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# Broken Promises: Constitutional Litigation for Free Primary Education in Swaziland

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## ABSTRACT

Swaziland's Constitution of 2005 promised that every Swazi child would have the right to free primary school education, within three years of the constitution coming into operation. That date having passed, a civil society group took the matter to court. The case initially fared well, but in a subsequent application for performance on the original order, the court balked at making an immediately enforceable order, citing lack of resources as an obstacle. That approach was upheld by the Supreme Court. This article examines the courts' pronouncements within the Swazi constitutional context. It discusses judicial deference, avoidance and pragmatism. Swaziland's free primary education judgments are compared with those of courts in South Africa. The remedial orders of those courts demonstrate that, although educational goods and services cannot be delivered overnight, creativity and oversight by the courts can ensure that an immediate start is made towards delivering on the constitutional promise.

### Keywords

Right to free primary education, constitutional litigation, judicial deference, remedies

## INTRODUCTION

Universal primary education is central for human development.[1] The significance of primary education is highlighted through international norms that provide for

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1 Committee on Economic, Social and Cultural Rights, general comment no 13, "The right to education" (art 13 of the International Covenant on Economic, Social and Cultural Rights), 21st session, 1999, UN doc E/C 12/1999/10; UN doc HRI/GEN/1/Rev.6 (2003) at 70, para 1; F Veriava and F Coomans "The right to education" in D Brand and C Heyns (eds)

compulsory free primary education. These are made obligatory through various international instruments, including the Universal Declaration of Human Rights,[2] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[3] the Convention on the Rights of the Child (CRC)[4] and the 1960 UN Educational Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education.[5] At the African regional level, the African Charter on Human and Peoples' Rights (ACHPR)[6] and the African Charter on the Rights and Welfare of the Child (ACRWC)[7] also provide for the right to education. The importance of the right to primary education cannot be overemphasized because, without it, one cannot proceed to secondary and tertiary education. Education is essential if all human beings are to achieve their full potential.

Despite these universal commitments, UNESCO's 2013/14 global monitoring report on education for all shows that, in 2011, 57 million children did not attend primary school,[8] which international law requires should be free and compulsory. As correctly observed by Kishore Singh, the special rapporteur on the right to education, "the enjoyment of the right to education is often least accessible to those who need it most - disadvantaged and marginalized groups and, above all, children from poor families".[9] It is against this backdrop that this article examines the justiciability of the right to basic education in Swaziland. Justiciability means "the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur".[10]

Swaziland is an interesting case study because its 2005 constitution (the 2005 Constitution) provides that "[e]very Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with

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contd
*Socio-Economic Rights in South Africa* (2005, Pretoria University Law Press) 57; SA Djoyou Kamga "Realising the right to primary education in Cameroon" (2003) 11 *African Human Rights Law Journal* 171.

2 Adopted 10 December 1948, art 26.

3 General Assembly res 2200A (XXI) of 16 December 1966, entered into force 3 January 1976, arts 13(2)(a) and 14.

4 General Assembly res 44/25 of 20 November 1989, entered into force 2 September 1990, art 28(1).

5 Art 4(a).

6 Adopted 27 June 1981 by the Organisation of African Unity Assembly (OAU), OAU doc CAB/LEG/67/3 Rev5 (1982) 21, art 17.

7 OAU doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999, art 11.

8 *Teaching and Learning: Achieving Quality for All* (UNESCO Education for All global monitoring report 2013–14) at 5, available at: <http://unesdoc.unesco.org/images/0022/002266/226662e.pdf> (last accessed 7 September 2017).

9 K Singh "Justiciability of the right to education" (report of the special rapporteur on the right to education, 2013) UN GA A/HRC/23/35 at 3.

10 International Commission of Jurists *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experience of Justiciability* (2008, International Commission of Jurists) at 6.

the first grade".[11] This was supplemented by national policies such as the Smart Programme on Economic Empowerment (2005) and the Poverty Reduction Strategy and Action Plan (2006), which reiterated the importance of education for all. Furthermore, Swaziland is a party to ICESCR,[12] CRC,[13] ACHPR[14] and ACRWC,[15] which are unequivocal in their provision of the right to education.

However, three years after Swaziland adopted the 2005 Constitution, many children still did not have access to primary education. As a result, the Swaziland National Ex-Miners Workers Association, together with a primary school child parent, brought a case to the High Court against the Department of Education in January 2009. In this case, known as *Swaziland National Ex-Miners Workers Association v The Minister of Education* (2009),[16] the applicants claimed and were granted a declaratory order stating that the right to primary education was subject to immediate realization. Nevertheless, a second High Court application[17] seeking to compel the government to provide primary education immediately was subsequently dismissed. This second decision was later upheld by the Supreme Court of Appeal on the ground that the government's programme for free education was "reasonable and satisfactory in view of the limited resources".[18] This decision was disappointing and contradicts the position under international law.

The purpose of this article is to explore the cases considering the right to education in Swaziland and to examine how the courts have dealt with attempts on behalf of rights-bearers to enforce that right. It interrogates whether the right to primary education is immediately realizable or is subject to progressive realization. The authors submit that the first High Court decision was correct in its declaratory order, but that the second High Court judgment incorrectly held that the right to primary education is subject to progressive realization based on the availability of resources. It is the authors' view that the Supreme Court of Appeal judgment is similarly erroneous. The article considers whether the cases are a sign of judicial deference taken to the point of avoidance or refusal to enforce, or whether they are indicative of judicial pragmatism. Remedies could have been crafted that would have resulted in the right being immediately realized, or at least immediately commenced.

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11 2005 Constitution, sec 29(6).
12 Ratified by Swaziland on 26 March 2004.
13 Ratified by Swaziland on 7 September 1995.
14 Ratified by Swaziland on 15 September 1995.
15 Signed by Swaziland on 29 May 1992, but not yet ratified.
16 *Swaziland National Ex-Miners Workers Association and Another v The Minister of Education and Others* [2009] civil case no 335/09 (16 March 2009).
17 *Swaziland National Ex-Miners Workers Association v The Minister of Education and Others* [2010] civil case no 2168/09 (19 January 2010).
18 *Swaziland National Ex-Miners Workers Association v The Minister of Education and Others* [2010] civil appeal case no 2/10 (28 May 2010), para 12.

In making this case, the article examines the findings of the Swaziland courts against applicable international law frameworks and in comparison with judgments from neighbouring South Africa, which may be of persuasive value in Swaziland. It demonstrates that, when dealing with similar cases, the South African courts have reached different conclusions and ordered creative remedies.

