even more deleterious set of consequences. The housing stock is already uninhabitable in many instances. It only stands to get worse unless some as yet unforeseen intervention takes place.

But it’s the cause of this chain of events that is of interest. As I shall contend at greater length in the case analyses found in Chapter 8, meaningful engagement *without* any normative framework (regarding minimum core content of the right of access to adequate housing) that forces all of the interested parties to accept that certain conditions will obtain *ex ante* for rent, for eviction notices, for the improvement of existing housing stock and the provision of alternative housing where necessary, will create significant disincentives – for the three main bodies of stakeholders – to do anything about this parlous state of affairs. The irony is that the doctrine of meaningful engagement (with respect to housing) could lead to absence of engagement. Only a state-of-chaos scenario – with which the Court found itself confronted in *Modderklip* – seems to have moved the Court off its acquiescent duff. But even *Modderklip*
did little to develop the law on adequate housing. While the Supreme Court of Appeal grasped the nettle of attempting to harmonize s 26’s right to adequate housing with section 25’s right to property, the Constitutional Court avoided giving content to both rights and instead grounded its decision on a s 34 ‘right of access to court’ claim married to a chaos theory of the rule of law. Put somewhat differently, where the state’s failure to act courts social disintegration and a descent into chaos, the Constitutional Court may find what I have previously described as a ‘substantive’ breach of the rule of law.54

But that apparent one-off scenario will become a more and more regular occurrence if the quiescence of all of the key role players in urban rental settings becomes the negative default setting. Such a turn of events cannot be what the Constitutional Court intended when it turned to ‘meaningful engagement’ as a solution to apparently intractable housing disputes. But as my colleague David Bilchitz would likely agree, it is a problem of the Court’s own making.55 The failure flows from a refusal to give the right of access to adequate housing the kind of normative (minimum core) content that would clearly indicate the duties and the responsibilities of all of the parties affected by such polycentric problems.56

The news, however, is not all bad. Quite the opposite. Where the parties subject to an order for meaningful engagement both know and trust one another, their regular engagement in meaningful engagement settlements generally results in close to optimal outcomes. Parties without the requisite trust, or, in many instances, the wherewithal to solve the polycentric problem, do not appear to succeed as often.57

That meaningful engagement as a form of experimental constitutionalism in a developmental state such as South Africa should be so patchy is hardly a surprise. Both the state bureaucracy and civil society remain quite thin. However, should such unevenness in outcomes continue, the Constitutional Court and lower courts may be forced to reconsider the extent to which they rely upon meaningful engagement as a bottom-up solution to South Africa’s housing problems. Brian Ray has reached largely the same conclusions.58 In comparing 51 Olivia Road with Mamba,59 he writes:

In Olivia Road, the High Court’s initial injunction put a stop to the City’s eviction process. Additionally, while the SCA’s judgment permitted the City to resume evictions, it still placed restrictions on that ability and imposed certain costs that required revising the original policy. Once the case reached the Constitutional Court, the City was already well on its way to instituting a revised policy, and the engagement order gave the residents and the groups representing them sufficient leverage to force the City to take seriously their views on the policy. Mamba presented precisely the opposite situation. The High Court found no basis for a challenge to the closures; there was no intermediate appellate review and the refugees asked the Constitutional Court to address a fluid situation with almost no substantive record. Under those circumstances, it was quite easy for the Gauteng government to treat engagement as nothing more than the equivalent of a formal notification requirement rather than the real consultation that the Court plainly expected. These differences highlight the political nature of engagement and its dependence on sufficient incentives for the political branches to take the process seriously. The ambiguity inherent in engagement provides ample opportunity for resistance and, without additional
political constraints, allows the government to fail to take it seriously in many situations without real political cost.\(^{59}\)

In late 2011, the *Blue Moonlight* Court finally recognized the deleterious consequences of placing insufficient strictures on the parties entering meaningful engagement negotiations. The state, the property owners and the occupants not only have a procedural obligation to reach a potentially pareto-optimal solution, the municipality has substantive obligations to provide urgent shelter should the persons subject to eviction require accommodation prior to the provision of appropriate alternative lodging.\(^{55}\) (Whether the rather meagre cover currently offered as ‘urgent shelter’ suffices for the purposes of encouraging further challenges to otherwise inadequate housing or creates another perverse disincentive for poor litigants who wish to press the state and other non-state actors to make good on FC’s 26 obligations remains to be seen.)

C. Experimentalism and Flourishing in South African Education Law and Policy\(^{62}\)

1. *The State’s Consciously Experimentalist Approach to Education Law and Policy*

Education law and policy might initially appear to constitute a somewhat less obvious and fruitful context in which to test hypotheses regarding experimental constitutionalism. It may seem so because the Constitutional Court and lower courts have had less opportunity to engage in general norm setting and the kinds of experimentation on display in the housing cases discussed above.

But it only seems less transparent. For as various expositors on experimental governance have made clear, an experimental constitutional order need not rely solely on judicial pronouncements as to the meaning of constitutional provisions or on court-monitored enforcement of judicial edicts as to what constitutional norms, in fact, require various parties to do. Experimental constitutionalism can take place effectively so long as the various stakeholders participate in running manifold experiments designed to make good on the promise of a given constitutional (or statutory) provision. Litigation is not a prerequisite for experimentation. The outcome of litigation in the highest courts can actually block more creative solutions to complex social problems. (Indeed, most experimentalists would argue that other institutions and actors, state and non-state, engaging in simultaneous forward- and lateral-looking trials will produce a more useful body of information about what works and what doesn’t.) Rather than waves of litigation, what we have seen in education law and policy is the devolution of power from the centre to the provinces, to school governing bodies, to unions, to principals, to teachers, to parents and to learners. With that devolution has come an array of responses to the same issues: admission criteria, language policy, school governing body autonomy, access to schools, school fees and access to an adequate basic education.

So despite the relative paucity of case law, constitutional education law is not underdeveloped. The constitutional discourse is simply located elsewhere.\(^{63}\) The best example of a nuanced and reflexive engagement between state and society over the meaning...
of education-related constitutional norms has occurred in a line of cases that have engaged linguistic and cultural autonomy in our public schools. The cases reflect the kind of trial-and-error responses consistent with an experimentalist approach to statecraft.

The Department of Education’s second white paper supports the proposition that the state has quite expressly adopted an experimentalist approach to education policy. Recall this aforementioned passage from Minister of Education Bengu:

Policies are stated in general terms and cannot provide for all situations. Our legacy of injustice and mistrust continuously throws up problems which need the wisdom of Solomon to settle. In this protracted transitional period, in which new policies for a democratic society are being developed and implemented, the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognised and corrected. The possibility of damage will be reduced if new policies are based on knowledge of our charter of fundamental rights and on sufficient consultation with those who are affected by them, if conflicts are negotiated, and if principled compromises are sought.

The minister acknowledges that the department’s various imperatives pull in numerous directions and that no amount of expert analysis could anticipate the manner in which a complex set of policy initiatives would interact with a dynamic social environment. More importantly, he makes it abundantly clear that the state would revisit its experiments in education at some later date and revise them as circumstances required.

Another way to describe this experimental political space is in terms of its open texture. The education landscape circa 1994 was a function of negotiated settlements between political parties, state bureaucracies, national government, provincial government, unions, local communities, principals, teachers, parents and learners. The negotiated settlements invariably led to open spaces – such is the nature of constitution making and law making that are a function of compromise. Controversial questions are not fully answered by the law. They are instead left open-ended or rather abstract. Rarefied language secures agreement because all parties hope that the subsequent resolution of open-ended questions about the content of a given provision, at some later date, will incline in their favour. Within the last 17 years, plenty of open questions have been answered (sometimes repeatedly, and with different outcomes). Experimentalists would be inclined to say that policy interventions have rolled with the times, new political exigencies, and feedback from participants in the education system about what works and what does not.

Not everyone views matters this way. The standard account begins with the widely accepted, but radically incomplete, story of how the National Party’s belated attempts to decentralize control over public school education, and subsequent concerns about Afrikaner succession, resulted in the rather diffuse degree of constitutional and statutory control exercised by provincial governments, unions, principals, parents, learners and school governing bodies (SGBs). To put it more pointedly, the standard account emphasizes how the fragility of the ANC-led government in 1994 required it to cede authority to multiple groups in order to avoid concentrating power in a group that might contest the government’s new agenda.

My preferred historical account, culled from the travaux préparatoires of both the Interim Constitution and the Final Constitution, as well as extant education framework legislation
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(SASA), the National Education Policy Act (NEPA) and the Educators’ Employment Act (EEA), suggests that appeasing the privileged or the provincial bureaucracy or the unions is but a small part of this story. SGB autonomy, for example, was driven to a very large extent by the fundamentally democratic commitments of the African National Congress (ANC) to grassroots politics.67 The drafting history discloses how the multiple constituencies with whom the state had to contend, and the conflicting imperatives within the state’s own agenda, led to significant decentralization of decision making.68 Three points need to be made about this commitment to decentralization. First, the decentralization of decision making had less to do with a belief that local is always lekker and more to do with the state’s need to ensure that no one interest group would be able to use the law as a means of organizing in opposition to the state. Second, the decentralization of decision making flows from inevitable conflicts between the egalitarian, utilitarian, democratic and communitarian commitments clearly manifest in the ANC’s political agenda and the two new Constitutions (as it would in any well-developed, non-reductionist social democratic political theory). Third, and most importantly from an experimentalist perspective, the new government realized that various political and legal choices would have a number of unintended consequences. (The inevitability of unintended consequences is one reason pragmatists and experimentalists embrace the notions of reflexivity and rolling best practices.) The drafting history is replete with references to the ‘provisional’ nature of the structures being created by the state and the state’s commitment to revisiting and revamping those structures as it consolidated its power and shifted its policy imperatives.69 This narrative arc correlates with the state’s attempt to use the variable space of the law to experiment quite consciously with changes in education policy so that education policy might be both more effective and more closely aligned to a progressive political agenda.70

2. Constitutional and Statutory Norms regarding Linguistic and Cultural Autonomy in Public Schools and Private Schools

a. The Basic Framework

Before our velvet revolution of 1994, most political claims based on culture, language, ethnicity and religion were greeted with suspicion, and, sometimes, outright hostility.71 From the passive resistance of Gandhi, through worker movements of the early 20th century to the Freedom Charter, the preferred language of liberation was that of universal human rights discourse.72 The liberation movement’s utilization of rights discourse reflected a considered rhetorical response to romantic assertions of white, Christian, English and Afrikaner hegemony.

The liberation movement’s universalist turn provides a partial explanation for the failure of group-based claims during CODESA and the MPNF. The African National Congress rejected every attempt to entrench what it termed ‘racial group rights’.73 Political power would have to be traded for peace. That peace, and the retention of economic power by a white minority, would be vouchsafed by a firm ANC commitment to a justiciable Bill of Rights.74 But all was not lost for advocates of community rights. The Interim Constitution’s
and Final Constitution’s rejection of group political rights\textsuperscript{75} was at least partially compensated by the ‘notable levels of constitutional significance’ to which cultural, linguistic and religious matters were elevated.\textsuperscript{76} The Final Constitution contains six different provisions concerned with culture, eight with language and four with religion.\textsuperscript{77} The Final Constitution, read as a liberal political document, carves out both public and private space within which cultural, linguistic and religious formations might flourish.

The public space and private space within which cultural, linguistic and religious formations might flourish is – in terms of FC s 29(2) and FC s 29(3), respectively – reflected in the constitutional recognition of single-medium public schools and culturally, linguistically, and religiously based independent schools. However, whereas public schools can, under FC s 29(2), maintain their linguistic homogeneity only when they meet strict constitutional criteria for equity, practicability and historical redress,\textsuperscript{78} FC s 29(3) permits linguistically and culturally restrictive admissions policies at independent schools so long as these policies do not discriminate, intentionally, upon the basis of race. The Constitutional Court, in \textit{Gauteng Education Bill}, made it quite clear that comprehensive visions of the good are more appropriately accommodated in private schools and not in our public schools.\textsuperscript{79} As Kriegler J notes in \textit{Gauteng School Education Bill}, IC s 32(c), soon to be FC s 29(3), and then extant national and provincial education legislation collectively constitute

a bulwark against the swamping of any minority’s common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion . . . . There are, however, two important qualifications. Firstly, … there must be no discrimination on the ground of race . . . . A common culture, language or religion having racism as an essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly, … [the Constitution] … keeps the door open for those for whom the State’s educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.\textsuperscript{80}

Justice Kriegler offers no comment on, and certainly no support for, the contention that communities bound by common culture, language or religion have some entitlement to state support.\textsuperscript{81} While sympathetic to the belief that communities bound by common culture, language or religion are an important source of meaning for many South Africans, Justice Kriegler makes it clear that the post-apartheid state can no longer support public institutions that privilege one way of being in the world over another. Here, as in \textit{Fourie}, is another place where the Constitutional Court’s jurisprudence is not so radically under-theorized that it leaves us with no useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that co-exist within our polity and how those communities ought to engage one another. Public schools are public, not private, entities, and the state has an overriding obligation to ensure equal treatment of all of its citizens by all of its agents (including teachers and principals). The Final Constitution’s answer to those parents who wish to school their children in the language, culture or religion of their choice is pretty
straightforward: you may ‘dig into your own pocket’ and build the ‘independent school’ on your own time.82

b. Government Efforts to Control Private Power and to Eliminate De Facto Racially and Exclusionary Language Policies in Public Schools

Over the last decade, the South African government has started to flex its muscle. Concerns about consolidating power through reconciliation have receded. The current ANC administration is now in a better position to consolidate its power through policy initiatives closer to its heart – say those that pursue redress – and to challenge existing patterns of privilege. The open texture of the law in this area (of admissions policies and equity requirements) anticipated such political contestation.83

The shift is not news. By the fin de siècle, the government quite obviously shifted from a state of anxiety about its quiescence, to apprehension about the speed of transformation. The subtle change in the government’s objectives did not, so it seemed, require dramatic alterations to the law. The government sought to achieve its more egalitarian ends through the very same legal structures that it had created to promote reconciliation: new policy experiments were undertaken without a significant change in the legal equipment.84 When there was change in the legal apparatus, that change went largely unannounced.85

The body of case law built up over the past 15 years evinces the government’s desire to advance transformation efforts more quickly and to control the exercise of private power in public spaces. At the same time, the decisions acknowledge that certain kinds of associational interests merit continued solicitude even in the face of the state’s pursuit of more egalitarian educational arrangements. The cases discussed below engage the state’s and parent and learner group’s attempts to experiment with public school admissions requirements facially designed to protect linguistic community rights.

Stated at a relatively high level of generality, the government has stepped into the breach created by those who assert a constitutional entitlement to single-medium public schools and those who assert the constitutional right to be educated in the official language of one’s choice. Not surprisingly, the state has weighed in on the side of black students who wish to receive instruction in English, but who have found themselves excluded from predominantly Afrikaans-speaking public schools. (That English has not suffered the same setbacks (as yet) can be attributed to such contingent facts as the acknowledged hegemony of English as the language of business (and thus success) and the identification of Afrikaans with the imposition of that language as a medium of instruction in the 1970s, the Soweto school uprisings of 1976, and the consequent use of schools as a site of struggle against the apartheid state.)

Matukane & Others v Laerskool Potgietersrus addressed the attempt of Mr Matukane to enroll his three children at the Laerskool Potgietersrus.86 Laerskool Potgietersrus was then, and remains still, a state-aided dual-medium primary school. In the High Court, Laerskool Potgietersrus argued that it was unable to accommodate more children and that it had not rejected the children on racial grounds. At the time of the hearing, Laerskool Potgietersrus had 580 Afrikaans students and 89 English students. (The applicants were black.)
The Laerskool Potgietersrus expressed concern that if it admitted these children, it would be swamped by English-speaking children who would destroy the Afrikaans ethos of the school. Our law uniformly prohibits discrimination on grounds of race. Despite the school’s assertion that the refusals were based on overcrowding, not race, the facts clearly painted a different picture. No black children had been admitted to the school. There were no black children on the waiting list. Room existed to accommodate more English-speaking children. Little danger existed of the school’s Afrikaans culture and ethos being destroyed even if every black applicant were to be accepted. The ratio of Afrikaans-speaking students to English-speaking students would remain 5:1. The *Matukane* court held that it could draw no other inference as to the actual intent of the school’s admissions policy other than that it had discriminated directly on the basis of race, ethnic and social origin, culture and language. The *Matukane* court was driven by the facts to conclude that the ostensible promotion of language and culture was operating as surrogate for racial discrimination and that the respondent had failed to discharge its burden of proving the fairness of its admissions policies.

*Laerskool Middelburg en ‘n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* extended the holding in *Matukane* from dual-medium to single-medium schools.\(^87\) However, in *Laerskool Middelburg*, the High Court was clearly more troubled by the conflict between the right to a single-medium school and the right to be educated in the official language of one’s choice. After chiding the state for failing to take cognizance of FC’s 29’s commitment to linguistic and cultural diversity, the *Laerskool Middelburg* court conceded that the right to a single-medium public educational institution was subordinate to the right of every South African to a basic education and the need for linguistic and cultural communities to share education facilities with one other. The *Laerskool Middelburg* court was unwilling to allow the needs of 40 English-speaking – and largely black – learners to be prejudiced by the state’s failure to play by the rules and the school’s intransigence on the issue of dual-medium education.\(^88\) So while the state’s actions had, in fact, been mala fide, it was still able to secure a victory for educational equity by getting the proper parties – namely the children – before the court.

