



**A case for judicial enforcement
of positive socio-economic constitutional rights:
strong-weak review, the right to free primary education
and the High Court of Swaziland.**

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ACKNOWLEDGEMENTS

Praise must go to my Mum and Dad for their help this past year, and for instilling in me a love of learning and ideas. My wife's parents, Ross Hall and Banma, must also be warmly thanked, particularly for the period I was ensconced at their house without a job, which upon reflection has been a really quite ludicrous state of affairs. Their encouragement and support (not to mention the hot meals) will forever be remembered. On the academic side, thanks to Patrick Macklem, Nsongurua Udombana, Renata Uitz and Murray Wesson whose insights were invaluable. Thanks also to Mr George Soros for establishing CEU, employing their fine minds, and bringing mine to interact with them. It was a wonderful opportunity for me to make some life-long friends so thank you so much for that. On the Swazi side, a special thanks to Ntombi Nyoni, Maxine Langwenya, Selby Gama, Nathi Vilakati, Dianna Ribeiro and Stephen Donaghy. The love you have for Swaziland is a constant source of hope for the future. 'Siyabonga kakhulu kakhulu!' And (more quietly) 'Amandla!' Finally, this paper is dedicated to my beautiful wife, Mary Ellen, whose patience, kindness and love is overwhelming. I give thanks to Jesus Christ for you and the gift of our son, Atticus, and the adorable possibility of spending more time in your presence. And, yes, you can use OUR computer now x

ACRONYMS

CAT	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
DHS	Demographic and Health Survey, Swaziland 2006-2007
HIV-AIDS	Human Immuno-deficiency Virus-Acquired Immuno-deficiency Syndrome
FPE	Free Primary Education
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

EXECUTIVE SUMMARY

This paper explores a recent right to primary education case that was decided by the High Court of Swaziland. The case is noteworthy because it outlines a ‘minimum core’ of content to the right to primary education in the country. While a minimum core approach is generally understood to be a relatively ‘strong’ approach to the enforcement of socio-economic rights, this paper argues that the type of judicial review exercised by the High Court was not strong enough. This argument is centred upon aspects particular to the place of the judiciary in Swazi constitutionalism: there is a ‘judicial tide’; there is a new Bill of Rights to ‘uphold’; consecutive governments have been unable to implement universal primary education; and there is an overwhelming need for FPE to be implemented as soon as possible. At its base it is essentially structural: it contends that the High Court should take the strongest form of judicial review because the formal courts are more desirable institutions for the settlement of disputes than the traditional ones. This claim is based on grounds of procedural fairness and the development of democracy.

Nevertheless, while the paper is particular to Swaziland, a number of general principles that may be of more general application are observed. First, in analyzing the scope of the right, it is contended that the ‘flexible minimum core’ does not give enough direction to the government or civil society about what the right to free primary education entails. This means that in effect the right itself remains ‘weak’. As an alternative model, a ‘benchmarked minimum core’ is advanced for consideration. Second, the limitations placed upon the judicial enforcement of children’s rights in South Africa are questioned. Third, the concerns of enforcement costs, separation of powers and vagueness in the field of positive socio-economic constitutional rights are explored. Fourth, the dialogical model is forwarded as an

answer to the problem of judicial competence in the construction and implementation of socio-economic rights. Fifth, through an analysis of supervisory jurisdiction, a test is advanced of when a structural interdict (or injunction) is warranted. Finally, compliance remedies for enforcing structural interdicts are then outlined, and in particular an attempt to marry the minimum core and the ‘reasonableness test’ is made.

INTRODUCTION

The High Court of Swaziland has passed judgment in a right to primary education case and it presents a good opportunity to discuss the justiciability and enforcement of positive socio-economic constitutional rights.¹ In *Swaziland National Ex-Miners Workers Association and Others v Minister of Education and Others*² (the ‘Free Education Case’), Agyemang J made “a declaration that every Swazi child of whatever grade attending primary school is entitled to education free of charge”³ and, further, that “the Government of Swaziland has the constitutional obligation to provide education free of charge, at no cost, to every child so entitled.”⁴ It has been greeted as a landmark decision in the Kingdom, with much jubilation on the part of the press and the applicants, one of whom called it “historic.”⁵

In assessing the scope of the right, the High Court did not follow the ‘reasonableness test’ that has been developed in South African constitutional socio-economic rights case law. Instead, it argued that there was an individual entitlement – a “flexible minimum core” – residing in each Swazi child to claim from the state. For a remedy, the Court refrained from issuing a structural interdict or exercising ‘supervisory jurisdiction.’ It acknowledged it had this power but argued it ought only do so if the “situation” was “grave indeed or capable of

¹ I have used the term ‘socio-economic rights’ because it is the term preferred in the Roman-Dutch common law world. In the US, these are usually known as ‘social welfare rights.’ In the UK and other parts of the world ‘economic and social rights.’

² *Swaziland National Ex-Miners Workers Association et al v Minister of Education et al* Unreported, High Court of Swaziland (2009).

³ *Ibid.*, 11.

⁴ *Ibid.*, 13.

⁵ Manqoba Nxumalo, “Government Loses Free Education Case,” *Swazi Times*, March 17, 2009.

no other remedy.” The Court thus adopted a ‘strong’ right-‘weak’ remedy approach to socio-economic rights adjudication. Strong right because a definition of the state’s positive obligation was advanced and weak remedy because the Court gave only declaratory relief. This type of approach to the positive obligations entailed in socio-economic rights cases has been praised in some quarters, and is not without merit.⁶

Nevertheless, this paper argues that the High Court of Swaziland could have and should have exercised a stronger form of judicial review in the Free Education Case. The new Swazi Constitution, which came into force on 8 February 2006,⁷ constitutionally mandates that “every child” shall “have the right to...primary school” within “three years.”⁸ As at 8 February 2009, many children were still not in primary school. The chapter which contains the right to education, the “Bill of Fundamental Rights & Freedoms” (hereinafter the ‘Bill of Rights’), states that a person may approach the High Court directly for a remedy in the case of a contravention of a constitutional right.⁹ The High Court is obligated to “make such orders, issue such writs and make such directions” as “appropriate” for “securing the enforcement of the provisions of this chapter.”¹⁰ It will be contended that the High Court is a viable venue for ensuring that this provision of the Constitution is met. This paper will explore the options available to the Court in constitutional socio-economic rights cases.

⁶ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press, Princeton, New Jersey, 2008. The whole book centres on this, but for an education example, see p 255 the North Carolina cases, in particular *Leandro v State* 346 NC 336 (1997) and *Hoke County v State* 358 NC 605.

⁷ Or 26 July 2005, depending on whether the King’s power to make decrees is *de jure* permitted in the new constitutional regime.

⁸ *Constitution of the Kingdom of Swaziland*, 2005, sec. 29(6).

⁹ *Id.* at , s 35.

¹⁰ *Id.* at , s 35(2).

By exploring these options, the central case that will be advanced is that the Free Education Case should be subjected to stronger judicial review because this will increase procedural fairness and further the development of democracy in the Kingdom. To explain this argument this paper is broken into several parts. Part 1 will outline the place of the High Court within the institutional landscape. Part 2 will analyse the Free Education Section and demonstrate why it is important that the High Court not miss this chance in particular to exercise its institutional power. The next three parts will then examine in detail the question of judicial competence and advance a dialogical solution to the vagueness problem found in socio-economic rights cases. Part 3 will look at the enforcement of socio-economic rights more theoretically. Part 4 will concentrate on the scope of the right, and in particular make the case for a more rigid form of the minimum core than that outlined in the Free Education Case. Part 5 will compare declaratory relief with various forms of supervisory jurisdiction. Finally, Part 6 will chart a course for the High Court, in particular detailing the importance of compliance remedies in enforcing broad structural relief in socio-economic rights cases.

Assumptions and limitations of scope

A number of key assumptions need to be outlined to qualify this structural argument. First, it is assumed that free primary education of the sort that many of the world's children today receive is a desirable good. No attempt is made to prove this proposition, although there is at least one good outcome that is relied on in the paper, being that higher levels of formal education have been shown to reduce the chance that a child will contract HIV-AIDS. The second assumption is that a comparative analysis of constitutional law is a meaningful and helpful exercise. It will become apparent that at times this paper will move between jurisdictions with what might be unseemly haste. This practice is defended on two grounds. First, the Swazi courts have never hesitated to hear developments in international law and the

law of other (even vastly different) jurisdictions.¹¹ Second, the constitutional order of the two other jurisdictions I rely on most heavily – the United States of America and the Republic of South Africa – have much in common with the new Swazi Constitution and constitutional case law can therefore be of great assistance.

In trying to demonstrate the importance of the High Court taking the very strongest approach to the Free Education Case, it has also to be acknowledged that there are a number of limits to the scope of this paper, which time and space have conspired to construct. Whether the claim to primary education could be made under the Equality Section of the 2005 Constitution will not be examined.¹² That Section offers equality before the law, equal protection of the law and freedom from discrimination. In particular, one of the prohibited grounds within the Equality Section is “social or economic standing.” It is contended that those children not being afforded primary school currently in Swaziland are almost certainly being discriminated against on the basis of social or economic standing, but this paper leaves that question behind. The Free Education Section is preferred because it has a certain level of specificity that is helpful, it has already been the subject of a claim and it may contain stronger grounds for a strong remedy. Nor will this paper examine whether socio-economic rights are human rights. By implication this paper contends that certain socio-economic rights in certain contexts are individually justiciable, and therefore are individual rights. The important and interesting jurisprudential question of whether socio-economic rights are in fact human rights is left behind, however, on the grounds that the right appears in solid terms in the justiciable chapter of the Constitution and has already been the subject of a decision. The third limitation is that no attempt has been made to engage with the standard of review in

¹¹ A good example is *Sithole N.O and Others v Prime Minister of the Kingdom of Swaziland and Others* (SZHC 123 2007).

¹² 2005 Constitution, sec. 20.

constitutional socio-economic rights cases. This is justified partly on grounds of space, partly because one of my claims – that the High Court should adopt a ‘benchmark minimum core’ – implies a high standard of review, and partly because the correctness-reasonableness distinction seems to me unconvincing in socio-economic rights cases.¹³

Methodology

This paper involves three types of qualitative review. First, it involves a desk-top research of materials available regarding socio-economic rights and the right to education. Second, it involves case studies from different jurisdictions regarding such rights. In particular, in discussing the types of review the High Court might take, a number of jurisdictions have been focused upon: the United States, because it has a vast array of examples of courts adjudicating education cases in a jurisdiction with constitutional supremacy; South Africa, because it has substantial experience in the adjudication of socio-economic rights; and a number of other African Roman-Dutch common law jurisdictions as they have similar milieus to Swaziland. And third, it also involves research and analysis of Swazi cases and court orders to hypothesise about the best models for the High Court to adopt.

¹³ For the sake of clarity, I should add that I do not mean to advance the argument that the reasonableness-correctness distinction is wholly without substance. There is of course a great deal of confusion here, mainly because of the inescapable subjectivity in the role of judge. This is not so much a problem with judging as the human condition. But this does not make administrative review wrong. Once accepted, it is desirable that there is some guideline as to how it is to be applied. The compliance standard – whether reasonableness or correctness – allows the judge to attempt to apply it in an objective way. The reasonableness test and the correctness approach do then present alternative approaches to a judiciary. They may be murky and lead to confusing (or perhaps the same) outcomes, but they are logically distinct approaches to be sure. It should also be noted that I do make a distinction between ‘correctness’ and ‘reasonableness’ in programmatic compliance remedies for structural relief by making a distinction between programmes *directly* reliant on a benchmarked minimum core (and by implication, a ‘minimalist’ right) and those only *indirectly* reliant, see Part 6.

1. A 'JUDICIAL TIDE': DISSONANCE, DUALISM AND A BILL OF RIGHTS

The 2005 Constitution and its meaningfulness

The central thesis of this paper is essentially structural: the right to free primary education ('FPE') in Swaziland should be enforced by the High Court because the formal courts¹⁴ are more desirable institutions for the settlement of disputes than the traditional ones.¹⁵ In order to understand this proposition an initial assessment of the new 2005 Constitution must be undertaken and in particular three aspects must be emphasized. First, the new Constitution has created a level of constitutional 'dissonance' between text and reality. Second, the Constitution continues the potentially unstable dualistic legal system that has existed since white domination and local dislocation. And third, the new Constitution reinstates a justiciable Bill of Rights. All of these aspects have created what in my view is a 'judicial tide' or high water mark, which means that aggressive action regarding the administration of FPE will not only be effective but will also increase the power and prestige of the courts.¹⁶

But first a very brief background to the new Constitution: it arose out of the constitutional crisis of 2002.¹⁷ That crisis was precipitated by the now-infamous November 28 Statement, where the government publicly vowed to disregard orders of the courts. This prompted all the judges to resign. A period of relative instability came to the Kingdom. After some time the government ratified the ICCPR, the ICESCR, the CAT and the

¹⁴ This is the name given to the colonial courts by the Swazi themselves. In fact, the traditional courts are also formal courts of record (except that reasons for judgment are not written down, although they are given verbally at the time of judgment).

¹⁵ I must reiterate here that a key assumption of this paper is that free primary education for children is a desirable good in Swaziland.

¹⁶ Note that when I refer to courts, I mean the formal or colonial courts, the 'Judiciary' in terms of the 2005 Constitution. The Swazi feudal courts I refer to (and are known) as the 'National courts' or the 'traditional courts.'

¹⁷ For an accurate and concise account of which, see *Swaziland - Law, Politics & Custom: Constitutional Crisis & the Breakdown of the Rule of Law* (London: International Bar Association, March 2003).

CEDAW.¹⁸ The Monarchy then presented a new Constitution to the country, which re-established a constitutional Bill of Rights, suspended in 1973.¹⁹ The reasons for signing the covenants and promulgating a new constitution are not clear, although there is near universal agreement that both were done to signal to the international community that the Kingdom respects human rights and to try and encourage foreign direct investment and trust from the business world. The judges then re-took their seats on the bench.

The first aspect that must be emphasized out of this new constitutional order is the constitutional ‘dissonance’ that exists in Swaziland. Constitutional dissonance is that gap between the formal constitutional and legal norms and the actual practise of the government and the citizen. Such dissonance exists of course in every jurisdiction. But it can be particularly pronounced in developing countries, and Swaziland is no exception. A number of examples will prove the point and give a sense of how the Monarchy still exercises control over the formal branches. Regarding the cabinet, the appointment of a chief from outside parliament as Minister of *Tinkhundla* Affairs²⁰ has meant that now less than half is from elected members of the lower house, which is unconstitutional.²¹ The current parliament is also improperly constituted.²² As is the Judicial Services Commission.²³

¹⁸ All without reservations, on 26 March 2004.

¹⁹ It is not the same Bill of Rights.

²⁰ The equivalent of a Minister for Local Government.

²¹ s 67(3), a move defended by the Prime Minister on the grounds that he and the Deputy Prime Minister are not ‘Ministers’, which is a dubious reading of the 2005 Constitution.

²² Under sections 94(3) and 95(2)(a), the King has a duty to appoint at least eight female senators and five female members of the House of Assembly. He has appointed seven and four respectively.

²³ The Secretary of the JSC has been the Principal Secretary of the Ministry of Justice, a situation which has a number of senior members of the judiciary particularly unhappy.

This dissonance has existed in Swaziland since the first written constitution of 1968. It has never become so great that Swaziland has engaged in civil war, a point of pride to the Swazis. But it has caused serious legal disruptions, seeing various institutions ebb and flow in importance and standing in the country: with sometimes the government, sometimes the *Liqoqo*²⁴, sometimes the Monarchy being the most influential players on the constitutional landscape. Since it has been reinstated after a new Constitution had been promulgated, the judiciary is at a ‘strong’ point in Swaziland’s constitutional history.

Of course, dissonance cuts both ways. If a government has not implemented a certain section of the Constitution, or will not abide by the Bill of Rights, then this could be viewed either as a sign that the new Constitution has no meaning, or as an acceptable lapse in a developing state. On this latter point, the Industrial Court has noted that a “degree of delay” is acceptable in implementing certain constitutional obligations.²⁵ But the interesting phenomenon since 2005 is that, dissonance notwithstanding, the government has shown a willingness to abide by judgments of the courts even where they do not follow its interests, and even in the most controversial areas. For example recently the judiciary ruled directly against the wishes of the Crown, or at least of traditionalists in the *Liqoqo*.²⁶ The case concerned the burial of a famous chief who had been evicted from his traditional area by an order found to have been forged by powerful members of the royal family. The descendants of the chief had been disputing the order with the newly-installed chief since the eviction. As a result the body of the chief had remained unburied for five years. In a dramatic turn, the

²⁴ The Privy Council, a group of senior princes and chiefs who are very close to the levers of power in Swaziland, and who ran the country during the King’s minority.

²⁵ *Hlatshwayo v Government of Swaziland & the Attorney-General* IC Case No. 398/06, 14 (2006).

²⁶ *HRH Prince Tfohlongwane N.O. and Others v Lindimpi Wilson Ntshangase and Others* SCSZ No 25/07 (2007).

High Court ruled against the interests of the royal family and ordered that Chief Mzikhayise be buried in his ancestral lands. On appeal to the Supreme Court this decision was affirmed. Despite strong resistance from within traditional circles (and the threat of serious violence), the burial took place.²⁷ There is then some reason to believe that the government would abide by even the very strongest form of judicial intervention in the Free Education Case.

Dualism: a ‘mixed and balanced’ ‘separation of powers’?

The second aspect that must be emphasized is that, as in many developing countries, there is a dualistic legal system in Swaziland. On the one hand, the traditional Swazi law and custom still dominates the social order. On the other, this traditional law is officially subservient to the statutory law created by the colonial institutions. It also has a conterminous existence with the Roman-Dutch common law, which is *generally* the law applicable in the colonial courts. Neither the Roman-Dutch common law nor Swazi law and custom is officially superior law; they usually govern different areas of life and are rarely in conflict *in a case*, although they do do ‘battle’ regarding choice of laws – for example, an individual might choose to marry in terms of the civil law (some aspects of which would then be governed by Roman-Dutch common law) or in terms of traditional law. This dualistic character, present in Swaziland since colonization, is preserved in the new Constitution.

The 2005 Constitution then creates a ‘mixed and balanced constitution’ and one that attempts to instil the doctrine of the separation of powers. On the one hand there is constitutional protection of a feudal structure based upon the late-nineteenth century Swazi

²⁷ Thulani Mthethwa, “Swazi Burial After Five-year Wait,” December 10, 2007, <http://news.bbc.co.uk/2/hi/africa/7135764.stm>. <accessed 29 October 2009>

state.²⁸ On the other the Constitution also creates decidedly modern institutions – Executive, Legislature and Judiciary. The traditional structures still dominate the constitutional landscape, mainly through the institutions of the Monarchy and the Chiefs, so it may be most sensible to examine these two first.

The Monarchy is made up of the King²⁹ and the Queen Mother,³⁰ who head an extended network of family princes and princesses. The King and the Queen Mother rule over the traditional institutions together. The King is the dominant decision-maker and administrator of these institutions, having, for example, the power to remove chiefs.³¹ But the Queen Mother does have crucial traditional and religious duties and also holds, importantly, the power of *veto* over the King.³² Thus there is a system of checks and balances within the Monarchy itself. There are also a number of other Senior Princes and the *Liqogo*, or Privy Council, which can (and do) exercise power over the Monarchy. All these institutions in fact constitute ‘the Monarchy’ and are outlined in some detail in the Constitution.

The chiefs also have comprehensive constitutional protection. The chiefs are described as “the footstools” of the King and the means by which the King rules.³³ They are constitutionally barred from standing for parliament and from “partaking in party politics” – a

²⁸ Philip Bonner, *Kings, Commoners and Concessionaires: the Evolution and Dissolution of the Nineteenth-century Swazi State* (Cambridge, United Kingdom: Cambridge University Press, 2002).

²⁹ *Ngwenyama*, but for ease of understanding I use ‘King’ when referring to the King in his role as *Ngwenyama* or King.

³⁰ *Ndlovukazi*, but likewise I use ‘Queen Mother’ throughout.