## THE CONSTITUTIONAL CONTEXT

Before considering the cases on education, it is important to understand the constitutional context. Historically, Swaziland constitutionalism has been flawed. Following the end of colonialism, the country adopted a constitution in 1968 (the Independence Constitution), which had quasi-Westminster style separation of powers, although King Sobhuza II could, as the executive, appoint some members of Parliament, as well as the judiciary.[19] However, due to parliamentary elections in 1972 that saw the rise of opposition parties in the Swazi Parliament, the king decided to repeal the Independence Constitution.[20] This was done through the so-called the "King Proclamation",[21] although there was no constitutional provision enabling the king to take such action. The king believed that the Independence Constitution was detrimental to law and order, because it enabled the introduction of political practices that were, "alien to, and designed to disrupt and destroy our own peaceful and constructive and essentially democratic methods of political activity".[22] He consequently decided to become the embodiment of the rule of law.[23] He subsequently banned political parties and rules, through proclamations that he issued from time to time and that had the equivalent force of a constitution. This development was instrumental in shaping constitutionalism in Swaziland.[24]

After the passing of King Sobhuza II, King Mswati III acceded to the throne. With the wind of democracy on the continent combined with the end of apartheid in South Africa, the new king decided to review the constitution. However, critics of the process point out that the king appointed a

19 For example, under sec 98(1) of the Independence Constitution: "The holder of the office of Chief Justice or any office of puisne judge of the High Court shall be appointed by the King, acting in accordance with the advice of the Judicial Service Commission". The Senate comprised 12 members, six of whom were elected by the House of Assembly, the remaining six being appointed by the king as he wished (Independence Constitution, sec 38(4)).

20 See *Ray Gwebu and Lucky Nhlanhla Bhembe v The King* criminal appeal nos 19 and 20/2002, AHRLR 229 (SwCA 2002).

21 Proc by His Majesty King Sobhuza II to the nation, 12 April 1973, available at: <https://www.eisa.org.za/pdf/swa1973proclamation.pdf> (last accessed 28 July 2017).

22 Id, para (c).

23 Id, para 3.

24 T Maseko "The drafting of the Constitution of Swaziland, 2005" (2008) *African Human Rights Law Journal* 312 at 316.

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commission headed by his brother and did not consult the people.[25] Consequently, although the 2005 Constitution is an improvement in that it does, on paper at least, recognize the rule of law and the independence of the judiciary,[26] in practice it is characterized by the pre-eminence of the executive. The latter assumes both the traditional and executive authority and as such is extremely powerful. Under section 64(1) of the 2005 Constitution, executive authority in Swaziland vests in the king as head of state, who must exercise the power in accordance with the constitution. Importantly, in delivering his mandate, the king may only rely on his cabinet[27] and is not compelled to follow advice from any advisory authority after a possible consultation.[28] He enjoys discretionary powers in all matters affecting the country. Charles Fombad explains it in these words: the king "is under no obligation either to consult anybody or authority or, if he consults, to act on any advice received. It is clear from this alone that [there is no possibility for separation of powers as expected in any meaningful] constitutionalism".[29]

Given the predominance of the king, the Swaziland system is characterized by the fact that most institutions established under the 2005 Constitution have their members appointed by the king.[30] This is aggravated by the fact that acts performed by the king within the exercise of his customary function are not open to judicial review or challenge in the courts.[31] So far as the independence of the judiciary is concerned, section 141(1) of the 2005 Constitution provides that the judiciary is independent and is subject only to the constitution. In addition, section 140 confirms that no organs or agency of the Crown shall interfere with judicial power. Judges are appointed by the king after

25 Id at 324–25.

26 M Langwenya "Swaziland: Justice sector and the rule of law" (March 2013) *AfriMAP and Open Society Initiative for Southern Africa* at 35, available at: <http://www.osisa.org/sites/default/files/afrimap_swz_justice_sector_main_text_web.pdf> (last accessed 28 July 2017).

27 2005 Constitution, sec 64(3).

28 Id, sec 66(3) and (4).

29 CM Fombad "Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from southern Africa" (2007) 55/1 *The American Journal of Comparative Law* 1 at 14.

30 The king appoints members of the Kings Advisory Council (sec 13), the prime minister and Cabinet (sec 67), members of the Judicial Service Commission (sec 159), Commission on Human Rights and Public Administration (sec 163(3)), members of the service commissions (sec 173(3)) and chiefs (sec 233(2)).

31 2005 Constitution, sec 151(8) provides: "Notwithstanding subsection (2), the High Court has no original jurisdiction or appellate jurisdiction in matters relating to the office of *iNgwenyama* [chief]; the office of *iNdlovukazi* [the Queen Mother]; the authorization of a person to perform the functions of the Regent in terms of section 8; the appointment, revocation and suspension of a Chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the procedure of the Council; and the *libutfo* [regimental] system, which matters shall continue to be governed by Swazi law and custom."

consultation with the Judicial Service Commission (JSC).[32] Nevertheless, the king is not compelled to follow the advice of the JSC and enjoys discretionary powers on whom to appoint.[33] Furthermore, the king enjoys immunity from prosecution[34] and, whenever he obstructs judicial independence, the constitution is silent on what should be done to protect the judiciary from such violation.[35] The prerogatives accorded to the king regarding the appointment of members of the JSC and members of the judiciary as well as his general influence cast serious doubt on the independence of the judiciary. The International Commission of Jurists (ICJ) has observed that, "Swaziland's Constitution, while providing for judicial independence in principle, does not contain the necessary safeguards to guarantee it. Overall, the legislative and regulatory framework falls short of international law and standards, including African regional standards".[36]

This was demonstrated in 2011 when the JSC dismissed a former High Court judge (Thomas Masuku) for supposedly criticizing the king.[37] Similarly, 2011 was also marked by a practice directive from the former chief justice prohibiting the registration of lawsuits against the king "directly or indirectly".[38] This directive shielded companies in which the king holds shares or interests against possible lawsuits. Through another practice directive, the chief justice ensured his involvement in the allocation of sensitive political cases so as to shield the king and his cronies from facing the might of the law.[39] The ICJ notes that "[t]he Kingdom of Swaziland has a constitutional and legislative framework that does not respect the separation of powers or provide the necessary legal and institutional framework and safeguards to ensure the independence of the Judiciary".[40]

According to Maxine Langwenya, the judiciary in Swaziland used to be held in high esteem because it did manage, under difficult circumstances, to maintain its independence.[41] A case that demonstrated this was *Chief Mtfuso and Another v Swaziland Government and Others*,[42] in which the applicants

32 Id, sec 64.
33 Id, sec 64(3) and (4).
34 Id, sec 228(1) and (2).
35 S Gumedze "Human rights and the rule of law in Swaziland" (2005) *African Human Rights Law Journal* 271 at 272.
36 ICJ "Justice locked out: Swaziland rule of law crisis" (international fact finding mission report 2016) at 5.
37 See UN Human Rights Council "ICJ oral intervention on the adoption of the outcome document of the universal periodic review of Swaziland" (15 March 2012), available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Swaziland-adoption-UPR-advocacy-2012.pdf> (last accessed 28 July 2017).
38 ICJ "Justice locked out", above at note 36 at 11.
39 Ibid.
40 Id at 8.
41 Langwenya "Swaziland: Justice sector", above at note 26 at 91.
42 *Chief Mtfuso II (formerly known as Nkenke Dlamini) and Others v Swaziland Government* (NULL) [2000] SZHC 82 (5 September 2000). For more on this case, see: <http://www.swazilii.org/sz/judgment/supreme-court/2000/22-0> (last accessed 28 July 2017).