At issue in *Minister of Education, Western Cape, & Others v Governing Body, Mikro Primary School & Another* was the refusal of an Afrikaans-medium public school to accede to a request by the Western Cape Department of Education (WCDoE) to change the language policy of the school so as to convert it into a parallel-medium school.\(^89\) Acting on behalf of 21 learners, the WCDoE had directed the primary school to offer instruction in their preferred medium: English. The WCDoE had interpreted the Norms and Standards issued by the National Department of Education under SASA as requiring all primary schools with forty learners who preferred a particular language of learning to offer instruction in that language. The Supreme Court of Appeal summarily rejected both the WCDoE’s reading of the Norms and Standards and the WCDoE’s gloss on FC’s 29(2).\(^90\) The decision is notable in two important respects. First, it diminished the ability of the state to determine admissions policy with regard to language. Such power continued to vest in the SGB. Second, while affirming the rights of learners to instruction in a preferred language, it simultaneously confirmed that individual schools retain the privilege of offering instruction in a single-medium.
Mikro brought temporary relief to the SGBs of single-medium, Afrikaans-speaking schools. In Seodin Primary School v MEC Education, Northern Cape, the High Court held that the three SGBs of three primarily Afrikaans-speaking public schools could not use language preference to exclude black, primarily English-speaking learners, from admittance. Moreover, public pronouncements by the MEC for Education on the need for greater integration in the public schools system could not be interpreted as an ultra vires act aimed at the elimination of single-medium (ie Afrikaans) public schools. Seodin’s reading of the Final Constitution makes it clear that considerations of equality and transformation would, more often than not, trump considerations of associational freedom within public institutions. Put slightly differently, while the language of the Final Constitution appears to reflect a compromise between the two parties, FC s 29(2) clearly eliminates any ‘right’ to single-medium public schools, grants the state ultimate authority over language policy and makes any demand for single-medium schools subject to threshold tests for equity, practicability and historical redress.

The Constitutional Court’s decision in Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another puts that last set of propositions beyond dispute. Although Ermelo addresses a mixed bag of legal irregularities, opaque statutory provisions and complex constitutional issues, Deputy Chief Justice Moseneke’s opinion makes transparent the Court’s lack of patience with Hoërskool Ermelo’s intransigence with respect to language policy and to the admission of black students who wish to be taught in English:

The case arises in the context of continuing deep inequality in our educational system, a painful legacy of our apartheid history. The school system in Ermelo illustrates the disparities sharply. The learners-per-class ratios in Ermelo reveal startling disparities which point to a vast difference in resources and of the quality of education. … [F]ormerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education … [FC s 29(2)] is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice [but] … is available only when it is ‘reasonably practicable’. … The second part of s 29(2) of the Constitution protects the right to be taught in the language of one’s choice. It is an injunction on the State to consider all reasonable educational alternatives which are not limited to, but include, single-medium institutions. In resorting to an option, such as a single or parallel or dual-medium of instruction, the State must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices.

Thus does the Deputy Chief Justice shut the window of autonomy granted SGBs with respect to the determination of language policy (and the discharge of any other function) ostensibly vouchsafed by the Supreme Court of Appeal in Mikro. While the Head of Department of the Mpumalanga Department of Education may not have followed the correct statutory procedures, and had his decision reversed accordingly, a provincial HoD clearly possesses the power to withdraw, with good reason, a function currently discharged by an SGB. In this matter, the Constitutional Court found that the necessary grounds existed for the withdrawal of the SGB’s restrictive language policies. It required that both the HoD and the SGB revisit
the existing language policy of the Hoërskool Ermelo in light of the needs of learners in the Ermelo circuit and then report back to the Court with regard to their findings.95 From an experimental constitutional perspective, it is important that we read the Final Constitution and the subsequent litigation around language policy in public schools as part of a forward looking yet reflective engagement between various spheres of government and members of civil society about the meaning of FC s 29(2). After 15 years of experimentation with single-medium public schools, dual-medium public schools and parallel-medium public schools, South African case law, education statutes and sector-specific regulations support the dual proposition that (a) linguistic interests may occasionally trump equity where there is no sign of overt discrimination, and (b) Afrikaans-speaking learners and their parents have no constitutional right to single-medium public schools.


3. School Governing Bodies as a Flexible, Reflexive Form of Government

a. Democracy and Education and Experimentalism

The national government, provincial government, principal, teachers, parents, learners, engagement with School Governing Bodies and the judiciary over language policy and reasonable accommodation can, as we have just seen, be viewed as an ongoing experiment (trial and error) about the place of cultural autonomy, linguistic pluralism and race in our radically heterogeneous state.96 That experiment began, as the politics of the time dictated, with fairly radical devolution of power over language policy to local communities. Over time, the state and other stakeholders identified at least two problems with such autonomy and reflexively read several limits on that autonomy back into the governing constitutional and statutory norms. A rolling basic practice analysis suggests that the state and other stakeholders first found racial exclusion masquerading as cultural autonomy in a sizeable number of public schools. Neither the Constitution nor SASA tolerate such behaviour. It remained for national government, provincial government, SGBs, parents and learners to work out a set of procedures (employing the extant constitutional and statutory framework) which provincial governments and public schools could follow when assessing, substantively, exactly when racial discrimination had occurred under the guise of cultural and linguistic autonomy. That first experiment turned the broad standards articulated in the Constitution and SASA into a richer set of principles regarding the relationship between our racist past and the constitutionally vouchsafed protection of cultural pluralism. I intimated above that by the time the issues in play had percolated up to the Constitutional Court, a second experiment had been placed, ever so gently, on the table. As we shall see in the extended discussion of Ermelo in Chapter 8, Deputy Chief Justice Moseneke’s ‘ironic’ [his word] aside tantalizingly suggests that the hegemony of English, at the expense of the ten other official languages, should become a space for fruitful contestation. As matters stood in 2011 in grades 1, 2 and 3, learners were taught three subjects: language, numeracy, life skills. A second language was introduced orally in grades 2 and 3. However, in terms of the national Department of Education’s new Curriculum and Assessment Policy, learners in grades 1, 2 and 3 should
receive tutelage in four subjects: numeracy, life skills and two languages. The instruction in both languages embraces conversation, reading and writing skills development. The policy has sent ripples of concern throughout the public school system. How are schools meant to accommodate this new requirement? We can now ask ourselves, without a hint of irony, how much mother-tongue instruction ought we to expect in our primary, secondary and tertiary levels of education? Educators and learners alike are apt to test Deputy Chief Justice Moseneke’s intuitions and the government’s policy. Such an experiment will yield at least three findings: (a) the type of multicultural society we wish to be, (b) whether language can be turned into a much-needed instrument for mutual respect and integration, and (c) what sorts of educational practices will realize an integrated society based on equal citizenship. It should, in addition, produce a set of best practices around how language instruction affects (the disturbingly poor) literacy and numeracy rates among South Africa learners.

In this section, I will look at another experiment undertaken by national government, provincial government, parents and learners over the first 17 years of South Africa’s new dispensation: the extent to which school governing bodies (SGBs) offer South African parents and learners the opportunity to participate in a particular form of self-governance. A close and careful reading of the enabling statutes governing SGBs demonstrates a clear commitment to various forms of democracy – representative, participatory, direct. More importantly for the argument propounded by this book, the broad array of participants in the SGB decision making process is consistent with the bottom-up, reflexive, polycentric and flexible commitments that we associate with emergent, experimental institutions. The following analysis of SASA Chapter 4 supports two primary propositions: (1) SGBs operate as a flexible, polycentric tier of self-governance; (2) the state has regularly tweaked the powers of SGBs (as we saw above with respect to FC s 29(2)) in order to make them more transparent, more responsive and more accountable to the broad South African community of learners that they are meant to serve.

b. Are SGBs Flexible, Polycentric Sites of Emergent Experimental Decision-Making?

Not all educators or commentators would buy the premise that SGBs operate as a new, flexible sphere of government. Nor, I would imagine, are they apt to describe them as emergent experimental institutions.

One set of commentators contends that the powers granted to SGBs in the South Africa Schools Act (SASA) obscures the real intention of the government in creating such bodies. This conspiratorial reading of the law suggests that its underlying motive is to provide communities with the illusion that they have genuine control over the governance of their schools. SASA, when read with constitutional rights to equality, to religion and to freedom of expression, leaves little scope for SGBs to take decisions that reflect a comprehensive – or even partial – conception of the good held by a majority of the members of their community.

Another set of commentators reply that the creation of school governing bodies in SASA and other pieces of legislation was part and parcel of a global neo-liberal agenda. In sum, the state granted certain democratic political rights to communities, parents and learners over their individual schools in return for the parents’ acceptance – especially in elite public schools
– of significant financial responsibility for their children’s education. These critics assert that the hollowing out of the state – that flowed from a neo-liberal agenda (the demands of global capital for a cheaper, less tax-intensive economic environment) and golden handshakes to apartheid-era bureaucrats – made cost recovery initiatives such as SGB autonomy and school fees an attractive answer to budgetary constraints and the need to attract foreign direct investment. The consequences, according to the critics, are clear. Like so much else about neo-liberal, Washington consensus policies, these cost-recovery programmes, and the grant of political authority to SGBs to create and to enforce them, has only re-inscribed pre-existing patterns of social and economic inequality. (The irony of the World Bank’s recent description of South Africa as ‘unsustainable’ due to rather mundane, and seemingly intractable, features of our educational landscape, our 15% bureaucracy and our sluggish implementation of other programmes essential for the success of our developmental state should not be lost upon these critics. As Tony Judt, in a recent posthumously published essay, rightly opines: It’s very easy to point the finger regarding anti-democratic and anti-human rights practices elsewhere. It’s the obligation of intellectuals to concentrate their efforts on solutions to problems here at home.)

The problem with both accounts of SGB power is that they offer very selective readings of the SASA provisions and the constitutional norms that govern this emergent experimental institution. This section offers a third line of interpretation regarding SGB autonomy. This reading takes seriously all of the provisions of SASA that determine the powers and the functions of SGBs. It also relies on a particularly thick conception of democracy made expressly manifest in the text of the Constitution, as well as in recent case law that more clearly delineates the political, communal, cultural and associative rights of South Africa’s citizens. A careful reading of the Constitution, SASA and the case law reveals the lineaments of this emergent experimental institution.

No-one has, as yet, challenged – in toto – the constitutionality of SGBs or the enabling legislation that breathed life into them. (We have indeed seen their power curbed with respect to language policies and admissions criteria by the Constitutional Court; and incredibly powerful resistance by the Supreme Court of Appeal to the Constitutional Court’s construction of SASA and the basic law. After the SCA’s most recent judgments in Welkom and Rivonia, many SGBs may feel emboldened to engage in unconstitutional behaviour knowing that their decisions can only be reversed if the provincial Head of Department undertakes a ‘reasonable’ review process and as necessary, secures a High Court finding in his or her favour.) This comparative lack of litigation, especially at the level of the Supreme Court of Appeal and the Constitutional Court, is instructive.

Visible public debate and manoeuvring regularly takes place between state administrators, SGB boards and learners. The state and other stakeholders have – through the original legislation in SASA, in subsequent amendments to that legislation and in a significant number of court cases – attempted to place significant limits on what this emergent experimental institution can and cannot do. At the same time, other amendments and cases have expanded the realm of the SGB. Experiments with SGB form and function have taken place unceasingly – as SGBs and other parties confront new problems and attempt to solve old ones. Even with their uneven success,
SGBs provide a vehicle for popular political participation that is quite real. That participation is made no less real by the strictures imposed upon them by our basic law and the subordinate statutory order. Despite concerns about their lack of capacity, SGBs enjoy popular acceptance and participation across race, class and language divides. SGBs are one of the few institutions that have the makings of a great, new and rather unique South African political tradition.109

Brahm Fleisch and I have offered elsewhere a comprehensive reading that cuts the Gordian knot that binds, perversely, those who view SGBs as little more than a thin form of compensatory legitimation for a state with little regard for communitarian concerns, and those who view SGBs as an unfortunate consequence of the need for a negotiated settlement between the apartheid state, big business, the ANC and the unions that took place in the 1980s. Some 27 discrete sections of SASA, when read together, support the contention that SGBs enjoy genuine autonomy – at the same time as they are subject to meaningful curbs on their power by other spheres of government, most notably the provincial government and the national government. This reading of SASA puts paid to the dual contentions identified above: (1) that SGBs are mere extensions of provincial departments of education, or (2) that most SGBs operate like private, gilded associations.

But the point of the argument in these pages – as opposed to a book on education law – is to demonstrate the presence of reflexivity with respect to the norms governing SGBs and the practices engaged in by SGBs. An examination of SGBs as democratic institutions is ancillary to an understanding of the process of engagement by various stakeholders in the formation and reformation of SGBs themselves. Put slightly differently, I am less interested in the content of the legislative amendments to SASA or court judgments that have restricted the power of SGBs, than I am in showing how (through a constantly renegotiated process of promulgation of legislation, regulation and other legal standards) SGBs, provincial governments and national government have effectively institutionalized shared constitutional competence over education in a variety of settings. The case law has granted SGBs broad authority to take community-based decisions on a range of school governance issues: from the hiring to the firing of teachers, to the right-sizing of school staff, to decisions about the content of their curriculum. At the same time, our jurisprudence has subjected these considerable powers to two powerful provisos: (1) no decision may block the ability of learners and parents from historically disadvantaged communities from becoming members of a school’s community (should they meet all of the accepted statutory and regulatory criteria);110 and (2) codes of conduct must be designed in a manner that enhances inclusion and diversity, and does not unfairly limit the expressive, religious, cultural or linguistic rights of individual learners.111 Such grants of authority and the two powerful provisos on that authority show significant evidence of the shared constitutional interpretation and participatory bubbles that are my quarry here.

c. **SGBs as Emergent, Experimental Institutions**

A careful examination of amendments to the legislation over the past 15 years, as well as the case law, demonstrates that the state has, in fact, remained deeply committed to the process of representative, participatory and direct democracy in SGBs. Again: most of the express
changes in the legislation and the clarification of the legislation through case law reflect attempts to limit arbitrary use of power by SGBs, to clarify rules regarding the internal workings of SGBs and its relationships with various spheres of government, and to enhance the quality of education of as many of South Africa’s learners as possible. These changes can hardly be viewed as full frontal attacks on the citadel of the SGB. (At the same time, it’s important to remember that while the Ermelo Court has left the provincial HoD with the final say regarding a host of critical decisions that might be taken over the governance and the management of public schools, the Supreme Court of Appeal has resisted this alleged usurpation of power.)

The background against which the experiments take place is the South African Schools Act. One cannot understand the material changes made to the SGB’s capacity to act as a site for experimentation without first getting a feel for the manner in which SASA creates this space. As Brahm Fleish and I have written elsewhere:

The Preamble not only calls for the ‘democratic transformation of society’ but calls on ‘learners, parents and educators’ to take ‘responsibility for the governance and funding of schools in partnership with the State.’ SGBs, in sections 6, 7, and 8 are granted the power to determine the language policy of a school, to set up the conditions for religious observation and to create a binding code of conduct for learners. Section 11 sets up a representative council of learners – an entity that wields power unlike student bodies in other jurisdictions. Chapter 3, while notionally entitled Public Schools, contains provisions – from section 16 through section 32 (80 per cent of the Chapter) – devoted to the role and the responsibilities of SGBs. SASA Chapter 4 – which engages the funding of public schools – is, from start to finish, about the complex decision making structure that exists between SGBs, school officials, learners, parents and the state. [This] delineation of SASA’s provisions demonstrates that the Act welcomes public participation in school affairs in any number of different ways.112

i. Inclusion

Some of the most exceptional provisions of SASA create the space for learner participation in school governance.113 Three distinct sections underwrite this unique set of powers. In addition to articulating the legal requirement of all public schools that enrol learners in Grade 8 or higher to establish a representative council of learners (RCL), section 11 demands that provinces develop guidelines concerning the establishment, election and function of the learner councils. SASA section 23(2)(d) recognizes that learners in the eighth grade or higher at school are a category of persons that must be represented on the SGB. SGB section 8(1) requires that SGBs consult with learners (and other stakeholders) prior to the adoption of a school code of conduct for learners. According to Karlsson, SASA provides learners with an opportunity to ‘experience democracy in student affairs, and through their representatives on the governing body, to engage in democratic structures and practices involving all relevant constituencies of the school community.’114 Such inclusion of learners in the process of decision making – as we saw in Dorf and Sabel’s analysis of drug treatment courts and the virtues of the participation of drug users — enables SGBs to take account of the wisdom of learners without acceding to the dictates of learners.115
The incorporation of learners into the governance of schools through RCLs is but one experiment in the law. SASA promotes broader, polycentric and flexible decision making in other important respects by expanding the definition of ‘parent’ and ensuring that older learners, teachers, non-teaching staff and members of the community have a voice (if not voting rights).116

ii. Decision-Making: Shared Powers of Interpretation
SASA expressly grants a wide range of specific decision-making functions and responsibilities to SGBs.117 The SGB, in the hotly contested domain of SASA Chapter 4, takes decisions that have an enormous impact on school finance: the raising of fees, the drafting of annual budgets and the oversight of bank accounts. Many of these functions are circumscribed by national and provincial law, regulation and policy. How could it be otherwise? As matters currently stand, both national government and provincial government share legislative competence over primary schools and secondary schools. More importantly, the powers granted SGBs demonstrate the extent to which learning what works, and what doesn’t, is built into this polycentric arrangement of decision-making.

iii. Forms of Participation and Kinds of Participants
The primary form of democratic participation envisaged by SASA – across a range of school institutions – is conventional representative democracy. So, for example, in terms of SASA section 28, the MEC is required to issue regulations that specify how elections of members to the SGB are to be conducted. SASA section 29 then requires that the newly appointed members of the SGB elect office-bearers (eg the chairperson of the SGB must be a parent). SASA section 30 outlines rules related to the establishment of committees or subcommittees that could include non-elected members. (However, the chairperson of any such structure must be an elected member of the SGB.) On a slightly more mundane level, SASA specifies the composition of the governing body (section 25), the term of office of members (section 31), the status of minors on the body (section 32), and the legal standing of the body (section 15). SASA likewise articulates the procedures that need to be followed in the event that a legally constituted SGB fails to perform its function (section 25).

Learners are, as we have seen, also introduced to the practices of representative democracy through learner representative councils (section 11). When read closely, SASA provides a comprehensive set of guidelines for the exercise of representative democracy in and over public schools. But representative democracy alone would be insufficient to give full expression to a government based on the will of the people. SASA provides for two instances of direct forms of democracy. SASA section 8(a) states that the SGB must adopt a code of conduct for learners ‘after consultation with learners, parents and educators of the school’. Why the requirement for a higher standard of democratic participation for the adoption of a code of conduct? If we are to follow the logic of Matatiele II and Doctors for Life, consultation, particularly with learners and parents, is likely to deepen the commitment to the democratic rules by which learners and parents are to be governed and create greater space for experimentation with critical school policies (say, the new debates...
over beginning genuine bilingual education at Grade 1). Such direct democracy is a first step toward experimental self-governance. Direct democracy is also required for approval of a school budget and, by extension, a schedule of compulsory fees (section 38(2)). In this case, the final authority for approval lies with a simple voting majority of parents present at an annual meeting. Here again, the drafters of the legislation thought it prudent to ensure that every potential payee could give voice to her views about how money has been spent in the past and whether better pedagogy warrants changes in school expenditures. The annual meeting offers members of the school community an opportunity (a) to reflect upon their own school’s performance; (b) to look laterally at the achievements of other schools, and (c) to look forward and to take decisions with respect to how their own school might provide a better education for its learners.

iv. Experimentation with Polycentric Participation in SGBs

In the 16 years since the adoption of SASA, Parliament has amended the legislation eight times. This section’s analysis of the amendments underscores the general thesis that the state has used its power to increase access to better schools for learners from historically disadvantaged communities and to broaden participation in the governance of schools.