³¹ 2005 Constitution, sec. 233(2).

³² Although this is not stipulated in the 2005 Constitution, it is a widely known and well-understood power, see Philip Bonner, *Kings, Commoners and Concessionaires: the Evolution and Dissolution of the Nineteenth-century Swazi State*, 25.

³³ 2005 Constitution, sec. 233(1).

barrier which they formally recognize.³⁴ But they retain control of Swaziland by three means. First, they are each responsible for an area of Swazi Nation Land (as it is known) throughout the Kingdom,³⁵ so that a subject's land title is dependent upon the goodwill of the chief. There are areas of title land throughout the Kingdom, particularly around the towns, where no control is exercised by the chiefs. But the vast majority of Swazis live on Swazi Nation Land,³⁶ and even those that do not almost universally have a "traditional homestead" in an area. Although forced evictions are rare,³⁷ pressure to pay homage to a chief, and to abide by a chief's behest, is acute. Thus the chiefs are able to effectively select an MP for a constituency by unofficially endorsing a candidate in an area. One MP told me quite frankly how he entered parliament:³⁸

"I was walking down the street about a month before the election when a group of chiefs approached me. 'We're tired of our MP' they told me, 'we'd like you to stand for election.' I told them I would and a month later I was elected. I never sought to become an MP."

The story reveals not only how a subject will likely follow the will of her or his chief, but how quickly an unofficial endorsement can become known throughout an area, and be followed by the other subjects.

³⁴ Ibid., sec. 233(6).

³⁵ Ibid., sec. 233(2) and (8).

³⁶ Surprisingly hard to find an accurate figure. The CIA and other sources repeat the figure of 75% but this is not referenced. The Swazi government figures also do not seem to accurately record this, perhaps a reflection of the controversial place land ownership holds in Swaziland.

³⁷ Certainly not unheard of as the removal of Mzikhayise (see *supra* note 26) and the infamous mass eviction of the Macetjeni and kaMkhweli areas 'evictions/chieftainship' case was heard: *Madeli Fakudze v The Commissioner of Police, Attorney-General and Abraham Dladla*, (Appeal Case No 8/2002). Plus there is plenty of anecdotal evidence of weaker parties, such as widows and children being removed from prime real estate in an area. But the power is not so abused that it is inflamed in the consciousness of the Swazi. It is therefore the "perfect" threat, understated and underused but ever present.

³⁸ Conversation with MP, who must remain unnamed, in February 2008.

The second method by which the chiefs exercise control of Swaziland is through the traditional courts, known as the National Courts. Distinguished chiefs well-versed in Swazi law and custom preside over these courts, which hear cases involving all aspects of Swazi life, from criminal laws to land disputes. National Court Presidents are given the power to fine those appearing up to 120 Emalangenis or imprison them for up to 12 months.³⁹ By far and away the majority of Swazis interact with the laws through these courts, and as judgments are not written,⁴⁰ there is a huge degree of discretion that can be exercised here.

The third means of control by the chiefs is by the huge moral and psychological authority vested in them through the traditional and quasi-religious nature of their role. It should be emphasized that chiefs are by and large approachable and appreciated by their subjects. A Chief is constitutionally recognized as “a symbol of unity and a father of the community”⁴¹ and this rather transcendental state translates into real and awesome power on the ground.

There are a myriad of other traditional structures which principally serve to strengthen these two powerful institutions in Swaziland, but this will serve enough for our purposes presently. We should now turn to the other side of the dualist coin in Swaziland – the western institutions which trace their way back through Swazi history to the period of white domination. These are based on the doctrine of the separation of powers – Executive, Legislature and Judiciary.

³⁹ Ian Seiderman (ed.), *Yearbook of the International Commission of Jurists* (Oxford: Intersentia, 2004), 14, although this report claims 10 months, in fact 12 months is more commonly viewed as the maximum, although strictly speaking section 12 of the *Swazi Courts Act 1950* allows any punishment except that “the fine or other punishment shall in no case be excessive but shall always be commensurate with the nature and circumstances of the offence and the circumstances of the offender.”

⁴⁰ Decisions are recorded, but reasons for judgment are not written down, although they are given verbally by the National Court President (a chief) at the time of judgment.

⁴¹ 2005 Constitution, sec. 233(6).

Executive authority vests in the King and he retains an extraordinary amount of power under the 2005 Constitution – through appointments, the veto, and as head of the armed forces. Whether or not the legislative function has been removed from the King is an open question. This is important for our purposes: as it will help us to discern what sort of orders might be made to who in reviewing education laws and the budget. After 1973 either the King-in-Parliament (through acts) or the King himself (by decree) could create laws.⁴² The 2005 Constitution is somewhat ambiguous about removing the legislative function from the Executive,⁴³ although this is what it is widely believed to have done. Section 106 states at subsection (1) that the “supreme legislative function” vests in the “King-in-parliament,”⁴⁴ a phrase borrowed directly from the United Kingdom and, since the Restoration, meaning that the monarch cannot pass primary legislation without the consent of parliament.⁴⁵ The problem is that subsection (2) goes on to say that the “King *and* parliament may make laws for the peace, order and good government” of the country.⁴⁶ Section 107 would seem to resolve the ambiguity in favour of the first construction, meaning that only the King-in-

⁴² *Proclamation by His Majesty King Sobhuza*, 1973., ss 10(2)(a) and 14A(2).

⁴³ *2005 Constitution*, sec. 107.

⁴⁴ *Ibid.*, sec. 106.

⁴⁵ An acceptable simplification, I hope, of English constitutionalism and the somewhat conflicting theories found in *The Case of Ship-money* (1637) 3 S.T. 826, the writings of James Whitelocke, and the various acts passed with the Restoration and in the ensuing years. For support I rely on Arthur L Goodhart and Harold G Hanbury (eds), *Essays in Law and History by Sir William Searle Holdsworth*, Clarendon Press, Oxford, 1946, p 90.

⁴⁶ *2005 Constitution*, sec. 106(b). (my emphasis).

parliament has the power to pass laws.⁴⁷ Whether there is a significance to this discrepancy has not been decided definitively by a court.⁴⁸

Either way, and to come to the point, it is submitted that the power to propose appropriations, potentially relevant to the question of socio-economic rights litigation, vests only in Cabinet. Appropriations and other money bills can only be considered with the consent of the Prime Minister or the Minister for Finance and must originate in the House of Assembly.⁴⁹ Therefore, even if the King constitutionally retains the power to make decrees, these are probably not the sort of decrees that would have large, on-going financial implications. Further, in terms of policy, the Executive operates through Ministers, who sit in parliament in a Westminster model. These Ministers are appointed by him, either after they are elected to the parliament, or from outside, in which case they are given a seat, usually in the lower house. Ministers are therefore usually very close to the King, and crucial posts

⁴⁷ s 107 states *inter alia* “the power of the King and Parliament to make laws shall be exercised by bills – (a) passed by both chambers of Parliament” (my emphasis) might resolve the question at least *de jure*.

⁴⁸ Or perhaps it has. There are two cases which have dealt peripherally with the question. The first contemplated the King’s decree published in the Gazette of 6 February 2006 as *The Constitution of the Kingdom of Swaziland (Date of Commencement) Proclamation*. This “extraordinary instrument” (in the words of the Court President) professes to be retroactive from 26 July 2005 and delay commencement of the Constitution until 8 February 2006. It is still not clear why this was done, but the case examining the decree, *Matsebula v Under-Secretary of Ministry of Education and Ors* IC Case No. 50/2007 (1 June 2007) may have something to do with it. The Applicant in this case attempted to enforce his constitutional rights (not a fundamental right from the Bill of Rights, but rather s 194(4) relating to the speed of disciplinary proceedings for public servants. The case was ultimately decided under s 109 (right not have rights adversely affected by a retroactive law)). The alleged violation had taken place after 26 July 2005 but before 8 February 2006. The Industrial Court noted the potential problem with the *Proclamation* – the source of its authority was the 1973 Proclamation, which was a Constitution widely understood to have been overturned by the 2005 Constitution. Before ultimately deciding the issue on other grounds, the Court noted that the question touched on “sensitive matters” relevant to monarchical authority and also that the 1973 Proclamation had not been specifically repealed by the 2005 Constitution. On the other hand, in *Prime Minister of Swaziland and Others v MPD Marketing & Supplies (Pty) Ltd* [2007] SZSC 11 (2007) available at <http://www.saflii.org/sz/cases/SZSC/2007/11.html> <accessed 20 September 2009>), the highest judicial authority, a Full Bench of the Supreme Court, issued a very strongly-worded decision stating that the section of the 2005 Constitution dealing with the powers of the Executive (s 64(4)) is a closed list and there are no powers residing in any member of the Executive beyond these. There is no legislative or decree-related function listed here, so while it has not been directly decided it is conceivably the case that the *Date of Commencement Proclamation* is *ultra vires* the 2005 Constitution and therefore void. If so, PM v MPD Marketing Supplies may be one of the most important judgments in modern Swazi constitutional law.

⁴⁹ 2005 Constitution, sec. 110-113.

such as the Prime Minister, Minister of Justice, Minister of Home Affairs and Ministry of Finance are nearly always held by members of the extended royal family. Nevertheless, ministers do have independent *de jure* control over the bureaucracy and policy in their areas.⁵⁰ They also have *de facto* control to some greater or lesser degree, usually depending on the competence of the Minister. Relevant for our purposes, the Ministry of Education is responsible for the education portfolio.

However, it is the bicameral parliament which has ostensible control of the budget. It also has the power to make laws “for the peace, order and good government” of Swaziland.⁵¹ It has some control over the Prime Minister by being able to pass a vote of no confidence, which should result in elections within three months.⁵² It has a committee system which allows it to call witnesses and investigate ministries and departments.⁵³ But if all this gives the impression that parliament is a powerful body in Swaziland, then that picture must be corrected. Paul Craig correctly notes that whether legislatures exercise sufficient control over executives in the Westminster model largely depends upon one’s expectations,⁵⁴ but wherever one stands it is certainly true that parliaments tend to play second fiddle. This situation is greatly exacerbated in Swaziland, where land is controlled by the chiefs,⁵⁵ and the authorities have a tight grip over the electoral process.⁵⁶ Perhaps more problematically,

⁵⁰ Ibid., sec. 75.

⁵¹ Ibid., sec. 107.

⁵² 2005 Constitution, sec. 68(1)(e), although this requires a two-thirds majority of the house, and still remains at the discretion of the King. Alternatively, a three-fifths majority no-confidence resolution in Cabinet means that the King must dissolve that entire body (s 68(5)).

⁵³ Ibid., sec. 129.

⁵⁴ P.P. Craig, *Administrative Law*, Third. (London: Sweet & Maxwell, 1994), 74.

⁵⁵ 2005 Constitution, sec. 233(4).

⁵⁶ Ibid., sec. 80.

political parties are constitutionally barred from contesting elections.⁵⁷ Thus there is a general listlessness to each new parliament.

Parliament, then, is currently inhibited by the “burdens of inertia” described by Rosalind Dixon.⁵⁸ According to Dixon, three types of such inertia might exist within even the most efficient legislature. First, “priority-driven burdens of inertia” occur where the legislature’s time is dominated by other concerns and a problem like the lack of universal FPE does not get the proper amount of attention. For the reasons just noted, Parliament prioritizes its time in a regrettable manner in Swaziland. In particular, priorities are drastically skewed to the concerns of the ruling elite.⁵⁹ Second, “coalition-driven burdens of inertia” are those produced where allies in a legislature see no gain in attending to a particular issue. As the Swazi MPs value unity and solidarity there is no interest for them in “rocking the boat” to make sure that government meets its constitutional obligation. The no-party state operates very much like a one-party state, and coalition-driven burdens of inertia are rife. Third, “compound burdens of inertia” are produced where requirements for complex and sustained administrative action intermingle with legislative inertia to delay redress of a particular problem. In Swaziland, for the reasons described above (and in particular because the King and not a legislative majority appoints Cabinet) there is a glaring inability on the

⁵⁷ Ibid., sec. 87(5).

⁵⁸ Rosalind Dixon, “Creating Dialogue About Socioeconomic Rights: Strong-form vs Weak-form Judicial Review Revisited,” *5 Intl J Const L* 391 (July 2007): 403.

⁵⁹ There are in fact numerous sections of the Constitution requiring the legislature to pass laws for a given purpose: for example, s 30(2) “Parliament shall enact laws for the protection of persons with disabilities so as to enable those persons to enjoy productive and fulfilling lives” or 32(4) “Parliament shall enact laws to – (a) provide for the right of persons to work under satisfactory, safe and healthy conditions...”. An interesting constitutional question is whether the parliament is actually permitted to pass laws *outside* of these areas or whether only these areas may be the subject of laws “for the peace, order and good government” of the country. At first glance, this latter interpretation might seem ridiculous, but it would still give the parliament a fairly wide scope of action and might tie parliamentary time to focus on poverty alleviation rather than quite feckless pursuits such as contempt-of-parliament proceedings against newspaper editors, or more recently substantially increasing MPs emoluments.

part of the House to control the government.⁶⁰ Parliament could therefore be described as extremely weak, if not superfluous.

The Judiciary and the new Bill of Rights

While the 2005 Constitution retains the dualistic legal system, it is the reinstated judiciary that has emerged with the most increased powers. The judiciary vests in the Supreme Court, formerly the Court of Appeal of the High Court. There are two more levels of courts of the judicature⁶¹ below the Supreme Court, the High Court and the Magistrates Court.⁶² The King appoints the judiciary upon the advice of the Judicial Services Commission.⁶³ The Commission is itself stacked with appointments of the King's choosing.⁶⁴ Nevertheless the courts are, to some extent, independent. A judge can only be removed upon the recommendation of the Commission. But whereas with regards to other appointments, the King can disregard any advice,⁶⁵ removal from judicial office must only be done with the recommendation of the Commission.⁶⁶ This has seen something of an independent spirit emerge, particularly on the High Court and the Supreme Court. The judiciary has made a

⁶⁰ Indeed, Cabinet itself has trouble controlling the government activities, see as a recent example: Innocent Maphalala, *Government Not Involved in E50 billion Project!*, Times of Swaziland, March 23, 2009, available at <http://www.times.co.sz/index.php?news=6494> <accessed 20 November 2009>

⁶¹ National Courts are not explicitly constitutionally protected but are governed by the *Swazi Courts Act* 1950 (as amended).

⁶² 2005 Constitution, chap. VIII.

⁶³ Ibid., sec. 153(1).

⁶⁴ Ibid., sec. 159(2).

⁶⁵ Ibid., sec. 65(4).

⁶⁶ Ibid., sec. 158(5).

number of important decisions against the government since the reestablishment of the Bill of Rights, most recently in the terrorism trials of agitators for constitutional reform.⁶⁷

The High Court itself has also been given substantially more power under the new dispensation, which arose out of the constitutional crisis. In the first instance, the 2005 Constitution re-established a justiciable Bill of Rights, repealed by the 1973 Proclamation.⁶⁸ The executive, legislature and judiciary are under an obligation to “respect and uphold” all the rights that appear in the Bill of Rights.⁶⁹ It is here contented that the word “uphold” ought to be interpreted as incorporating both “protection” and “promotion” of rights. Regarding protection, the courts in Swaziland have already held that not only does the Bill of Rights create horizontal obligations between parties, but also that the enshrined rights are “directly” enforceable by private parties in private disputes.⁷⁰ Regarding the positive obligation to “promote” the rights contained in the Bill of Rights, the Court in the Free Education Case did not hesitate to stress the government’s obligation in this regard.⁷¹ Furthermore in the preamble the Court is also given authority as “the ultimate interpreter of the Constitution.”⁷² It thereby has the power to void any law which is inconsistent with the Constitution “to the extent of the inconsistency.”⁷³ This is a massive increase of power and responsibility over the previous constitutional dispensation.

⁶⁷ The trials of Mario Masuku, the President of the People’s United Democratic Movement, and lawyer Thulani Maseko are at the time of writing unpublished.

⁶⁸ *Proclamation Constitution*, sec. 3(A).

⁶⁹ *2005 Constitution*, sec. 14(2).

⁷⁰ *Sayed v Usutu Pulp Co. Ltd t/a SAPPI SZIC 10* Case No 433/06, 64 (2006).

⁷¹ *Free Education Case*, para. 23., for example.

⁷² *2005 Constitution*, chap. Preamble.

⁷³ *Ibid.*, sec. 2(1).

The third aspect pointing to this ‘judicial tide’ is the Bill of Rights, which includes both first- and also second-generation rights. To date, there have been a number of claims against the civil and political rights sections within the Constitution.⁷⁴ The Free Education Case is, however, the first claim made against a socio-economic right. Any person who claims to have a right violated is able to take a claim directly to the High Court. Before we examine that right more specifically, it is important for us to examine the enforcement provision. It reads as follows:

- “35(1) *Where a person alleges that any of the foregoing provisions of this [Bill of Rights] has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member...then, without prejudice to any other action...which is lawfully available, that person...may apply to the High Court for redress.*
- (2) *The High Court shall have original jurisdiction –*
- (a) *to hear and determine any application made in pursuance of subsection (1)...*
- and may 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].”*

⁷⁴ For examples involving the government, see: *R v Gamedze* (Criminal Case No 195/04) [2007] SZHC 2(16 October 2007) (‘the right not to be compelled to give evidence’) available at <http://www.saflii.org/sz/cases/SZHC/2007/2.html> <accessed 3 November 2009>; or *Mhlanga and Others v Commissioner of Police and Others* (341/07,764/07) [2008] SZHC 8 (31 January 2008) (‘the right to join a trade union’) available at <http://www.saflii.org/sz/cases/SZHC/2008/8.html> <accessed 3 November 2009>

The High Court is thus given very broad powers to secure the enforcement of rights. It is also given a very wide discretion, as evinced by the phrase to do “as it may consider appropriate.” This must be balanced against the duty on the Court to “uphold” the Constitution written in the opening section of the Bill of Rights, as discussed above. The net effect, it is submitted, is that the Court is under an obligation to enforce the right to FPE but that it may do so in a way which it considers to be most appropriate.

Before finally moving on to the right to FPE itself, one last aspect of the constitutional structure must be emphasized to see why FPE should be the subject of this attempt by the courts to exercise their power. As has been shown, the judiciary has been given a greatly expanded oeuvre under the new constitutional order. But there are many areas where it simply will not exercise its power, where it might in other countries. Typically, these will be political or cultural hot spots – say, for example, the right to freedom of assembly. The right to FPE is not such an issue. Instead, FPE is an area where the judiciary can demonstrate its authority and gain credit with the population and with more progressive members of the traditional authorities (if only secretly). Even if the battle with the government ends in a stalemate, the courts have everything to gain by taking the fight to them. Failure to implement FPE will be attributed to the government, not the courts. Counterwise, any gains would be seen as a result of the court’s actions and would therefore increase the prestige of the judiciary.

And this reveals my value judgment: that an increase in power and prestige for the judiciary is a desirable outcome. There are two interrelated reasons that this is the case. First, for an increase in procedural fairness and, second, for the development of democracy. These two reasons deserve further explanation. As mentioned, most legal disputes are currently settled by the traditional courts. These have done an admirable job in forging Swazi identity and sustaining community cohesion. However, procedural protections are extremely

weak.⁷⁵ Further, legal certainty is undermined because Swazi law and custom is not written down. It can change not only between geographic locations but seemingly depending on the parties involved in a dispute.⁷⁶ In these regards, the formal justice system is certainly more desirable. If Swaziland is “to blend the good institutions of traditional law and custom with those of an open and democratic society”⁷⁷ then people must know, first, what the laws are and, second, how they can be changed. This would still leave the substantive nature of laws to be decided by Swazis themselves. Swazi law and custom could still be used to settle disputes, but this ought to be by consent. A crucial way of building that consent is to make the laws less fluid and subject to formal political processes. This is still probably some way off in Swaziland but if the formal courts can make some useful decisions and increase their popularity, then people may be more willing settle their disputes therein. If this can lead to a ‘hardening’ of the law, then this may create a move to a more democratic society.

With this rather hastily sketched picture of the new constitutional dispensation in mind, an examination of how the right to primary education appears in the Bill of Rights can now be undertaken.