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successfully appealed against an eviction, signed by Prince Sobandla (the king's brother), minister of home affairs. The appeal court granted a suspension of the order, to allow the appellants time to exercise their traditional appeal to *Ngwenyama* [the chief].[43] The prime minister issued a statement that the government did not recognize the judgment and that it would not be obeyed.[44] As a result, the Court of Appeal judges resigned en masse.[45] Langwenya observes that, even when the king had vested all legislative, executive and judicial power in himself, the judiciary continued to attempt to uphold people's rights when they were able to, giving rise to increasing tensions between the different arms of government. She notes, however, that in recent years "the judiciary seems to have been subdued through the purging of non-compliant judges and the rewarding of those who can and do toe the executive's line. With respect to the doctrine of separation of powers, Swaziland seems to have retrogressed despite a constitutional dispensation that provides a sound normative framework for the doctrine".[46]

For example, one post-2005 Constitution case concerned Bhekindlela Thomas Ngwenya, an opposition party member[47] who was elected as a member of Parliament. Before he was sworn in, the deputy prime minister declared him a prohibited immigrant.[48] Ngwenya approached the court, which found for him and set aside his deportation.[49] However, the government appealed and, while the appeal was pending, the legislature pushed through an amendment to the Immigration Act establishing a new tribunal dealing with nationality.[50] Ngwenya was called to appear before the new tribunal and the High Court decision confirming his citizenship was overturned. Ngwenya approached the High Court to challenge the competence of the tribunal as well as its constitutionality, but his application was simply dismissed.[51]

The cases show how the supremacy of the executive, aided by the legislature, weakens the judiciary, which resorts to judicial avoidance, ultimately suspending the justiciability of fundamental rights. Thulani Maseko bemoans the fact that Swaziland's constitution-making process "did not herald a departure from the constitutional order that existed prior to the adoption of the

43 Ibid.

44 The report of the ICJ / Centre for the Independence of Judges and Lawyers "Swaziland: Fact-finding mission to the Kingdom of Swaziland" (10 June 2003) at 14–15, cited in Gumedze "Human rights and the rule", above at note 35 at 275.

45 Id generally.

46 Langwenya "Swaziland: Justice sector", above at note 26 at 91.

47 He was a member of the Ngwane National Liberatory Congress.

48 The declaration was issued under sec 9(1)(g) of the Immigration Act 32 of 1964, published in (1972) 65 *Government Gazette*, as quoted in Maseko "The drafting of the Constitution", above at note 24 at 320.

49 *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970–76 SLR (HC) 88. For further analysis of this case, see Maseko, ibid.

50 Immigration (Amendment) Act 22 of 1972.

51 *Bhekindlela Thomas Ngwenya*, above at note 49 at 119.

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Constitution of the Kingdom of Swaziland Act 1 of 2005".[52] He therefore takes the view that Swaziland cannot claim to be a constitutional and democratic state with a justiciable bill of rights capable of enforcement by an independent judiciary. Sabelo Gumedze makes a similar point, drawing attention to the limitations of the Bill of Rights itself.[53]

However, many of these critiques are levelled at Swaziland's non-compliance with civil and political rights. Can the same criticism be levelled in respect of socio-economic rights? This is more difficult to assess, because socio-economic rights have been much less contested. As a problematic starting point, the Bill of Rights does not generally provide for justiciable socio-economic rights. Except for the right to education, in the children's rights section, the only other provisions relating to socio-economic rights are in section 27(6) (dealing with facilities and programmes for the needy and the elderly) and section 28(2) (dealing with facilities and programmes for women). Unlike the provision on free primary education, those two provisions are expressly subject to the availability of resources. All other socio-economic rights are located in the non-binding Directive Principles of State Policy (DPSPs) and Duties of the Citizen.[54] This means that rights to goods and services related to housing, health care and social services are unenforceable rights. Directive principle 60(8) says that the state will provide free and compulsory basic education for all, but also includes basic health care for all in the same clause. Due to the non-binding nature of most socio-economic rights in the Bill of Rights, human rights case law in Swaziland has tended to focus on civil and political rights. Section 29(6) is remarkable, not only for its lack of internal qualifiers such as "subject to availability of resources" or "to be progressively realized", but also as it has a built-in target date by when the right was to be achieved, namely within three years from the constitution coming into operation. Jackson Rogers has called this a "trigger" that makes it absolutely clear that the right is not subject to progressive realization.[55] He also argues that this must have been intentional, because several other sections in the Swaziland Bill of Rights do have in-built limitations. It is particularly interesting, therefore, that the Swaziland government has been taken to court on the one immediately realizable justiciable socio-economic right in the constitution, namely children's right to free primary education.

52 Maseko "The drafting of the Constitution", above at note 24 at 313.

53 Gumedze "Human rights and the rule", above at note 35 at 272.

54 See 2005 Constitution, secs 56–63.

55 J Rogers "A case for judicial enforcement of positive socio-economic rights: Strong-weak review, the right to free primary education and the High Court of Swaziland" (2010, LLM long thesis, Central European University) at 25.

## *SWAZILAND NATIONAL EX-MINERS WORKERS ASSOCIATION V THE MINISTER OF EDUCATION*: FACTS AND DECISIONS

In 2009, members of the Swaziland National Ex-Miners Workers' Association decided to secure the right to education for their children and grandchildren.[56] The association approached the High Court for a declaratory order recognizing that the right to education is free and subject to immediate realization. It is notable that the association's standing was not challenged, indicating an openness in Swaziland's courts and legal system for public interest litigation.[57] In addition to the association, another applicant was the parent of a child unable to access education. The respondents were the minister of education, the prime minister, the Swaziland government and the attorney general.

In claiming the declaratory order, the applicants requested that article 29(6) of the 2005 Constitution be read together with section 60(8), which also compels the state to satisfy the right to basic education as follows: "[w]ithout compromising quality, the State shall promote free and compulsory basic education for all and shall take all practical measures to ensure the provision of basic health care services to the population".[58] The applicants also pointed out that three years had elapsed since the commencement of the 2005 Constitution, yet many Swazi children were still excluded from school, in contravention of the law.[59]

In their argument, the respondents claimed that they had complied with the right to free primary education in the Swaziland context. They depicted the issue not as "the provision of primary education free of charge to the parents of children",[60] but rather as the presentation of "a consolidated programme aimed at creating an environment characterised by minimum barriers to quality primary education".[61] They also argued that the delivery of stationery, schoolbooks, qualified teachers, classrooms and other infrastructure as then provided by the government was key to assessing whether free primary education was provided.[62] In addition, they argued that, to ensure free

56 *Swaziland National Ex-Miners Workers Association* (2010 appeal), above at note 18.