The 1999 Education Laws Amendment Act contains two significant changes that have had a direct impact on the majority of schools. The first relates to the role of the governing body in suspension decisions. In terms of the original version of SASA s 9(1)(b), SGBs had the right, after a fair hearing, to suspend a learner from school pending the outcome of that fair expulsion hearing. In the amended legislation, SGBs cannot take the decision alone — no matter how fair the process. The amendment now requires the SGB to ‘consult with the [provincial] Head of Department’ prior to suspending a learner awaiting an expulsion decision. The 1999 Amendment also changes the rules related to co-opted members. The 1999 Amendment adds to SASA s 23 a number of provisions that enable SGBs to continue to function when elected parents drop out of the governing body. The amendment allows the SGB to co-opt parents, temporarily, and grants these parents voting rights pending the outcome of a by-election. What is the significance of these two amendments? The first amendment, by shifting some of the SGB’s authority to the provincial HoD, makes SGB decision making more accountable. The second amendment addresses a situation in which an SGB may be rendered dysfunctional by a mid-term resignation and provides a practical solution that enables SGBs to continue to function with a parental majority. If anything, this amendment increases SGB authority and the ability of parents to exercise meaningful control over the governance of their children’s school.

In 2000, s 20(1)(k) was amended in such a way as to give the provincial Head of Department (HoD) the right to determine what constituted reasonable and fair use of school facilities for educational programmes not actually conducted by the school. The story behind this amendment is that some schools were refusing to grant provincial government the right to use parts of educational campuses to establish new schools or to provide additional classroom accommodation for nearby schools that were overcrowded. In the original formulation, schools were required to allow reasonable use under fair conditions. The question of
The ultimate legal authority – ‘who would define what constituted reasonable use and fair conditions’ – was left unspecified (until Ermelo?). Schools could have contested the meaning of these terms and in the process delayed the state’s attempt to make use of the facilities indefinitely. The post-Ermelo shift in ultimate decision making power to the provincial HoD (rightly) expands the community of learners to whom any given SGB will ultimately be held accountable.

The 2001 amendment to s 11 added the phrase: ‘and such a council is the only recognised and legitimate representative body at the school’.120 How are we to interpret the addition of this restriction? In many institutions, residual practices of the prefect system had been retained. In such cases, duly elected representative councils of learners did not receive the respect and the authority that SASA had granted them. The amendment provided a mechanism by which the state could signal to schools the importance that they attached to democratic decision making bodies – not just for adults, but for learners as well.

The 2005 Education Laws Amendment Act contained a number of significant and far-reaching changes.121 The most significant change was the creation of a new institution: the ‘no fee’ school. In the original 1996 version of SASA, all schools could charge fees and SGBs would determine the fees to be charged. As a rule of thumb, the bottom three quintiles of schools are now ‘no fee schools’. This new power to determine that a school be made a ‘no fee school’ came at a price. Any ministerial determination that a school could not charge school fees imposed upon the state an obligation to provide sufficient funding to such a school so as to compensate for the loss of funds associated with foregone fees. As an experiment, the state had finally come to the conclusion that fees charged by a substantial number of schools had no appreciable effect on their quality and constituted an unconstitutional barrier to access. The matter never had to be litigated.

Yet another change in legislation speaks to the experimental nature of education policy. The original formulation of SASA s 41 – which provided for the enforcement of payment of fees – has been substantially revised. The 1996 formulation simply states that the governing body may legally enforce payment of school fees. In the 2005 amendments, SASA s 41 was re-written in an attempt to clamp down on a range of abusive practices that had emerged around the enforcement of the payment of fees. For example, enforcement of payment can only take place after it has been determined that parents do not qualify for exemptions and all due process requirements have been satisfied. The new law also prohibits schools from placing an attachment on dwellings in any effort to recover unpaid school fees. While fees may still have their place, abuse of the fee system – and a concomitant denial of access to basic education – does not. Again: the matter never had to be litigated.

The pace of change to the South African Schools Act gained momentum in 2007.122 The 2007 amendment gives the Minister the right to prescribe minimum norms and standards around a range of issues related to school infrastructure. These issues embrace class size and classroom utilisation, first and foremost. New draft norms set minimum standards for the provision of electricity, water, sanitation, libraries, labs and sports facilities. (As matters currently stand four years later, the norms have not been promulgated and are the subject of litigation initiated by the NGO Equal Education designed to force the Minister to meet the
draft those standards.) The amendment also envisages regulations regarding the provision of learning support materials of all kinds. The most significant amendment can be found in SASA s 5A(3) and (4). One would anticipate that the responsibility to meet the minimum standards would primarily fall on the provincial department. However, the amendment stresses instead that the SGB bears the responsibility of compliance with the norms and standards. The SGB must review any school policy that may have a deleterious effect on compliance with these provisions. The School Governance Foundation’s interpretation suggests that: ‘... these norms and standards will create a basis for the state to attempt to become prescriptive concerning the number of learners in a school in relation to teacher numbers, class size and utilisation of classrooms.’

Given the strong emphasis on compliance by SGBs, it is difficult not to read this amendment against the background of battles between provincial departments and SGBs over class size and oversubscription. As I have noted elsewhere, cases such as Sunward Park demonstrate that the provinces regularly struggle to deal with large learner flows around and across provinces. Given the holding of the Constitutional Court in Ermelo, it’s hard to gainsay the School Governance Foundation’s interpretation. The new norms could provide provincial governments with standards against which they could measure school compliance and a legal basis to increase learner enrolment in an individual school. (One problem, and the subject of current litigation regarding the power of SGBs to control classroom numbers and enrolment, is that the necessary regulations have not been promulgated.) That said, Parliament has split the baby three ways: retaining for itself the power to determine adequacy standards, leaving SGBs with the power to govern themselves properly, and providing the provinces with the ultimate authority to ensure that standards are met and to solve problems that any given individual SGB might throw up with respect to access and to adequacy. (Now, for reasons that have as much to do with the economics and politics of legal NGOs, and the unqualified right to a basic education, the draft norms and standards are finally being used to leverage change through litigation around such issues as libraries, class size, teacher deployment and exclusionary practices. I am, at best, agnostic about the virtue of this new litigation frenzy.

As Mary Metcalfe, former Gauteng MEC for Education, recently pointed out, roughly 93% of provincial education budgets are allocated to salaries. Legal NGOs seem relatively unaware of the extent to which resource constraints, married to a widespread administrative failure of provincial governance, place discernable limits on what litigation might actually achieve.

But before one reads these draft norms solely as an effort to restrict the autonomy of SGBs, one must recognise that the new norms likewise provide a relatively flexible set of standards against which the efforts and the achievements of provincial governments can be measured. The continual failure of provincial governments to respond timeously to demands for more teachers and buildings will (once the norms are promulgated) be viewed as a failure to comply with SASA’s norms and standards. With the requisite legal support, parents can just as easily hold the provincial government’s feet to the fire as can the state an obstreperous SGB. (However, the contestation by parents flows in both directions: many parents (through their SGBs) are attempting to hold the line against the imposition of the new norms and standards.) Sharing competence in this manner keeps the parties accountable to one another.
Moreover, the publication of individual school scores ensures that information about effective teaching practices will be viewed in a rolling, lateral and forward-looking fashion.

One would have to be a flak – and a very disingenuous flak at that – to conclude that 15 years’ worth of amendments (and court decisions) have not altered the balance of power between the state and SGBs over the control of our classrooms. The amendments demonstrate the extent to which the state has used its power, through law making, to challenge and to force more privileged schools to open their gates to historically disadvantaged learners. The amendments have reinforced fee exemptions and come to grips with other exclusionary practices of a few elite public schools. The new norms enable provincial governments and parents to take firmer stands against schools that turn away learners when they are clearly undersubscribed. Once again, these restrictions on SGB power do not come at the cost of democratic processes or the creation of new stores of social capital. In fact, these amendments look remarkably like what John Hart Ely has called representative democracy reinforcing actions. When a majority fails to cater adequately for the equal participation of all community members (because the majority can always, by virtue of the franchise, effectively exclude meaningful minority participation), then it falls to the courts to ensure that the representative democratic processes work as they were intended.\textsuperscript{127} The enforcement of fee exemptions, the power to ensure admittance to undersubscribed institutions and the move to expand the powers of RCLs all ensure greater inclusion of various members of the community in the decision making processes that shape the school environment.

d. \textit{Does the Evidence Support SGBs as an Emergent Experimental Institution?}

SASA, the amendments to SASA and the case law litigated under SASA (and other laws) demonstrate that SGBs have come to be accepted, over time, and through trial and error, as legally legitimate emergent, experimental institutions that enhance a bottom-up, reflexive (sometimes reactive), broad-based participatory form of public decision making. SGBs clearly possess the requisite authority to take community-based decisions on a range of school governance issues: from the hiring to the firing of teachers, to the right-sizing of school staff, to decisions on language policy and curriculum offerings.\textsuperscript{128} These immense SASA-based grants of power – as the amendments to SASA have shown – do not simply preserve the status quo. Through SASA’s oft-renewed and oft-revised commitment to fee exemptions, to learner representation on SGBs and to a generally tougher legal regime that holds out the promise of new face-to-face relationships in schools, the state has charted an intelligent course between maintaining bonding networks that possess large stores of social capital and creating new social networks that deepen cross-racial, cross-creed and cross-class collaboration. The goal: that every learner receives an education that allows her to flourish.

Some critics, however, might ask whether the reflexive activity described above counts as truly experimental. It’s a legitimate question. I have pulled this punch, until now, because of an important ambiguity in theories of emergent experimental governance.

The critique elicits three primary responses. First, experimentalism does not require formal structures that pool information, that then reflect back to all participants best practices and that finally suggest appropriate rolling norms. Social practices need not work in a Cartesian

manner to qualify as experimental. Second, the evidence regarding the manner in which school policy takes shape suggests that information about what works and what does not, in fact, occurs through consistent exchanges between national government, provincial governments, municipalities, SGBs, NGOs and a variety of other social actors. The exchanges may be imperfect and the solutions proposed limited: but to experiment is to fail more often than one succeeds. Third, the change that occurs is often driven by political concerns. In South Africa, the move from reconciliation to redress means that some policies must go. Here the critiques have some bite. And yet the distinction between policy and experiment is not always clear. Nor can it be. What is a policy but an attempt to realize some good by some means? What some theorists appear to want, it would seem, are pre-planned structures that arrange for different policy interventions, collect the data on those interventions and then determine which of the various interventions constitutes a best practice. However, given the commitment to reflexivity inherent in experimentalism, it’s hard to know how a highly structured experimentalist regime can determine – in advance – exactly should count as a best practice or what should count as a new and preferred norm. The argument presumes that experimentalism always requires conscious planning of all school environments and relatively conscious ex ante assessments of optimal individual and collective outcomes. As I noted in Chapter 3’s discussion of Donald Campbell’s views on downward causation and BSVR, no empirically based discipline really works entirely in that manner.

4. The Cartesian Error as Manifest in Political and Social Experimentation

In the first place, it’s simply not true that all policies are the spawn of trial and error. Plenty of policies reflect deeply ingrained norms that lie at the very core of a community’s self-understanding. Dorf and Friedman establish this very point in their discussion of Miranda and Dickerson. Miranda expressly invited experimentation within the rarified norms articulated by the Supreme Court. However, the Dickerson Court found that because (a) the community had formed legitimate expectations about their rights vis-à-vis the Miranda holding, and (b) that co-ordinate branches of the state had failed to take up the offer to experiment for some 34 years, meant that (c) the time-frame to experiment with the Court’s gloss on the constitutional norm had passed. The amendments to SASA that have affected the powers of SGBs, along with the holding in Ermelo, suggest a fluidity consistent with reflexivity and rolling basic norms.

Second, it’s simply not true that experimentalism must always involve an expressly conscious trial-and-error approach in which politicians and other non-state actors create space for decentralized decision making and feedback mechanisms that analyse the results of local actions and distil best practices that inform the next round of large-scale policy making. This Cartesian error is exactly what this book has called into question from the outset.

Third, some readers make this Cartesian error because the experimentalist literature itself describes different kinds of forward and lateral looking feedback mechanisms. Not all experimentalist frameworks look like drug treatment courts.

Let’s return for a moment to the thesis (or interlocking theses) that lay at the heart of this work. Whether we have looked at the nature of consciousness, our radically heterogeneous
naturally and socially determined selves, how social networks form, evolve and might best be tweaked, or why emergent experimental doctrines and institutions in a social democracy committed to individual and collective flourishing might create a desirable form of political order, we have found that: (a) they are best described as processes; (b) these processes are best described as feedback mechanisms that take cognizance of both positive and negative outcomes (whether simulated or actual); (c) our record of these outcomes enable us to produce better outcomes (as measured primarily by how they fit our own ends); (d) the best processes begin with some notion of the values and the means necessary – a thin notion where thinness is a virtue, a thicker notion where a richer description is required – to create and to maintain the process (or framework) in question and (e) every such process contains an ineliminable degree of risk, such that we must be prepared for accidents to happen, and learn as much as we can from them when they do. With respect to this last (anti-Cartesian) observation, recall the fate that befell the Mars Climate Orbiter, or the Space Shuttle Challenger that preceded it. Even with such powerful negative feedback, and a desire to diminish risk to the vanishing point, the Mars Rover Curiosity team faced unknown obstacles (prior to landing) for which it could not take account. At best, all the simulated thought and lab experiments in the world could only reduce the degree of risk associated with the mission. As it is in space, so it is on Earth.

In light of the humility and the modesty life imposes upon us, we have found that while an apex constitutional court may be nice to have, it is by no means a necessary condition for experimental governance. Indeed, the provision of each individual with a basket of material and immaterial goods is far more essential for (a) the pursuit of lives worth valuing (flourishing) and (b) the kind of individual, social, political and constitutional experiments that enable us to determine which neural networks, selves, associations, policies, laws, doctrines and institutions work best.

Courtrooms have their place. But as I have just suggested, they may not generate the most useful forward- and lateral-looking learning nor provide the greatest normative legitimacy for an outcome arrived at through extended assessment and experimentation by the parties most affected by the social problem in question. The pooling of information is essential, but it need not occur through the formal structures of a courtroom. Other institutions – as we have seen in Chapters 4 and 5 – may do just as well, if not better. South Africa and the United States are constitutional democracies. That tends to skew the experimentalist pitch toward the courts. But it need not be so. European scholars – who, for the most part, are not distracted by apex courts armed with wide-ranging powers of judicial review – have described these very same processes as ‘emergent experimental governance’.

Another set of responses turns on a re-engagement with errant theories of consciousness, the desire of some critics for formal dialogical decision making structures, and the recurring reification of Cartesian modalities of thought in the legal academy. To re-engage these well-entrenched modalities of thought, let’s head back to the lab – the quintessential space for experimentation.

The 2011 Nobel Prize in physics went to three astrophysicists for their discovery of dark energy. What’s truly interesting about this discovery is that the astronomers and physicists in question literally stumbled on this truly game-changing finding. The three astrophysicists had – on two competing teams of astronomers – been locked in a race to discover how fast
the universe was expanding by using data on a particular kind of supernova. Both teams had assumed that the data captured would indicate how fast the universe (we inhabit) was slowing down (some 13.7 billion years after the Big Bang). The two primary theories about the expansion of the universe had held that the components of the universe, as they slowed down, would either fall back on themselves in what was described as the Big Crunch or simply continue to drift ever more slowly apart. As Dennis Overbye wrote: ‘Instead, the two teams found … that the expansion of the universe was actually speeding up, a conclusion no one would have believed if not for the fact that both sets of scientists wound up with the same answer.’ The scientific community did believe the results. They did so because the findings were based on evidence, the same evidence, not mere argumentation and conjecture.

Once firmly established – after severely shaking up the overlapping communities of physicists and astronomers – other scientists were off to the races. What they found has actually told us that, as powerful as relativity theory and quantum mechanics are, they explain the behaviour of only a small amount of matter and energy in the universe. We now know that 70% of the universe is made up of dark energy and 25% is comprised of dark matter – the former speeds the universe’s acceleration up, the latter slows it down. Both forces currently remain largely mysterious to us. We moved from three dimensions to four in the 20th century – and have found ourselves flummoxed by the apparent incompatibility of relativity theory (which works just fine in a world of objects with substantial mass) and quantum mechanics (which works quite well at the sub-atomic level). Yet the two theories continue to do more than enough heavy lifting in everyday science and technology.

Why are we contemplating supernovas almost 13.7 billion light years away? They have shed light on the meaning and the virtues of experimentation. First, the experience of these prize-winning astrophysicists tells us that hypotheses are just that: and that unexpected meaningful data, confirmed and reconfirmed, provide new insights into our understanding of the universe. Second, and more importantly, the story above should serve as a break on the notion of ‘conscious’, pre-determined structures of information pooling. To be sure, the scientists in question work in communities with substantially shared visions of the universe (or what little we know of it). However, the discovery and its consequences (to be left with just a complicated 5% solution) do not take the form of a stable, conscious, feedback mechanism that some critics have in mind. Not only were the teams in question unprepared for what they found, the discovery undermined the two basic views that astronomers and physicists had previously adopted as the best explanations for the phenomena already known to them.