2. THE 2005 CONSTITUTION’S SOCIO-ECONOMIC RIGHTS AND THE FREE EDUCATION SECTION

The Free Education Section

The right to primary education appears in the Bill of Rights under section 29, which bears the title, ‘Rights of the Child.’ The section contains a number of important provisions for

⁷⁵ For example, one cannot have legal representation before a Swazi Court (see *Swazi Courts Act 1950* and *2005 Constitution*, sec. 21(13)(b)) and *habeas corpus* protections can arguably be overridden (by for example, *Swazi Courts Act 1950*, s 12).

⁷⁶ *Swaziland - Law, Politics & Custom: Constitutional Crisis & the Breakdown of the Rule of Law*, 14.

⁷⁷ *2005 Constitution*, chap. Preamble.

children. It makes child labour unconstitutional.⁷⁸ It protects them from abuse⁷⁹ and grants them a right “to be properly cared for...by parents or other lawful authority in the place of parents.”⁸⁰ The right to primary education then appears in the following terms:

“29(6) *Every 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 the first grade.*”

The provision stands out for a number of reasons. Most obviously, it is one of only a handful of socio-economic rights that appears in the Constitution. Not including the Equality Section,⁸¹ there are six sections in the Constitution which might be described as containing socio-economic rights: ‘Rights and protection of the family’;⁸² ‘Rights and freedoms of women’;⁸³ ‘Rights of the child’;⁸⁴ ‘Rights of persons with disabilities’;⁸⁵ ‘Rights of workers’;⁸⁶ and ‘Property rights of spouses.’⁸⁷ Furthermore, of these, only three subsections create a *prima facie* positive obligation upon the state: the Free Education Section that is the subject of this paper, a section relating to the welfare of the needy and the elderly and a

⁷⁸ Ibid., sec. 29(1).

⁷⁹ Ibid., sec. 29(2).

⁸⁰ Ibid., sec. 29(3).

⁸¹ Ibid., sec. 20.

⁸² Ibid., sec. 27.

⁸³ Ibid., sec. 28.

⁸⁴ Ibid., sec. 29.

⁸⁵ Ibid., sec. 30.

⁸⁶ Ibid., sec. 32.

⁸⁷ Ibid., sec. 34.

similar provision regarding the welfare of women. But these latter two subsections appear in different terms, with a substantial limitation appended to the front of them:⁸⁸

“27(6) Subject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of the needy and elderly.”

This reads more weakly than the right to primary education. There is an in-built limitations clause regarding the availability of resources which does not appear in the Free Education Section. Also, the subject of the right to welfare is the government, which is to “provide” the somewhat ambiguous phrase “facilities and opportunities.” On the other hand, the subject of the right to education is “every Swazi child.” And the substance of the right is arguably much clearer – primary school education.

The Free Education Section also comes with a rather unusual in-built timetable provision or ‘trigger.’ It is arguable that this makes the right, to extend the language of Dworkin, a ‘super-trump’ – a trump that trumps all trumps.⁸⁹ This means that there is no ‘progressive realization’ clause attached to the right to FPE. In arguments before the Court, the government attempted to argue that Section 60 of the ‘Directive Principles of State Policy’ incorporated a ‘progressive realization limitation’ into the right.⁹⁰ The relevant principle states that “free and compulsory basic education” shall be promoted “[w]ithout

⁸⁸ s. 28(2), the positive obligation to assist women appears in identical terms but finishes with “...to enhance the welfare of women to enable them to realise their full potential and advancement.”

⁸⁹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1978), 199-200. Actually this may not be so much an “extension” of Dworkin as a “renovation” as it requires the trump to work as a collective trump over other claims in the system of government. This may not be exactly akin to either rights-as-trumps over social utility or rights as trumps over majority decision, see: Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), p 245.

⁹⁰ *Free Education Case*, 24.

compromising quality.”⁹¹ The State argued that this implied progressive realization of the Free Education Section. Agyemang J rejected this argument outright. And in case it might be thought that such a limitation was left out by some sort of scrivener’s error, note that the 2005 Constitution is a highly detailed document (with some 279 sections), most of the rights in the Bill of Rights have very specific and in-depth limitations clauses⁹² and many have serious claw-back clauses which tear out their very meaning.⁹³

Justiciability and legitimacy

Text and context

It is these textual characteristics of the Free Education Section which make the right more obviously concrete and more obviously justiciable than the other socio-economic rights that appear in the 2005 Constitution. A demonstrable commitment of a particular issue to the judicial sphere is crucial to deciding whether a court can exercise its powers in a given policy area. This is, in my submission, the first test that must be passed by any court in deciding whether to act on any complaint regarding rights. But it cannot be the sole guide. The section must be analyzed within the text as a whole. As should have become clear from Part 1, the Constitution envisages that the administration of education will be the responsibility and domain of the executive. In addition, the Constitution itself needs to be seen in the wider context of Swazi history and society. There is a certain “expectation” of what the colonial

⁹¹ 2005 Constitution, sec. 60(8).

⁹² For example, s 26 the right to freedom of movement has usual limitations regarding *inter alia* order, safety and the rights of others, but then has specific limitations regarding swazi law and custom.

⁹³ For example, s 24 the right to freedom of expression has a myriad of claw-back clauses including “regulating the technical administration...of any medium of communication” and, more arcanelly, this limitation: “A person shall not except with the free consent of the person be hindered in the enjoyment of the freedom of expression...” Just what this means, or how it would be applied in a case (who, for instance, would have the burden of proof to show that such ‘consent’ was given or not given?) has not been tested.

courts should and should not do.⁹⁴ For example, there is an entire private sphere that exists in the field of education – private schools and religious schools, most obviously – that really make it unclear what sort of action any court might take in such a situation.

These concerns of text and context are addressed legally by the question of ‘justiciability,’ the doctrine under which a court determines whether a matter should or can be determined by it. Of course, the High Court has already ruled that the question was a ‘justiciable’ one in terms of the Swazi Constitution. But in order to see that the Court should have undertaken a stronger form of judicial review it is helpful to revisit it. This will allow a proper examination of why the High Court did what it did and why it could have done more.

Before continuing, however, we ought to note that the term ‘justiciability’ is a deceptive one. It is a legal term, packed full of extra-legal considerations.⁹⁵ Both the legal and extra-legal considerations have been broken down into, on the one hand, issues regarding legitimacy and, on the other, issues regarding competence. So for example, a matter may be non-justiciable because there is a “textually demonstrable constitutional commitment of the issue”⁹⁶ to a department outside the judiciary (a legitimacy question). Or it may be non-justiciable because of “obvious difficulties insofar as...redressability is concerned” (a competence question).⁹⁷ For reasons we shall see, the difficulties in both these areas are

⁹⁴ Marius Pieterse, “Coming to Terms with Judicial Enforcement of Socio-economic Rights,” 20 *SAJHR* 383 (2004): 407.

⁹⁵ Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Aldershot: Dartmouth Publishing Company Ltd, 1996), 25; Craig Scott & Patrick Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution,” *University of Pennsylvania Law Review* 141 (November 1992): 17.

⁹⁶ *Baker v Carr* 369 US 186, 217 (1962). To use the ‘political questions’ doctrine of the United States as found in *Baker v Carr* and elsewhere. This is not to say that the issue of justiciability only comes down to ‘political questions’, but regarding socio-economic rights often the considerations that a court must make correlate with that US constitutional law doctrine

⁹⁷ *Lujan v Defenders of Wildlife* 504 US 555, 568 (1992).

heightened when dealing with large-scale socio-economic rights claims. Although legitimacy and competence often overlap and intermingle, it will help to look at each separately.

Before answering the issue of legitimacy, it is useful to recognize what it addresses. Legitimacy addresses the question: *should* the adjudicator act?⁹⁸ Now, I hope that you will agree that the structural reasons given in Part 1 regarding the contest for supremacy between the traditional and formal courts would be a profoundly unsatisfactory reason for the High Court to give in deciding the Free Education Case. It is not the sort of consideration that is properly given legal form in the decision of a court. Something more tangible and agreeable needs to be found to secure the legitimacy of the High Court making this question a ‘justiciable’ one. To find what this is, it may be helpful first to look at the options that were available to the Court to make it *non*-justiciable.

Aspirational rights

One option that was available to the High Court was to place the right to FPE outside of the justiciable sphere by describing the right as ‘aspirational.’ Aspirational rights may have their place in constitutionalism, at least in some “political cultures.”⁹⁹ Mark Tushnet has argued that they are generally only useful for “entrenched democratic” ones.¹⁰⁰ Swaziland could not be described as an entrenched democracy. But even if aspirational rights are useful in constitutionalism (and all human rights are ‘aspirational’ to some greater or lesser degree¹⁰¹), the High Court should note the experience of the Republic of India regarding FPE.

⁹⁸ Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, 25.

⁹⁹ Frank I Michelman, “What (If Anything) is Progressive-Liberal Democratic Constitutionalism?,” 4 *Widere L Symposium* 181 (1999): 199.

¹⁰⁰ Mark Tushnet, “Social Welfare Rights and the Forms of Judicial Review,” 82 *Tex L Rev* 1895 (2004): 1901.

¹⁰¹ Jacek Kurczewski and Barry Sullivan, “The Bill of Rights and Emerging Democracies,” 65 *Law and Contemporary Problems* 251 (Spring 2002): 259.

An aspirational right to education appeared in very similar terms to the Swazi provision in the Independence Constitution of India (1950). The ‘Directive Principles of State Policy’ “endeavoured” to meet “within a period of ten years” the “right to free and compulsory education for all children until they complete the age of fourteen years.”¹⁰² The right was not met, and in a case to enforce the right to education, a State court found that the right was non-justiciable.¹⁰³ Now obviously, the crucial distinction here is that the Indian provision appears in the ‘Directives of State Policy,’ whereas the Swazi one appears in the Bill of Rights. But it should also be noted that in 2002, the Constitution of India was amended to make the right to a basic education a fundamental right within the justiciable Bill of Rights.¹⁰⁴ The Indian experience therefore represents a definite warning to the High Court in the context of a developing state.

The limitations placed on children’s rights in South Africa

A second option available to the High Court to undermine the potential “super trump” that seems to be given by the right to FPE would be to follow the jurisprudence of the South African Constitutional Court relating to a child’s right to shelter. South Africa also provides for children’s rights in fairly absolute terms (although the South African Constitution does have a general limitations clause, which is not present in Swaziland’s) and s 28(1)(c) provides for a child’s right to ‘shelter.’ This was subject to a claim in the landmark case of

¹⁰² “Constitution of India,” 1950, Art. 45 (repealed by Constitution (Eighty-Sixth Amendment) Act 2002), repeal not yet in force)

¹⁰³ As far as I understand, in *Joseph Valamangalam, Rev. Fr v. State of Kerala: [AIR 1958 Ker. 290]* Art.45 was held to be not justiciable, although despite my best efforts, I have not been able to access a copy of the judgment. See http://www.hrcr.org/safrica/childrens_rights/India.html <accessed 13 October 2009>. It seems that later the Supreme Court did declare education a fundamental right (through Art 21, the right to life), but this is beyond the scope of this study, see *Unnikrishnan v. State of Andhra Pradesh* AIR 1993 SC 2179: (1993) 1 SCC 645.

¹⁰⁴ Constitution (Eighty-Sixth Amendment) Act 2002, s 2, not yet in force.

Grootboom, which we shall deal with in more detail below. For the moment, it is enough to note that while the Court *a quo* had found that the children in the claim were entitled to an immediately realizable claim to ‘shelter,’ this was not followed by the Constitutional Court.¹⁰⁵ Instead, it was argued that children did have a claim against the state if they were not in the care of their parents.¹⁰⁶ Yacoob J based his reasoning on the proximity of the right to shelter in the Bill of Rights (s 28(1)(c)) to the right to ‘alternative care’ (s 28(1)(b)).¹⁰⁷ Thus, the right to shelter only concretizes if a child has been removed from her or his parents or abandoned.¹⁰⁸

An initial assessment may also make this an attractive proposition to the High Court of Swaziland. After all, the right to FPE (s 29(6)) appears after the right to ‘alternative care’ (s 29(3)) of the Swazi Bill of Rights. But the High Court should not do so for two reasons. First, and with respect, it is submitted that the reasoning of Yacoob J was fundamentally faulty. The right to shelter in the South African Bill of Rights should not have been limited by the right to alternative care. But second there is a clear and important policy implication here. The policy reason Yacoob J gave for limiting the right to shelter was that to grant it to children as an absolute might encourage people to have children in order to be fast-tracked into government housing.¹⁰⁹ This was a patently undesirable outcome. The right to FPE works the other way: whereas shelter could presumably benefit an entire family, FPE is only directly beneficial to an individual child. If the High Court were to limit it only to children

¹⁰⁵ *Government of the Republic of South Africa and Ors v Grootboom and Ors* 2001 (1) SA 46 (CC), 76 (2000).

¹⁰⁶ *Ibid.*, para. 77.

¹⁰⁷ *Ibid.*, para. 76.

¹⁰⁸ *Ibid.*, para. 77-78.

¹⁰⁹ *Ibid.*, para. 71.

who had been removed or abandoned, then this might incentivize abandonment. This is obviously undesirable policy.

The legitimacy of the High Court's involvement in FPE

This latter point is symptomatic of a larger proposition: it is not possible for the High Court to enforce the right to FPE in a piecemeal fashion, that is, only for those who are not in primary school, or who have the good fortune to be able to approach the Court. Rather, this is a root and branch problem. However, the experience of India and South Africa do not finally answer the question: *should the High Court itself* enforce the right to education? There are two related reasons that it should. The first is that there is a pressing social need because of the HIV-AIDS pandemic. The second builds on the structural issues alluded to earlier: education levels have stagnated in the country, there are no other potential enforcers of the right, and it may be the will of the King that the High Court takes over. Let us examine each in turn.

Education and children's health outcomes

The children's rights decision in *Grootboom* attempted to limit the absolute nature of the right to shelter by limiting the class of applicants that might attempt to claim such a right. I have argued that to follow this reasoning with regards to education might incentivize abandonment in Swaziland, since a parent might be encouraged to think that if their child is able to claim abandonment, they may be able to access schooling. Another more positive policy reason is now advanced as to why the High Court should take over the administration of education: there is evidence to suggest that a formal primary education is the most effective preventative measure a state can take in the fight against HIV-AIDS. Swaziland is buckling under the weight of the disease, with some 25.9% of 15-49 year-olds now living

with it.¹¹⁰ Traditional arrangements are being undermined because of the burgeoning number of orphans¹¹¹ and vulnerable children¹¹² (OVC), which now make up 31.1% of the total number of children.¹¹³ The situation is very grave indeed (to reference Agyemang J). While the government has done some admirable work in getting OVC back into school, it is manifestly inappropriate that any child is going through life without primary education. This is especially the case given that a formal education is possibly the single most effective way of combating the disease.¹¹⁴ The terrible impact of HIV-AIDS in Swaziland is an especially cogent reason for the High Court to do its constitutional duty and enforce the right to FPE. And again, since as a practical matter, it may in fact be easier to work with all children than spending time and money assessing which of those children are genuinely affected by or living with the disease, the solution ought to be root and branch rather than targeted.

The state of education, a lack of other potential enforcers and the will of King and Country

Partly because of this enormous and grave problem of HIV-AIDS, neither the government nor the parliament have been able to realize FPE in Swaziland. Perhaps even more significant have been the compound burdens of inertia discussed in Part 1. Whatever the

¹¹⁰ *Swaziland Demographic and Health Survey 2006-07* (Central Statistical Office Mbabane, Swaziland and Macro International Inc. Calverton, Maryland USA, May 2008), 243, <http://www.safaid.net/files/Swaziland%20Demographic%20and%20Health%20Survey%202006-2007.pdf>. <accessed 25 August 2009>

¹¹¹ *DHS*, 283, defined as a child below the age of 18 years with one or both parents deceased.

¹¹² *DHS*, 283, defined as a child below the age of 18 years whose parent is very sick, or who lives in a household where an adult is very sick, or who lives in a household in which a very sick adult died in the 12 months preceding the survey. An adult is considered very sick if he/she is too ill to work or undertake other normal activities for a period of at least three months.

¹¹³ *Ibid.*, 285.

¹¹⁴ *Education and HIV/AIDS: A Window of Hope* (Washington DC: World Bank, 2002), 3-11, http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099080042112/Edu_HIVAIDS_window_hope.pdf. In fact, there are numerous reports supporting this conclusion, see eg http://www.savethechildren.org/publications/mothers/2005/SOWM_2005.pdf and this is also supported by the conclusions of the DHS, which found that

reason, primary education levels have genuinely stagnated in the Kingdom. In 1987, according to both UNESCO and alternative reports, 81% of females and 80% of males were attending primary school.¹¹⁵ In 2007, the last time figures were taken, this stood at 84% and 82%. And this does not even capture the full picture – in 1999, for example, net enrolment rates¹¹⁶ had fallen back to 69% and 71% respectively. The fact that successive governments have been unable to realize FPE is an indication that these burdens of inertia are perhaps insurmountable by the usual constitutional processes. Intervention by the High Court is necessary.

Nor is there any other potential enforcer of the right in the country. The Office of the Deputy Prime Minister has introduced the new National Children's Coordination Unit, which has done an admirable job in advancing children's rights in the country. Nevertheless, it has an extremely limited influence over matters of education. It is supposed to assist in the implementation of education policies and programs,¹¹⁷ but in fact it has little input because the area of education is jealously guarded by the Ministry. Another potential enforcer, the new Commissioner for Human Rights & Public Administration, was created by the Constitution.¹¹⁸ The Commissioner has the duty and the power to 'investigate',¹¹⁹ and

¹¹⁵ These and the following figures taken from UNESCO Institute for Statistics, <http://stats.uis.unesco.org>; 2007 figures also broadly supported by the most comprehensive door-to-door survey ever undertaken in Swaziland: the *DHS* (supra 110), pp 12-15, which found 2007 net enrolment rates stood at 85.6% for females and 82.9% for males.

¹¹⁶ A net enrolment rate is the number of children in a particular grade divided by the number of children eligible in terms of age for that particular grade.

¹¹⁷ *Report on Meeting with Parliamentarians re: the Children's Bill & Child Justice Bill* (Mbabane: National Children's Coordination Unit, 2008), 3, part titled 'Objectives of the NCCU', on file with the author.

¹¹⁸ 2005 *Constitution*, sec. 163(1), to "be established within a year of the first meeting of Parliament after the commencement of this Constitution" (ie by about July 2006) but still not established.

¹¹⁹ *Ibid.*, sec. 164(1)(a).

“publicize...recommendations”¹²⁰ regarding the rights in the Bill of Rights. However, the problem is that the Commissioner has yet to be appointed and there has been no room made for the Commission in the budget.¹²¹ In this situation, it is reasonable that the High Court may step in to enforce the right, as it is constitutionally mandated to do.

Which might lead one to ask: why is judicial intervention in the area of education mandated at all? To the extent that the new charter is “the King’s Constitution,”¹²² it is perfectly possible that the constitutional right to FPE was born of the King’s frustration in this regard. To understand why this may have been necessary one needs to have an understanding of Dlamini rule. While often described as “the last absolute monarch of Africa,”¹²³ in reality King Mswati III has a number of significant restrictions even from within his domain. Principal among these are the royal family, and especially the *Liqoqo*, members of whom ruled during his minority and still hold sway over large parts of the traditional and formal government. These traditional rulers have historically had an uneasy relationship with the judiciary, who are generally better educated, but seen to be open to foreign influences. The King may have wished to avoid beginning an open battle between himself and some of the main players around him by giving power to the judiciary for ensuring FPE. If true, aggressive intervention on the part of the judiciary has been fully

¹²⁰ Ibid., 164(1)(d)(i).

¹²¹ A Commissioner and two Deputy-Commissioners were appointed in September, but they have so far remained low-key. At last check, they had not been accounted for in the budget. At any rate, as administration of FPE is a policy area that involves many interested parties, it is unlikely that this will be an area the Commission will get involved with in its infancy.