57 2005 Constitution, sec 35(1) states that, if any person alleges that a right in the Bill of Rights has been or will be contravened, that person or a member of group to which that person belongs may take a case to the High Court. Child Rights International Network (CRIN) expresses the view that the Supreme Court has not yet confirmed the question of standing without "victim" status; see CRIN "Access to justice for children: Swaziland" (2015), available at: <https://www.crin.org/sites/default/files/swaziland_access_to_justice_-_updated_sep_2015.pdf> (last accessed 28 July 2017). However, the Supreme Court judgment in *Swaziland National Ex-Miners Workers Association* made no adverse findings in relation to standing.

58 2005 Constitution, sec 60(8) is a principle of state policy and, as such, non-justiciable.

59 *Swaziland National Ex-Miners Workers Association* (2009), above at note 16 at 16.

60 Id at 8.

61 Id at 4.

62 Ibid.

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primary education, they paid school fees for orphans and other vulnerable children. Moreover, the respondents called for the right to primary education to be interpreted to infer the progressive realization and availability of resources, as with the implementation of socio-economic rights in general.[63]

Disagreeing with this view and subscribing to a position that the constitution is unambiguous on the issue and does not warrant further clarification, the judge stated: "[i]t seems to me that the respondents are seeking to have the court give the words 'free education' an interpretation which will only do violence to the language, will at best be artificial and in reality be absurd".[64] Moreover the court was unequivocal in pointing out that an "artificial interpretation of article 29(6) would violate the spirit of the entire Constitution", which is "the aspiration of a people towards a free society that seeks the welfare of its own".[65] Therefore, the court held:

> "I make a declaration that every Swazi child of whatever grade attending primary school is entitled to education free of charge, at no cost and not requiring any contribution from any such child regarding tuition, supply of textbooks, and all inputs that ensure access to education and that the said right accrued during the course of the period of three years following the coming into force of the Constitution. I make a further declaration that the third respondent being the Government of Swaziland has the obligation to provide education free of charge, at no cost, to every child so entitled."[66]

It is crystal clear that this order of the High Court was in line with the international regime on the right to primary education.[67] It is unfortunate, however, that it was only a declaratory order and did not set out any practical obligations or actions.[68] It was therefore weak relief and, predictably, did not initially lead to any real changes in access to education. Almost a year later, the Swaziland National Ex-Miners Workers Association brought a second High Court application.[69] This time, the applicants sought a mandatory order compelling the government to provide the declared right immediately.

Regrettably, the second application was dismissed on the ground that the government's programme for free education was "reasonable and satisfactory in view of the limited resources at the disposal of the respondents".[70] In reaching this conclusion, the court noted that section 60(8) of the 2005 Constitution

63 Id at 9.
64 Id at 22.
65 Id at 17.
66 Id at 27–28.
67 For a detailed discussion of the judgment, see Rogers "A case for judicial enforcement", above at note 55.
68 For a discussion of the case and an evaluation of its remedy, see ibid.
69 *Swaziland National Ex-Miners Workers Association* (2010), above at note 17.
70 Id, para 52.

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(which also urges the state to promote the right to basic education) was a principle of state policy and, as such, was not justiciable.[71]

Subsequently, the court went on to accept arguments based on availability of resources that had been rejected in the 2009 judgment. In this vein, ignoring the immediacy of the realization of the right to primary education, the court held that the declaratory order put in place no timetable to indicate when "the Respondents would implement the 'declared right'. It was left to the Respondents to decide when implementation would commence".[72] The court treated the right to basic education as any other socio-economic right and was of the view that an order compelling the government to realize the right to primary education immediately was likely not to be enforceable and would lead to "anarchy, chaos and confusion".[73] Unlike in the previous 2009 judgment, where steps taken, including a "consolidated programme" for primary education, were not accepted as realizing the right,[74] the 2010 High Court held that "steps taken by the Respondents are in the circumstances reasonable and satisfactory in view of the limited resources at the disposal of the Respondents".[75] The court dismissed the application.

To the disappointment of the public interest law community,[76] this decision was upheld by the Supreme Court,[77] which also subjected the right to primary education to progressive realization and availability of resources.[78] After hearing the arguments of the counsel for the applicants, it held that realization of the right could not be found by resorting "to legal syllogism and the persuasiveness of judgments and academic writing".[79] Although the Supreme Court lauded the original High Court declaratory order as the "beacon that will throw the searchlight on [the government's] official actions"[80] for the achievement of the right to primary education, it held that the government's efforts were sufficient and that fulfilment of the right could be undertaken progressively.[81] As discussed below, this judgment was a disappointing display of judicial deference to the executive. The pragmatic approach adopted by the 2010 courts resulted in an interpretation of the right to education that fell short of international standards.

71 Id, para 17.
72 Id, para 5.
73 Id, para 43.
74 *Swaziland National Ex-Miners Workers Association* (2009), above at note 16.
75 *Swaziland National Ex-Miners Workers Association* (2010), above at note 17, para 52.
76 R Parekh "Lessons from litigating universal primary education in Swaziland" (2013) 17/2 *Interights Bulletin* 83 at 83.
77 *Swaziland National Ex-Miners Workers Association* (2010 appeal), above at note 18.
78 Id, paras 16 and 18.
79 Id, para 21.
80 Id, para 24.
81 Id, paras 16 and 18.

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## AN EVALUATION OF THE COURT'S DECISIONS: JUDICIAL DEFERENCE, JUDICIAL AVOIDANCE AND JUDICIAL PRAGMATISM

Judicial deference can be defined as a situation in which the courts, when faced with complex decisions regarding socio-economic rights, avoid making orders to ensure the implementation of the law, and rather defer this responsibility to other branches of government.[82] Judicial deference flows from classical separation of powers doctrine and has different strands of concerns expressed within it. It is sometimes explained by the judiciary as concern about their own lack of expertise regarding complex issues relating to matters requiring specialized knowledge. Linked to this is a strand of deference that leaves the day to day governance of a country, particularly with regard to polycentric issues, to those arms of government more suited to the task.[83] A slightly different motivation for judicial deference relates more to seeing separation of powers in terms of democratic principles: separation of powers means that courts must respect that certain issues fall within the domains of the legislature or the executive, because it is those arms of governance that can be held to account for failure through the polls.[84] Danie Brand points out that the courts may be sensitive about their own institutional security when applying this version of judicial deference.[85] The South African Constitutional Court has observed that courts need to be sensitive to institutional competence and the separation of powers, and that "[u]ndue judicial adventurism can be as damaging as excessive judicial timidity".[86] Writing extra-curially, former Chief Justice Langa, has said that, while judges certainly do have a role to play in law-making, this is primarily to bring the law in line with the constitution. He warns that "overly activist judges can be as dangerous for the fulfilment of the constitutional dream as unduly passive judges".[87] In an early judgment of the South African Constitutional Court dealing with education, the court showed deference to the executive, remarking that a court "should be slow to impose obligations on government which will

82 D Brand "Judicial deference and democracy in socio-economic rights cases in South Africa" (2011) *Stellenbosch Law Review* 614; K McLean "Towards a framework for understanding constitutional deference" (2010) 25 *Southern African Public Law* 445; SA Djoyou Kamga and S Haleba "Can economic growth translate into access to rights? Challenges faced by institutions in South Africa in ensuring that growth leads to better living standards" (2012) 17/9 *Sur International Journal on Human Rights* 82 at 92.