These discoveries suggest that we bracket the formalism some legal theorists and even scholars familiar with experimentalism would impose. Instead, the story above should cultivate a strong degree of modesty about the power (and the limits) of legal reasoning (and how information is pooled and reflected back to the community). Cartesian consciousness and feedback is rigid and hierarchical. Experimental consciousness is not. (And remember from Chapter 2 – what is ‘conscious’ is but the tip of the cognitive iceberg – other players wait in the wings for ‘conscious’ attention with respect to any given problem. Many of the
most important neurological actors never set foot on the stage.) Dorf and Sabel understood
this thesis well enough when they wrote (regarding the insights that pragmatist business
management theory has to offer constitutional theory):

Pragmatist information pooling provides an alternative solution to the problem[s] of mass
production [and] hierarchical specialization. Resources specific to one project in such a system
[of hierarchical specialization] have only scrap value if put to another use, and expertise is so
fragmented and specialized that the doings of one actor or group are inscrutable to others. Hence, in
hierarchical firms, vertical integration, possession of residual control rights by a unitary owner, and
the corresponding direction of the integrated enterprise by authority and incentives are a response
to the temptations of holdups and deception. The new institutions, in contrast, so transform the
conditions of cooperation that these incitements to trickery do not exist in anything like their
acustomed form, and new forms of trickery can be countered by the very exchanges of information
required for the exploration of ambiguity. The master resource in the new system is the ability
to redeploy resources fluidly, as demonstrated in both the command of the novel search routines
and in the capacity to reuse an increasingly high percentage of the physical equipment committed
to one project in subsequent ones. The latter is accomplished, for example, by extensive use of
flexible capital equipment that can be reconfigured by reprogramming the computers that guide its
operation and changing one type of tool-bearing module for another. Moreover, the greater a work
team's command of the search routines and problem-solving disciplines, the more accomplished the
team becomes at such redeployment.131

Modern physics, contemporary pragmatist management theory and experimental
constitutionalism demonstrate the importance of remaining extremely flexible when it comes
to problem solving. Too many legal theorists fall in love with their own brilliance. They
take Dworkinian maximalism as their model, even when they profoundly disagree with his
conclusions. Shouldn't that observation alone impose a certain degree of modesty about what
we can legitimately claim in the domain of constitutional theory?

5. The Desire to Experiment, the Ability to Experiment, and the
Experiments Carried Out by National Government, Provincial
Government and SGBs

We can return now to Minister Bengu's statement and ask whether more than a decade
of experimentation with SGB power rightly qualifies as experimentation with the decision
making structures of our public schools. A sufficient amount of change – as opposed to mere
policy churn – suggests that the answer is a qualified 'yes'.

The pooling of information that has led to shifts in policy and law resides in three different
locales: the SGBs, national government and provincial government. The School Governance
Association pools information from its 2 000 member constituency. The information, while
public, is not shared with government in a fully collaborative fashion. National government
has pooled information from schools throughout the country – often relying on provincial
structures. This information has had a direct effect on changes in both law and policy.
As for provincial governments: left with the responsibility of managing schools, given
virtually no control over their budgets (dictated as they are by the national government)
and caught between powerful entities, as well as unpredictable learner demands, they have
tried their best. Have education MINMECS (National Minister and Provincial Members of the Executive Council Forum) provided truly effective fora for information sharing and policy formation between the national government and provincial governments? In most instances, MINMECS do not discharge their essential function. However, I have noted that the engagement between these three parties – not always friendly or truly co-operative – has led to limited litigation at the same time as constructive change has taken place. (The new drive towards litigation flows from parties – mostly legal NGOs – who wish to bend the will of all three of the dominant players toward a nascent social movement’s rather inchoate notion of equal education. Not surprisingly the rush to usher in change – and change is certainly necessary in our ailing and often failing public schools – does not always address the most fundamental problems in our system of public education.)

The problem with the education sector MINMEC is worth teasing out for our current purposes. The MINMEC, by design, brings together the parties with shared constitutional competence for education: the national government and the provincial governments. By design, the education MINMEC should pool information from nine very different provinces and one national government. The problem is not the experimental constitutional design contemplated by Final Constitution Schedule 4. The problem is the Big Dog that we last saw in Chapter 4. The President has no interest in actually learning about the problems in primary and secondary school education in South Africa. The President (ostensibly) needs to be seen by his party and the other members of the current tripartite alliance – as well as the public – to be an engine for change. Thus, he demands that the Minister produce a document – say new ‘draft’ Norms and Standards about learners per classroom. These standards, once employed will ostensibly reduce the appalling illiteracy and innumeracy rates that are the hallmarks of South African school system. The Minister then produces a draft that is circulated to the provinces for their ‘feedback’. The feedback from these policy interventions (well conceived or ill conceived) is invariably provincial education department blowback. The reason for the blowback is simple. The primary and secondary education sector, one of the three most heavily funded sectors in the national budget, spends 97% of the national outlay on labour and the maintenance of extant structures. That leaves roughly 3% for discretionary spending (read ‘new initiatives’). Two immediate outcomes are possible. One. The national government can, and often does, go ahead and promulgate new regulations. Since the budget remains the same, the result of such new policies with no new funding is your standard ‘unfunded mandate’. In short, the national government dictates policy initiatives, but does not supply the funding necessary to make them reality. Two. The national government can make a big production of the draft – and then sit on it because it knows that the provinces oppose having to do more with less.

In the case of the new draft norms and standards, the Minister has done just that. For better or worse, however, the national government has been taken to court by Equal Education and the Legal Resources Centre (LRC) for failing to make good on the draft. The case looks like a winner from a litigator’s perspective because the government has already promised to produce the new norms. However, everyone would be better off if this new line of cases reflected a greater understanding of the actual political and financial dynamics at play, and an appreciation
of the limited benefits that would flow from implementation of the new standards. I'm not suggesting that the national government or the provinces are always in the right. Far from it. Provincial underspend has been a persistent problem. Moreover, the provinces consistently game the system when it comes to alleged markers of success such as matric results. (It's common knowledge that schools hold back students who will likely fail their final year exams.) Only recently has the public become aware that but one out of three students who begin Grade 1 actually graduate from high school.

Despite these significant limitations, we have exchange of information and change in policy here in a form that seems far less crushingly destructive than the information-pooling, feedback-driven and ultimately punitive No Child Left Behind Act in the United States. (In the year 2014, some 80% of US public schools will likely be found to fail to have adequately educated their learners.) Put slightly differently, national government invariably has the power (because of our largely centralized policy) to make or to float policy. The provinces, in turn, can create quite a ruckus and can ultimately fail to make good on promises that they know cannot be kept. Or they can reach a compromise. 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.

This give and take doesn't look all that bad when viewed through the prism of experimentalism. The MINMECs are fora for policy formulation – even if national government gets to be the 'big dog in the room'. The back and forth between provincial governments and SGBs looks like relatively healthy engagement – even when one brackets the line of racially motivated exclusion cases that ended in Ermelo. The Constitutional Court entered the fray at exactly the right juncture – where substantial SGB autonomy had run its course and racist policies suggested that provincial Departments of Education must have the final say on any given SGB policy. (Of course, provincial departments of education have repeatedly proven incapable of following the proper procedures for altering policy or taking decisions. As a result, the effect of Ermelo is to put the issue of SGB autonomy formally to bed, knowing full well that (the most powerful) SBGs will retain day-to-day, year-on-year operational control over most school management and policy decisions. Plus ça change.)

From my experimentalist perspective, the Constitutional Court’s quiescence on issues educational has been all to the good. However, when a class of SGBs (and the Supreme Court of Appeal) proved incapable of reading FC s 29(2) properly, the Court rightly intervened on behalf of learners of colour.

From my experimentalist perspective, the host of new legal interventions is somewhat more troublesome. While a vibrant social movement around education cannot but be of great moment – for we have no future if we fail a third generation of learners – the issues chosen thus far for litigation suggest the lack of a thorough investigation of what happens inside schools themselves. Libraries for everyone would be lovely if our teachers could effectively
teach our learners to read or to think critically. They certainly don’t now. The reasons for this failure have become apparent to many educators and policy makers (call it the ‘Missionary Position’). The attempt to fix the limitations of our current stock of teachers has already secured meaningful monetary support (as an experiment undertaken in Gauteng). If litigators drive the movement, as matters currently stand, then getting teachers and learners to sing from the correct hymn sheet will prove decidedly more difficult as money is shifted from one policy to another. (Build teaching capacity. Build toilets.)

From my experimentalist perspective, the primary virtue of the currently under-theorized, extremely formal approach to education litigation is that it will – like *Brown v Board of Education* – have unintended positive consequences down the line. *Brown*’s faux sociological arguments regarding the benefits of desegregated classrooms are not its true legacy. The shift in racial relations (regarding more general social relations) unrelated to the classroom is. *Brown* ultimately delivered a two-term African-American president in Barack Obama because the US Supreme Court initiated a shift in perception that has led a sufficiently large number of white Americans to view black Americans as their equals and affirmative action programmes as justifiable. Missteps in litigation strategy in South Africa are acceptable so long as litigators learn from their mistakes and take cognizance of the policies that actually make a difference.

6. **The Tension between Politics and Experimentalism**

I must give the critics of my experimentalist gloss on education policy their due. Change has, to a significant degree, been driven by politics – a shift from reconciliation to redress. (That the number of schools affected by the shift to redress has been small is not at issue here.)

For the purposes of understanding experimentalism better, and making the theory of experimental constitutionalism better, we need to understand the extent to which ‘the banishment of politics’ limits our understanding of experimentalism’s aims. I have already suggested in this book that the social democratic cast of experimental constitutionalism – or at least its primary proponents – seems to go largely unmentioned. Indeed, such silence gives Tushnet’s critique of experimental constitutionalism its bite: namely, it’s the best technical or instrumental approach to constitutional law in a welfare state. What’s missing, again, is a clear expression of the progressive political commitments of experimental constitutionalism’s primary expositors.

I fail, as before, to see why that should be so. You can nudge – as the politically progressive Sunstein would have us do. You can experiment – as the politically progressive Dorf, Freidman, Sable, Simon and Sturm would have us do. Both nudging and experimenting in law and politics must begin with at least some deeply shared normative pre-commitments. Even in his most minimalist phase, Sunstein acknowledged the need for such shared normative pre-commitments. Indeed, they are what allows either minimalism or its beefier cousin, experimentalism, to get off the ground. (I take this same point up a third time in Chapter 7 when a substantive view of constitutional politics – flourishing – is once again ushered into the discussion.)
So politics, messy, sometimes venal, sometimes virtuous, cannot be banished. Law is ineluctably, though not entirely, norm driven. Yet the presence of politics is what exorcises experimentalists who want the theory limited to conscious, information-pooling, feedback mechanisms, and who believe that anything but such a neutral approach fails to take the rolling, reflexive nature of experimentalism seriously. For some experimentalists, describing the changes to SGB autonomy looks like nothing more than politics as usual.

However, experimentalism makes no sense unless it rests upon a progressive core of norms. What, after all, are we trying to improve but the institutions that structure our lives? Indeed, the kinds of examples of institutions that reflect experimental constitutionalist’s aspirations are dead giveaways of a progressive disposition. Drug treatment courts that have, as Dorf and Sabel hypothesized, enabled us to revise our view of drug use as deviant and criminal and supplant it with a less judgemental view of substance abuse as an illness that requires a degree of care and understanding that proves to be both more humane and far less expensive than incarceration. Articles on child welfare and education reform reveal a similar bias toward improving the lot of the most vulnerable amongst us. All three objects of study reflect a concern with individual flourishing – the very reason experimentalism is actually so easily married with development theory and the capabilities approach.

7. Polycentricity, Participatory Bubbles, Shared Constitutional Interpretation and the Right to a Basic Education in the Province of the Eastern Cape

Mud huts. No ablution facilities. No electricity. No chalkboards. No seats. No desks. No books. A place one could hardly call home. And yet government officials had the temerity to call these buildings, and what happened in them, schools. The High Court in Bisho was not fooled. In The Centre for Child Law & Others v Government of the Eastern Cape & Others, the High Court found that the Government of the Eastern Cape Province, the OR Tambo Municipality and the Government of the Republic of South Africa had failed to deliver an adequate basic education in terms of FC s 29(1) to a large number of Eastern Cape learners. The case, initiated by the Centre for Child Law and the infrastructure crisis committees of several primary schools in the Bisho district is a watershed event in South African education law and policy. A paradigmatic example of a well-designed instance of public impact litigation, the eight applicants created a record of such abject neglect that a finding of a violation of FC s 29 was ineluctable. Given this pre-ordained outcome, the culpable three tiers of government were obliged to enter into settlement talks with the applicants. From an experimentalist perspective, the settlement agreement – although not an order of the High Court – is particularly interesting because it reflects the combined wisdom of the High Court, the Centre for Child Law, the infrastructure crisis committees for seven primary schools and, of course, the government respondents.

Despite persistent averments by the Constitutional Court, that courts in South Africa should eschew decisions that determine directly the budget of any co-ordinate branch of government, the national government was compelled to make a financial commitment of R8.2 billion from 1 April 2011 to 1 March 2014 to replace inadequate structures, including mud structures, at schools throughout South Africa, and to provide basic services to those
schools'. This amount would be delivered in three successive tranches of R700, 000, R2.3 billion and R5.2 billion. R6.36 billion of this amount would flow to schools in the Eastern Cape. Of that amount, the seven applicant schools would receive amounts ranging from R10 million to R13.5 million. In addition, the national government committed itself to securing service providers within three months of the order that would ensure that the seven schools received ‘water tanks, mobile classrooms, and sufficient desks and chairs for learners’. The provincial government was obliged, in the interim, to ensure that the local municipality in which the schools are located provided interim supplies of water. Finally, although non-compliance with any part of the order by the respondents can only immediately be brought to the attention of the High Court by the applicant’s attorneys, the settlement agreement reflects consent by the parties to an ‘expedited process’ in the High Court should something go awry.

An extraordinary achievement by any measure, this settlement agreement (even without a supervisory order) sets the stage for similar forms of engagement between learners, parents, schools and all three tiers of government throughout South Africa. Should these cases continue to be brought before High Courts throughout the country, government, SGBs, schools and learners will find themselves challenged to make good on these agreements. (Indeed, the national government is already in hot water for intervening in the educational affairs of the Eastern Cape, but failing to actually solve the problem of inadequate teacher post provisioning.) What we should see, in the short term and the long term, is varying degrees of success, by the state, in co-operation with civil society, in carrying out these orders.

This case, as well as any other, establishes the virtues of an experimentalist approach to constitutional interpretation. The High Court provided a general normative framework (as courts must do) within which the various actors had to proceed in concluding a settlement. This act of shared constitutional interpretation created the participatory bubble for negotiation. Having concluded negotiations, and having reached a settlement, the bubble has burst. Of course, should any of the government respondents fails to discharge its obligations in terms of the order, a new bubble may take shape. But let us assume that in this matter the bubble entirely loses its cohesion. (This possibility cannot be assessed until April 2014.) What remains – in addition to better schools – is the enhanced legitimacy of the Constitution and the political order in the eyes of the litigants. This cardinal virtue of experimental constitutionalism – the legitimacy secured by participation – cannot be overemphasized.

This participatory bubble in the Eastern Cape foreshadows the appearance of new bubbles across the Republic. These bubbles may raise roughly identical issues. Or they may form as other parent-learner-NGO led structures identify other kinds of pressing issues best addressed by courts in terms of FC s 29(1). In each case, or any case, we shall witness a reflexive filling out of the right to a basic education, and, as a result of that reflexivity, a set of rolling best practices as determined by the parties to all such future education litigation. Here, at any rate, we can imagine participatory bubbles and shared constitutional interpretation working hand
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in glove to give FC s 29(1) increasingly greater content. An experimental constitutionalist could not ask for anything more.

Endnotes

2. Grootboom (supra) at paras 3–16.
3. Ibid at para 95. Analyses of the Constitutional Court’s distinction between a child’s unqualified guarantee to shelter under FC s 28 and the qualified right of access to adequate housing under FC s 26 were justifiably scathing. Kirsty McLean identifies three decidedly problematic contentions. First, the travaux préparatoires reflect an express intent that the rights of children to adequate shelter remain unqualified because children’s ‘vulnerability, lack of maturity and comparative innocence render them deserving of more effective protection’. Travaux Préparatoires Memorandum of the Panel of Constitutional Experts on ‘Children’ (5 February 1996). Second, the Constitutional Court conflates shelter for children under FC s 28 with adequate housing for everyone under FC s 26. No basis for such an elision exists in the text. Shelter on the plainest of meanings is rarely confused with housing. Thirdly, the Constitutional Court’s reasoning ‘subsumed’ the unqualified rights of children to protection from the elements under the highly qualified protections afforded adults. By making the rights to children subordinate to the rights of adults, the Constitutional Court has left us with the absurd outcome that only children without parents are entitled to immediate relief from the elements. Otherwise vulnerable minors are left to the wits of their parents or the acracy of the state in providing sufficient shelter. K McLean Constitutional Deference, Courts and Socio-Economic Rights in South Africa (2009) 134–135. Davis J’s analysis in the High Court suffers from none of these infirmities and is, undoubtedly, a better statement on how the relationship between FC s 28 and FC s 26 should be understood. Grootboom v Oostenberg Municipality 2000 (3) BCLR 277 (C). See L Stewart ‘Interpreting and Limiting the Basic Socio-Economic Rights of Children in Cases where They Overlap with the Socio-Economic Rights of Others’ (2008) 24 South African Journal on Human Rights 472. Stewart contends that one set of socio-economic rights ought not to be made subordinate to another set of socio-economic rights, nor should an unqualified socio-economic right (as in FC s 28) be subject to the internal limitations clause found in FC ss 26(2) or 27(2). Stewart argues that courts ought to employ FC s 36, the general limitations clause, to work out conflicts between rights and to harmonize them where possible. While Stewart’s argument sounds good at a certain level of abstraction, it relies entirely on the Constitutional Court’s willingness to give identifiable content to various socio-economic rights. In the absence of such content, it’s hard to know exactly ‘what’ the Constitutional Court will be asked to compare, contrast and reconcile under FC s 36.
4. Ibid at para 94.
6. See S Sturm ‘A Normative Theory of Public Law Remedies’ (1991) 79 Georgetown Law Journal 1357, 1367–1368 (Describes the approach embraced in Holt v Sarver 309 F Supp 362, 383 (ED Ark 1970). In Holt, a finding of grave constitutional violations in an Arkansas prison system was followed by a remedial order requiring a ‘prompt and reasonable start toward eliminating the conditions that have caused the court to condemn the system and to prosecute their efforts with all reasonable diligence to completion as soon as possible.’
7. Ibid at 1407–1408.
8. See Sabel & Simon (supra) at 1062–63 (Note that political blockage, ie the lack of accountability from the public bodies in question to certain stakeholders, is often an implicit element of the prima facie case for destabilization rights.)
9. Sturm (supra) at 1411 (Remedial orders must provide effective remedies ‘reasonably calculated to produce compliance with the underlying substantive norm.’)
10. See Grootboom (supra) at para 97 (‘Commission indicated during argument that the Commission had the duty and was prepared to monitor and report on the compliance by the State of its section 26 obligations. In the circumstances, the Commission will monitor and, if necessary, report in terms of these powers on the efforts made by the State to comply with its section 26 obligations in accordance with this judgment.’)