¹²² Chris Maroleng, *Swaziland: The King’s Constitution*, Situation Report (Institute for Security Studies, June 26, 2003), 1. This was not discussing the new Constitution, but Maroleng’s central analyses still hold true. The only fundamental difference is the Bill of Rights (and the Commissioner for Human Rights & Public Administration but as discussed, that is not operational).

¹²³ Sebastien Hervieu, “The Last Absolute King of Africa,” *Guardian Weekly*, date obscured, originally published in *Le Monde*, 28 July 2009, available at http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES&type_item=ART_ARCH_30J&objet_id=1092445 <last accessed 17 November 2009>

sanctioned by the King. The judiciary must respond to the challenge and serve the monarch. The great boon for the judiciary is that this intervention would also be broadly supported by the population at large. Therefore, there is genuinely nothing for the judiciary to be afraid of in this instance, as they have the support of King and Country. Rights litigation in the field of women's rights, for example, might not enjoy such popularity with the people and might be considerably more difficult for the Court.

For these two reasons, then, the High Court is legitimized in exercising review over FPE. First, there has been a proven inability on the part of the government to achieve this goal, which may have led to the King in effect handing the problem over to the judiciary. And second, there is a dire and pressing social need for implementation as soon as possible. But just because the Court *should* does not mean that it *can*. That is, there remains the competence side of the justiciability debate.¹²⁴ Before exploring that question, it may be helpful to look at the adjudication of socio-economic rights in somewhat more theoretical terms.

3. SOCIO-ECONOMIC RIGHTS IN THEORY & PRACTICE

The jurisprudence for the enforcement of constitutional socio-economic rights is notoriously slippery, both conceptually and practically. There are three fundamental concerns with judicial involvement in the area: enforcement costs, separation of powers and vagueness.¹²⁵ There is an understandable sentiment that the doctrine of the separation of powers is the main

¹²⁴ Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, 25.

¹²⁵ Mitra Ebadollahi, "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa," *New York University Law Review* 83 (November 2008): 1567.

reason that courts should not interfere with budgets.¹²⁶ With respect, it is submitted that all three concerns impact on justiciability, and that their centrality varies according to context. Problems of enforcement undoubtedly influence a court's willingness to substantiate the scope of a right.¹²⁷ The vagueness of such rights goes to the court's capacity to properly or satisfactorily outline and enforce them.¹²⁸ Indeed, it is contended that the primary concern in the Free Education Case is vagueness, but a brief analysis will now be made of the other two before turning specifically to the problem of vagueness.

Enforcement costs

The first concern is enforcement costs. This entails issues such as the court's time and government expense in trying to answer these sorts of broad-based myriad claims.¹²⁹ The

¹²⁶ Which I think is implied by Tushnet in Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, New Jersey: Princeton University Press, 2008), at p 252; and which is also implied (although not supported necessarily) by Pieterse in Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socio-economic Rights," 20 *SAJHR* 383 (2004), where he discusses institutional legitimacy (p 390) and ideology (p 396).

¹²⁷ And can also affect the decision to craft a remedy, see Richard H Fallon Jr, "The Linkage Between Justiciability and Remedies - and Their Connections to Substantive Rights," 92 *Virginia Law Review* 633 (Spring 2006). As Fallon notes (at 636), the enforcement costs concern is presumed even in standing doctrine (*locus standi*) that there be, for example, a concrete injury to remedy. This requirement was affirmed in fundamental rights litigation in Swaziland in the Free Education Case itself (p 16) but in *obiter dicta* the High Court threw open the possibility of "public interest litigation for the defence and upholding of [the 2005 Constitution]" (as opposed to rights litigation) requiring no interest on the part of an applicant, which would be a welcome development and overrule Jan Sithole N.O. (in his capacity as a Trustee of the National Constitutional Assembly (NCA) Trust and Others v Prime Minister of the Kingdom of Swaziland and Others (Civil Case No. 2792/2006) [2007] SZHC 1 (6 November 2007) (at [46]) and earlier cases such as *Lawyers for Human Rights (Swaziland) and Another v Attorney General*, unreported, (Civil case No. 1822 of 2001) [2001] SZHC 1 (Full Bench) (requiring a "direct and substantial interest" for an application regarding any part of the Constitution). The standing requirements in public interest litigation in Swaziland are possibly in a state of flux.

¹²⁸ Craig Scott & Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," 44; Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, 30.

¹²⁹ Thomas J Bollyky, "R IF C > P + B: A Paradigm For Judicial Remedies of Socio-economic Rights Violations" 18 *South African Journal of Human Rights* 161 (2002): 167 noting that, where the rights violation was seen as comparatively small, and the remedy comparatively complex, the Constitutional Court has elected not to act.

cost for applicants or civil society organizations to make such claims might also be prohibitive.¹³⁰ This might also encompass the problem that court intervention focussed on short-term solutions may tend to force the government towards temporary and ultimately more costly solutions to socio-economic privation, which could, for example, produce an unforeseen drag on the economy and thus prolong the battle against poverty.¹³¹ These problems are certainly a proper concern of judicial enforcement of FPE, but are possibly more pertinent to the type of remedy to be ordered by a court, and will be returned to later.

Separation of powers

This paper does not seek to tread over well-worn ground, especially as the High Court has already ruled that separation of powers concerns do not apply (at least at the level of the scope of the right) in the Free Education Case. But it is necessary to deal with two separation of powers aspects here to see why the High Court ought to go further than it has thus far. The first aspect is that judges lack the democratic mandate of parliaments, which are the preferred domains to authorize public spending.¹³² Thus when it comes to large-scale socio-economic rights, involving complex and varied claims on state budgets, it is argued that the courts ought not to become involved. The second claim is that any interference by courts will ultimately be ignored by the government, thus undermining the constitutional structure as a

¹³⁰ Mitra Ebadolahi, "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa," 1587.

¹³¹ Murray Wesson, "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court," 20 *SAJHR* 284 (2004): 304.

¹³² Aryeh Neier, "Social and Economic Rights: A Critique," 13/2 *Hum. Rts. Brief* in Henry J Steiner, Philip Alston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals*, Third. (Oxford: Oxford University Press, 2008), 284; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, New Jersey: Princeton University Press, 2008).

whole.¹³³ Against the backdrop of the constitutional crisis of 2002 in Swaziland, which was precipitated by government vowing to disregard orders of the courts, this is especially relevant.

In answer to the first claim, it is submitted that enforcement of the right to education will enhance democratic processes and a commitment to constitutionalism in Swaziland. In particular, it is submitted that the compulsory primary education is a prerequisite for an individual to properly partake in a modern democratic state. The well-known judgment of the US Supreme Court in *Brown v Board of Education* is here recalled:¹³⁴

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

This is no doubt as applicable to Swaziland in 2009 as it was to the United States in 1954, where it remains true to this day. Both the contract theorists of jurisprudence and the

¹³³ Cass Sunstein, “Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe,” *East European Constitutional Review* (Winter 1993): 36.

¹³⁴ *Brown v. Board of Education of Topeka* 347 U.S. 483, 493 (1954).

pragmatists agree that education of children is a fundamental right to an individual in a democratic state.¹³⁵

This “civic justification” is reflected in the modern wave of school finance reform litigation in the United States. In searching for a basis upon which to assess what is an “adequate education,” a number of important state jurisdictions there have decided that an ability to partake in the democratic life of the state is key.¹³⁶ An adequate education, therefore, is one which gives sufficient communication skills, knowledge and understanding to make informed choices in the political arena.¹³⁷ An education is one of the basics “for the slow, often tedious haggling among often sharply differing groups that democracy requires.”¹³⁸ Therefore, enforcing the right to education, if it in fact results in more children getting an education, will be a way of enhancing democratic deliberation in Swaziland.

The second claim under the banner of the separation of powers is that intervention will be ignored by the government, and therefore the constitutional structure as a whole will be undermined. To some extent, this problem is addressed by some of the arguments above – for example, it is probable that the constitutional structure itself will be undermined more dramatically by a failure on the part of the judiciary to protect the Bill of Rights. Likewise, the popularity of FPE will probably strengthen some aspects of the new constitutional order,

¹³⁵ I acknowledge the danger of using labels like 'contract theorists' and 'pragmatists' and I rely on Rawls and Habermas. Although perhaps Rawls would only accept such a right if it could be shown to benefit everyone absolutely, based on the difference principle, see John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, 1971), 303; and for the pragmatic position, I rely on Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT, 1996), 123. I acknowledge the danger of using labels like 'contract theorists' and 'pragmatists' but stand by the statement.

¹³⁶ *Rose v. Council for Better Education* 790 S.W.2d 186, 60 Ed. Law Rep. 1289, 212 (1989); *Campaign for Fiscal Equity, Inc. v. State of New York* 86 N.Y. 2d 307 (1995).

¹³⁷ *Rose v. Council for Better Education*, para. 212.

¹³⁸ Herman Schwartz, ‘Do Economic and Social Rights Belong in a Constitution?’, *American University Journal of International Law and Policy*, 1995 Summer, 1233: 1243.

in particular the Bill of Rights. Intervention by the High Court will also likely increase the popularity of the judiciary and may have certain other beneficial effects for the constitutional order. That is to say, appropriate action by the judiciary may increase ‘constitutionalism’ in Swaziland. This requires a brief investigation.

Definitions of constitutionalism are notoriously tricky. It is generally recognized that there are two definitions: a narrow one and a thick one. Thinly defined, constitutionalism is where a state abides by written rules that govern how it operates and what it can and cannot do.¹³⁹ The thick definition incorporates some substantive values into the rules of government: rules should not only be followed but be designed for broader, positive goals in mind.¹⁴⁰ So, for example, the Swazi Constitution seeks to “promote...the progressive development of...Swazi society.”¹⁴¹ The great advantage for the High Court in the Free Education Case is that bold action on its part satisfies both definitions of constitutionalism. That is, as outlined when comparing the Swazi provision with the Indian one, a literal reading of the text hands control for the administration of FPE over to the judiciary after three years of the commencement of the Constitution. This satisfies the thin definition. But also, and satisfying the thick definition, more aggressive action by the High Court might help to achieve some of the progressive goals viewed as desirable by the Constitution itself: an increased level of formal education, a state where democratic deliberation can more widely take place, and where Swazis can “blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social,

¹³⁹ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund Inc, 2008), 21.

¹⁴⁰ U Preuss, The Political Meaning of Constitutionalism, in R Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avesbury, 1996), 12.

¹⁴¹ 2005 Constitution, chap. Preamble.

economic and cultural development of [the] Nation.”¹⁴² Viewed from this angle, aggressive intervention by the High Court is almost a *sine qua non* for constitutionalism in the country.

To another extent, however, this argument suggests that judicial intervention is only legitimate if it actually makes a difference. That is, it conflates with arguments about judicial competence, to which we shall shortly turn.

Vagueness

It is here submitted that it is the problem of vagueness which presents the biggest obstacle to any court in the adjudication of socio-economic rights cases. Vagueness infects every stage of the adjudicative process: what is the right? How can it be remedied? Has the remedy resolved the problem? It is the complexity of these questions which makes positive rights jurisprudence fundamentally different to adjudication involving negative rights and even most claims against the positive aspect of civil and political rights. Even granting that the difference is one of degree,¹⁴³ there is a point one reaches where the degree is so large that it becomes a difference in kind. This has to be accepted at some level: it is the main reason that the two-stage process of rights adjudication (ie has there been an infringement of the right? If so, was it justified?) cannot be applied to socio-economic rights litigation.¹⁴⁴ The vagueness of the right (what *is* the right to free primary education?) and the vagueness of the

¹⁴² Ibid.

¹⁴³ But cf Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, 53-60; also cf Tushnet's rather brilliant exposition of "background rules" in Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Chapter 6; and cf Craig Scott & Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," 46.

¹⁴⁴ Sandra Liebenberg, "Socio-economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate," in *Constitutional Conversations*, 321.

justification (is it really true that the government cannot afford the right, as it no doubt claims?) make such an analysis only partially useful.

The remainder of this paper will therefore concentrate on the problem of vagueness. Both the separation of powers and the enforcement costs aspects will once again come back to trouble us when we are discussing remedies, but it is vagueness that is our Gallipoli (to use an Australian term). I only hope this thesis will turn out rather better than that campaign.

Competence – the single word answer to vagueness

So far most of this paper has dealt with the legitimacy of the High Court's involvement in the Free Education Case: that there is a judicial tide, that there is a new Bill of Rights to "uphold", that consecutive governments have been unable to implement FPE, and that there is an overwhelming need for FPE to be implemented as soon as possible. As noted, these have addressed the question: should the right to FPE be upheld by the High Court? Obviously, the High Court has already ruled on the case, and has already ruled the question to be justiciable, but this analysis has helped to demonstrate why it is so important for the High Court to act aggressively in this matter. Now, at various points it has been evident that the question has begun to seep into the other side of the equation – not whether it *should* but whether it *can*.¹⁴⁵ This is a question about judicial competence. It is this competence aspect that presents the answer to the concern of vagueness (and also separation of powers and enforcement cost concerns) and it is to competence which I now turn.

The argument against judicial competence goes that the judiciary does not have the necessary tools at its disposal to ensure the proper construction and implementation of social

¹⁴⁵ Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, 25.

programs.¹⁴⁶ There are obviously two sides to this problem: construction and implementation. On the construction side, it is argued that large-scale social rights with detailed budgetary implications are subject to a multiplicity of conflicting claims, whereas a court generally only hears a case with two fairly clearly divided camps.¹⁴⁷ On the implementation side, it is argued that courts really do not have the necessary day-to-day oversight of government officials and agents to ensure that programs are properly implemented.¹⁴⁸

The dialogical model

The remainder of this paper shall propose a dialogical solution to the problem of competence as created by vagueness in socio-economic rights. By dialogue is meant that the courts should initiate a conversation between the branches of government, other state institutions and the citizens to effectively overcome the vagueness of the right to FPE, overcome the burdens of inertia in achieving it, and effectively implement education for all. The dialogical model is probably best encapsulated by the Africa case of *Mtikila*.¹⁴⁹ In this case, the High Court of Tanzania recognized that it had an obligation to “speak” on behalf of the dispossessed in order to encourage an interaction between the courts, the politically-accountable branches, and civil society at large. It claimed to do so for three principle reasons: first, that there were high levels of illiteracy in Tanzania; second, that poverty was a huge factor in the country; and third, that there was “a culture of apathy and silence..in large

¹⁴⁶ Cass Sunstein, “Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe,” 37.

¹⁴⁷ Lon L Fuller, “The Forms and Limits of Adjudication,” 92 *Harvard Law Review* 353 (December 1978): 394.

¹⁴⁸ Cass Sunstein, “Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe,” 37; Lon L Fuller, “The Forms and Limits of Adjudication,” 394-395.

¹⁴⁹ *Rev. Christopher Mtikila v. Attorney-General* [1995] TR 31 (High Court of Tanzania) (1995).

measure, a product of institutionalized mono-party politics.”¹⁵⁰ With the proviso that there are other reasons beyond these, it is here contended that these three reasons are particularly applicable to Swaziland today (as mentioned the no-party state operates very much like a one-party state). The High Court should therefore take its duties very seriously and institute a dialogical approach to securing the enforcement of FPE.

In order to more fully explain the dialogical position it is necessary to have an understanding of the constitutional idea of, on the one hand, ‘strong’ and ‘weak’ rights and, on the other, ‘strong’ and ‘weak’ remedies. However, rather than doing that here, the right and the remedy will now be examined separately in the following two parts.

4. VAGUENESS AND THE SCOPE OF THE RIGHT TO FPE: MINIMALISM v. A BENCHMARKED MINIMUM CORE

In this Part, the way vagueness interacts with the scope of the right will be examined. This will be done as follows. First, an analysis of Tushnet’s metaphor of ‘strong’ and ‘weak’ rights will be undertaken, and in particular this will require an explanation of the ‘minimum core’. Second, an analysis of how the minimum core was used in the Free Education Case will be outlined, focussing on how the Court overcame the problem of vagueness in the case. Third, other options of dealing with the concern of vagueness at the level of the scope of the right will be explored, focussing in particular on another option, the ‘benchmark minimum core.’

¹⁵⁰ *Rev. Christopher Mtikila v. Attorney-General*, para. 61, available at <http://www.elaw.org/node/1298> <last accessed 28 November 2009>

Strong and weak rights

Regarding the scope of a right, there are at least two ways in which a right might be either ‘weak’ or ‘strong.’ Generally, a weak right is one which a Court will not define and defend. So, for example, the High Court refused to rule that the right not to be compelled to give evidence was contravened in a criminal trial where an accused had a ‘case to meet’ and was given an opportunity to present a defence.¹⁵¹ The right was not therefore ‘expanded’ and defended by the High Court. In education cases in the United States, many state judiciaries have abandoned the field because of the intense political controversy generated by judicial intervention.¹⁵² (It is submitted that the primary reason for this controversy is the racial dimension to education litigation in that country, a factor entirely absent from the Swaziland context.) Thus a right might be ‘weak’ if it does not encompass what an applicant argues it ought to encompass.

But there is a second aspect to the ‘weak’-‘strong’ dichotomy, especially relevant to socio-economic rights claims. A ‘weak’ right is not one that gives an individual entitlement, but rather a right to have government policies and programs that are ‘reasonable’ in light of the constitutional provision. This interpretation of the scope of a socio-economic right was first outlined in the seminal South African case of *Government of South Africa v Grootboom*.¹⁵³ The facts are here briefly retold. The claim was brought by a number of homeless people under the South African Bill of Rights. The applicants claimed that the right

¹⁵¹ *R v Gamedze* 195/04 [2007] SZHC 2 (2007).

¹⁵² Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, 257, employing the “Vietnam exit strategy” of Senator George Aiken - declare victory and bring the troops home.

¹⁵³ *Government of the Republic of South Africa and Ors v Grootboom and Ors* (2000) (hereinafter ‘Grootboom’).

to 'adequate housing' gave them a self-standing individual right to immediate shelter.¹⁵⁴ The Constitutional Court did not endorse this position. It found instead that the s 26(1) 'right to adequate housing' was inherently linked with the 'progressive realisation' within 'available resources' clause of s 26(2). In so doing, it found that the individual's right to adequate housing could only be examined through the prism of the policies and budgets of the state.¹⁵⁵ The test, therefore, was whether the state's policies and actions were 'reasonable.'¹⁵⁶ In order to assess the reasonableness of the state's actions, the Court examined the policies and budgets of the provincial and national governments. It found that these policies were worthy of praise for the medium- and long-term. However, it found that there was no policy aimed at the short-term provision of shelter for people in 'desperate need.' Therefore, the policies of the state were not reasonable in the circumstances and in light of the constitutional provision.¹⁵⁷

The decision was hailed by legal scholars upon its release.¹⁵⁸ The decision seemed to provide the avenue for enforcing the positive aspect of socio-economic rights. The method by which this was done was to use an administrative law standard of reasonableness of state action (or inaction).¹⁵⁹ But after some time, the mood soured. If all socio-economic rights did, after all, was to provide administrative review, which was available without the

¹⁵⁴ *Grootboom*, 59-60, claims were filed under s 26(1), the right to 'adequate housing' and s 28(1)(c), a child's right to 'shelter.'

¹⁵⁵ *Ibid.*, para. 38.

¹⁵⁶ *Ibid.*, para. 63.

¹⁵⁷ *Ibid.*, para. 69.

¹⁵⁸ Cass R Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press), 256.

¹⁵⁹ *Ibid.*, 235.

constitution, then what was their point?¹⁶⁰ Worse, after some time it was revealed that the state's response to the *Grootboom* decision had been sluggish, or in fact non-existent.¹⁶¹ This and related concerns led some commentators to agitate for a competing standard of review, previously developed by the Committee for Economic, Social & Cultural Rights - the 'minimum core.'

The minimum core

The minimum core theory contends that positive socio-economic rights contain a judicially-enforceable and measurable base content that abides in each individual to claim. The idea was developed most forcefully by the Committee on Economic, Social & Cultural Rights.¹⁶² The minimum core was developed in response to the 'progressive realization excuse,' this being that any state failing to meet its obligations under the CESCR would claim that it was being inhibited by a lack of resources.¹⁶³ The Committee wrote in response that "*a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.*"¹⁶⁴ Translating this to the national arena, advocates of the minimum core argue that positive aspects of socio-economic rights ought to be clearly defined so that each individual can claim the minimum threshold. So, for example, the right to 'adequate housing' in South Africa

¹⁶⁰ Murray Wesson, "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court," 289.