83 K O'Regan "Check and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution" (2005) 8/1 *Potchefstroom Electronic Law Journal* 120.

84 Djoyou Kamga and Haleba "Can economic growth", above at note 82 at 92.

85 Brand "Judicial deference", above at note 82 at 617.

86 *Prins v President of the Cape Law Society of the Cape of Good Hope* (2002) 1 SACR 431 (CC).

87 P Langa "Transformative constitutionalism" (2006) 17/3 *Stellenbosch Law Review* 351 at 357–58.

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inhibit its ability to make and implement policy effectively".[88] In an article concerning education law disputes, Liebenberg has argued that respect for separation is important at the remedial phase of a case, where it requires the courts to craft workable remedies, while avoiding taking over the policy-making tasks of the legislature or the judiciary; this is based on the fact that those two arms of government have greater democratic legitimacy.[89] Of course, Liebenberg is describing the situation in South Africa, which is a fully-fledged multi-party democracy.

Despite criticism by scholars of the deference of South African courts in socio-economic rights adjudication, which some writers describe as "judicious avoidance",[90] South African courts do hold other branches of government accountable. They do so by examining their policies and actions or failures through the lens of reasonableness. So, while the courts will not dictate to the other branches of government what steps they should take to fulfil rights, in many cases the courts are willing to assess their policies, plans, actions and failures, and, where necessary, do find these measures to be unreasonable.[91] At times the courts will use supervisory powers to enforce orders, particularly where there has been a previous failure to comply.[92] There are criticisms of the reasonableness review, in particular the fact that it does not examine the "core content" of rights. However, a recent cluster of education-related cases show that the South African courts are dealing with content issues and are also willing to use stronger remedies, going beyond declarations to more complex orders that require oversight. This article discusses these cases below.

Turning to the Swaziland constitutional context, it is apparent that judicial deference occurs in relation to civil and political rights.[93] However, it is less apparent whether deference or avoidance was at play in the *Swaziland*

88 *Premier Mpumulanga v Executive Committee of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91(CC).

89 S Liebenberg "Remedial principles and meaningful engagement in education rights disputes" (2016) 19 *Potchefstroom Electronic Law Journal* 1, available at: <http://dspace.nwu.ac.za/bitstream/handle/10394/18060/1%20Liebenberg.pdf?sequence=1&isAllowed=y> (last accessed 28 July 2017).

90 J Dugard "Courts and structural poverty in South Africa: To what extent has the Constitutional Court expanded access and remedies to the poor" in DB Maldonado (ed) *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (2013, Cambridge University Press) 293. See also Djoyou Kamga and Haleba "Can economic growth", above at note 82 at 93, where the authors describe judicial avoidance as "adjudicate questions that call on them to check on other branches of government and hold them accountable for their actions".

91 *Government of the Republic of South Africa v Grootboom and Others* (2001) (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).

92 K Roach "The challenges of crafting remedies for violation of socio-economic rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law* (2008, Cambridge University Press) 46 at 58.

93 Gumedze "Human rights and the rule", above at note 35; Langwenya "Swaziland: Justice sector", above at note 26 at 9.

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*National Ex-Miners Workers Association* case. Perhaps a more charitable interpretation of the judgments is that the Swaziland 2010 High Court and Supreme Court judges were simply being pragmatic, and that this is defensible because the judiciary must deliver enforceable judgments and not always rely on normative correctness.[94] In the context of the right to primary education, a pragmatic judiciary would see no point in simply urging the state to comply with the minimum core when it is well aware of the lack of resources needed for the implementation of the right. This might have been the view of the Swaziland judiciary, which in effect turned the right to primary education into a "normal" socio-economic right requiring progressive realization and being subject to availability of resources.

Although this approach may appear logical, it casts serious doubt on the judiciary's ability to uphold the right to primary education. Parekh observes, correctly in the authors' view, that the 2010 decisions "threaten to undermine the minimum core of the right to education. In accepting a lower standard and failing to meaningfully flag the significance of UPE [universal primary education], the ruling detracts from the progress made at the international level".[95]

One problem with this form of judicial pragmatism is that it disregards international norms and standards, and provides states with a way to avoid their obligations. Although the context matters, it should rather provide guidance as to how (not whether) to achieve the enforcement of international norms to which state parties are committed.

## INTERNATIONAL AND REGIONAL STANDARDS ON EDUCATION

International standards regarding the right to primary education provide a good starting point for interrogating the Swaziland judiciary's approach. The UN Committee on Economic Social and Cultural Rights has enunciated the steps needed to give effect to the ICESCR.[96] In this respect, it has identified the minimum action a state party should take. This is known as "the minimum core obligation to ensure the satisfaction of, at the very least, minimum levels of each of the rights"[97] in the covenant. In the absence of the minimum core obligation, the ICESCR "would be deprived of its raison d'être".[98]

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94 JW Singer "Property and coercion in federal Indian law: The conflict between critical and complacent pragmatism" (1990) 63 *Southern California Law Review* 1821 at 1822; FH Easterbrook "Originalism and pragmatism: Pragmatism's role in interpretation" (2008) 31 *Harvard Journal of Law and Public Policy* 901.

95 Parekh "Lessons from litigating", above at note 76 at 84.

96 ICESCR, art 2(1).

97 UNCESCR general comment no 3: "The nature of states parties' obligations" (the Covenant, art 2, para 1) at 10, UN doc E/1991/23 (14 December 1990).

98 For more on the minimum core obligation, see ibid. Also see D Bilchitz "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *South African Journal on Human Rights* 1. S

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In the field of education,[99] while secondary and tertiary education are subject to progressive realization and availability of resources,[100] primary education is compulsory, free of charge and subject to immediate realization.[101] In this sense, it may be argued that the provision of "free primary education" is the minimum core obligation of the right to education.

In the case of Swaziland, the country subscribes to the dualist tradition of international law, which requires an act of Parliament to domesticate ratified international agreements.[102] However, closer examination shows that the constitution clearly and directly provides for the right and, failing appropriate action by the executive, the courts should implement that right. Nevertheless, the Swazi courts disregarded the minimum core obligation related to primary education in their 2010 judgments, which found that, although many children were not receiving free primary education, their constitutional rights had not be violated. This is at odds with the approach of the UN Committee on Economic, Social and Cultural Rights that found, albeit in the context of minimum core obligations, that "in order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".[103]

Furthermore, the Supreme Court judgment[104] interpreted the right to free primary education to be subject to progressive realization and availability of resources. In using this approach, the court not only abandoned its responsibility, but deferred the matter to the executive, which had failed to provide adequately for the fulfilment of the right in the first place. Judicial deference in the Supreme Court's final judgment was informed by budgetary constraints. Such an approach contrasts with the standards governing the right to primary education. The enforcement of this right clearly urges the courts to "provide an effective remedy for infringement, [and] this applies even where the remedy would impact upon policy and / or have budgetary implications".[105]

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contd
Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010, Juta and Company Pty Ltd) 163.