11. See Sabel & Simon (supra) at 1069–1071 (The remedies, which take ‘the form of a rolling-rule regime’, are provisional rules that are evaluated according to their success in achieving the desired outcomes and can be supplanted with more successful rules.)

12. See Klaaren (supra) at Chapter 24C (Klaaren argues that the Human Rights Commission has the capacity to play an ‘important independent role in interpreting, influencing and critiquing the state’s obligations with respect to socio-economic rights’.)

13. See Sabel & Simon (supra) at 1080–82 (Destabilization rights tend to spin a ‘web’ of social networks that extend far beyond the litigants affected by the positive outcome of the litigation.)

14. The detailed order in Grootboom is available at http://www.saflii.org/za/cases/ZACC/2000/14.html. The SAHRC’s failure to discharge its responsibilities in terms of the order partially undercuts Professor Klaaren’s hopes, and my own, with regard to how Chapter 9 Institutions can provide structures for information pooling and greater normative legitimacy for any order or settlement through continual and broad engagement with the communities most effected. Other Chapter 9 institutions have proved more robust. For example, the Public Protector, with the assistance of the Special Investigations Unit, has proved successful in identifying patterns of corruption in the security services and, in particular, the police force.


19. Ibid at 125.

20. Ibid at 124.


22. See Grootboom (supra) at paras 39–46, 52, 53, 63–69, 74, 83.


26. See National Housing Code, Part 3: National Housing Programmes: Chapter 12 Housing Assistance in Emergency Housing Situations, 12.2.1., available at http://www.housing.gov.za/Content/legislation_policies/Emergency%20%Housing%20Policy.pdf (accessed on 25 January 2006). Many municipalities have failed to put the policy into practice. According to McLean, City of Cape Town v Rudolph reflects the ongoing gap between rhetoric and reality. City of Cape Town v Rudolph & Others 2004 (5) SA 39 (C), 2003 (11) BCLR 1256 (C), [2003] 3 All SA 517, 547 (C)(In Rudolph I, the primary application was for eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 by the Cape Town Metropolitan Municipality. The respondents brought a counter-application for an order by the Court that the applicants were in breach of their...
McLean draws particular attention to the remarkable similarity between the factual circumstances in *Grootboom* and *Rudolph*. Both involved an attempt to evict a group of illegal occupants from state-owned land by the Cape Town municipality. Both groups were living with ‘no access to land, no roof over their heads . . . in intolerable conditions’ or crisis situations. *Rudolph*, however, was decided almost three years after *Grootboom* and Selibowitz J took great care to apply the holding of the *Grootboom* Court to the facts of *Rudolph*. The *Rudolph* Court found that ‘despite the clear statement by the Constitutional Court, applicant has still not implemented the AMLSP [Accelerated Managed Land Settlement Programme] or any equivalent programme’ and that ‘applicant has displayed and continues to display, an unacceptable disregard for the order of the Constitutional Court — and therefore the Constitution itself.’ McLean (supra) at 55–22 quoting *Rudolph I* (supra) at 553, 554. Of greater import is the *Rudolph I* Court’s order: ‘The circumstances and, in particular, the attitude of denial expressed by applicant in failing to recognise the plight of respondents as also its failure to have heeded the order in *Grootboom* . . . makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is ‘necessary’, ‘appropriate’ and ‘just and equitable’: *Rudolph I* (supra) at 553. As McLean notes, the *Rudolph I* Court was obliged to hand down such a far-reaching order – requiring the City of Cape Town to deliver a report within four months outlining the ‘steps it has taken to comply with its constitutional and statutory obligations’ – because the City had been afforded numerous opportunities to craft an appropriate response to the housing crisis and had failed to do so. McLean (supra) at 55–22 quoting *Rudolph I* (supra) at 560. The City of Cape Town barely managed to avoid being cited for contempt by making some effort to discharge their constitutional duties. *City of Cape Town v Rudolph & Others* (Unreported decision of the Cape High Court, 5 December 2005) (‘*Rudolph II*’) 2.


For support for this claim, see L Feris ‘Constitutional Environmental Rights: An Underutilized Resource’ (2008) 24 South African Journal on Human Rights 29 (finds that the content and the value of s 24 remains largely undefined and radically indeterminate.)

*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) (‘Port Elizabeth Municipality’). The usefulness of this case was brought to my attention by Professor Andre van der Walt. See A van der Walt Constitutional Property Law (2005).


*Port Elizabeth Municipality* (supra) at para 35.

Ibid at para 39.

Ibid at para 42.

Ibid at para 16.

Ibid at para 15.

Ibid at para 19.

Ibid at para 14.

Ibid at para 20.

[2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC). As always, I am indebted to Michael Bishop for his account of this case and other related matters.

Ibid at para 408 (Sachs J, concurring).
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46. Ibid at para 407 (Sachs J, concurring) ("[T]hose who have been compelled by poverty and landlessness to live in shelters, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. … The achievement of a just and equitable outcome required an appropriate contribution not only from the municipal authorities but from the residents themselves.")


49. The riots in Khutsong, Merafong and Durban reflect a conscious response to the underlying repression of pain and suffering experienced by the majority of South Africans under apartheid and in the 16 intervening years of post-liberation one-party dominant democratic rule. See T Madlingozi ‘The Constitutional Court, Court Watchers and the Commons: A Reply to Professor Michelman on Constitutional Dialogue, “Interpretive Charity” and the Citizenry as Sangomas’ (2009) 1 Constitutional Court Review 65. For an additional, largely consistent explanation of this phenomena, see S Woolman ‘Is Xenophobia the Correct Legal Term of Art? A Freudian and Kleinian Response to Loren Landau on Township Violence in South Africa’ (2011) 22 Stellenbosch Law Review 185.

50. Abahlali (supra) at para 97.

51. Ibid at para 69.

52. 2010 (4) SA 133 (GSJ). At the same time, Willis J casts significant doubt about whether single judges sitting on the High Court can play the role of meaningful engagement facilitators envisaged by the Constitutional Court, and in these pages. With respect to that part of the opinion, the learned judge is not sufficiently precise. Many individual High Court judges, on their own, are not well placed to assess complex polycentric matters. I have suggested exactly why this contention may be so in Chapter 4 and Chapter 5.

53. Ibid at para 19.


56. Of course, some more radical solutions, that depart from the standard liberal constitutional framework, are on offer. We could treat certain spaces within urban areas as commons. See E Ostrom & TK Ahn ‘The Meaning of Social Capital and Its Link to Collective Action’ in GT Svendsen & GLH Sendsen (eds) The Handbook of Social Capital: The Troika of Sociology, Political Science and Economics (2010) 17. Moreover, the notion of a commons connecting upper class Sandton and the township of Alexandria has been put on the table in the recent past. The idea was mooted – and rejected.

57. I am grateful to Michael Bishop and Jason Brickhill for extended discussions regarding this outcome.


Brickhill point out that the most significant part of the court’s reasoning and order in relation to the eviction and provision of alternative accommodation is the principle that these two orders must be ‘linked’ so as to avoid the prospect of action leading to homelessness: ‘The date of eviction must be linked to a date on which the City has to provide accommodation. Requiring the City to provide accommodation 14 days before the date of eviction will allow the Occupiers some time and space to be assured that the order to provide them with accommodation was complied with and to make suitable arrangements for their relocation. Although Blue Moonlight cannot be expected to be burdened with providing accommodation to the Occupiers indefinitely, a degree of patience should be reasonably expected of it and the City must be given a reasonable time to comply. The date should not follow too soon after the date of the judgment.’ M Bishop & Jason Brickhill ‘Juta Quarterly Reports: Constitutional Law 2011 (4)’ (December 2011) quoting Blue Moonlight (supra) at para 100. Having reached these conclusions conjoining (1) engagement, (2) accommodation, and (3) eviction, the Constitutional Court handed down in swift succession three further judgments that put further flesh on the still largely procedural right to housing. In Pheko, the Constitutional Court addressed the powers of municipalities to evacuate individuals in terms of the Disaster Management Act and the extent to which both constitutional and statutory protection against eviction limited these powers. Pheko v Ekurhuleni Metropolitan Municipality [2011] ZACC 34, 2012 (2) SA 598 (CC), 2012 (4) BCLR 388 (CC). While the Constitutional Court held that the forcible removal of the applicants amounted to an eviction and thereby infringed the applicants’ rights under FC s 26(3) and FC s 1 of the Constitution, the Court held that the evacuation of the community from an imminent sinkhole that would swallow the community was justified in terms of FC s 36 so long as – per Blue Moonlight – the municipality arranged suitable temporary accommodation between evacuation and relocation. Skurweplaas further extends the learning in Blue Moonlight. Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd [2011] ZACC 36, 2012 (4) BCLR 382 (CC). The Court found that since PPC Quarries had demonstrated little interest in using the land for profit in the near future and the municipality had the capacity to take reasonably quick steps to provide ‘bridging’ accommodation, the connection between engagement, eviction and relocation obliged the municipality to provide a clear link between the date of eviction and the date for provision of alternative accommodation. Ibid at para 13. In Occupiers of Mooiplaats 355 JR v Golden Thread & Others, the Court builds on its new linkage jurisprudence in two distinct ways. [2011] ZACC 35, 2012 (2) SA 337 (CC), 2012 (4) BCLR 372 (CC). First, a High Court must assess the viability and the desirability of the proposed alternative accommodation. Second, in order to undertake such an assessment, the municipality that seeks an eviction and relocation order must report back to the High Court on both issues before an order will be granted. See also City of Tshwane Metropolitan Municipality v Mamelodi Hostel Residents Association [2011] ZASCA 227, available at http://www.saflii.org/za/cases/ZASCA/2011/227.html. (Supreme Court of Appeal confirmed the extant prohibition on eviction without a court order in terms of s 26(3) of the Constitution.) Of greater interest, however, with respect to issues of shared constitutional interpretation is Claassen J’s approach to contempt of court in Mthimkulu v Mahomed. 2011 (6) SA 147 (GSJ). Claassen J writes: ‘Where, however, enforcement of a court order is sought civilly without any criminal sanction, proof of contempt of court may be established on a preponderance of probability. A court may issue a declarator that a respondent is in contempt of court, established only on a balance of probabilities, together with associated civil relief such as barring a contemnor from access to civil courts until the contempt is purged. In the present case the appellants did not seek a committal, only a suspended fine.’ Ibid at para 18. The High Court found the respondents to be in contempt of court and fined them R100,000 (suspended for twenty years, and contingent upon the state’s commitment not to evict the residents during that period of time).

63. A notable exception occurred in the Eastern Cape in early 2011. In *The Centre for Child Law & Others v Government of the Eastern Cape & Others* (Case No 504/10, Eastern Cape High Court (Bisho)) (2 February 2011). I discuss the basis for the FC’s §29(1) constitutional challenge and the settlement in *The Centre for Child Law & Others v Government of the Eastern Cape & Others* in the text below.

64. For a close reading of the constitutional provisions and the statutes governing equity requirements at independent schools, see S Woolman ‘Defending Discrimination: On the Constitutionality of Independent Schools that Promote A Particular, If Not Comprehensive, Vision of the Good’ (2007) 18 *Stellenbosch Law Review* 31 (Constitutional, legislative and regulatory framework for admissions policies at non-state-aided independent schools appears to afford learners, parents, educators and school governing bodies (SGBs) a substantial degree of autonomy.) For a close reading of the constitutional provisions and the statutes governing equity requirements at public schools, see B Fleisch & S Woolman ‘On the Constitutionality of Single Medium Public Schools’ (2007) 23 *South African Journal on Human Rights* 34. In *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, Justice Kriegler claimed that IC § 32 (c), FC § 29(3) and then extant national and provincial education legislation and subordinate legislation collectively constitute ‘a bulwark against the swamping of any minority’s common culture, language or religion … But there is a price, namely that such a population group will have to dig into its own pocket’. *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Kriegler J)(‘Gauteng Education Bill’) at paras 39–42.


66. That account, as John Pampallis writes, turns primarily on the rear-guard actions of the apartheid state to maintain white, privileged public schools. He first notes that: ‘In its dying days, the apartheid government took a significant step towards decentralising the white education system. After the government’s unbanning of the liberation movements in 1990, pressures began to build for the desegregation of white state schools … In 1990, the Minister responsible for white education ... announced that white state schools would be allowed to change their status from the beginning of 1991. Three new school models were available: (1) Choosing Model A would result in the privatisation of the school; (2) A Model B school would remain a state school but could admit black students up to a maximum of 50% of its total enrolment; (3) A Model C school would receive a state subsidy but would have to raise the balance of its budget through fees and donations.’ J Pampallis ‘The Nature of Educational Decentralisation in South Africa’ (Centre for Education Policy Development, Evaluation and Management) Decentralisation and Education Conference, Johannesburg, South Africa (11–14 June 2002) 3, citing Department of Education ‘Education and Training in a Democratic South Africa: First Steps to Develop a New System’ GN 16312 (March 1995) 8. See also S Badat ‘Educational politics in the Transitional Period’ in P Kallaway et al (eds) *Education after Apartheid: South African Education in Transition* (1997) 9. Pampallis continues: ‘By early 1992, most of the 1 983 white state schools had chosen to retain their old status … The following year, however, the government announced that all the formerly white schools … would become Model C schools unless parents voted by a two-thirds majority to retain the status quo or become Model B schools, and that subsidies to all school models would be cut. As a result, … 96% of the former white state schools became Model C schools, thus giving themselves the possibility of raising additional funds from parents to make up for the decrease in state funding … The parent body in each Model C school elected a governing body. Title to the fixed property and equipment of the school was given by the state to the school, to be administered by the governing body. The schools became juristic persons with the right to enter into contracts and to sue and be sued. They gained a high degree of autonomy, including the right to charge compulsory school fees and to determine their own admissions policy. The reasons for this change in the status of the white schools appear to have been twofold. First, the state was increasingly unable to provide the same level of financial support to white schools as previously. … [T]he changing political climate
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... obliged [the] government to move to greater equality in spending on black and white education.

... Second, the change to Model C was an attempt to ensure that white communities could continue to control their schools rather than allowing them to fall into the hands of a democratically-elected government, which was (rightly) seen as imminent.’ Pampallis (supra) at 4–5. See, further, Education Affairs Act (House of Assembly) Act 70 of 1988. What was truly surprising was how few schools and parents opted for Model A. The sense of entitlement to government largesse in large sectors of the white community was so ingrained that most white parents could not foresee a future without access to state funding. This lack of foresight explains (a) why advocates for historically privileged schools continue to misread FC s 29(2) as protecting continued access to state funding for single-medium public schools, and (b) why so few cases have turned on the protection afforded independent schools under FC s 29(3). The need to reverse this sense of entitlement was recognised in one of the first new ANC government’s white papers. See Department of Education White Paper II: The Organisation, Governance and Funding of Schools GN 1229 (November 1995) 6.23 (‘White Paper II’) (‘The provision of state aid to a semi-privatised school system … served to entrench existing privileges and retain the best schools, the best facilities and the most highly qualified teaching staff in the interest of those who had historically been most advantaged by the policy … of racial preference in this country.’) See also J Samuel ‘The State of Education in South Africa’ in B Nasson & J Samuel (eds) Education in South Africa: From Poverty to Liberation (1990) 17.

67. See S Woolman & B Fleisch ‘Democracy, Social Capital and School Governing Bodies in South Africa’ (2008) 20 Education and the Law 37. Extant SGB autonomy has its roots in the practices of South Africa’s liberation movements. Many of the ANC government’s early educational initiatives were predicated on the assumption that sustained school improvements must develop organically out of community participation and that community participation is contingent upon stronger (read autonomous) school governance structures. See Gauteng Department of Education ‘Gauteng School Renovation Programme Implementation Plan’ (1994) (‘The key to successful school development lies in the capacity of communities at all levels to guide and manage their own development … [and] the revitalisation of participatory structure[s]’); Gauteng Department of Public Works ‘Evaluation of the Gauteng Schools Toilet Building Project’ (1997) 10–11 (‘It was envisaged that community participation would prompt greater civil society participation in school governance, and stimulate emerging builders. … It was believed that the toilet project would help to transfer power from the State to school governing bodies.’) See, generally, African National Congress The Reconstruction and Development Programme (1994) (‘Everyone who is affected must participate in decision making. … Democracy is not confined to periodic elections. It is, rather, an active process enabling everyone to contribute to reconstruction and development’); ANC National Education Co-ordinating Committee National Education Policy Initiative (1992) (Calls for dual structures of power: the state, on the one hand, community stakeholders on the other.) It is, among other things, a testimony to the ANC’s commitment to democracy that a party without a real opposition would divest itself of decision making power based upon its belief that local schools and local communities would be best served by local political structures – in this case the SGB. However, the ANC’s belief in the need of a strong central government to effect transformation may have militated against giving too much power to the community. See Y Sayed ‘Discourses of the Policy of Educational Decentralisation in South Africa since 1994: An Examination of the South African Schools Act’ (1999) 29 Compare 141, 143 (Sayed notes that community representatives – unlike parents – do not possess voting status on SGBs in terms of SASA. It seems reasonable to ask, however, why community representatives, who have no direct tie to the school, should enjoy such status.) But see R Malherbe ‘Centralisation of Power in Education: Have Provinces Become National Agents?’ (2006) 2 Tydskrif vir Suid-Afrikaanse Reg 237 (Malherbe contends that the ANC believed that ‘political power should be centralised as far as possible.’) Jonathan Jansen offers his own complex historical narrative
to explain the constitutional choices and the educational policies that we have today. For Jansen, the trade union movement, the ANC’s National Education Crisis Committee, the international aid community, the business community, the NGO sector and the National Education and Training Forum constitute the seven most important bodies with respect to educational policy development in the run-up to and aftermath of the 27 April 1994 elections. See J Jansen ‘The Race for Education Policy after Apartheid’ in Y Sayed & J Jansen (eds) Implementing Educational Policies: The South African Experience (2001) 12.