¹⁶¹ Kameshni Pillay, "Implementing Grootboom: Supervision Needed," *Economic and Social Rights Rev* (2002): 2.

¹⁶² Committee on Economic, Social and Cultural Rights, "General Comment 3: The Nature of States Parties Obligations," 1990, para. 10.

¹⁶³ *Ibid.*, para. 1.

¹⁶⁴ *Ibid.*, para. 10.

might be “protection from the elements in sanitary conditions with access to basic services, such as toilets and running water.”¹⁶⁵

There are significant advantages to such an approach. First, it arguably does justice to the constitutional enshrinement of socio-economic rights. Second, it gives the state a clearer guideline as to its priorities and may help “to direct resources to where they are most needed.”¹⁶⁶ Third, it arguably converts “programmatic socio-economic rights into individual entitlements.”¹⁶⁷

On the other hand, the minimum core poses significant problems for the judiciary. These problems all spin off from the three core concerns in socio-economic rights litigation alluded to earlier: separation of powers, enforcement costs and vagueness.¹⁶⁸ Separation of powers concerns encompass issues such as judicial respect for the politically-accountable branches. In particular, it is felt that the implementation of a minimum core will undermine deliberative democracy.¹⁶⁹ Enforcement of a right might for example create the danger of ‘reverse burdens of inertia,’ where actions by the courts result in legislatures devoting less time and energy to an issue.¹⁷⁰ This is a significant risk. But as Agyemang J realized, and for the reasons discussed under ‘legitimacy’ above, these concerns cannot apply here.

¹⁶⁵ David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford: Oxford University Press, 2007), 198.

¹⁶⁶ Murray Wesson, “Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court,” 299.

¹⁶⁷ *Ibid.*, 300.

¹⁶⁸ Mitra Ebadolahi, “Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa,” 1567.

¹⁶⁹ Sandra Liebenberg, “Socio-economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate,” 311.

¹⁷⁰ Rosalind Dixon, “Creating Dialogue About Socioeconomic Rights: Strong-form vs Weak-form Judicial Review Revisited,” 407.

Further, it is probably true that separation of powers concerns regarding enforcement of socio-economic rights have, to some degree, “fallen out of favour.”¹⁷¹

But the dominant problem is vagueness. There are a number of inter-related problems here, essentially centring around the question: What exactly is the right? First, the minimum core has been attached to a survival standard.¹⁷² That is, in order to deduce what constitutes the basic minimum of a right, it has been argued that a court should take a two-tiered approach to human interests: on the first level, that which is necessary to survival and, on the second, that which allows “the fulfilment of a wide range of purposes.”¹⁷³ The minimum core could then be tied to the first tier or what is necessary to survival. This kind of calculation might translate more readily to other socio-economic rights such as food and water than education, although studies by the World Bank tend to support the argument that in Swaziland at least a formal education is necessary to survival.¹⁷⁴ But this does not remove the problem of how to decide the basis for making decisions about what constitutes the minimum threshold of formal primary schooling.

Second, and related to this, whatever basis is used, there is a problem of arbitrariness and uncertainty when it comes to prioritizing what constitutes the fundamental minimum. The specification runs the risk of being either over- or under-inclusive.¹⁷⁵ This was evident

¹⁷¹ Mitra Ebadolahi, “Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa,” 1580. This actually extends Ebadolahi's argument from 'legitimacy' concerns to cover the whole 'separation of powers' issue. As I have argued, I do not think that legitimacy is strictly a separation of powers concern but I do think that separation of powers has to some degree fallen out of favour, and I acknowledge Ebadolahi pointing this out.

¹⁷² David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*, 188.

¹⁷³ Ibid., 187-188.

¹⁷⁴ As outlined above, formal schooling seems to be more effective than any other method in halting the flow of HIV-AIDS, see *supra* n 114.

¹⁷⁵ Sandra Liebenberg, “Socio-economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate,” 313.

in the Free Education Case, while the Court outlined what constituted the individual right to education it explicitly rejected the provision of uniforms¹⁷⁶ and implicitly rejected travel costs. Both of these are potentially unassailable barriers to education in Swaziland, particularly for orphans and vulnerable children (OVCs). Further, the very concept of a “constitutional minimum” may tend to incline judges towards the more conservative end of the spectrum.¹⁷⁷ That is, a constitutional minimum might be thought of as a bare minimum.

These problems in one sense can only be acknowledged. They represent problems with judicial involvement in the welfare state.¹⁷⁸ But there is a third vagueness aspect: that courts are ill-equipped to make decisions regarding different requirements of different groups in different circumstances.¹⁷⁹ This inflexibility has been responded to by ensuring that the minimum core is outlined in a way which allows latitude to the government or, indeed, third-party implementers of a right.¹⁸⁰ So, for example, for the case of *Grootboom* described above, David Bilchitz proposes that the right should be described in general terms, allowing tailored implementation. Bilchitz states that ‘the right to adequate housing is “protection from the elements in sanitary conditions with access to basic services, such as toilets and running water.”’¹⁸¹ I call this the “flexible minimum core” as I wish to distinguish it from a more rigid form of minimum core later in this paper.

¹⁷⁶ *Free Education Case*, 23.

¹⁷⁷ Sandra Liebenberg, “Socio-economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate,” 314.

¹⁷⁸ Jack M Balkin, “What “Brown” Teaches Us About Constitutional Law,” 90 *Virginia Law Review* 1537 (October 2004): 1568-1574, noting that “managing a welfare state is hard to do.”

¹⁷⁹ *Grootboom*, 32-33; Sandra Liebenberg, “Socio-economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate,” 315.

¹⁸⁰ David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*, 198.

¹⁸¹ *Ibid.*

The flexible minimum core at work in the Free Education Case

This ‘flexible minimum core’ is essentially what Agyemang J authorized in the Free Education Case. She outlined the basic conditions to which each child is entitled, without being so prescriptive as to hem the Government in to a response that might be inappropriate or unaffordable. But before we analyze her response, it might be beneficial to examine more fully the vagueness presented by the Free Education Section.¹⁸²

The first vagueness problem to note is the phrase “beginning with the first grade.” The government seized on this to argue that it only had to provide only the first grade “within three years of commencement of the Constitution” and that the following grades were to follow in consecutive years.¹⁸³ So the second grade should be available within four years of the commencement of the Constitution and so on. Unfortunately for the Court, the consultations and recordings of the Constitutional Drafting Committee have not been made public.¹⁸⁴ Nor is it possible for the Court to order them either to be made public nor shown to the Court.¹⁸⁵ Agyemang J, however, made very short shrift of this argument. Instead, she ruled that the wording “beginning with the first grade” meant that “free education would commence when [children] entered Grade One and not at preschool.”¹⁸⁶ Therefore, the Court ruled that the right should be understood as requiring the government to provide free primary

¹⁸² For ease of reference, I here write out the Free Education Section again: “s 29(6) Every 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 the first grade.”

¹⁸³ *Free Education Case*, para. 23.

¹⁸⁴ The Constitutional Review Committee undertook its work from 1996 to 2001 virtually in secret and has not released the submissions made to it, see *Swaziland - Law, Politics & Custom: Constitutional Crisis & the Breakdown of the Rule of Law*, 20, a state of affairs which might please a number of respectable scholars (see generally, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997)), but which is profoundly unsatisfactory in practice.

¹⁸⁵ *Sithole N.O and Others v Prime Minister of the Kingdom of Swaziland and Others*, para. 45.

¹⁸⁶ *Free Education Case*, 24.

education for all eligible children more or less immediately. It is submitted that this is the most sensible reading of the phrase. Therefore the first vagueness problem was neutralized.

The second ambiguity is the beneficiary of the right to FPE – who exactly is “every Swazi child”? It is not clear, for example, whether the right includes those teenagers who have not yet received a full primary school education in Swaziland.¹⁸⁷ Should they be permitted to start their schooling at the first or some other suitable grade? This issue was not dealt with by the High Court in its judgment. Implicitly, and on a plain-text reading of the judgment as a whole, the Court ruled out including children who were not of the proper age for primary school education. It did this by including the phrase “eligible age”, which appears throughout the judgment.¹⁸⁸ Arguably, this is the wisest approach to the constitutional right, but it is submitted that the Court could have made a provision for those children that were not so far above primary school as to qualify to begin at Grade Four or some other suitable grade. At the very least, some sort of provision could be made for appropriately qualifying children. For the moment, at any rate, children over the age of 11 shall continue towards adulthood without any formal education. This is perhaps a less successful resolution of vagueness than the first problem, but it is some sort of resolution at least.

But it is the phrase regarding the scope of the right most directly that presents the most difficulty – “primary school.” Just what this entails is not made clear in the text itself. Nevertheless, Agyemang J did not shy away from enunciating the substance of the right in

¹⁸⁷ By one estimate, some 38% see *Swaziland Achieving Basic Education for All*, Main Report (Washington DC: World Bank), 30.

¹⁸⁸ *Free Education Case*, 27. Although cf. p 25 and 27 where the right is said to belong to “every Swazi child of whatever grade attending primary school.” There are students in public schools (as evidenced by the huge gap between gross enrolment rates and net enrolment rates, see *Swaziland Achieving Basic Education for All*, 21) who actually are above the ‘normal’ age applicable to that grade. Therefore, these could be included under then right. But this creates additional problems: what about children above normal age who are not currently attending?

the Free Education Case: she found that the right included tuition, including classrooms and facilities and qualified teachers,¹⁸⁹ textbooks, exercise books and stationery.¹⁹⁰ She specifically ruled out the right from including school uniforms.¹⁹¹ She implicitly rejected it covering travels costs. She adopted therefore a “flexible minimum core” – a definition of the right that presents the minimum basis for the government to realize for each individual. It is “flexible,” however, in the sense that it gives the government room to move in the circumstances of each individual case.

It is here contended that it is this flexibility which makes the supposedly ‘strong’ right enunciated by the Court in the Free Education Case in fact ‘weak.’ The scope of the right to FPE as outlined by the Court is not clear enough to either the applicants or the government. There are a myriad of questions which flow from the judgment: what sort of building constitutes ‘shelter’? Does a school require a fence? Is there a maximum class size per teacher? Is each student entitled to a desk and chair? Is there a certain space requirement for each student? The judgment answers none of these and, importantly, far too few questions to be of meaningful guidance. Many commentators have argued that the minimum core tries to do too much in human rights litigation.¹⁹² Proponents of the flexible minimum core obviously argue that it does enough. It is a central contention of this paper that the result of the Free Education Case supports a different conclusion: that the flexible minimum core does

¹⁸⁹ *Free Education Case*, para. 21-23, while Agyemang J did not include a definition of “tuition” in either her findings or her declaration, she did by implication incorporate the aspects of tuition submitted by the government in para [7] by stating that “the items listed by the [government]...can by no means be said to have discharged the constitutional obligation.” Meaning, I contend, that these are nevertheless a part of the constitutional obligations.

¹⁹⁰ *Ibid.*, para. 23.

¹⁹¹ *Ibid.*

¹⁹² Rosalind Dixon, “Creating Dialogue About Socioeconomic Rights: Strong-form vs Weak-form Judicial Review Revisited,” 417; Murray Wesson, “Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court,” 305.

rather too little. In short, as Katharine Young argues, the minimum core is “a concept in search of content.”¹⁹³

Beyond the minimum core: benchmarks and indicators

But if the minimum core does not do enough in socio-economic rights litigation, then what should a court do? The problem facing judges when they embark on cases involving positive state obligations is that the ‘myriad of questions’ alluded to above are potentially limitless. There seems to be two clear options other than the “flexible minimum core” available to a court in this position, and the rest of this Part shall be devoted to them. The first is to avoid any definition of the right. This is the approach which seems to have been reaffirmed recently by the South African Constitutional Court in *Mazibuko*.¹⁹⁴ Asked to outline the minimum core of the right to water, the Constitutional Court explicitly avoided such a course, instead stating:¹⁹⁵

“[T]he City is not under a constitutional obligation to provide any particular amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right. This the City accepts...[and we find that] the policy of the City was [not] based on a misconception as to its constitutional obligations...”

This approach was first most properly outlined in the case of *Grootboom*, and is known as the ‘reasonableness approach’. For reasons that should become clear, this approach will be

¹⁹³ Katharine G Young, “The Minimum Core of Economic and Social Rights: A Concept in Search of Content,” 33 *Yale Journal of International Law* 113 (Winter 2008).

¹⁹⁴ *Mazibuko et al v City of Johannesburg et al* CCT 39/09 [2009] ZACC 28 (2009).

¹⁹⁵ *Ibid.*, para. 85.

referred to as the ‘minimalist’ approach to outlining the right in this paper.¹⁹⁶ Since the High Court of Swaziland has already moved beyond such an approach by adopting a flexible minimum core, no more time will be spent analyzing this option, except to repeat my contention that the flexibility of the ‘flexible minimum core’ makes it in effect a ‘minimalist’ approach.

The second option, which will occupy the remainder of this Part, is for the Court to move “beyond the minimum core” and adopt a ‘benchmarked minimum core.’ Moving beyond the minimum core runs the significant risk of becoming bogged down in the minutiae of micro-management, a task to which courts may be unsuited. Yet critics of judicial intervention possibly overstate the complexity of such management, at least in some contexts regarding some policy areas.¹⁹⁷ The fact is that the government has an imperfect but useful way of measuring the management of any area of positive socio-economic assistance: indicators and benchmarks. Young gives an in-depth, philosophical grounding for the use of indicators and benchmarks, which this paper does not seek to repeat.¹⁹⁸ Suffice to say that these are the tools used regularly by governments themselves, including the Swazi government, to measure the success or otherwise of their social programs.¹⁹⁹

Indicators and benchmarks have a long history of use in the educational field, including in developing countries. A cursory examination of the literature yields a plethora

¹⁹⁶ Here I coopt the language of Sunstein, see Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Second. (Cambridge, Massachusetts: Harvard University Press, 2001).

¹⁹⁷ David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*, 189.

¹⁹⁸ Katharine G Young, “The Minimum Core of Economic and Social Rights: A Concept in Search of Content,” 165-167.

¹⁹⁹ Benchmarks and indicators have been used in public health areas, for example to measure the success of the fight against HIV-AIDS, see *DHS*. They are also regularly used by the Department of Social Welfare in assessing the success of projects.

of good examples. A particularly thorough example dates back to 1987 and covers five indicators of education (each with a number of sub-indices):²⁰⁰ school expenditures, school material inputs, teacher quality, teaching practices/classroom organization and school management (here attached and marked ‘Appendix 1’). What indicators are ultimately used is a matter for the High Court, upon submission by the applicants and the Government. But the Court should not sit back and wait for the applicants to construct a perfect case in this regard, and allow the Government to obfuscate. Rather, extending the logic of *Mtikila*, the Court must actively press the parties to agree on fair and measurable indicators, applying its own if agreement cannot be reached.²⁰¹

Likewise, the benchmark figures to be set are ultimately a matter for the Court – it is this decision which gives definition to the phrase ‘primary school’ within the Bill of Rights itself. It is submitted that it is at this point that s 60(8) of the ‘Directives of State Policy’ should be used. That section outlines that the implementation of FPE shall be undertaken without compromising the quality of the primary education currently provided in Swaziland. At the application’s hearing, the Government attempted to argue that the section meant that the right to FPE within the Bill of Rights was subject to a ‘progressive realization.’²⁰² As noted, Agyemang J specifically rejected this argument.²⁰³ Instead, it is submitted that a more appropriate use of the phrase would be to ensure that the current standard of education for

²⁰⁰ Hugh Hawes, *Questions of Quality: Primary Education and Development* (Essex: Longman Group Ltd, 1990), 7.

²⁰¹ *Rev. Christopher Mtikila v. Attorney-General* [1995] TR 31 (High Court of Tanzania). I understand that strictu sensu, *Mtikila* stands for the proposition that standing ought to be liberal in areas where illiteracy is rife (see *supra* n 150), but I think that it also stands for a Court being cooperative and proactive in such situations. In this way, I do not think it is fair for the Court to wait for the Applicants to make a perfect case regarding indicators and benchmarks in the Free Education Case.

²⁰² *Free Education Case*, 19.

²⁰³ *Ibid.*

those receiving formal education should be set as the benchmark figures to be implemented by the government. After considerable research, the author was surprised to find that no such figures exist in Swaziland.²⁰⁴ This remarkable fact only underscores the importance of the strongest form of intervention by the courts.²⁰⁵

Benchmarks and indicators certainly have their shortcomings – they are obviously a rather mechanical and quantitative measurement in an area where quality is absolutely vital.²⁰⁶ This obviously lends itself to window-dressing. It may also lead to a focus on short-term remedies at the expense of longer term, but better, solutions. This echoes an earlier enforcement cost concern that the *Grootboom* judgment could have led to shelter for homeless people which was temporary, substandard and ultimately wasteful.²⁰⁷ Likewise, qualifying teachers too early, constructing low-grade thatch class rooms, or filling schools with cheap furniture without a decent half-life, may prove to be more expensive for Swaziland in the medium-term. These criticisms in one sense can only be acknowledged – there is no satisfactory answer to them. But perhaps this paper could tentatively put forward two defences to the High Court taking such an approach. First, it is submitted that putting down specific indicators to use to measure the implementation of a constitutional socio-economic right is more likely to be useful to the government, the education sector, parents and children and civil society than the flexible minimum core. The good sense of the

²⁰⁴ A state of affairs which is confirmed by Alice Peslin, *Planning Workshop Report* (Swaziland: Ministry of Education, 2007).

²⁰⁵ When first starting this paper, I assumed that the Swazi Ministry of Education would at least have some picture of the education being given in the country looked like in terms of indicators, and what sort of benchmark figures it was striving towards. But what has become clear, after much research, is that no such figures exist in the MOE. This is an undesirable state of affairs, and if the High Court could only get the MOE to produce some sort of basic indicators and benchmarks, then it would be going a long way to realizing FPE.

²⁰⁶ Hugh Hawes, *Questions of Quality: Primary Education and Development*, 6.

²⁰⁷ Murray Wesson, “Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court,” 304.

government and other relevant actors in what is best for the future of the country in implementing the right can be worked out with some sensible amount of compromise (which should take place between the parties' representatives in front of the High Court). And second, and to echo the argument relating to government provision of social services, these difficulties are not particular to the judiciary - rather, they pertain to any branch of government deciding to use benchmarks and indicators. This paper cannot answer to that larger question, except to say that benchmarks and indicators are an acceptable part of the way governments operate throughout the world today.

When is a benchmarked minimum core justified?

But this paper is not an argument for using indicators and benchmarks in every case involving the adjudication of positive socio-economic rights. The 'minimalist' approach that is the hallmark of courts is generally appropriate and just.²⁰⁸ There are a huge number of reasons for this – many have already been touched on above. One of the primary ones regarding socio-economic rights is that any court has a significant chance of being under-inclusive in the formulation of any welfare right.²⁰⁹ That is, if a court becomes involved in stipulating exactly what a right should look like, it might preclude aspects that would be incorporated by the legislature. Thus, courts are generally right to be conservative when deciding to interpret the scope of any right. To demonstrate this point, another landmark case involving socio-economic constitutional rights in South Africa will now be examined:

Treatment Action Campaign v Ministry of Health (No 2) (TAC2).²¹⁰

²⁰⁸ See generally Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Second. (Cambridge, Massachusetts: Harvard University Press, 2001).

²⁰⁹ Sandra Liebenberg, "Socio-economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate," 313.

²¹⁰ *Minister of Health v Treatment Action Campaign (No 2)* 5 SA 721 (CC), 10 BCLR 1033 (2002).

TAC2 concerned an anti-retroviral drug that had been proved to assist in the prevention of mother-to-child transmission of HIV (PMTCT). The drug was being provided free by a pharmaceutical company for distribution throughout South Africa, but a rather sceptical government only made it available at a very limited number of sites, ostensibly to run its own tests on the drug. An NGO brought the claim to have the drug distributed much more widely to HIV-positive mothers. In so doing, it argued that the constitutional right to health ought to be fully enunciated by the Constitutional Court. As (purportedly) in *Grootboom*, the Court did not opt to outline the minimum core of the right to health. And like *Grootboom*, the Court did find that there had been a violation of the right, as the actions of the government were judged unreasonable.