99 ICESCR, art 13.

100 UNCESCR general comment no 13 at 6(b)(iii) and 1.

101 Id at (2)(a), para 9.

102 2005 Constitution, sec 238(2) and (4).

103 General comment no 3, above at note 97, para 10.

104 *Swaziland National Ex-Miners Workers Association* (2010 appeal), above at note 18.

105 See for example *Minister of Health and Others v Treatment Action Campaign and Others* (no 2) 2002 (5) SA 721 (CC); *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); *City of Johannesburg Metropole Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

Swaziland has also ratified the ACHPR and, more recently, the ACRWC. Both these instruments also provide for the right to free primary education.[106] At the African sub-regional level, the community court for the Economic Community of West African States (ECOWAS) made a pronouncement on the right to basic education through the case of *The Registered Trustees of the Socio-Economic Rights Accountability Project v the Federal Republic of Nigeria*.[107] This case originated from the allegation that, as a result of blatant corruption, the funds allocated for basic education were embezzled. First of all, the ECOWAS court rejected the government's claim that the right to basic education is non-justiciable for its location in the DPSPs, which are in the non-binding part of the constitution and simply provide guidance to the state.[108] Secondly, it upheld the right to universal primary education, discarding all excuses based on lack of funds, which in turn had been caused by corruption. The court held that "whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the [government] should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education".[109]

It can be argued that the ECOWAS court complied with international law and did not try to be pragmatic or deal with the government's ability to provide the right to basic education, given the lack of money due to corruption. This approach should be commended, as trying to address issues of corruption may sidetrack the main issue, which is the right to basic education. Secondly, the court rejected reliance on the location of the right to education in the DPSPs to deny its justiciability and, unlike the Swaziland courts in 2010, did not claim that it was to be progressively realized. The African Committee of Experts on the Rights and Welfare of the Child recently dealt with education issues in *Centre for Human Rights at the University of Pretoria and Rencontre Africain Pour la Défense des Droits de l'Homme v Senegal*.[110] The communication raised the plight of as many as 100,000 children of primary school age (known as *talibés*) who are sent for "free" religious education in Qur'anic schools. However, they are required to beg in order to fund their education. The committee found that Senegal was in violation of article 11 of the ACRWC, due to its failure to provide free and compulsory education to all children. This decision shows the committee's awareness of the importance of the right to education and a willingness, where violation is proven, to make strong recommendations to governments. An open letter from the committee to the

106 See ACHPR, art 17 and ACRWC, art 11.

107 Suit no ECW/CCJ/APP/0808 delivered on 27 October 2009 (unreported).

108 Nigerian Child's Rights Act of 2003, sec 15; Compulsory, Free Universal Basic Education Act of 2004, sec 2.

109 *Socio-Economic Rights Accountability Project*, above at note 107, para 28. Also Parekh "Lessons from litigating", above at note 76.

110 Comm 003/2012, decision handed down on 31 May 2015.

president of Senegal, thanking him for taking positive steps towards complying with the recommendations indicates that the decision is having some practical impact on the ground.[111]

## COMPARATIVE REVIEW OF SOUTH AFRICAN EDUCATION CASES WITH A FOCUS ON REMEDY

A more directive, but still practical, approach could have been adopted by the Swaziland court, respecting the separation of powers by asking the government to produce a plan to realize the right, starting immediately and setting time frames. The remedial stage of a case is an important juncture for considering limitations of institutional capacity. This article now examines examples of remedies from courts in neighbouring South Africa, which demonstrate that it is possible to make remedial orders that initiate action, while recognizing that the delivery of goods and services takes time. It is perhaps important here to mention supervisory jurisdiction and mandatory relief. The South African Constitution empowers the courts to "make any order that is just and equitable"[112] and the courts are able to craft new remedies to give life to the constitution.[113] One type of legal remedy that has been utilized to great effect in South African cases regarding the right to basic education is the "supervisory" order. In such an order, a court may retain its jurisdiction over a matter, so that aggrieved parties can return to the same court in the event of non-compliance. A court may also, where appropriate, make structural orders that require specific performance and in which the respondent has to report to a party and / or to the court itself.[114] On the face of it, it appears that the Swaziland judiciary do have such powers, because section 35(2) of the 2005 Constitution enjoins a court to "make such orders, issue such writs, and make such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of this [Bill of Rights]".

111 The letter, dated 26 July 2016, is available at: <http://www.acerwc.org/open-letter-to-h-e-macky-sall-president-of-senegal/> (last accessed 29 August 2017). Unfortunately it cannot be said that the ECOWAS judgment is also having such a positive effect; a UNESCO report *Education for All 2000–2015: Achievements and Challenges* (Education for All global monitoring report 2015) reported that the rate of children in Nigeria not attending school did not improve between 1999 and 2012, despite its GNP per capita improving during that period. The study is available at: <http://unesdoc.unesco.org/images/0023/002322/232205e.pdf> (last accessed 1 September 2017). UNICEF sets the number of children in Nigeria not attending school at 10.5 million; see UNICEF Nigeria "Insecurity threatens gains in girls' education" (15 June 2014), available at: <https://www.unicef.org/nigeria/education_8480.html> (last accessed 31 August 2017).

112 South African Constitution, sec 172(1)(b).

113 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC), para 69.

114 K Roach and G Budlender "Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?" (2005) 5 *South African Law Journal* 325.

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Section 29 of the South African Constitution provides that everyone has the right to basic education. It may be criticized for the fact that it does not include the words "free" or 'compulsory",[115] and sets no time frames for the right to be realized. On the other hand, the word "basic", which accords with the wording under the ACRWC,[116] can be interpreted to mean something more than "primary" and in South African practice seems to mean all school education,[117] or at least education until the end of the year in which a child turns 15 years of age.[118] Furthermore, the clause regarding basic education is not qualified by any aspirational language. Most socio-economic rights provide the rights bearer with "access" to the required goods or services.[119] Section 29(1) guarantees "the right to a basic education", not merely "access to" the right. The state must provide education and not merely take "reasonable legislative and other measures, within available resources, to achieve the progressive realisation of this right".[120]

The Constitutional Court provided an expansive interpretation of the right to a basic education in the case of *The Governing Body of the Juma Musjid Primary School*, where the court stated:

> "It is important, for the purposes of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section

115 However the South Africa Schools Act 84 of 1996 provides for compulsory education. That, together with the norms and standards for school fees and a "fee free schools" policy ensure that no child in South Africa is deprived of education due to an inability to pay, and that parents who have sufficient income pay school fees in government schools.