68. Sophie Oldfield describes this process of decentralisation of power in terms of a ‘fragmentation’ of state policy that had not, prior to 1994, been anticipated by those parties who would govern the post-apartheid state. See S Oldfield ‘The South African State: A Question of Form, Function and Fragmentation’ in E Motala & J Pampallis (eds) Education and Equity: The Impact of State Policies on South African Education (2001): ‘The broader dismantling of the apartheid legacies has involved a process of rereading and rewriting the legal and social contracts that govern relationships between state and society. However, the process of making society legible to post-apartheid imperatives of equity and then simplifying these realities into social policy to redress inequality has been fraught with difficulties. … The reconstruction of education [through state policy] lies at the heart of this transformation [of South Africa] because education marks a path for individual, community and collective development. … To give effect to these policies, Parliament has passed a host of legislative measures … to reconfigure educational structures from the level of the school, to the district, the provinces and the national state. In the process of constructing … solutions to post-apartheid transformation, the state’s role in development has rotated in orientation. This rotation has altered the development process itself – so much so that the agenda of the post-apartheid state has fragmented from one of prioritising reconstruction and redistribution … to one of facilitating the delivery of social services beyond the ambit of state responsibility.’ Oldfield (supra) 32–33.

69. Put somewhat differently, the fragile state that drafted the Final Constitution, SASA, NEPA and EEA could never have withheld the authority that it had granted. At best, the state could hedge its bets. Whether the issue was basic education, or school fees, or admissions policies (or even school choice), a fragile state crafted legislation and regulation that divided management, governance and policy-making responsibilities between national government, provincial government, provincial Heads of Department, teachers, principals, unions, SGBs, parents and learners without establishing clear hierarchies of authority. The result was that local and private actors in the mid-1990s were able to assert their interests through legal channels without having to worry about being rebuffed by the state. The price that the state paid for such assertions of private power was small by comparison to the compensatory legitimation that it secured through de jure and de facto decentralization. H Weiler ‘Comparative Perspectives on Educational Decentralization: An Exercise in Contradiction?’ (1990) 12 Education Evaluation and Policy Analysis 433.

70. The ANC’s complex political agenda mirrors, but does not always match, the egalitarian, utilitarian, democratic and communitarian commitments found within the Constitution. The ANC as a governing party in the 21st century, and no longer a liberation movement in the 20th century, must pursue: (a) an egalitarian agenda that aims to provide a substantively, equal start for all its citizens; (b) a libertarian agenda that recognises the formal freedoms enjoyed by its citizens; (c) a utilitarian agenda designed to create the greatest good for the greatest number of its denizens; and (d) a democratic and a communitarian agenda that privileges, in some important respects, the face-to-face relationships found in kin, clan and commune over the more abstract relationships that bind us, at a highly abstract level, as citizens of the Republic of South Africa.

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72. Some might argue that these movements were more group oriented than this sentence admits. Gandhi’s work in South Africa focused almost exclusively on rights for South Africa’s Indian population and was later translated into an anti-colonialist movement when he returned to India. Worker’s rights would – in the South African context – have been described as class rights for white workers. The Freedom Charter has a decidedly communitarian cast. Its language describes the land (and its fruits) as belonging to all South Africans and is decidedly focused on redistribution and reclamation. The displaced and disenfranchised South Africans were primarily people of colour.


74. See Giliomee (supra) at 40. The ANC insisted that minority rights qua static, non-demographically representative levels of political representation were unacceptable. The ANC proposed a compromise between two political positions: the demand for unfettered majority rule on the one hand, and the insistence of some whites for structural guarantees that ‘majority rule will not mean domination by blacks’ on the other. The Bill of Rights is, in large part, the content of that compromise.

75. See Sachs (supra) at 13 (‘The instruments and the institutions of government are not based on cultural groups, cultural communities or representation in terms of membership of a particular community.’)


77. Ibid. Provisions of the Final Constitution dealing with culture, language and religion include, but are not limited to: (a) ss 9, 30, 31, 235 (culture); (b) ss 6, 29, 30, 31, 35, 235 (language); and (c) ss 9, 15, 30, 31, 224 (religion).

78. IC s 32 reads quite generously. It states that ‘educational institutions based on a common culture, language or religion’ can be established, ‘provided that there shall be no discrimination on the ground of race’. FC s 29(2) reads: ‘Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account: a. equity; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices.’ FC s 29 (3) reads: ‘Everyone has the right to establish and maintain, at their own expense, independent educational institutions that a. do not discriminate on the basis of race; b. are registered with the state; and c. maintain standards that are not inferior to standards at comparable public educational institutions.’ Rassie Malherbe contends that FC s 29(2) provides a strong guarantee – a rebuttal presumption – that linguistic communities can create and maintain publicly funded single-medium public schools. See R Malherbe ‘The Constitutional Framework for Pursuing Equal Opportunities in Education’ (2004) 22 Perspectives in Education 9. With the greatest respect, Malherbe misreads FC s 29(2). He collapses the distinction between the right to instruction in a mother-tongue or preferred language (where practicable) with the obligation imposed upon the state to consider a range of options as to how to offer such instruction. Malherbe privileges single-medium schools. FC s 29(2) does not. Ibid at 21. It mentions them only as one in a range of alternatives that the state has an obligation to consider. Moreover, any option considered by the state for delivering mother-tongue instruction – one of which is single-medium schooling – must satisfy the three criteria of equity, practicability and historical redress. Malherbe claims that because the Final Constitution specifically refers to ‘single-medium institutions’ that ‘whenever they [single-medium institutions] are found to be the most effective way to fulfill the right to education in one’s preferred language, single-medium institutions should be the first option’. Ibid at 22. This analysis places the cart before the horse. Because Malherbe collapses the distinction between mother-tongue instruction and single-medium schools, he fails to recognize that the right to the preferred language instruction is subject to ‘practicability’, and that the privilege of maintaining a single-medium public
school can only be retained if the school’s continued existence satisfies the three-fold criteria of equity, practicality and redress. Finally, Malherbe asserts that ‘right to education in one’s preferred language is guaranteed unequivocally in the South African Bill of Rights’. Ibid. This statement is clearly false. As the above language of FC s 29(2) indicates, the right to receive education in the official language or languages of one’s choice in ‘public educational institutions’ is subject to a powerful internal modifier. That dimension of the right exists only where the provision of ‘that education is reasonably practicable’. See also R Malherbe ‘Submission to President Nelson Mandela on behalf of a group of Afrikaans Organizations’ (15 May 1996); R Malherbe ‘A Fresh Start: Education Rights in South Africa’ (2000) A European Journal for Education Law and Policy 49. In any event, the Constitutional Court’s judgment in Ermelo has put paid to this line of argument.

79. See Ex parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Justice Sachs argues that the religious, linguistic and cultural rights found in the Interim Constitution are best understood as efforts to ‘concretis[e] … a certain measure of cultural/linguistic autonomy in the private sphere. … Section 32(c) appears, … to be an explicit, if limited, acknowledgement of the need in certain circumstances to allow for a departure from the general principles of [non-discrimination] … What appears to be provided for … is not a duty on the State to support discrimination, but a right of people … to further their own distinctive interests.’)

80. Ibid at paras 39–42.

81. Others, such as Iain Benson, have argued that the Final Constitution’s permission to create a Religious Charter does just that. I Benson ‘Religious Freedom and South Africa’s Charter of Religion’ SAIFAC Conference on Equality and Religious Freedom (June 2010)(On file with author.)

82. Of course, the historical and legal record regarding community rights and public schools is somewhat more complex. See S Woolman & B Fleisch ‘South Africa’s Unintended Experiment in School Choice: How the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act Create the Enabling Conditions for Quasi-Markets in Schools’ (2006) 16 Education and the Law 37.


84. A good example of this shift in goals is on display in the state’s efforts to bring independent schools to heel by attempting to control the age of admittance for learners at independent schools. The state seemed to assume that it could go after independent schools in this manner without having to worry about alienating a particular constituency – a constituency that would mobilize around ascriptive identifiers such as language, religion or culture. What the state failed to take sufficiently seriously was the ability of individual parents to mobilize around the interests of their own children. In Harris v Minister of Education, the High Court found that the state’s age restrictions on admission to Grade 1 constituted an unjustifiable impairment of Tayla Harris’ right to equality. 2001 (8) BCLR 796 (T) (Harris HC)(The King David Schools refused to admit Talya to Grade 1 in 2001 – even though her parents believed she was ready. The refusal to admit Talya was based upon a notice issued by the Minister of Education stating that independent schools could only admit learners to Grade 1 at the age of seven. Unwilling to take the risk that Talya might experience a developmental deficit after being held back a year, Tayla’s parents decided to challenge the constitutionality of the notice so that their daughter could be admitted to Grade 1 in 2001.) The Harris HC Court found that the state had failed to tender any adequate justification for its policy. The Minister was afforded an opportunity to rebut the presumption of unfair discrimination. First, the Minister argued that six-year-old children were more likely to fail than seven-year-old children and such failure rates had serious financial consequences for the state. Second, the Minister argued that the diversity of cultures and languages within South Africa produced insuperable difficulties for the creation of a school readiness test. Third, the Minister argued that sound pedagogical reasons exist for starting formal education at age seven. The Harris HC Court rejected all three arguments tendered by the Minister because the state
had failed to adduce any evidence in support of its claims. As a result, the state failed to rebut the presumption that unfair discrimination on the grounds of age had taken place. More importantly, the result thwarted state efforts, on apparently neutral grounds, to control private power as exercised through private institutions. *Harris HC* stands for the proposition that the associational rights of the parents who send their children to independent schools trump alleged state interests in equality where the equality interest asserted cannot be backed up by any compelling pedagogical rationales. The Constitutional Court did not confirm the ratio or the holding of the High Court, but found instead that the Minister lacked the requisite authority under NEPA s 3(4) to create such a rule. *Minister of Education v Harris* 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC) (*Harris CC*) at paras 11–13.

85. The biggest legal challenge to the exercise of private power in private institutions has been the promulgation of the Promotion of Equality and Prevention of Unfair Equality Act 4 of 2000. PEPUDA constrains private power in ways the courts, and those who run public schools and non-state-aided independent schools, have yet to fully appreciate. Indeed, it seems fair to say that the government itself — in the form of national and provincial departments of education — remains largely unaware of the power this particular tool has to reshape admissions policies (along more egalitarian lines) at both public schools and non-state-aided independent schools. PEPUDA makes it clear that its provisions prevail over all other law — save where an Act expressly amends PEPUDA or the Employment Equity Act applies. However, recent Equality Court judgments have slowly drawn attention to the manner in which PEPUDA can be used to constrain private power that impairs the dignity of employees of private religious schools. See, eg, *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park* 2009 (4) SA 510 (EqC) (the applicant was an independent contractor appointed by the church to teach music to the learners that participated in the church’s arts academy. When the church discovered that Mr Strydom was gay, they dismissed him from his job. The Equality Court found that the church had unfairly discriminated against Mr Strydom on grounds of sexual orientation. It ordered the church to apologize to Mr Strydom and awarded damages for loss of earnings, the impairment of dignity, and emotional and psychological suffering.)

86. *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T).

87. 2003 (4) SA 160 (T).

88. FC s 28(2)’s guarantee that the best interests of the child are always of paramount importance was held by the *Laerskool Middelburg* court to trump the language and cultural rights of the school’s Afrikaans-speaking learners. In deciding that the ‘minority’ students must be accommodated, the *Laerskool Middelburg* court correctly concludes that the right to a single-medium public educational institution is clearly subordinate to the right which every South African has to education in a similar institution is to a clearly proven need to share education facilities with other cultural communities. The *Laerskool Middelburg* court seems to be on far shakier grounds when it suggests that a claim to a single-medium institution is probably best defined as a claim to emotional, cultural, religious and social-psychological security. This trivializes the desire to maintain basic, constitutive attachments. It seems clear that the desire to sustain a given culture as it stands — read contemporary Afrikaner culture — is best served by single-medium institutions that reinforce implicitly and expressly the importance of sustaining the integrity of that community. As a result, the *Laerskool Middelburg* court must be wrong when it claims that the conversion of a single-medium public institution to a dual-medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic communities’ claim to a school organized around its language and culture. Ibid at 173. That is exactly what the conversion does. Whether such insularity is good for learners in a multicultural society is another matter. I, like Professor Jansen and others, tend to think that it leaves them ill prepared to engage the radically heterogeneous world that they will enter upon graduation. See J Jansen *Knowledge in the Blood: Confronting Race and the Apartheid Past* (2009).
89. *Minister of Education Western Cape & Others v Governing Body, of Mikro Primary School & Another* 2006 (1) SA 1 (SCA) (*Mikro*). See also *Governing Body, Mikro Primary School, & Another v Minister of Education, Western Cape & Others* 2005 (3) SA 504 (C), [2005] 2 All SA 37 (C), 2005 (10) BCLR 973 (C).

90. It did so on three primary grounds. First, the Supreme Court of Appeal overturned Bertelsmann J’s finding in *Laerskool Middelburg* that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. At best, the Supreme Court of Appeal said, the Norms and Standards constituted a guideline for members of the department and those parties responsible for the governance of public schools. Second, the Supreme Court of Appeal held that SASA s 6(1) granted neither the national Minister of Education nor the provincial MEC or HoD the authority to determine the ‘language policy of a particular school, nor does it authorize him or her to authorize any other person or body to do so’. The power to determine language policy vests solely with the SGB of a given public school and is subject only to the Final Constitution, SASA and any applicable provincial law. Third, the Supreme Court of Appeal rejected the applicant’s contention that FC s 29(2) could be ‘interpreted to mean that everyone had the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable’. *Mikro* (supra) at para 30.

91. *Seodin Primary School v MEC Education, Northern Cape* 2006 (1) All SA 154 (NC).

92. Brahml Fleisch and I believe that the extant jurisprudence, post-*Ermelo*, supports the following reading of FC s 29(2): 1. FC s 29(2) grants all learners ‘the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable’. First note that the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable is not, as the Supreme Court of Appeal in *Mikro* noted, an unqualified right. The right is subject to a standard of reasonable practicability. How should this internal limitation of the right be read? Where sufficient numbers of learners request instruction in a preferred language – and, as we shall see below, we do possess regulations, as well as standards and norms, that make clear what those numbers are – and no adequate alternative school exists to provide such instruction, then a public school is under an obligation – with assistance from the state – to provide instruction in the language of choice. However, when we proceed to the second sentence in FC s 29(2), it is worth taking another look at the meaning of ‘reasonably practicable’. As an evidentiary matter, the learner or the learners or the state must be able to show that instruction in the language of choice is ‘reasonably practicable’ at the institution where the learner or the learners have applied for admission. So, for example, a single learner who requests instruction in Sepedi in a single-medium Zulu school may be hard pressed to demonstrate that it is reasonably practicable to accommodate her. An inability to establish reasonable practicability would be even more pronounced where the learner who preferred instruction in Sepedi had access to an adequate school that offered Sepedi instruction. However, when we proceed to the second sentence in FC s 29(2), it is worth taking another look at the meaning of ‘reasonably practicable’. As an evidentiary matter, the learner or the learners or the state must be able to show that instruction in the language of choice is ‘reasonably practicable’ at the institution where the learner or the learners have applied for admission. So, for example, a single learner who requests instruction in Sepedi in a single-medium Zulu school may be hard pressed to demonstrate that it is reasonably practicable to accommodate her. An inability to establish reasonable practicability would be even more pronounced where the learner who preferred instruction in Sepedi had access to an adequate school that offered Sepedi instruction. Finally, a failure to demonstrate that a request for instruction is reasonably practicable ends, as the *Mikro* Court found, the FC s 29(2) inquiry. Assume, however, that the learner has shown that instruction in the language of choice is reasonably practicable at the institution where she has applied for admission. Only then do we consider the import of the second sentence of FC s 29(2). The second sentence of FC s 29(2) states that ‘[i]n order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account: a. equity; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices’. The second sentence of FC s 29(2) makes it patently clear that single-medium institutions are but one way of accommodating the right of a learner to instruction in the language of choice. Moreover, the mere mention of single-medium schools in no way privileges such institutions over dual-medium schools, parallel-medium schools, or schools that accommodate the multilingualism of the student body in some other way. All that this section of FC s 29(2) requires is that the state consider ‘all reasonable educational alternatives’ that would make mother-tongue or preferred language instruction possible. However, even if single-medium schools are found to be one of the reasonable alternatives for preferred language instruction, the single-medium school must be able to
satisfy a three-factor test. That is, for a single-medium school to be preferred to another reasonably practicable institutional arrangement – say dual-medium instruction or parallel-medium instruction – it must demonstrate that it is more likely to advance or to satisfy the three listed criteria of equity, practicability and historical redress. 7. This constitutional concession to single-medium schools is a very weak right indeed. It is, perhaps, best described as right to have reasons or an entitlement to justification. Such an entitlement is not without value for proponents of single-medium schools. What the second sentence of FC s 29(2) ultimately requires is that the state be able to justify its preference for one form of school over another. Given the Final Constitution’s recognition of single-medium schools as a legitimate means of providing preferred language education, the state will find itself under an obligation to demonstrate why another form of instruction – dual-medium, parallel-medium, special tutoring – will better serve the learners in question. Moreover, the Final Constitution’s recognition of community rights, associational rights, religious rights, cultural rights and linguistic rights creates a set of background conditions against which claims for single-medium schools must be taken seriously. For where preferred language instruction is reasonably practicable, and where single-medium schools satisfy the desiderata of equity, practicability and historical redress, the state cannot simply invoke an overriding commitment to ‘equality’ or ‘transformation’ in order to dismantle single-medium institutions. The Final Constitution is, ultimately, a post-apartheid constitution. Thus, at the same time as it sets its face against exclusion and discrimination, it rejects the kind of totalizing view of the state that marked and marred apartheid. Space remains – within both the private realm and the public realm – for the accommodation of multiple ways of being in the world. That public space, as we have seen, is extremely narrow for single-medium public schools. However narrow it may be, it cannot be entirely wished away. The Constitutional Court, in Ermelo, has largely confirmed this reading. See Head of Department, Mpumalanga Department Of Education & Another v Hoërskool Ermelo & Others 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC).