It is submitted that the decision not to outline the minimum core was correct in *TAC2* but not *Grootboom* (assuming for the moment that one was not outlined). *TAC2* purported to establish whether a single good was part of a larger good provided for in the constitution. This is what we might call ‘usual’ human rights litigation – there is a dispute and a party attempts to incrementally fit their claim into a larger amorphous right. A court is generally right not to attempt to fully enunciate a right but rather be guided by a self-limiting principle and limit its inquiry simply to the alleged breach at hand.²¹¹

On the other hand, *Grootboom* seems like a different kind of case. Bearing in mind that the separation of powers doctrine was quite rightly put aside in the circumstances, the reasons given for not fully expounding what the right entails seem flimsy.²¹² In addition, it is doubtful whether the Court could do what it purported to do as a matter of logic. The Court

²¹¹ Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, 24 - "there is a close connection between minimalism and democracy."

²¹² Murray Wesson, "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court," 300-302.

made a judgment about whether a policy relating to the provision of a good was reasonable without outlining what the good was. It is respectfully submitted that this was impossible; the Court could not make an assessment of the reasonableness of government policy regarding ‘housing’ without accepting some formulation of such ‘housing’.²¹³ This is reflected in the similarity of definitions of ‘adequate housing’ between the Constitutional Court and the leading proponent of the minimum core, David Bilchitz. In “not” outlining the right to ‘adequate housing’ the Constitutional Court noted it was defined by the government as: (1) land, water, sewage and electricity;²¹⁴ (2) a “permanent residential structure with secure tenure ensuring internal and external privacy and adequate protection against the elements” and “potable water, adequate sanitary facilities and domestic energy supply”;²¹⁵ (3) land and “basic services”;²¹⁶ and (4) a marked-off site, waterproof structure, basic sanitation, and water and refuse services.²¹⁷ Any of these definitions compares rather favourably to Bilchitz’s outline of the minimum core: “protection from the elements in sanitary conditions with access to basic services, such as toilets and running water.”²¹⁸ The Constitutional Court *did* therefore (despite itself) outline a flexible minimum core to some degree of specificity in *Grootboom*. As we have seen, such a flexible right may remain ‘weak’ unless combined with concrete indicators and benchmarks.

²¹³ David Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence” (2003) 19 South African Journal of Human Rights 1: 9; Marius Pieterse, “Coming to Terms with Judicial Enforcement of Socio-economic Rights,” 407.

²¹⁴ *Grootboom*, para. 37.

²¹⁵ *Grootboom*, para. 49-51: The definition of “housing development” within the *Housing Act* 107 of 1997 (South Africa), s 1.

²¹⁶ *Grootboom*, para. 60: quoting the Cape Metro *Accelerated Managed Land Settlement Program*, which is quoted with approval in the final order (at [90]).

²¹⁷ *Ibid.*, para. 91.

²¹⁸ David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*, 198.

A comparison of *Grootboom* and *TAC2* perhaps offers us a way to settle when a benchmarked minimum core should be outlined by a judiciary: a test focussed on the context of the claim. If *Grootboom* was decided incorrectly because it refused to properly authorize a minimum core, and if *TAC* was decided correctly even though it did not explicate one, then the context of the claim might be illustrative. It is the complete or near-complete absence of the right in *Grootboom* which makes the failure to clearly outline a benchmarked minimum core incorrect. In *TAC2* no one was justifiably alleging the complete or near-complete absence of the right in question. The right to health is catered for in a myriad of ways in South Africa: there is relatively good coverage of immunizations, there are state-of-the-art hospitals and clinics with qualified nurses in even some of the most remote areas. To make the claim that the Constitutional Court should outline what the minimum core of the right to health is, one would have to be making a claim that goes toward a full explication of the right. This would be difficult, but may be possible in some areas of the country. *TAC2*, however, was not concerned with such a claim.

The test for using a benchmarked minimum core may, then, be a three-fold test. First, there needs to be a textually demonstrable commitment authorizing the judiciary to make judgments in the area. This is emphasized because critics of judicial intervention in the area of socio-economic rights often argue that this authorizes complete judicial oversight of the entire budget.²¹⁹ That is a distortion: a constitutional socio-economic right instead allows judicial intervention regarding legislation and policies relating to a specific policy area. Second, the claimants need to satisfy the ‘socially disadvantaged’ test outlined by Murray Wesson. This requires itself a two-part analysis, that (1) a significant sector of society is

²¹⁹ There are many examples of this argument, but for a particular good one see Timothy Macklem, “Vriend v Alberta: Making the Private Public,” 44 *McGill LJ* 197 (1999): 210.

excluded from a good that (2) others already benefit from.²²⁰ It is on this ground that the claim in *Mazibuko* fails, as it was clear that most South Africans do not benefit from the kind of water services being provided to the applicants.²²¹ And third, the claim needs to be one that goes toward a full explication of the right in question. It is this third aspect that was satisfied in *Grootboom* but not in *TAC2*.

One of the great advantages of framing the question of whether to outline benchmarks and indicators in this way is that the dichotomy between the ‘reasonableness test’ and the ‘minimum core approach’ at least partly falls away. If a case does qualify for benchmarks and indicators, then a question which might follow is whether government plans and policies are reasonable in light of same.²²² There are a number of qualifications to be made here and these will be returned to below. But for the moment, it is contended that the real dichotomy in socio-economic constitutional law should be between the ‘minimalist approach’ on the one hand, and the ‘benchmarked minimum core approach’ on the other. The ‘reasonableness test’ – or a programmatic remedy – is then one of a series of options available for remedies, to which we now turn.

5. VAGUENESS AND REMEDIES: DECLARATORY v. SUPERVISORY RELIEF

The order that was used for analyzing the scope of the right will now be repeated looking at remedies in the Free Education Case. First, ‘strong’ and ‘weak’ remedies will be examined, in particular emphasizing how these might be used in a dialogical model. Second, this paper will look at how these principles played out in the Free Education Case. This will include a

²²⁰ Murray Wesson, “Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court,” 293

²²¹ *Mazibuko et al v City of Johannesburg et al*.

²²² David Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence,” 9.

brief analysis of the resulting government action and legislation coming out of the decision. Third, other options that were available to the High Court will be explored.

Strong and weak remedies

Tushnet's metaphor of 'strong' and 'weak' applies to remedies in the following way.²²³

Strong remedies are those which a party is bound to follow – mandamuses, interdicts, orders and so on. Weak orders are those which a party is not strictly bound to follow, but which a court expects will be remedied – declarations, recommendations, 'directions to consider.' It is these weak remedies that have opened up further possibilities of a dialogical model in human rights litigation – principally through the Commonwealth model of statutory human rights protection. The weak remedy (such as a declaration) sets off a dialogue between the government, parliament and civil society which results in a solution being enacted by the politically-accountable branches and, if necessary, non-governmental actors.

The benefits and limitations of the weak remedy in the Free Education Case

In the Free Education Case, Agyemang J issued a weak remedy and thus did not burden the court with any on-going responsibilities.²²⁴ She simply issued a declaration that the right was being contravened. The Court therefore has not placed itself in the uncomfortable position of having to try and oversee multiple government departments and programs, rather it is letting the government itself try to correct the problem.

²²³ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, chap. 2, my analysis diverts away from Tushnet's on some level because he generally maintains that the distinction between rights and remedies is to some extent pointless in socio-economic rights litigation (see 251). I admit there is some truth in this, but there is I think some protection to be found in procedure itself, plus it makes for easier analysis.

²²⁴ *Free Education Case*, 27.

As mentioned, this approach is not without its supporters, and certainly not without merit.²²⁵ In Swaziland, there has been a dramatic increase in the awareness of the constitutional right to FPE. Civil society has rallied to what most even in the government see as a crucial project.²²⁶ There has been a coalescence of important stakeholders as the normally apolitical church groups have decided to take on the cause, important as they are also key partners in the field of education in the country.²²⁷ There has also been the following action taken directly by various actors as a result of the decision:

- (i) the parliament asked for a submission from the government as to how it would implement the High Court's decision;²²⁸
- (ii) the parliament has insisted that *contra* the decision, the right to primary school must include provision of school uniforms;²²⁹
- (iii) civil society and banned political parties have led a series of marches, which have been supported by church groups;²³⁰
- (iv) the Ministry of Education has issued a communiqué to the Swazi people outlining how it will be implementing FPE;²³¹

²²⁵ Mark Tushnet, *Weak Courts*, 257; Charles F Sabel and William H Simon, "Destabilization Rights: How Public Interest Litigation Succeeds," *117 Harvard Law Review* 1015 (2004).

²²⁶ See for example: Sikelela Dlamini, "And the People Marched!," *SIka Media*, <http://sikamd.wordpress.com/page/2/>.

²²⁷ In fact the case was originally financially supported by the Council of Swaziland Churches, the umbrella body for many of the mainstream Christian churches in the country, see , "Swaziland Country Report May - July 2009" (Open Society Initiative of Southern Africa). But support has increased dramatically since the Free Education Case, see Mantoe Phakathi, "Govt Pleads for More Time on Free Primary Education," *International Press Service News Agency*, April 23, 2009, <http://ipsnews.net/africa/nota.asp?idnews=46602>.

²²⁸ Zwelihle Sukati, "Hillary warns govt to respect rule of law," *Times of Swaziland*, March 18, 2009, <http://www.times.co.sz/index.php?news=6349>. <last accessed 25 November 2009>

²²⁹ Ibid.

²³⁰ Mbongiseni Nhleko, "March Turns Violent," *Times of Swaziland* (April 17, 2009).

- (v) the applicants have secured an interim interdict from the High Court to prevent head teachers from sending children who have not paid their fees home;²³²
- (vi) the Ministry of Education has begun a registration of eligible students to start them in school in 2010;²³³
- (vii) the Ministry of Education has produced the *Free Primary Education Bill 2009* and submitted it to parliament;²³⁴
- (viii) in addition, private communication has revealed that there has been a substantial increase of “pressure” within the Ministry to deliver services. This has been accompanied by demands from the Ministry to Cabinet to provide it with more funds. In the words of one official within the Ministry: “The civil service does still tend to look at the Constitution as just a piece of paper. But the decision by the High Court created a noticeable change in here. There was all of a sudden an urgency to realize FPE for all.”²³⁵

Nevertheless, as the dust settles, one gets the sense that the government is not overly concerned by the decision. It has not appealed to the Supreme Court. While there were initial rumblings about the decision, the government soon realized that not much had changed.²³⁶ As mentioned, shortly after the decision, the Ministry of Education issued a

²³¹ Macanjana Motsa, “Government Press Statement Re: Free Primary Education (FPE)” (Government Press Secretary, No 25, 2009).

²³² Although this judgment has not been reported, or circulated widely, and has not been successful, see n 305 below.

²³³ Arthur Mordaunt, “Free Education Registration Starts,” *Times of Swaziland*, June 5, 2009.

²³⁴ *The Free Primary Education Bill 2009*, *Swazi Government Gazette* S133, 133.

²³⁵ Conversation with Ministry of Education official who must remain unnamed, 18 November 2009.

²³⁶ Manqoba Nxumalo, “Government Loses Free Education Case”, regarding the government's intention to examine whether to appeal; and Richard Rooney, “Defend the Swazi Constitution,” *Swazi Media Commentary*, April 14, 2009, <http://swazimedia.blogspot.com/2009/04/defend-swazi-constitution.html> <accessed 6 November

communiqué in response to the decision. The Ministry announced it would implement free primary education for only Grades One and Two beginning April 2010 (with a plan to keep all those children in school, so that the right would be realized progressively by 2015), in clear violation of the Court's decision and its constitutional obligations.²³⁷ In addition, the proposed *Free Education Bill 2009* does not implement the High Court's judgment in a number of ways. First, the Bill repeats the decision to start implementing FPE for Grades One and Two only in 2010, in clear breach of the High Court's judgment.²³⁸ There is, further, good reason to be sceptical of whether the government will actually achieve this. During the trial, it kept repeating that it would ensure all children in Grade One would be in school by 2010, without admitting that it has been getting every eligible student in Grade One into school for nearly twenty years, and that the issue is the sharp decline in enrolment thereafter.²³⁹ And second, the Bill mandates a spending cap for each child at a maximum of E560²⁴⁰ per year, which has not been subject to proper testing and is disputed as grossly deficient by principals.²⁴¹

It is submitted, therefore, that the decision to adopt a 'weak' remedy in the Free Education Case, settling for a declaration (in the end, by consent of the parties), is the most worrying aspect of the judgment. There are two aspects of the remedy as enunciated by the

2009>, drawing on newspaper reports showing that the government would not appeal nor implement FPE in accordance with the Constitution.

²³⁷ Macanjana Motsa, "Government Press Statement Re: Free Primary Education (FPE)," 2.

²³⁸ *The Free Primary Education Bill 2009*, sec. 13(1).

²³⁹ *Swaziland Achieving Basic Education for All*, 17.

²⁴⁰ About US\$60.

²⁴¹ *The Free Primary Education Bill 2009*, Schedule and it then orders that a school may not send a pupil home "only on the grounds that the Government has not paid the fees due" (s 3(1)) which hardly bodes well and which underscores the lack of proper consultation on the matter, see Mduduzi Magagula, "Free Education Not Free," *Times of Swaziland*, April 26, 2009.

court: the remedy itself and the test of when to apply such a remedy. It is submitted that the Court decided incorrectly on both these fronts, and that the test applied by the Court was particularly inappropriate. But before turning to the test, and possible alternatives, let us examine the remedies available in such a case.

Supervisory jurisdiction

The difficulties for the judiciary in implementing large-scale socio-economic rights are obvious. When looking, for example, at the list of benchmarks and indicators (*Appendix I*) it is clear that a dizzying array of orders might be required if a court was to take a strong-form approach to such a right. How could a court, for example, order more teachers if such teachers are coming from overseas, or are being trained in private colleges? As mentioned, these difficulties have led many to believe that ‘weak’ remedies, such as declarations, are the best way of dealing with constitutional socio-economic rights violations. Certainly such an approach accords respect for traditional notions of the separation of powers. However, particularly since the perceived failure of the South African Constitutional Court’s approach in *Grootboom*,²⁴² there has been a marked shift in the literature to a more aggressive approach on the part of the courts.²⁴³ Many of these commentators have coalesced around the idea of ‘supervisory jurisdiction’ and it is worth our time examining this type of remedy now.

‘Supervisory jurisdiction’ has two distinct uses in jurisprudence. First, it means the power that a superior court retains over an inferior court. The second meaning is directly

²⁴² Kameshni Pillay, “Implementing Grootboom: Supervision Needed,” 2.

²⁴³ Murray Wesson, “Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court,” 306; Rosalind Dixon, “Creating Dialogue About Socioeconomic Rights: Strong-form vs Weak-form Judicial Review Revisited,” 415.

relevant to the Free Education Case. Supervisory jurisdiction means that a court retains jurisdiction over a matter. It could do so for two inter-related purposes: (1) to make it easier for the applicants or a relevant party to approach the court (retaining jurisdiction); or (2) to supervise a general order it has made regarding a matter (structural interdict). Each of these is not perfectly distinct but should be examined briefly in turn.

Retaining jurisdiction

One remedy that was open to the High Court of Swaziland in the Free Education Case was to retain jurisdiction in the matter. This could be done even as the Court decided only to grant declaratory relief. There are two advantages to such an approach. First, it allows the applicants to come immediately back to a court if there is a problem or query in the future. This can save disadvantaged applicants money. This could have been useful even in the original *Grootboom* decision, where the applicants had to reapply to the High Court of Cape Town after an offer which was accepted before trial was not followed through by the government.²⁴⁴ Second, however, even without any orders or declarations, retaining the mandate can send a powerful signal to government and other service providers. The message at least is: we are watching you, so make sure you deliver.

Structural interdict

In Roman-Dutch constitutional jurisprudence, there seems to be at least four remedies available to a court at first instance for socio-economic rights claims: declaratory relief (as in the Free Education Case), prohibitory interdicts (stopping a party acting in a certain manner),

²⁴⁴ *Grootboom*, para. 5.

mandatory interdicts (requiring a certain action by a party) and structural interdicts.²⁴⁵ A structural interdict is a broad-based order to remedy a situation. Owen Fiss has named it the “civil rights injunction”²⁴⁶ and described it as “the formal medium through which the judge directs the reconstruction of a bureaucratic organization.”²⁴⁷ Such interdicts have been used to reorder governmental organizations – such as prisons and mental institutions – as well as social institutions extending beyond government – such as housing, hospitals and school systems.²⁴⁸

The High Court of Swaziland should have issued a structural interdict in the Free Education Case. To assist in thinking about how one might be employed in the Free Education Case, a brief analysis of some examples from education litigation in the United States will now be undertaken. After that, in order to see under what conditions a structural interdict should be employed (and to see that the Free Education Case fits those conditions), a short analysis of their use in South African case law will be made. This will conclude this part, and the paper will then move on to charting a course of action for the High Court in the Free Education Case.

Examples of structural interdicts: education in the United States

In the US, the structural injunction (as it is known there) had some limited use before World War II, but burst onto the scene in the school desegregation decision of *Brown II*.²⁴⁹ Here it

²⁴⁵ Mitra Ebadolahi, “Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa,” 1568.

²⁴⁶ Owen M Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978).

²⁴⁷ Owen M Fiss, “The Social and Political Foundations of Adjudication,” 6 *Law and Human Behaviour* 121 (1982): 121.

²⁴⁸ Owen M Fiss, *The Law As It Could Be* (New York: New York University Press, 2003), 106.

²⁴⁹ *Brown v. Board of Education of Topeka* 349 U.S. 294 (1955).

was used to order that states remove segregation of schools “with all deliberate speed.”²⁵⁰ It thus has a particularly long history in the field of education in the US, where it has mainly been focussed at the level of the state courts since education was found not to be a ‘fundamental right’ of the national constitution in 1976.²⁵¹ 49 of the 50 state constitutions provide for education as a positive constitutional right. All but five states have had litigation regarding the financing of the right.²⁵² Many of these have had long-running cases, requiring the judiciary to become seriously involved in the management of state affairs.²⁵³ In recent times, the focus of this litigation has shifted from ‘equality’ more generally to ‘adequacy’.²⁵⁴ This is significant as it reflects the development of a ‘minimum core’ for positive rights. That is, claims for socio-economic protection have not centred around the idea of equality itself, but rather that there should be some sort of constitutionally-protected basic provision of the good in question.

To help think about the forms of structural interdicts that might be ordered in education cases, it might be helpful to look at two types of interdicts that have arisen from the ‘adequacy’ cases in the United States: one focussed on *outputs* and the other on *inputs*. In *Rose v Council for Better Education*,²⁵⁵ the court focussed on outputs and ordered that the

²⁵⁰ Ibid., 301.

²⁵¹ *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1973).

²⁵² Benjamin Michael Superfine, *The Courts and Standards-based Education Reform* (Oxford: Oxford University Press, 2008), 10.

²⁵³ Ibid., 126-129.

²⁵⁴ Ibid., 127.