116 Note, however, that art 11(3)(a) enjoins state parties to provide "free and compulsory basic education".

117 South Africa has separate Ministries of Basic Education and Higher Education. The former deals with all school education while the later deals with further education and training, from tenth grade vocational training to post-matric education at universities and technical colleges.

118 *White Paper on Education and Training* (1995). See also *Phillips v Manser* [1999] 1 All SA 198 (SE) 217. See, however, R Malherbe "Education rights" in T Boezaart (ed) *Child Law in South* Africa (2009, Juta) 407 who argues that it may be better to define basic education according to the World Declaration on Education for All.

119 Sec 26(1) provides everyone "the right to have access to adequate housing" and sec 27(1) provides the "right to have access to (a) health services, including reproductive health care services; (b) sufficient food and water; and social security including, if they are unable to support themselves and their dependents, appropriate social assistance".

120 See South African Constitution 1996, secs 26(2) and 27(2).

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> 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'."[121]

Furthermore, the South African courts have found that the provision of goods and services such as textbooks,[122] teachers,[123] furniture[124] and school transport[125] all form part of the right to a basic education. In these cases, the courts accepted that such rights are immediately realizable and specifically rejected arguments that the state lacked resources. As Goosen J said in *Madzodzo v Minister of Basic Education* (*Madzodzo*):

> "[T]he respondents have been well aware for a considerable time that proactive steps need to be taken to address this shortage and to fulfil the right to basic education as required by sections 7 and 29 of the Constitution. In these circumstances it is not good enough to state that inadequate funds have been budgeted to meet the needs and that the respondents therefore cannot be placed on terms to deliver the identified needs of schools within a fixed period of time. Nor is it good enough to state that the full extent of the needs is unknown. The information available to the respondents from 2011 was such that reasonable estimates of the funding required could be made and reasonable steps taken to plan for such expenditure."[126]

In *Madzodzo*, the court issued a declaratory order that the Provincial Department of Basic Education was in breach of learners' constitutional right to a basic education. It coupled this with an order that required the department to undertake an audit of the school furniture needs of the schools in the Eastern Cape Province, to be filed with the court by a set date, and that within 90 days of that audit report being filed, all schools should receive adequate "age and grade appropriate furniture" to enable each child to have his or her own learning space.[127] The court even foresaw the possibility of non-delivery and included the following clause in the order: "[i]n the event that the respondents envisage that they will not be able to comply with paragraph 4

121 *The Governing Body of the Juma Musjid Primary School and Another v Essay NO and Others (Centre for Child Law and another as amici curiae)* [2011] 7 BCLR 651 (CC), para 37.

122 *Section 27 v Minister of Education* 2013 (3) SA 40 (GNP); *Basic Education for All and Others v Minister of Basic Education and Others* (23949/14) [2014] ZAGPPHC 251, 2014 (4) SA 274 (GP), [2014] 3 All SA 56 (GP), 2014 (9) BCLR 1039 (GP) (5 May 2014); *The Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015).

123 *Centre for Child Law and Others v Minister for Education and Others* 2013 (3) SA 183 (ECG); *Linkside and Others v Minister of Basic Education and Others* [2014] ZAECGHC 111 (17 December 2014) (*Linkside I*); *Linkside and Others v Minister of Basic Education and Others* [2015] ZAECGHC 36 (26 January 2015) (*Linkside II*).

124 *Madzodzo and Others v Minister of Basic Education* 2014 (3) SA 441 (ECM).

125 *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG).

126 *Madzodzo*, above at note 124, para 35.

127 Id, paras 36 and 37.

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above, the respondents must make and [sic] application on notice to the applicants".[128] The order also required that, in that event, the department would have to file an affidavit, setting out the steps taken towards compliance, the extent of non-compliance and the reasons for non-compliance. In fact, the court's prediction that the department would fail to deliver was proved right. The applicants had to return to court where, in an out-of-court settlement, they were given a further innovative remedial order. This included the appointment of a "school furniture task team" by the department, which was tasked with preparing a consolidated list of furniture needs, using a format that can be regularly updated, with the list to be made publicly available on-line. The task team was also required to verify schools' furniture needs by visiting each school on the list and to report the results to the court by a specified date; by a further date, all schools had to have received their furniture, with the task team co-ordinator required to report on a quarterly basis until the process was completed.[129]

Also in the Eastern Cape, courts have handed down judgments with very innovative remedies. One court required the Provincial Department of Basic Education to review its policy on pupils' transport (relating the distance a child lives from school to their qualification for free transport) and to report back to the court on progress with that task.[130] With regard to the appointment of teachers, the Legal Resources Centre brought South Africa's first opt-in class action in the *Linkside* cases.[131] The Eastern Cape had a serious problem with vacant posts, which had risen to 8,479 in January 2012. Some of the more affluent schools managed by appointing teachers whose salaries were paid out of school fees, while others could not afford to do this, resulting in classes without teachers. The "opt-in" class action was successful and an order was obtained that required schools to be reimbursed for the money they had paid to teachers from school fee reserves, in addition to filling the posts and paying the salaries of the appointed permanent teachers. The court ordered the appointment of all the educators listed in the application, and a total of R 109 million was paid to the 123 schools over the two phases of the case, with 145 teachers permanently appointed.

Also notable was series of cases relating to the provision and delivery of school textbooks.[132] The factual background was that the Department of Basic Education adopted an explicit national policy that each learner must be provided with a textbook for each subject before the academic year commenced. However, as a result of budgetary challenges and hiccups in the procurement process as well as the collapse of the Limpopo Provincial

128 Id, para 41(5).

129 This court order was handed down (by agreement) on 16 January 2016. At the time of writing in August 2017, this process is ongoing, under the supervision of the court.

130 *Tripartite Steering Committee*, above at note 125.

131 *Linkside I*, above at note 123; *Linkside II*, above at note 123.

132 *The Minister of Basic Education v Basic Education for All*, above at note 122.

Government,[133] the Provincial Department of Basic Education failed to provide textbooks on time and, when they were provided, only some learners received the books. The matter was originally taken to the Pretoria High Court by an organization called Section 27.[134] The court order declared that the failure to provide textbooks violated the right to education and directed the provincial department to deliver the required books as a matter of urgency, with a specified commencement date. The department was also directed to develop a "catch up / remedial plan" immediately and the court specified what should be included in it, such as identifying the curriculum gaps that had occurred and the extent to which the quality of teaching had been compromised, and then formulating remedial measures and carrying them out by a date to be determined in the plan. The court required the plan to be lodged with it by a certain date and monthly progress reports to be produced thereafter. However, at the beginning of 2014, the department failed again to provide the required textbooks on time. This time Section 27 represented a new organization, Basic Education For All, in another application to the High Court.[135] The central question for the court to determine was "whether the right to a basic education, guaranteed by the Constitution, includes the right of learners at public schools to be provided with a textbook for each subject in time for the commencement of the teaching of the curriculum at the beginning of the school academic year".[136] The court declared that textbooks are included in the constitutional right to basic education. It also noted that the respondents had undertaken to deliver the books by a certain date. The order also required the respondents to provide proof to the applicants on affidavit that applications for the requisite funds for textbooks had been made. The Department of Basic Education appealed against the decision on the issue of whether the right to education included a textbook in each subject for every child, and this matter went to the Supreme Court of Appeal.[137] The Supreme Court of Appeal upheld the High Court decision in these terms:

> "1. It is declared that s 29(1)(a) of the Constitution entitles every learner at public schools in Limpopo to be provided with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.
> 2. It is declared that it is the duty of the State, in terms of s 7(2) of the Constitution, to fulfil the s 29(1)(a) right of every learner by providing him or her with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.