93. Ibid. The High Court had heard the matter twice. Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga [2007] ZAGPHC 4 (2 February 2007)(‘Hoërskool Ermelo I’); Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga [2007] ZAGPHC 232 (12 October 2007)(‘Hoërskool Ermelo II’). In Hoërskool Ermelo I, Judge Prinsloo, of the Pretoria High Court, suspended a decision of the Mpumalanga education department to dissolve the school’s governing body and to replace it with a departmentally appointed committee. The dissolution would have enabled the Mpumalanga education department to alter the school’s language policy and allowed English-speaking pupils to receive instruction in English. On appeal, Transvaal Judge President Ngoepe, and judges Seriti and Ranchod, set aside the High Court ruling in Hoërskool Ermelo I. The Hoërskool Ermelo II Court found that the Afrikaans-medium public school must admit English-speaking pupils. Of particular moment for the Hoërskool Ermelo II Court was the under-subscription of Hoërskool Ermelo. Given that Hoërskool Ermelo was operating at only half capacity, the Full Bench found that it was ‘reasonably practicable’ – as contemplated by FC s 29(2) – for the high school to accommodate the 113 Grade 8 learners. The mere fact that all the classrooms were being employed and that the existing curriculum turned on the current availability of classrooms did not constitute sufficient grounds for excluding English learners and maintaining Hoërskool Ermelo as a single-medium Afrikaans-speaking public school. Equity, practicability and historical redress – the three express grounds for assessment of existing language policy in terms of FC s 29(2) – justified the transformation of Hoërskool Ermelo from a single-medium public school into a parallel-medium public school. The Supreme Court of Appeal reversed the judgment of the High Court in Hoërskool Ermelo II. Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others 2009 (3) SA 422 (SCA). The Supreme Court of Appeal found that the HoD lacked the requisite statutory authority to alter the SGB’s language policy. It did not contemplate the constitutional implications of the matter. The Constitutional Court upheld some aspects of the SCAs judgment – namely the rebuke of the HoD with regard to a brace of procedural irregularities that undermined the Department’s attempt to alter Hoërskool Ermelo’s language policies. At the same time, the Constitutional Court indicated that it wanted
to hear — after appropriate consideration — how the HoD planned to engage the issue of a parallel-instruction school or an English-only instruction school in the Ermelo circuit. It also made clear that Hoërskool Ermelo must revisit its language policies in light of the Constitutional Court’s clear finding that the SGB did not possess the unmitigated authority to determine the school’s language policy and that it was obliged, in terms of FC s 29(2), to take the needs of all learners into account when it determined the language of instruction: the right to instruction in a language of choice (where reasonably practicable), fairness, feasibility and the need to remedy the results of past racially discriminatory laws and practices must play a critical role in their decision making.

94. Ibid at paras 2, 46, 49–53.

95. Although Ermelo constitutes the first instance in which the Constitutional Court opined upon the meaning of FC s 29(2) of the Constitution, it is, perhaps, the Deputy Chief Justice’s ‘ironic’ aside regarding the hegemony of colonial languages in Africa that packs the greater charge. In policy circles, a consensus may be building around the belief that the de facto default position of English as the primary language of instruction from primary school onwards has not served South African learners well. As I note above, we may be on the verge of witnessing a new experiment: namely that educators have come to believe that multilingualism in schools is essential for the success of most South African learners (because they will only learn effectively if mother-tongue instruction is offered). Although this new experiment may not save single-medium Afrikaans schools, it may save Afrikaans as a living language. Multilingual schools do not necessarily have to accept English as a default language. One could easily imagine schools in which Afrikaans and Sepedi were both taught to the same, or to distinct, cohorts of learners. Indeed, single-medium Afrikaans schools may well come to see dual-medium or parallel-medium education as a saving grace — and get out in front of intrusive provincial Heads of Department. Such a strategic move has already occurred at the tertiary level. The University of Johannesburg (formerly Rand Afrikaans University) made a strong play for black students in 1990s — and thus the provision of tuition in English — as a strategy for growth. The University of Pretoria has embraced English as matter of survival. (Indeed far more students at the faculty of law study in English than in Afrikaans. The vast majority of these students are black.) Whether the actual needs of learners can displace the call of the marketplace will prove an interesting test for educators: a decision to pursue multilingualism would constitute South Africa’s largest experiment in education.

96. When ensuring that people are not prevented from securing access to existing educational resources, FC’s 29 operates much like an ordinary civil and political right. Any interference with the legitimate exercise of the right can be justified only in terms that meet the test set out in FC’s 36(1). Matukane & Others v Laerskool Potgietersrus 1996 (2) SA 223 (T) (‘Matukane’). Schools may not refuse to admit learners of a particular race, or expel learners for trivial non-compliance with dress codes. In a number of cases, the exclusion flows from a school’s code of conduct, which although seemingly neutral, excludes or punishes members of particular communities. In Antonie v Governing Body, Settlers High School & Others, a learner had been found guilty of ‘serious misconduct’ for attending school with dreadlocks and a cap she deemed to be essential parts of the practice of her Rastafarian faith. 2002 (4) SA 738 (C). In the High Court, Van Zyl J held that codes of conduct should not be rigidly enforced. They must instead be read in ‘a spirit of mutual respect, reconciliation and tolerance. The mutual respect, in turn, must be directed at understanding and protecting, rather than rejecting and infringing, the inherent dignity, convictions and traditions of the offender’. Ibid at para 17. The student’s conduct was ultimately held to fall well short of the definition of ‘serious misconduct’, and the High Court set aside the School Governing Body’s decision. In KwaZulu-Natal MEC for Education v Pillay, the Constitutional Court had to decide whether a Hindu learner was entitled to wear a nose stud to school as an expression of her Tamil culture and Hindu religion. [2007] ZACC 21, 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC) (‘Pillay’). The school had refused to permit her to wear the stud on the grounds that the wearing of the stud did not fall within the core belief set of the religion. The Constitutional Court held that the ‘norm embodied by the Code is not neutral, but
enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. Chief Justice Langa found, in addition, that voluntary religious and cultural practices were entitled to the same protection as obligatory practices. While recognizing the importance of codes of conduct and the need to ensure discipline, Chief Justice Langa concluded that a mere appeal to uniformity was insufficient grounds to refuse a learner's request for an exemption from a code. A school that wished to enforce a code of conduct under the kind of circumstances that brought Ms Pillay to court would have to show that a particular exemption was more than likely to cause a palpable disruption to school activities. Given the absence of any such evidence, the Court found that the learner ought to have been granted an exemption.


98. See S Woolman & B Fleisch 'The Problem of the “Other” Tongue: Official Languages, Equal Citizenship and an Integrated South Africa' (Paper for Legal Resources Centre Conference on Education and Constitutional Litigation, 2012) (forthcoming *Education and the Law*). Seventy years ago, TJ Haarhoff wrote: There is increasing ignorance of the second language; ignorance brings a feeling of inferiority, and that in turn brings aggressive assertion that it is a good thing to be unilingual and that strength lies in isolationism. Let us save our children from isolationism. The adult, with all the worries of a busy life and the handicap of an unfavourable environment, finds it difficult to acquire a new language and to break down group barriers; to a child it is “child’s play”. The world is moving away from the isolationist principle. … Fullness of life, educationally or spiritually is not comparable with the barbed-wire fences of racial politics. With the sun of a new world rising over the grandeur of our limitless veld, the darkness of estranging barriers will yield; it will yield before the creative inspiration of giving ourselves to South Africa – ourselves undivided to her undivided.’ TJ Haarhoff ‘Foreword’ in EG Malherbe *The Bilingual School* (1941). The above words, written at a very different time, in a vastly different context, contain a contemporary resonance. Haarhoff and Malherbe should be read as maintaining that genuine reconciliation, dignity and equal citizenship can only be achieved in multilingual, radically heterogeneous societies when groups learn the language of the other groups with whom they share political sovereignty. That Haarhoff and Malherbe understood reconciliation, race and the ‘other’ solely in terms of English and Afrikaans give their words a bitterly ironic bite. As I have already noted, that bitter ironic bite has not been lost on present day commentators and the current members of the Constitutional Court, such as Deputy Chief Justice Mosenekal, in Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another. Haarhoff’s (apt if odd) observations about race, language and understanding the ‘other’ retain their force with respect to the promise of national reconciliation and genuinely equal citizenship. Only the players and the petitioners have changed. Most black South Africans have done their share of heavy lifting when it comes to overcoming problems associated with race, language and understanding the ‘other’. The same cannot be said for most white South Africans. We take the *Ermelo Court*’s concerns seriously and refract them through current, lively and difficult debates in our public schools about how ‘we’, as School Governing Bodies (SGBs), provincial Heads of Department (HoDs), members of the national Department of Education, interested academics, lawyers, teachers, parents and learners should decide which two official languages should be taught at any given public school. This question is by no means a philosophical abstraction about how one should order a just and fair society. The new Curriculum and Assessment Policy Statement (CAPS) has quite consciously reinvigorated language policy deliberations and led to a growing number of disputes over the languages taught in our public schools. Curriculum and Assessment Policy Statement, Department of Basic Education, 2012. Rather than introducing the First Additional Language (FAL) at the end of the Foundation Phase, the Department of Basic Education decided to shift FAL to the first year of schooling: ‘Children come to school knowing their home language. They can speak it fluently, and already know several thousand words. Learning to read and
write in Grade 1 builds on this foundation of oral language. Therefore, it is easier to learn to read and write in your home language. When children start to learn an additional language in Grade 1, they need to build a strong oral foundation. They need to hear lots of simple, spoken English which they can understand from the context. Listening to the teacher read stories from large illustrated books (Big Books) is a good way of doing this as it also supports children's emergent literacy development. As children's understanding grows, they need plenty of opportunities to speak the language in simple ways. This provides the foundation for learning to read and write in Grades 2 and 3. In South Africa, many children start using their additional language, English, as the Language of Learning and Teaching (LoLT) in Grade 4. This means that they must reach a high level of competence in English by the end of Grade 3, and they need to be able to read and write well in English. For these reasons, their progress in literacy must be accelerated in Grades 2 and 3.' Ibid. To address this specific challenge of ensuring that African language speakers become sufficiently proficient in English, CAPS requires that all schools identify a First Additional Language. In most instances schools would choose English, and thus teach oral language and English reading and writing explicitly from Grade 1. The new curriculum policy explicitly allocate between two and three hours per week for the First Additional Language in grades 1 and 2, and between three and four hours per week for the First Additional Language in Grade 3. The primary purpose of this significant portion of the school week is to develop 'listening and speaking, thinking and reasoning and language structure and use, which are integrated into all 4 languages (listening, speaking, reading and writing), reading and phonics, writing and handwriting'. More specifically, the CAPS Foundation Phase document specifies that Grade 1 teachers should teach listening and speaking for one and half hours a week, and half an hour on reading and phonics for the First Additional Language. By Grade 3, the policy requires one hour on listening and speaking, one hour on reading and phonics, and half hour respectively on writing and language use. Ibid. The new policy raises, at least, two new education and constitutional law questions. First, do parents have a right to choose the First Additional Language their children will learn? Second, what are the legal and constitutional strictures placed upon SGBs decisions with regard to First Additional Language policies for their schools? This decision is not merely of consequence for those elite public schools which have generally chosen English and Afrikaans as primary mediums of instruction, and a third 'African' language as something akin to an extra-curricular activity. Prior to the introduction of CAPS, most South African schools tended to teach in their home language: that is, in one or two of the nine African languages. A small percentage of disadvantaged schools shifted to English as the 'default' home language and medium of instruction. Ibid at 20. Although most quintile 1–3 schools introduced English towards the end of the Foundation Phase, many children in South African schools do not acquire an adequate vocabulary and the reading and the writing proficiency necessary to cope with the language demands of English-medium teaching in Grade 4. Ministry of Education Problems with English as a Medium of Instruction in Primary Schooling (2009). Aware of this deficit, the Department of Basic Education has shifted the introduction of the first additional language to the first year of schooling. The department reasoned as follows: 'Children come to school knowing their home language. They can speak it fluently, and already know several thousand words. Learning to read and write in Grade 1 builds on this foundation of oral language. Therefore, it is easier to learn to read and write in your home language. When children start to learn an additional language in Grade 1, they need to build a strong oral foundation. They need to hear lots of simple, spoken English which they can understand from the context. Listening to the teacher read stories from large illustrated books (Big Books) is a good way of doing this as it also supports children's emergent literacy development. As children's understanding grows, they need plenty of opportunities to speak the language in simple ways. This provides the foundation for learning to read and write in Grades 2 and 3. In South Africa, many children start using their additional language, English, as the Language of Learning and Teaching (LoLT) in Grade 4. This means that they must reach a high level of competence in English by the end of Grade 3, and they need to be able to read and write well in

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English. For these reasons, their progress in literacy must be accelerated in Grades 2 and 3. So far so good: it would appear at first blush an eminently reasonable manner in which to retool of the early school environment of most South African learners. To address the specific challenge of ensuring that African language speakers become sufficiently proficient in English, CAPS made a First Additional Language (FAL) mandatory at all public schools. In most instances, schools would choose English. They would expressly require instruction in oral language and English reading and writing from Grade 1. While an appropriate curriculum policy decision for most 1 to 3 quintile schools, it has had an unanticipated consequence for a growing number of quintile 5 English home language schools. Over the past 15 years, privileged public schools like Parkview Junior Primary in Johannesburg and Grove Primary School in Cape Town had begun teaching two additional languages in the Foundation Phase. In Johannesburg, the two additional languages tended to be Afrikaans and isiZulu. Western Cape schools were inclined to teach Afrikaans and isiXhosa. The teaching of these additional languages was initially limited to the oral language. By Grade 3, schools introduced a limited degree of reading and writing tuition. A new irony, that Deputy Chief Justice Moseneke could have easily anticipated, arose. As a result of the new FAL requirement, a sizeable number of English home language schools (a) correctly assumed that they were obliged to make a choice and (b) opted to drop African languages and select Afrikaans as the First Additional Language. The choice of Afrikaans as the First Additional Language is, evidently, based on a range of practical considerations. First, these schools have Foundation Phase teachers that have been trained to teach Afrikaans as a second language. Any given African language is often taught by a specialist SGB-paid teacher. (These staff members are often part-time employees paid by the SGB, as opposed to the state, to offer this additional tutelage.) Second, if a school adopted an African language as FAL, the new two to three hours a week FAL requirement would have staffing consequences and increase overall school expenditures. (New teachers would be required – not simply to teach the FAL, but to teach other subject matter (math, science or geography) in the FAL African language.) As matters stood, these schools already possessed the existing resources – books and teachers – to provide instruction in Afrikaans as a second language. Few schools enjoy comparable resources for African language instruction. Most publishers have not produced systematic materials in African languages for young second-language speakers. Third, many parents expressed anxiety regarding the extremely high demands that IsiZulu and other African language matriculation examinations would place on their children. Even exceptional African language students fair poorly in their exams. Afrikaans, by contrast, was widely viewed as an ‘easy’ language that offered the opportunity for excellent matric results. For learners in elite public schools competing for a limited number of places in first-rate university programmes, a mediocre FAL mark could well prejudice their chances. Given the ‘locked in’ systemic advantages of English and Afrikaans, the SGBs of many top quintile schools chose Afrikaans as the FAL and dropped African language instruction. The irony of which Deputy Chief Justice spoke is no longer collateral. Diminished African language instruction, in a growing cohort of schools, is a direct function of teaching materials, qualified teachers, additional expenses and potentially difficult matric exams. These disheartening consequences raise a number of thorny legal questions. Section 6(1) of SASA grants an SGB the power to determine the language policy of the school subject ‘to the Constitution, this Act and any applicable provincial law’. For some SGBs, this grant of power answers any questions that one might have about an FAL. But the learning of Ermelo suggests that the answer is not so straightforward. Although the answers to the tricky statutory and constitutional questions raised in Ermelo engaged SGB-initiated admissions policies, the broader concerns in the matter turned on who possessed the ultimate authority to assess the ‘reasonableness’ of these policies. Ermelo found that such power vested with the provincial HoD once it had undertaken appropriate reasonable review of (a) the SGB’s decision making process, and (b) the s 29(2) rights of the learners in question. A similar, but by no means identical, set of issues is raised by FAL decisions taken by SGBs. Both the Ermelo Court and the state wish to ensure that the nine official African languages are treated with same degree of respect accorded English and Afrikaans in our public
schools. Fair enough. It’s taken long enough. For sound pedagogical reasons, they want to ensure that mother-tongue instruction and dual-medium tuition is offered from initial entrance into our primary schools. However, as one must be aware, the state’s purse, the resources of individual schools, the availability of appropriately trained teachers and the adequacy of existing textbooks across all eleven languages place cognizable, constitutionally recognized limits on our capacity to deliver immediately upon this promise. Thorny and difficult questions do not preclude an initial response. First, one can ask where SASA places ultimate authority for FAL decisions? Second, one can ask whether the statute, as read in light of s 29 of the Constitution, and a panoply of other rights – to citizenship, official languages, equality, dignity and community practices – does not warrant a reading of the FAL policies consistent with the need, recognized in Ermelo, for creating conditions in which we are truly capable of speaking to one another in languages we all eventually come to understand. Rights to equality, dignity, community rights, official languages, citizenship and a basic, adequate education, as well as a mother-tongue education, all support the proposition that a truly agonistic South African democracy will never bloom until we all make an effort to understand one another as best as we possibly can. By limiting instruction to English and Afrikaans, many learners are denied access to basic capabilities and the opportunity to flourish. Second-class linguistic skills invariably entrench or reinforce second-class status. The state and the Constitutional Court understand that our radically heterogeneous society will never coalesce into a single nation until we are able to speak rationally and respectfully to one another. The new policies allow us to look inward and protect our particular community’s linguistic heritage, while demanding that we also look outward toward the broader South African landscape and come to appreciate that learning another language is essential if we are ever truly to understand one another and to build a ‘rainbow nation’ truly deserving of the appellation.


101. This contention is only partially true with respect to single-medium public schools and entirely false with respect to independent schools. See S Woolman ‘Defending Discrimination’ (supra); B Fleisch & S Woolman ‘Single-Medium Public Schools’ (supra).


106. Dietlin and Enslin contend that participatory governance by SGBs block significant change in public schools, especially in those communities with limited resources, and that we would be better served by direction and intervention by our representatives at the national level of government. See V Dietlins & P Enslin ‘Democracy in Education or Education in Democracy: The Limits of Participation in South African School Governance’ (2002) 28 Journal of Education 5. Piper responds directly to Dietlin and Enslin and suggests that they may have ‘reached their conclusions too hastily’ and that they have thrown out ‘the participatory baby with the School Governing Body bathwater’. See L, Piper ‘Participatory Democracy, Education, Babies and Bathwater: A Reply to Dietlins and Enslin (2002) 28 Journal of Education 28.