²⁵⁵ *Rose v. Council for Better Education*.

state provide sufficient funding for each child to access an ‘adequate education.’²⁵⁶ An adequate education was one that was designed:

“to provide each and every child with at least the seven following capacities:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;*
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;*
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;*
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;*
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;*
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and*
- (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market”*

This outputs-oriented approach was not followed more recently in *Campaign for Fiscal Equity v State of New York*²⁵⁷ (although this case did follow the ‘adequacy’ argument that

²⁵⁶ I recognise that the court also made an order regarding inputs, but it is this output-oriented aspect of the judgment that is noteworthy, see *Superfine*, supra n 252, p 126.

was pioneered in *Rose*). The Court here did use outputs to determine whether (what it called) a ‘sound basic education’ was being delivered in the school districts. But in fashioning the structural interdict, the court in *CFE* focussed on the *inputs* to an adequate education. Here the courts found that a student must be given access to:²⁵⁸

- “1. Sufficient numbers of qualified teachers, principals and other personnel.*
- 2. Appropriate class sizes.*
- 3. Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum.*
- 4. Sufficient and up to date books, supplies, libraries, educational technology and laboratories.*
- 5. Suitable curricula, including an expanded platform of programs to help at risk students by giving them "more time on task."*
- 6. Adequate resources for students with extraordinary needs.*
- 7. A safe orderly environment.”*

Both of these approaches adopt (what this paper has called) a ‘flexible minimum core’ by using such words as “sufficient” and “adequate.” But the reason for fully expounding them here is to demonstrate that structural interdicts can take an extremely broad approach to a structural problem and give very wide orders regarding it. The approach in *CFE* accords more closely with the approach taken in the Free Education Case. Further, it should be noted that in further fashioning the remedy, the Supreme Court of New York went on to give the

²⁵⁷ *Campaign for Fiscal Equity Inc v State of New York* (New York Court of Appeals) 2006 NYSlipOp 08630 (2006).

²⁵⁸ *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y. 2d 307 (1995):317; implicitly reaffirmed in *Campaign for Fiscal Equity Inc v State of New York* 100 NY2d 893, 11-13 (2003).

right a financial shape, and in doing so adopted a benchmarked minimum core approach.²⁵⁹ It is submitted that this is the correct approach for the High Court of Swaziland to adopt, in particular as the curriculum in Swaziland at the primary level is already overly output-oriented.²⁶⁰ The High Court should therefore adopt an input minimum core, but instead of being flexible should outline concrete benchmarks and indicators as urged previously.

The test of when to use structural interdicts: South Africa

That gives us some idea of how the structural interdict has developed in constitutional law, and the wide forms it can take in education litigation. But when should it be used? Roach and Budlender have attempted to extract a number of general principles for determining when a structural interdict is appropriate and just.²⁶¹ They believe that constitutional dissonance can occur for three reasons: When a government (a) lacks attention to an issue; (b) lacks capacity to bring a situation under control; or (c) lacks the will to do so. They demonstrate that traditionally structural interdicts would have been used only for (c), but in their opinion general structural interdicts and supervisory jurisdiction should be used for (b), with more detailed structural interdicts backed by the contempt power reserved for (c).²⁶² They follow the work of Chris Hansen who uses the terms: inattentive, incompetent or

²⁵⁹ An acceptable simplification, I hope, of what happened *Campaign for Fiscal Equity v State of New York (State Supreme Court Decision)* 719 N.Y.S.2d 475 (2001), where Judge DeGrasse ordered that a detailed "costing out" exercise be undertaken on a district by district basis to be broken down by divisions of standards, teachers, facilities, curricula, class size, special education, and school finance. These were then split into, on the one hand, capital costs and on the other operating costs. For an explanation of how the costing out worked, see <http://www.cfefequity.org/cost-out.html> <last accessed 20 September 2009>

²⁶⁰ *Swaziland Achieving Basic Education for All*, 26-27. Anecdotally, there is far too much emphasis on 'grades' and 'progress' and far too little emphasis on making learning an enjoyable experience, for example, students are ranked in each class and given a passing exam every year of primary school (students and parents know the ranking numbers and regularly compare children).

²⁶¹ Kent Roach and Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" 5 South African Law Journal 325 (2005).

²⁶² *Ibid.*, 350.

intransigent.²⁶³ This analysis also dovetails interestingly with the work cited earlier by Dixon – about legislative blind-spots (lack of attention), and the three types of burdens of inertia – priority-driven, bureaucratic and coalition-driven. Some attention suggests that there is a link between attention and will on the one hand, and priority-driven and coalition-driven burdens of inertia on the other.

Perhaps there is really only two types of reasons for constitutional dissonance – lack of capacity and lack of will, the lack of attention being an early expression of the lack of will. That is, a socio-economic rights violation occurs because either the state will not fix it, or the state cannot. At first blush, if the state cannot, then there does not seem much point for the judiciary to get involved. But this is perhaps deceptive – either the judiciary will enable the state to perform the action by removing unseen impediments (a perceived inability) or by bringing in more skills or resources (a surmountable inability). Of course, this may result in no improvement in the condition on the ground, in which case the problem may be unsolvable by a court (an insurmountable inability). But clearly what type of incapacity the government is facing is not to be known in advance by the judiciary, so in this sense the type of incapacity does not present an *ex ante* hurdle to judicial intervention. The unwillingness or intransigence of the government is a lot easier – commentators are in agreement that this cannot be allowed to stand in the way of meeting constitutional rights.²⁶⁴

After studying documents, analyzing policies and budgets and using my sources within the Ministry of Education, it is difficult to say whether the government is unwilling or

²⁶³ For historical reasons, I prefer the terms lacks attention, lacks competence and lacks the will. Interestingly, they also rely on the work of Braithwaite, who places the order of severity differently: attention, will and competence – making competence the most egregious form of violation. I prefer Hansen’s take – I think intransigence is the most serious reason for violation.

²⁶⁴ Kent Roach and Geoff Budlender, “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?” citing Hansen and Braithwaite again.

unable to implement FPE. One factor that points to intransigence is that there is no lack of resources at the budgetary level, although there is at the Ministry level. The Ministry lacks resources because there is no will to change spending and budgetary habits to incorporate children's constitutional rights. As mentioned, primary education attendance has fairly stagnated over the past twenty years. Primary education still gets an unreasonably small slice of the education pie, which is already an undersized portion of the budget.²⁶⁵ Further evidence of the intransigence of the government is: its unwillingness to alter its policies; its unwillingness to fully cooperate with the High Court during the trial, particularly by refusing to make policies available to the Court; and by its statements since the trial. As mentioned, it has submitted a Bill which blatantly violates the declaration of the High Court in the Free Education Case.²⁶⁶ But this lack of will interacts in a substantial number of areas with lack of capacity within the civil service. There are a number of very important stakeholders who simply do not know how to do their jobs properly, to make a department run effectively, to deliver a proper service to the Swazi people. And here is a huge problem: because in Swaziland, as in many developing countries, there is no welfare, the consequences of being dismissed are catastrophic and profound. The result is that there is a reticence to dismiss even the most incompetent officials. This ties back to a lack of will – there is therefore a complex symbiosis between the lack of will and the lack of competence within the Swazi civil service.

Does this situation then justify a structural interdict? With respect, it is submitted that these analyses make too much of unwillingness or incapacity in deciding whether a court

²⁶⁵ In 2007, the Ministry of Education received 24.4% of the national budget and of this portion, 38% went to primary education funding, source http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=121&IF_Language=eng&BR_Country=7480&BR_Region=40540 <last accessed 28 November 2009>

²⁶⁶ Macanjana Motsa, "Government Press Statement Re: Free Primary Education (FPE)."

should issue a structural interdict. A lack of will or a lack of capacity might be crucial in deciding whether a court should make the pragmatic decision to hear and decide a case (in weighing whether the court's intervention is legitimate). But this goes rather too deep to be of use at the practical, remedial level in deciding whether to make use of a structural interdict. Much work in human rights at this level is done by the proper exposition of procedure. The first procedural question in analysing whether to issue a structural interdict is not so much will not or cannot, but rather has or has not. Once the determination has been made that the state 'has not' provided the constitutional right in question (an analysis made at the level of the scope of the right), it is submitted that the decision to use a structural interdict is more an analysis of practical considerations than underlying root causes.

So what are these 'practical considerations'? An investigation of South African constitutional law might be illustrative here. Since 1996, the South African courts have used structural interdicts sparingly but to good effect.²⁶⁷ Roach and Budlender argue that they have been used in three different circumstances.²⁶⁸ It is submitted that their analysis actually suggests four circumstances. First, for failure to comply with a declaratory order. Second, when it is unsafe to assume that an order will be carried out promptly. Third, a structural interdict "is warranted...where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance." They argue here that *TAC2* was such a case, where failure to comply with the court's order would lead to the continued transmission of HIV-AIDS from mothers to their newborns.

²⁶⁷ Kent Roach and Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?," 329; but cf Danielle Elyce Hirsch, "A Defense of Structural Injunctive Remedies in South African Law" 9 *Oregon Review of International Law* 1 (Winter 2007). I acknowledge that it is sometimes fairly difficult to tell whether an interdict has been made, but I think that there have been a number of effective ones made by the South African courts.

²⁶⁸ Kent Roach and Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?," 333-334.

Fourth, a structural interdict should be used where “it is not possible to define with any precision what the government is required to do.”

Upon reflection, it would seem that the first, second and third points do not necessarily argue for structural interdicts in socio-economic rights litigation *per se*. Rather, other types of remedies may be warranted by those situations. For example, if a declaratory order has been unsuccessful, a simple mandamus may be warranted under certain circumstances. But the fourth point seems to go to the heart of the matter. If the analysis is tweaked slightly, the proper test for structural interdicts might be that they are appropriate and just where there are so many affected departments and agents that an order general in its terms is required *and*: (a) there has been “a failure to heed declaratory orders”; *or* (b) it is “inadvisable for the court to assume” that the order will be carried out “promptly”; *or* (c) the consequences of even a good-faith failure to comply with an order are so serious that such an interdict is warranted.

Applying these principle to the Free Education Case could offer some support for the High Court’s decision to offer only declaratory relief. But it is submitted that there is no reason to think that the Swazi government will rectify the constitutional violation “promptly.”²⁶⁹ As discussed, the numbers of out-of-school primary children has been fairly stagnant since 1986. Despite a constitutional requirement to implement FPE within three years, there has been little progress made by the government in this regard. Therefore, under the above test, the High Court of Swaziland would be justified in issuing a structural interdict.

²⁶⁹ I acknowledge that, of the three options, this is the weakest one to stand on, but I rely (as Roach and Budlender did) on *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* (CCT45/04) [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC); 2006 (1) SACR 220 (CC); [2005] JOL 14514 (CC) (2005).

Comparing the test with the Free Education Case

How does this compare with the test outlined in the Free Education Case? Agyemang J did not attempt to order a structural interdict in the case, but she did outline when she thought the High Court should review government programs and plans. These are programmatic remedies discussed below, which are one of the compliance remedies that could accompany any structural relief. By extension, then, Agyemang J did outline when a court should get involved in structural reform. She ruled that programmatic administrative review should only be used if “the situation...is capable of no other remedy.”²⁷⁰ By this reasoning, and on a plain reading of the Free Education Case, it is submitted that Agyemang J is proposing that the “capable of no other remedy” test is the one to be applied in deciding whether the judiciary should move beyond declaratory relief in the enforcement of positive constitutional rights. With respect, it is submitted that this is incorrect. Any case involving constitutional rights is presumably always capable of being settled by a mere declaration of the parties’ interests. For this reason, Agyemang J’s test is unsustainable. But what this test goes towards and what is also alluded to in other jurisdictions is that structural relief should only be attempted as a last resort. This is an understandable sentiment (especially given judicial reticence to manage what are really governmental affairs) but does not quite properly capture when structural relief should be ordered. Instead, the High Court of Swaziland should follow the lead of the Supreme Court of Canada and the South African Constitutional Court who have ruled that broad-based equitable relief should only be used when “necessary.”²⁷¹ This is the test that has been adopted by the Supreme Court of Canada and the South African Constitutional

²⁷⁰ *Free Education Case*, 26.

²⁷¹ Kent Roach and Geoff Budlender, “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?,” 333 citing *TAC2*.

Court. In more exact language, a structural interdict has been accepted when it is “appropriate and just” in the circumstances.²⁷² The test outlined above previously gives proper form to deciding when structural relief is appropriate. Indeed, the word “appropriate” is fortuitous as the High Court is given the obligation to “make such orders, issue such writs and make such direction as it may consider *appropriate* for the purpose of enforcing” the Bill of Rights.²⁷³

6. CATCHING THE TIDE: A MODEL ORDER FOR THE HIGH COURT

Applying these principles, then, to the construction and implementation of the right to FPE yields the following results. On the side of construction, or the scope of the right, there are at least three options: a minimalist approach of leaving the right ambiguous; a flexible minimum core as was granted in the Free Education Case; and a benchmarked minimum core. The implementation, or remedial side, is somewhat more murky. Given the number of affected parties, there are essentially two options available: declaratory relief as given by *Agyemang J* or a structural interdict.

A structural interdict involving a benchmarked minimum core

The High Court should upon reapplication scrap the *Agyemang* test for granting programmatic relief and move beyond a declaratory order by issuing a structural interdict incorporating a benchmarked minimum core. This will more fully initiate a proper dialogue between the government and civil society in Swaziland. The great weakness is that this course of action might eventually sideline the judiciary from the debate, when the benchmark

²⁷² Kent Roach and Geoff Budlender, “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?,” 341, citing the Supreme Court of Canada decision in *Doucet-Boudreau v Nova Scotia*.

²⁷³ 2005 *Constitution*, sec. 35(2).

figures are eventually reached, but this is a risk worth taking. And it could still be taken by the Court upon reapplication by any interested party. The decision that has been granted so far could be seen as the first step in the process of issuing a structural interdict.

But how would such a structural interdict work? In practical terms, Iain Currie and Johan de Waal have recognized five steps that courts take in issuing and enforcing structural interdicts.²⁷⁴ First, a court issues a declaration or judgment outlining a violation of constitutional obligations. Second, the court orders rectification of the situation. Third, the it orders that specific reports be returned by the government outlining how the government intends to overcome the constitutional violations. The first ought to contain what indicators will be used by the government to assess FPE and, the second what benchmark figures are to be attained. In order to properly ensure that quality is maintained in accordance with the ‘Directives of State Policy’ this second aspect would also require a rapid report of the current state of education, once all the indicators are finalized. Fourth, the court analyses the submitted plans and policies and takes evidence, including any submissions from interested parties. And fifth, the court then issues an order mandating the government plan and amendments as it sees necessary. This seems like a sensible enough approach for the High Court of Swaziland, with the addition of the compliance remedies as suggested in the Part. Thus far, the Court has stopped at step one. But this analysis reinforces the observation that in positive rights litigation, the difference between declaratory relief and injunctive relief is that with the former a government has an extra chance to remedy the situation.²⁷⁵

²⁷⁴ Iain Currie and Johan De Waal, “Remedies,” in *The Bill of Rights Handbook*, 5th ed. (Landsdowne: Juta and Co., 2005), 217.

²⁷⁵ As Fiss argues, declaratory relief will give a defendant two more chances to remedy the situation, whereas a structural injunction gives just one more chance, see Owen M Fiss, “Dombroski” 88 Yale Law Journal 1103 (1977): 1122-1124.

In sum, then, a structural interdict should be ordered in the following terms: “It is hereby ordered that the government must ensure that every child entitled to be in primary school is accessing a free primary education promptly from the date of this judgment. The government is to submit all policies and plans regarding primary education and meeting the requirements of this order within four months. Jurisdiction is hereby retained in this matter until the requirements of the Constitution are satisfied or until such time as the Court deems fit. For the purposes of this order, the following indicators and benchmarks shall be used to determine whether a child is accessing free primary education: etc.” (see *Appendix 1*).

But note that there also may need to be some sort of “out-clause” to prevent the input-analysis becoming too mechanistic. So, the order should also allow the Court to find that a child is being afforded a “free primary education” even if she or he is not otherwise accessing the benchmarks and indicators. Likewise, the order should allow the court to find that the minimum requirements are not being met by the government even if all the benchmarks are otherwise satisfied. This will allow a little bit of compromise between parties to take place within the shadow of the courts. This sort of approach has support in US law in positive constitutional rights: in assessing whether a prison violates the cruel and unusual punishments clause, a court is instructed to evaluate the “totality of conditions” rather than simply relying on benchmarks and indicators.²⁷⁶ The High Court could instead of being restricted by this approach, give itself some room to manoeuvre by adding: “The parties shall be allowed to approach this Court for a determination that a child is or is not receiving the right to primary school whether or not the aforementioned benchmarks and indicators are

²⁷⁶ For a good explanation of the case law leading to this approach, and how it works see Susanna Y Chung, “Note: Prison Overcrowding: Standards in Determining Eighth Amendment Violations” 68 Fordham L. Rev. 2351 (2000).

being met, which determination shall only be made by this Court.” It is submitted that this is an appropriate order in the circumstances.

Compliance remedies –separation of powers and enforcement costs return

The remainder of this paper shall examine how the High Court could implement such broad structural relief. It is necessarily somewhat speculative, and many of these suggestions are put forward only tentatively. But in putting them forward a number of surprising results come out of the woodwork for the enforcement of positive socio-economic constitutional rights. First, the reasonableness test can then be seen as one approach of programmatic remedies. That is, it may be used if a court takes a ‘minimalist’ approach to the scope of the right (as the South African Constitutional Court professes to do) *or*, as in this instance, if a court uses a benchmarked minimum core, it can apply to policies and legislation that do not *directly* touch on these benchmarks and indicators (as, it will be submitted, the New York Court of Appeals did in *CFE III*). Of course, the directness or otherwise will be the cause of considerable debate, but as we shall see jurisdiction can be retained to make sure that budgets, in particular, are meeting the constitutional standard. Second, some clarity to the types of compliance remedies available to courts in enforcing structural interdicts is reached. It is submitted that there at least three compliance remedies available to the High Court of Swaziland to ensure the government complies with the structural injunction: programmatic remedies, bureaucratic remedies, and damages. Each will now be examined in turn.

Programmatic remedies

The first compliance remedy available in constitutional positive socio-economic rights cases is programmatic in nature. This was the remedy granted in the *Grootboom* and *TAC2* cases. In *Grootboom*, the Constitutional Court found that the housing policies of the provincial and

national governments did not accord with the right to housing because they offered insufficient focus on short-term housing. In *TAC2*, the Constitutional Court ruled that the government policy of testing the HIV-AIDS medication at only four of the nation's clinics was not reasonable, and ordered that it be made available at all clinics throughout the country. These remedies are not individual entitlements as such, but rather guarantees that the policies and plans of the government will accord with the constitutional provision. There are two divisions within programmatic remedies: policies and plans, and legislation and budgets.

Policies and plans

In the Free Education Case, the High Court expressly avoided looking at any policies or plans of the government. It is submitted that this was a serious mistake. This is especially so in light of the actual policies and plans of the government. Of the two relevant government education policies, the first clearly does not accord with the constitutional requirement of “free school.” Instead, it aims at a system with “minimal barriers to quality primary education.”²⁷⁷ It is submitted that there is a world of difference between an education system which is “free” and one with “minimal barriers to entry.” “Minimal barriers” means that there are still barriers, whereas “free” implies that the state will actively overcome all barriers to ensure that children are in school. This should have been (and can be) recognized by the Court. The Court should have ordered the Ministry of Education to redraft its policies within a period of, say, four months. Instead, the government is being allowed to continue to apply a policy that is manifestly unconstitutional. Worse, the second policy document was not even

²⁷⁷ “Re: Introduction of Free Primary Education (FPE)” (Ministry of Education), this is the document that was produced for the Court although there is some doubt as to whether it is a genuine policy document or was just produced for the case itself. I can demonstrate why I believe this is so on demand, but to explain it here may expose some of my sources.

produced for the Court.²⁷⁸ The government was blatantly treating the Court with contempt. The Court should have pressed the government for this document. Strong bureaucratic remedies should have been used to force the government to cooperate. Some options in this regard shall be turned to shortly. For the moment it should be noted how this outcome reinforces what has already been suggested, that a strong-weak approach to the judicial enforcement of socio-economic rights will actually result in “weaker” outcomes than a weak-strong approach (that is a ‘minimalist’ right (what is known as a reasonableness approach) coupled with orders to amend policies and report back to the court).²⁷⁹

Legislation and budgets

Programmatic remedies also extend to judicial review of legislation and appropriations. Primary legislation does not seem to be directly in conflict with the constitutional right to FPE in Swaziland. However, it is submitted that the budget almost certainly is. This gets to the crux of the problem with judicial enforcement of positive state obligations.²⁸⁰ There is a deep-seated distrust of judges sitting down to decide budgets (for all the legitimacy reasons raised previously). However, Marius Pieterse has pointed out that the question of scrutinizing budgets to ascertain whether they provide for constitutional rights is a different task from actually constructing a budget itself.²⁸¹ At any rate, uncomfortable as it may be, constitutional human rights law does allow a court to nullify an Act of Parliament, and this does extend to appropriations.