133 *Section 27 v Minister for Education*, above at note 122, paras 10 and 11.
134 Id generally.
135 *The Minister of Basic Education v Basic Education for All*, above at note 122, para 13.
136 Id, para 53 (3.1, 2, 3 and 4).
137 Ibid.

3. It is declared that the National Department of Basic Education and the Limpopo Department of Education violated the s 29(1)(a), s 9 (equality) and s 10 (dignity)."[138]

This decision is unequivocal in highlighting the content of the right to basic education, including the provision of textbooks to all students. Moreover failure to provide these books amounts to a violation of learners' dignity and equality. This decision, and the orders in the earlier phases of the case that contained detailed plans for delivery and remedial actions by deadlines and with regular reporting, are good examples of how declaratory orders can be fortified so that they become very strong forms of judicial review, which culminate in real, concrete results.

## WHAT WOULD HAVE BEEN AN APPROPRIATE ORDER FOR THE SWAZILAND COURTS TO MAKE?

The final consideration is whether it would have been appropriate for the Swaziland courts to have reinforced the 2009 declaratory order that the right to free primary education is immediately realizable, overcome the problem of practical considerations by asking the state to produce a plan that started on a particular date and put in place a supervisory order to ensure compliance. Supervisory orders involve some intrusion into the area of the executive (and sometimes the legislature) and therefore should only be used in situations where they are appropriate. Roach and Budlender have identified three situations in which such orders have traditionally been used: where a government has not paid attention to an issue, lacks the capacity to be able to undertake the tasks that are necessary or lacks the will to do so.[139] They note that the courts in South Africa have used such orders sparingly, but to good effect. The situations in which they have been used are: failure to comply with a declaratory order; when there are signs that an order will not be carried out promptly; when the consequences of even a "good faith" compliance failure will be grave; and "where it is not possible to define with any precision what the government is required to do".[140]

At the first hearing in 2009, four years had elapsed since the constitutional promise of free primary education had been made. In the course of arguments, the government asserted that the right should be interpreted to mean that only children in grade one needed to be assisted within the three years, an assertion that the court rejected. That may have indicated a lack of political will, and the 2009 court could have given a supervisory order. By the time the case was heard in 2010, there was evidence that the government

138 Id, para 53.

139 Roach and Budlender "Mandatory relief", above at note 114.

140 Id at 333–34. See also M Ebadolahi "Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa" (2008) 83 *New York University Law Review* 1565.

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had let a year pass without providing free basic education for all children. Again, this could have been a reason for a supervisory order. Interestingly, it is apparent that, by this time, the government was working on the Free Primary Education Act, which was passed in 2010 but provided for a phasing-in of free primary education, starting with grades 1 and 2. In that context, it may have been difficult to say that there was no attention being paid to fulfilment of the right. That being said, what is the problem with the 2010 courts' approach? The problem is that, by finding that the right to basic education was progressively realizable, the courts have limited the right and this has set a precedent. Instead, the courts should have upheld the 2009 court's finding that the right was immediately realizable and solved the practical problems through a creative order. Lack of capacity may have been the loophole through which the courts could have found space for a supervisory order. It is relatively easy, with hindsight, to see that the government lacked capacity to carry out its mandate. In January 2010, when grades 1 and 2 were offered primary education for the first time, there was a lack of teachers and serious overcrowding. Orphans and vulnerable children were not admitted to school due to a stand-off between the principals' union and the deputy prime minister's office, which was supposed to pay for them. In Ngwenya Central Primary, 239 of the 579 children were orphans and vulnerable children. "To say that this week's opening was a disaster would be an understatement", chided the *Times of Swaziland* editorial.[141] By 2015, the right still had not been made real for all children,[142] and some children who were eligible for grade 3 or were already in grade 3 by 2010 had simply lost out on the right to free primary education, although it is clear that the 2005 Constitution had included them in its promise. The court could have asked the government to put its plan on the table, assessed its reasonableness and given a time specific order that would have allowed for a graduated method.[143] Scrutiny of the plan would have allowed for improved planning and budgeting.

## CONCLUSION

Swaziland's 2005 Constitution holds a bold promise that all children will receive free primary education. The promise was broken, but civil society

141 "Free primary education, at last" (29 January 2010) *IRIN*, available at: <http://www.irinnews.org/news/2010/01/29/free-primary-education-last> (last accessed 28 July 2017).

142 Swaziland's report to UNESCO "Education for all: 2015 national review" noted that, by 2015, 95.6% of children in Malawi were enrolled in primary school, of whom only 75% complete primary school. The report is available at: <http://unesdoc.unesco.org/images/0023/002327/232703e.pdf> (last accessed 31 August 2017).

143 See Rogers "A case for judicial enforcement", above at note 55 at 81. Writing after the 2009 judgment but before the 2010 judgment, Rogers could see the potential usefulness and appropriateness of a supervisory order. In his view, the 2009 court should have asked the government to submit its plan to realize free primary education and ordered that it begin "promptly".

activism aimed to force the government to make amends. This article has briefly described the constitutional context in Swaziland, and the difficulties relating to separation of powers and the independence of the judiciary. Against that backdrop, it has examined the trilogy of judgments on the right to free primary education. The first case, brought to court in 2009 by the Swaziland Ex-Mineworkers Association, upheld the justiciability of the right to education and recognized that it was an immediately enforceable right; however, the case was weak in that it merely resulted in a declaratory order. The government's failure to implement the court's order and the subsequent refusal of the High Court and, ultimately, the Supreme Court to enforce the right to education were disappointing. In 2010 the Swaziland courts avoided making a difficult decision and opted for a pragmatic approach due to the lack of resources. This rendered the right to free primary education, which was the only immediately realizable socio-economic right in the Swaziland Bill of Rights, subject to progressive realization, which is contrary to international and regional law and the Bill of Rights itself. The article found fault with that approach and argued that, despite financial constraints, there was still scope for the courts to direct government to act on its constitutional mandate. The type of judicial pragmatism displayed by the Swaziland courts in 2010 has diluted the constitutional guarantee. This is regrettable, and a review of recent remedial orders of South African courts has shown that national constitutions can be interpreted in the light of international and regional standards, and failures to deliver on rights can be remedied with creative orders, with the result that governments can be directed to deliver promptly on the constitutional promise of education.