107. See, especially, Head, Department of Education, Free State Province & Another v Welkom High School 2012 (6) SA 5 (SCA), [2012] ZASCA 150. Given the Supreme Court of Appeal’s holdings in Mikro, Welkom and Rivonia, it’s fair to expect more cases that test the boundaries of the Constitutional Court’s holding in Ermelo. In Welkom, the Supreme Court of Appeal held that a provincial HoD could not reverse, by mere departmental instruction, a decision taken by an SGB with respect to the governance of the school within the SGB’s realm of statutorily granted powers (ie, ‘student conduct’ such as falling pregnant), even when the SGB knows that its decision effectively constitutes an unconstitutional encroachment on a learner’s rights. A fair and rational review process undertaken by the provincial HoD will be deemed insufficient to overturn an SGB decision or to withdraw an SGB power or function. Welkom constitutes a powerful challenge to Ermelo’s apparent shift in the balance of power to provincial Heads of Departments of Education. Given the vast number of complaints that land on an HoD’s desk regarding the behaviour of various SGBs, it is patently inconceivable that HoDs will continually retain outside counsel to litigate – in the High Court – each and every facially unconstitutional SGB action.

108. I must, however, hedge my bets at the outset of 2012. New education and law social movements led, in part, by Equal Education, the Legal Resources Centre, the Centre for Child Law and the Socio-Economic Rights Institute (to identify but a few of the NGOs litigating education cases) have brought new issues to the fore. One can fully expect both national government, provincial government and SGBs to feel increasing heat inside and outside the courtroom.


110. Ermelo (supra).

111. MEC for Education, KwaZulu-Natal, and Others v Pillay 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC); Antonie v Governing Body, Settlers High School & Others 2002 (4) SA 738 (C).

112. Woolman & Fleisch The Constitution in the Classroom (supra) at 177. Other commentators demur on the meaning of the provisions and the power afforded by those provisions to SGBs under SASA: See, eg, M Smit “Collateral Irony” and “Insular Construction” – Justifying Single-Medium Schools, Equal Access and Quality Education’ (2011) 27 South African Journal on Human Rights 398 (With respect, the author both erroneously describes the learning of Ermelo and mischaracterizes the clearly articulated positions adopted by Professor Fleisch and me in various publications.) Such arguments have already been decisively engaged and rebottled, and will be re-engaged again, in another place and at another time. However, it is worth noting here that Jennifer Karlsson contends that the original school governance legislation – and SASA in particular – was overly ambitious. J Karlsson ‘The Role of Democratic School Governing Bodies in South African Schools’ (2002) 38 (3) Comparative Education 327. As a result, SGB authority was largely symbolic and SGBs did not – according to Karlsson – deepen the Constitution’s commitment to democracy. She reads two empirical studies as supporting two conclusions: (1) the weakness of SGB governance tends to reinforce principal and teacher authority, and (2) SGB authority – as reflected in the quality of tuck shops – tends to reproduce existing patterns of inequality. However, a substantially different picture of school governance emerges in
Zolani Ngwane’s study: “‘Real Men Reawaken Their Fathers’ Homesteads, the Educated Leave Them in Ruins’: The Politics of Domestic Reproduction in Post-Apartheid Rural South Africa’ (2001) 31 Journal of Religion in Africa 402. Ngwane studied intergenerational conflict and social reproduction in the context of school governance in the rural Eastern Cape. Ngwane found, pace Karlsson, that the openness and the inclusivity of school governance turned them into sites of political opposition to the patriarchal structures of local traditional leaders. Women — who had, and continue to be, excluded from traditional centres of power — found that they could use the SGB as a vehicle for articulating grievances, making themselves heard, and changing the way things have been traditionally done. He notes: ‘unpredictable as they were, these [SGB] meetings were ... important sources of legitimacy for the school and gave indispensable stamps of approval for its projects.’ Ibid at 410.

Grove Primary School v Minister of Education & Others offers another opportunity to assess complex, but competing, claims about the virtues and the vices of SGB power. Jonathan Jansen, in a carefully reasoned and nuanced article, recognises that Grove Primary was — in 1998, in the Western Cape — part of the vanguard of the revolution in historically white, former Model C schools. J Jansen ‘Grove Primary: Power, Privilege and the Law in South African Education’ (1998) 23 Journal of Education 5. It hired black teachers and attempted to ‘give effect to government priorities for transformation’. When it attempted to recruit additional black teachers, the school found that only two of seventy applicants met the criteria in its advertisements. It then had to head-hunt black graduates of the University of Cape Town in order to advance its transformative goals. Jansen accepts the proposition that Grove Primary’s actions, in resisting the government’s redeployment plan, were not motivated by racism. Jansen adamantly defends Grove on this ground. At the same time, he notes that eighty other white schools joined Grove in its contestation of the government’s redeployment plan. He refuses to defend the bona fides of these other schools. For Jansen, it is clear that historically white schools wished to maintain their position of privilege and that such privilege, in South Africa, meant that schools in wealthy white communities could maintain their substantial funding and teaching advantages over schools in poor historically disadvantaged black communities. Grove Primary, on Jansen’s reading, stands for the proposition that existing SGB powers and general funding norms invariably re-inscribe racial privilege. Jansen’s reading does not go uncontested. Maree and Lowenherz, while sympathetic to many of Jansen’s conclusions, express dismay with Jansen’s ‘unsupported claims’ that Grove Primary became the object of black ridicule. H Maree & A Lowenherz ‘Grove Primary: A Response to Professor Jonathan Jansen’ (1998) 23 Journal of Education 31. They note that public support for Grove’s efforts appeared evenly divided amongst black and coloured residents in the Western Cape, that black and coloured applicants for admission had increased substantially in the aftermath of the litigation and that a large number of black teachers sent their children to Grove Primary. Moreover, they argued that Jansen’s tarring of Grove Primary’s opposition to the VSP/Redeployment Scheme by associating it with three Wynberg schools (that had decided to spend R2 million on Astroturf fields) constituted an ad hominem attack that did not do justice to Jansen’s otherwise balanced account. In the end, Maree, a member of Grove’s SGB, and Lowenherz, the school’s principal, argue that the existing structures of school governance were, in fact, what enabled them to pursue a first-class education for their learners at the same time as they pursued the government’s — and the country’s — transformation agenda.


114. See Karlsson (supra) at 329.

115. While the law opens up considerable space for participation in line with the best practices of democratic governance, the actual practices of RCLs are, at best, uneven. Nongubo has found evidence of continued autocratic tendencies among educators regarding learner involvement in school governance. See MJ Nongubo ‘An Investigation into Perceptions of Learner Participation in the Governance of Secondary Schools’ (Unpublished Master’s thesis, Rhodes University, 2005.)
However, as learners became aware of the new legislation – and their increased powers – they have gradually been brought into school governance. As of 2003, their involvement tended to focus on sports policies, fundraising and discipline. See I Carr ‘From Policy to Praxis: A Study of the Implementation of Representative Councils of Learners in the Western Cape, from 1997 to 2003’ (Unpublished PhD dissertation, University of the Western Cape, 2005.)

116. The definition of parent (SASA section 1, xiv) extends the normal definition beyond the conventional definition: a parent is a biological parent or legal guardian, and embraces ‘the person who undertakes to fulfil the obligation referred to in (a) and (b) towards the learner’s education.’ In other words, an individual who may be neither a biological parent nor a legal guardian, but who has taken on a major role in the learner’s life, may participate in school governance on an equal basis to persons that have conventional legal claims to parental status. Given long historical patterns of informal fostering, this recognition of the complexity of parenting in South Africa also represents an important effort to extend participation in school citizenship. See F Zimmerman ‘Cinderella Goes to School: The Effect of Child Fostering on School Enrolment in South Africa’ (2003) 38 (3) Journal of Human Resources 557; K Anderson ‘Relatedness and Investment in Children in South Africa’ (2005) 16 (1) Human Nature 1; K Anderson ‘Family Structure, Parent Investment, and Educational Outcomes amongst Black South Africans’ (2000) University of Michigan Population Studies Centre Research Report 461.

117. These powers include: (1) Determine the school admissions policy (SASA s 5(5)); (2) Determine the language policy (SASA s 6(2)); (3) Issue rules regarding religious observance at school (SASA s 7); (4) Adopt a code of conduct after consultation (SASA s 8(1)); (5) Suspend learners (SASA s 9(1)); (6) Function in terms of a constitution (SASA s 18); (7) Adopt a constitution (SASA s 20(1)(b)); (8) Develop a mission statement (SASA s 20(1)(c)); (9) Determine times of the school day (SASA s 20(1)(f)); (10) Administer and control school property (SASA s 20(1)(g)); (11) Recommend the appointment of educators (SASA s 20(1)(h)); (12) Recommend the appointment of non-educator staff (SASA s 20(1)(j)); (13) Give permission to use school facilities including the charge of a fee (SASA s 20(2)); (14) Take reasonable measures to supplement the resources of the school (SASA s 36(1)); (15) Establish a school fund (SASA s 37(1)); (16) Open and maintain a bank account (SASA s 37(3)); (17) Prepare an annual budget for parent approval (SASA s 38(1); (18) Implement resolution parent meeting (SASA s 38(3)); (19) Enforce the payment of school fees (SASA s 41); (20) Keep financial records (SASA s 42(a)); (21) Appoint a registered auditor (SASA s 43(1)). In addition, SGBs that have been allocated additional functions may: (23) Undertake improvement of the school’s property (SASA s 21(1)(a)); (24) Determine the extra-mural curriculum (SASA s 21(1)(b)); (25) Make choices of subject options (SASA s 21(1)(b)); (26) Purchase textbooks, education materials and equipment (SASA s 21(1)(c)); (27) Pay for services (SASA s 21(1)(d)).

124. Sunward Park High v MEC, Education, Province of Gauteng (Case 05/2937, unreported, Witwatersrand Local Division, 6 June 2005).
125. See The Governing Body of Rivonia Primary School & Another v Gauteng Province MEC of Education & Others Case No: 11/08340 (Heard, October 2011). I am grateful to Michael Bishop and Jason Brickhill for their insight into this matter and to the parties for providing their heads of argument.
126. While the truly important issues in education policy tend to lie elsewhere, and a significant number of the rather new, easy cases will make for meaningless ‘development’ of constitutional education law, some of the new actions will clarify and confirm previous Constitutional Court and High Court decisions.
Over the first 15 years after liberation and the passage of SASA, the state regularly lost battles with SGBs in which the matter turned on identifying the party with the ultimate authority to take a decision. Whether these cases are simply evidence of a general disregard for the demands of due process by provincial officials, or whether they signify the conscious intent to challenge private power on all fronts, the cases of administrative overreach certainly suggest the willingness of the state to push up against the limits of the law in order to achieve its objectives. On hiring, see *Observatory Girls Primary School & Others v Head of Department of Education, Gauteng* 2003 (4) SA 246 (W). A contest of wills broke out between the SGB of Observatory Girls Primary School and the GDoE. The former needed an educator to teach mathematics to Grade 5 and Grade 6 learners. The Personnel Administration Measures of the DoE required that the SGB first appoint an interview committee. The regulations then obliged the SGB to submit a list of preference to the DoE. The SGB attempted to comply with the various regulatory and statutory requirements. Prior to forwarding the name of the candidate with the most points in the selection process to the GDoE HoD, the SGB learned that the preferred candidate lacked the requisite experience for the post and had not admitted such at her interview. Two members of the selection committee then took it upon themselves to forward the name of the candidate with the second highest point total to the GDoE HoD. The GDoE HoD received the recommendation. But he declined to reject or to confirm the SGB's new preferred candidate. The school pressed for a decision. The HoD continued to stall. This stalemate persisted for several months. The school eventually decided to institute court proceedings to force the HoD to make a decision. The HoD finally justified his refusal to act on the grounds that an applicant, who had received the third highest mark, had filed a complaint. The HoD stated that he could not make an appointment until the complaint had been resolved. The *Observatory Girls Primary* Court found that although the HoD was obliged to hear the complaint, the applicant had produced no evidence to support his claim. A thorough enquiry by the HoD would have revealed the baselessness of the charges – that the complainant had failed to make even a *prima facie* showing for a negative finding as delineated in the EEA.

The heart of the matter, as the statutory language above suggests, was who, ultimately, had the authority to recommend and to ratify the appointment. Under both SASA and the Personnel Administration Measures regulations, the SGB makes the apposite recommendations. The HoD appears to retain the power to confirm or to deny. But the EEA narrows the HoD's discretion to instances in which the SGB acted *ultra vires*. The *Observatory Girls Primary* Court held that substantial compliance with procedural provisions is sufficient. The purpose of the procedures is manifestly not to provide grounds 'to stymie the process of appointing suitable candidates to teaching'. The High Court found that the HoD's intransigence did just that, and that the SGB had, in fact, followed a fair and equitable procedure. Another attempt by a Provincial Education Department to bring the personnel and the SGB of a school to heel is on display in *Schoonbee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T). On 25 September 2001, the HoD sent a letter to the principal of the school asking him to provide reasons why he should not be suspended. The principal – with the assistance of his trade union – replied that the HoD was obliged to give reasons for the suspension prior to any response by the principal. A meeting was held on 12 October 2001 between the principal, the HoD and representatives of the SGB to discuss and to resolve the matter. The SGB contended that the parties had agreed to release the principal from any obligation to respond to the HoD's letter. The HoD demurred. A flurry of further exchanges followed. The High Court held that the suspension of the senior deputy principal violated one of the most fundamental tenets of natural justice and just administrative action: the *audire alterum partem* rule. In addition to being denied the opportunity to make representations to the trier of fact and to being given no notice of the HoD's intention to suspend him, the *Schoonbee* Court found that the Auditor-General's analysis provided no factual basis for a legal finding of malfeasance. The HoD's refusal to give the SGB an opportunity to address the HoD's concerns, to notify the SGB of an intention to take a decision, or to inform the SGB of the decision making procedure or
the consequences of a negative finding – the hallmarks of a fair hearing – was deemed inconsistent with the values of rationality, reasonableness, fairness and openness that underlie our Constitution and the basic tenets of administrative law. As a result, the Schoonbee court held that the HoD’s dissolution of the SGB was invalid. Much ink has been spilled about the meaning of Grove Primary School v Minister of Education & Others 1997 (4) SA 982 (C) and the power it ostensibly accords to SGBs. In short, an attempt by the national government to right-size and to redeploy educators failed in the face of an SGB’s refusal to allow the national government to control the process of redeployment and its willingness to use and to defend the authority vested in it by legislation – in this case, SASA and EEA. However, the state did not walk away entirely empty-handed. The court noted that while the power to recommend educators to fill posts was vested, in terms of s 4(2) of the EEA, solely in the schools and their SGBs, this power was subject to two constraints. First, the qualifications required for appointment, or promotion, as an educator were prescribed by section 4(1) of the EEA. Second, the SGB’s power of appointment with regard to subsidised posts was subject to the approval of the MEC. Even here the state’s victory was largely pyrrhic. The state’s power was limited to formal matters – such as the nature of advertising posts. As the law stood in 1996, the minister could not ‘impose his will as regards the selection of a particular educator for appointment (or non-appointment), and thus override that of the SGB and the MEC concerned’. Given the recent outcome in Ermelo, it is highly unlikely that a strengthening state will sit on the fence in the face of such defeats. The Constitutional Court in Ermelo was quite clear that the provincial government possessed the power to withdraw an SGB function as necessary and where the HoD’s decision satified criteria of reasonableness and practicability. The Ermelo Court’s legitimate concerns regarding an HoD’s procedural fairness with respect to review of an SGB’s decisions did not undermine the Court’s commitment to substantive fairness. One may have to revisit the above judgments in light of the Ermelo Court’s conclusions. However, as I have already noted, the ability of the SGBs and the SGB Foundation to litigate such cases means that our Constitutional Court, after the Supreme Court of Appeal decisions in Welkom and Rivonia, will likely encounter a number of cases as they percolate upwards to test just how far SGBs can push their statutorily granted powers without fear of contradiction or usurpation by a provincial Head of Department.


131. Dorf & Sabel ‘Democratic Experimentalism’ (supra) at 304.


133. Unfortunately, as Mary Metcalfe has noted, information often flows to the centre but not back out to the provinces or the schools. M Metcalfe ‘Tracking the Delivery of School Textbooks and Workbooks’ Paper for Legal Resources Centre Law and Education Conference (2012)(Notes on file with author.)

134. Diane Ravitch, one of the most esteemed commentators on American public schools, opines: ‘Because of its utopian goals, coupled with harsh sanctions, NCLB has turned out to be the worst federal education legislation ever passed.’ D Ravitch “School Reform: A Failing Grade” (2012) 58 (14) The New York Review of Books p. 32. The harshest assessment of the Act, however, comes not, originally, from Ravitch, but from the US Department of Education Secretary Anne Duncan. Duncan writes that ‘No Child Left Behind’ is broken and we need to fix it now ... This law has created a thousand ways for schools to fail and very few ways to help them succeed.’ ‘No Child Left Behind? ‘ Teach Along with Me (19 March 2010) available at http://www.teachalongwithme.blog (accessed on 10 September 2011).
135. See Woolman & Fleisch *The Constitution in the Classroom* (supra) at Chapter 7 ("Conclusion: On the Constitutionality of School Fees and the Narrative Arc of Law and Education in South Africa").
136. One problem, identified by Brahm Fleisch and others, is that teachers still work with a pedagogical system inherited from missionary schools. In short, only a few students actually learn how to read: they then function as instructors to the remainder of the class, who simply rehearse what they have heard without learning how to read from the book in front of them.
137. If I had to spend money on schools, then I would first concentrate on proper ablution facilities. As I make clear in my discussion of flourishing, development theory philosophers, political scientists and economists such as Amartya Sen regularly invoke the notion – echoing Adam Smith – that the state’s first obligation to all its citizens is to give them the ability to enter the public realm without fear of embarrassment or shame.
138. One cannot comprehend the alacrity in growth and the vitriolic nature of the new powerful reactionary base of the Republican Party (the Tea Party) without looking at this phenomenon through the prism of race: namely, a black man is suddenly in the White House. For a subtle analysis of race, law and politics in the United States, see R Kennedy *The Persistence of the Colour Line: Racial Politics and the Obama Presidency* (2011). That said, the change in demographics in the United States will, ultimately, undermine the success of the Tea Party’s craven appeal to older white Americans’ racist sentiments.
139. Case No 504/10, Eastern Cape High Court (Bisho)(2 February 2011).