²⁷⁸ *Free Education Case*, 23.

²⁷⁹ Rosalind Dixon, “Creating Dialogue About Socioeconomic Rights: Strong-form vs Weak-form Judicial Review Revisited,” 415.

²⁸⁰ Mark Tushnet, *Weak Courts*, 252.

²⁸¹ Marius Pieterse, “Coming to Terms with Judicial Enforcement of Socio-economic Rights,” 408.

But there are two aspects to this power which need to be discussed before continuing. Both of these aspects could be the subject of separate papers and cannot be fully explored here. First, it ought to be emphasized that the power to nullify appropriations is a power of the judiciary over the executive and not over the legislature. Some commentators disagree,²⁸² and the dissent in *CFE II* contained a spirited argument that this should not be the case,²⁸³ but the current state of the law views acts of parliament as property of the government. There are cogent reasons for this: principally, it is the government which represents the parliament in court and to allow orders to be made to a parliament without a proper defence would be a precarious kind of constitutionalism.²⁸⁴ One outcome of this is that a court has no power to order a parliament (as opposed to a government) to pass a law. The power of the court over the budget is therefore a negative one, which is a highly unstable power as it could lead to a stand-off between the courts and the parliament.²⁸⁵ This does not prevent the court issuing a mandamus to the executive to increase the budget in a certain area or a certain way, but the executive may then not be able to get this through the legislature (as in fact happened in the *CFE* case²⁸⁶). This potential for stalemate is probably somewhat less of a concern in Swaziland for two reasons. First, as demonstrated in Part 1, the executive has a very firm grip over the parliament. And second, the constitutional instability is less worrying in a

²⁸² Herman Schwartz, "Do Economic and Social Rights Belong in a Constitution?," *American University Journal of International Law and Policy* 1233 (Summer 1995): 1238 and note also that entire jurisdictions disagree with this, for example Germany and Hungary. But I do not think that the 2005 Constitution makes this the situation in Swaziland.

²⁸³ per Saxe J, *Campaign for Fiscal Equity Inc v State of New York* 29 AD3d 175, 15 (Appellate Division, First Department). Note that the majority's reply that "this directive does not merely urge the Governor and the Legislature to consider taking action. They are directed to take action" (per Buckley J, 10) is not entirely convincing given the language in the order ("consider") and the discretion they give: "it is for the Governor and the Legislature...to adopt a dollar-specific budget" (per Buckley J, 1).

²⁸⁴ Cf. Herman Schwartz, "Do Economic and Social Rights Belong in a Constitution?," 1238.

²⁸⁵ Ibid.

²⁸⁶ *CFE III*, 5.

jurisdiction where the legislature is already so palpably out of sync with the Constitution. Indeed, for the High Court to ignore the new Bill of Rights might present a bigger problem than the potential loggerheads between the courts and the parliament.

The second consequence flowing from judicial oversight of the budget is that such judicial review concerning fundamental rights is supposed to be a “hard-look” or correctness review. This implies that there would be some sort of proportionality test, at least proportionality in the positive sense: is the budget adequately tailored to the aim required by the Constitution? This is not unheard of in constitutional law – in the United States prophylactic remedies (positive measurements required by a Court to fulfil constitutional duties) can be tested in the appellate sphere to make sure they are strictly proportional to the aim sought to be achieved.²⁸⁷ A court will seek to answer two questions in analyzing the mandated remedy: (1) is there a “causal nexus” (including an analysis of ‘foreseeability’ and ‘proximate cause’) between the illegality found and the remedy ordered? and (2) is the remedy “necessary to achieve the aim of remedying the illegality?”²⁸⁸ It is the principle of necessity in this second leg which incorporates the proportionality test. In recent times, courts have interpreted this as requiring “carefully-tailored” measures aimed at “strict remedial proportionality.”²⁸⁹ How exactly this requirement for proportionality interacts with the reasonableness approach is beyond the scope of this paper.

One answer, perhaps an unsatisfactory one, lies in *CFE III*.²⁹⁰ Recall that the right to a ‘sound basic education’ had been framed by the Court of Appeals in terms of a flexible

²⁸⁷ Tracy A Thomas, “Proportionality and the Supreme Court Jurisprudence of Remedies,” 59 *Hastings Law Journal* 73 (2007): 98-99.

²⁸⁸ Tracy A Thomas, “The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief,” 52 *Buffalo Law Review* 301 (Spring 2004): 309.

²⁸⁹ Tracy A Thomas, “Proportionality and the Supreme Court Jurisprudence of Remedies,” 99.

²⁹⁰ *CFE III*.

minimum core – adequate teachers, adequate instruments and adequate buildings.²⁹¹ When it came to assess the final order, both the majority and the dissent agreed that the test should be: whether the government budget to achieve that minimum core was “reasonable.”²⁹² This is an interesting phenomenon – having moved to a minimum entitlement for each child, the Court of Appeals then fell back towards a programmatic review at an administrative law standard.²⁹³ The only really acceptable reason for this seems to be that, as both the majority and dissent recognized, budgets are (1) essentially forward-looking²⁹⁴ and (2) actually only estimates.²⁹⁵ They were therefore not as *directly* relatable to the (by this time, benchmarked) minimum core of the right to a ‘sound basic education.’

Without expressing final support for this position, this does offer one way of reconciling the reasonableness approach with a benchmarked minimum core. If a benchmarked minimum core is adopted in socio-economics rights litigation, and there are times as we have seen when this may be appropriate and just, then there are two types of analyses regarding government programs that ought to be undertaken by a court. First, for those policies *directly* relevant to the minimum core, for example, policies that outline benchmarks and indicators or otherwise touch or rely on the minimum core, a correctness review must hold. Thus in the Free Education Case, the *Statement Re: Introduction of FPE*²⁹⁶ and (what is sometimes called) the *National Education Policy*²⁹⁷ should have been

²⁹¹ *CFE II*.

²⁹² *CFE III*, 10 and 14.

²⁹³ *Ibid.*, 10.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ “Re: Introduction of Free Primary Education (FPE).”

held to have been violating the Constitution. An order to rectify this situation could then have been made. Second, for government action which is only *indirectly* relevant to the minimum core, and here is included other accompanying legislation such as the *Education Act*, the budget and other potential obstacles to FPE such as (for example) local government building ordinances, a reasonableness review may be appropriate. So the judge might say: “I cannot say for sure whether or not these actions will achieve the minimum core, but the government is acting in good faith so I will take a deferential approach to these.”

But two consequences flow from this for the Court of Appeals in *CFE III*. First, the court should have retained jurisdiction to ensure that each child was then afforded a sound basic education as promised. Second, and following this, over time it may have become clear that the budget passed was inadequate, in which case more narrowly-tailored interdicts could have been passed to ensure more money.

Bureaucratic remedies

In order to achieve movement within the civil service to overcome the burdens of inertia that have been hampering the realization of FPE, it will also be necessary to fashion some more targeted bureaucratic remedies. Hansen writes that huge gains can be made in administrative action by the shaming or removal of personnel,²⁹⁸ and this may be particularly true in developing countries. Swaziland has a very cumbersome civil service which does not have a high turnover rate (the civil service is very well paid) and therefore a court-sanctioned tightening of the screws is absolutely vital to achieve primary education for all. This paper

²⁹⁷ “National Policy Statement on Education” (Ministry of Education, 1999), but this is not a proper policy in form or effect.

²⁹⁸ Kent Roach and Geoff Budlender, “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?,” 348.

here suggests three types of bureaucratic remedy: two ‘strong’, mandated reporting and targeted mandamuses backed by contempt; and one relatively ‘weak’ and innovative, ‘recommendations’ to the Head of State.

Mandated reporting

Mandated reporting is a mandamus to a specific department or entity to report back about progress relating to a matter. This can increase the sense of supervision over a bureaucrat or a department. This sort of remedy is in effect the first type of order that should immediately accompany any structural interdict. In particular, for the Free Education Case, the High Court should order that the Ministry of Education provide a rapid report to outline the state of education using the indicators in the structural interdict (*Appendix I*). The Court should then order the Ministry of Finance to provide detailed reports about what it would take to meet these (now benchmarked) indicators for all eligible children. Both reports should preferably work at the level of the constituency (that is, they should be broken down into constituency reports) so that parliament’s sense of ownership of the problem can be increased. The ministries could then be asked to update these reports every six months or so. After 18 months, all the relevant stakeholders should have a much clearer picture of the progress being made towards realizing FPE.

No doubt this has a cost implication for a government (part of the enforcement costs concern of socio-economic rights), not just regarding the government’s time in preparing and submitting the report, but also in the court’s own time and related costs. Such an approach also has the possibility of building resentment of the court within government. And such a remedy also risks creating many of the problems we have mentioned earlier: a confusion over the separation of powers, undermining deliberative democracy and the potential for

reverse burdens of inertia. But it is absolutely vital if the bureaucratic bottlenecks and the unresponsiveness of the government is to be overcome with any sort of promptness.

Mandamus and contempt

If the government refuses to implement the structural interdicts, programmatic remedies or refuses to submit the mandated reports in accordance with the benchmarked minimum core (or indeed, in this instance the flexible minimum core or a minimalist right) as required, then there are a number of options open to it. The Court should first begin by issuing more specific interdicts mandating action by individual civil servants, especially to submit the relevant reports. It can back these more tailored orders with the power of contempt. These orders should also be exercised against the Minister of Education as the member of the Cabinet responsible for the policy area in question. If the Minister will not abide by orders of the court, then he must face imprisonment. This is not unheard of in socio-economic rights cases.²⁹⁹ In the enforcement of the *TAC2* judgment, the Treatment Action Campaign secured an order for contempt of court against a recalcitrant provincial Minister.³⁰⁰ And even recently in Swaziland an officer in the King's Office (no less) faced imprisonment for ignoring orders of the courts. In *Vilakati v Swazi National Treasury*³⁰¹ the Industrial Court

²⁹⁹ It has to be acknowledged (in comparison with the 'precariousness' noted above regarding the power of the courts over budgets and acts being seen as a power over the government, and not the legislature) that such a situation creates its own constitutional 'precariousness'. That is, if a Minister or officer is ordered to take some action but cannot because of the legislature or some other circumstance, she or he could be imprisoned. But the legislature or some other actor may deliberately obfuscate for this very purpose, ie to imprison the Minister. But if the official can demonstrate *bona fide* attempts to remedy the constitutional wrong, then she or he should avoid a finding of contempt.

³⁰⁰ *TAC v MEC for Health Mpumalanga* unreported, Case no 35272/02 (2002); Mark Heywood, "Contempt or Compliance? The TAC Case after the Constitutional Court Judgment" 4(1) ESR Review (2003): 7-10; Mark Heywood, "Preventing mother-to-child HIV transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health" 19 South African Journal on Human Rights 278 (2003).

³⁰¹ *Vilakati v Swazi National Treasury* (574/06) [2007] SZIC 36 (2007).

considered a reapplication by a former employee of the King's Office. The Court had previously ordered the employee's reinstatement, but this had been ignored by the Human Resources Department. A notably irate Industrial Court President ordered that the reinstatement be effected by the Human Resources Officer, who had been identified as the obfuscating party, upon pain of imprisonment for one month.³⁰² If similar disobedience to the constitutional order is practised by the Ministry of Education then the responsible party must be held accountable. Further, *Vilakati v Swazi National Treasury* demonstrates that the party to be named in the contempt proceedings need not be limited to a Minister or even a senior bureaucrat her or himself. Instead, the particular party responsible can be singled out for incarceration.

If this point regarding the contempt power is being laboured it is because cooperation from the government is unlikely, especially at the initial stages. During the Free Education Case, the Ministry refused to disclose its latest policy document regarding the implementation of FPE. In other jurisdictions this document would be considered public property, available to a citizen let alone a judge. However, the peculiar circumstances present in Swaziland described above mean that departmental cooperation must be extracted forcefully by the Court.

Cooperation is one aspect to the problem, but then there is implementation itself. If after the continued submission of reports, the government is no closer to meeting the constitutional requirement of FPE, then what then? Of course, it is true that money is not the single consideration in such a case, but it is undoubtedly a key factor. The underlying

³⁰² I have been given conflicting reports about whether he has actually been reinstated, but I understand he has been, which would be more evidence of the 'judicial tide'.

concern regarding judicial involvement in positive rights is the amount of judicial control over the state's finances.³⁰³

Once judicial responsibility for securing FPE is accepted, then the authority to exercise jurisdiction cannot be restricted to the Ministry of Education. The Ministry of Finance must also be asked to submit reports if no progress seems to be made after eighteen months or so. Further, any other department or government official must be forced to give evidence as necessary if unseemly delays remain.³⁰⁴ The High Court must not be shy in outlining very specific interdicts and back them with the contempt power and imprisonment in supervising the implementation of FPE.

But before we move on a warning about more tailored mandamuses. Two months after judgment in the Free Education Case, the applicants attempted to secure an order directing all head teachers to refrain from sending children who had not paid school fees home in light of the decision in the Free Education Case.³⁰⁵ The order was in fact made. However, the order was universally ignored and represents a substantial loss for the High Court. The potential instability of orders backed by contempt in socio-economic rights cases has been well noted.³⁰⁶ The interdicts aimed at the head teachers presents at least two lessons for the use of such orders. First, they should only be aimed at government officials. It seems that these interdicts were aimed at all head teachers, no matter what type of school was

³⁰³ Mark Tushnet, *Weak Courts*, 252.

³⁰⁴ As noted, there is an acceptable "degree of delay" see *Hlatshwayo v Government of Swaziland & the Attorney-General* supra n 25 but I think this time has already passed.

³⁰⁵ Unfortunately, I have not been able to secure a copy of this judgment but see Manqoba Nxumalo, "High Court Orders Schools Not to Expel Owing Pupils," *Times of Swaziland*, June 27, 2009 available at <http://www.times.co.sz/index.php?news=8817> <last accessed 20 November 2009>

³⁰⁶ Mitra Ebadolahi, "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa," 1586; Charles F Sabel and William H Simon, "Destabilization Rights: How Public Interest Litigation Succeeds," 1071.

involved.³⁰⁷ This was a mistake. And second, these sorts of orders should only be aimed at one individual at a time. This will ensure maximum effect – if the order is ignored, a very definite contempt trial can be immediately instituted. This should ensure a wider compliance within the individual’s targeted class.

Recommendations to the King

If after, say, two-and-a-half years there are still significant numbers of children not accessing their right to FPE, a “weaker” but “appropriate” remedy might be for the High Court to make recommendations to the King. These admittedly would be highly unusual remedies. But new constitutional dispensations may call for new remedies,³⁰⁸ and Swaziland’s is a relatively unusual constitutional order. The High Court is given the broadest possible ambit to do whatever is “appropriate” to secure the enforcement of the Bill of Rights.³⁰⁹ There are two recommendations that would be of benefit in securing the constitutional right to FPE but would maintain the constitutional balance and would be ‘democracy-promoting.’³¹⁰ Both would need to be framed as recommendations to the King, in the form of directions, rather than “orders” or “interdicts” for reasons outlined below.

The first recommendation would be for the King to appoint a new Cabinet. This is within the constitutional power of the King, who can revoke the appointment of the Prime

³⁰⁷ As noted, I do not have a copy of this judgment, but this is what I understand from newspaper sources and conversations with some of the people involved.

³⁰⁸ Danielle Elyce Hirsch, “A Defense of Structural Injunctive Remedies in South African Law,” 17. There is, in fact, a line of cases in South African jurisprudence supporting this proposition, see eg *Kate v. MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141, 152 (S. Afr.) and even *Grootboom* itself.

³⁰⁹ 2005 *Constitution*, sec. 35(2).

³¹⁰ Carol Steinberg, “Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-economic Rights Jurisprudence” 123 *South African Law Journal* 264 (2006): 276.

Minister “for incompetence.”³¹¹ In this case, a failure to enforce the Bill of Rights “promptly” could be a trigger for an incompetence dismissal. The High Court would need to word its recommendation carefully: after an unreasonable amount of time, the Prime Minister has been unable to realize the constitutional right to FPE, and therefore the High Court recommends that the King removes him in accordance with s 68(1)(a) of the Constitution. Once the Prime Minister is removed and a new one appointed, the King and the new Prime Minister would have a free hand to appoint a new Cabinet under s 68(4)(a). As mentioned, the King would still retain his discretion to act in such matters. But it would encourage the King to get better results from his Cabinet, and pressure on the Cabinet to get better results from the civil service. Further, if a new Cabinet was appointed it would then be under a heavy obligation to reform the legislative and budgetary framework to meet the “super trump” that is the constitutional right to FPE.

The second recommendation flows from the first. If the King will not appoint a new government, or if the new government continues to fail to meet the indicators and benchmarks required, then the High Court should direct the Head of State to call for fresh elections. This power is retained by the King in the Constitution: he may dissolve parliament “at any time.”³¹² It is submitted that this is an acceptable judicial tool and an acceptable reason for the King to dissolve parliament and call fresh elections. Currently, new elections are scheduled for 2013. If the Court was to act to try and call for the elections in 2012 this would go a long way to securing FPE in Swaziland.

Both of these remedies are innovative remedies with very little support in the literature. As stated, the High Court has a wide ambit to make new types of remedies. In

³¹¹ 2005 Constitution, sec. 68(1)(a).

³¹² Ibid., sec. 134(1)(b).

addition, one would have to travel far and wide to find a constitution which gives more *de jure* and *de facto* control over the executive and legislature to a Head of State. These two remedies are simply responding to that constitutional balance.

Relatively weak remedies are of course not unheard of in education litigation. In *CFE III*, the lower court (the Appellate Division of the Supreme Court of New York) gave the Governor and the Legislature a direction to “consider” a certain budgetary amount as meeting the constitutional minimum for a ‘sound basic education.’³¹³ Whether this was in fact an “order” or a “declaration” was later disputed, but in effect it operated as (to use my own language) a mere “recommendation.” The decision to issue such a ‘weak’ direction to the Executive results from a complex and interesting confluence of historical and political considerations in the United States. The most obvious and pressing consideration is that judicial involvement in the area of taxation is deeply unpopular. There is also a deeply divisive racial element to education litigation in that country. Considerations in the Kingdom are somewhat different: first there would be serious political ramifications for the judiciary if any type of strong-form order was directed towards the King; and, second, he is constitutionally protected from contempt proceedings.³¹⁴ Therefore, the Court would not only be unwise to aim orders at the King, but it may also be acting unconstitutionally.

The obvious problem with such weak remedies is that they might be ignored. However, it is submitted that these recommendations would have powerful and salutary effects, even if ultimately not followed. They would serve to focus political pressure on the government to abide by the Constitution and enhance democratic deliberation if polls were indeed called. Obviously there would be concomitant media pressure on parliamentarians

³¹³ per Buckley J, *Campaign for Fiscal Equity Inc v State of New York*, 10.

³¹⁴ 2005 *Constitution*, sec. 11.

and would-be parliamentarians to pledge to meet the requirement of FPE. But this might also serve as a catalyst for greater parliamentary scrutiny of government activity. If the Head of State is not willing to act, then it is unlikely that the parliament would attempt to pass a vote of no confidence in the Prime Minister, but there probably would be more robust interrogations of Ministers at the parliamentary and committee level. Further, in every parliament there has always been a number of MPs willing to press the government forcefully on certain issues, and these members might be willing to at least call for a vote of no confidence. This would all be good for the democratic processes in Swaziland, which are badly in need of strengthening.

Damages

If all of this still proves to be ineffective at securing FPE in Swaziland, there is an even more extreme option which needs to be explored: damages sounding in money. This is a remedy which is undesirable for many reasons but should not be lightly dismissed by the High Court. The government has seemingly seen this possibility and tried to head it off by incorporating an immunities from damages provision in the *Free Education Bill 2009*.³¹⁵ Nevertheless, if the right application can be made, and the right safeguards put in place, as outlined below, then the Court should not hesitate in finding this part of the *Free Education Act* (if it gets passed, which is probable) inconsistent with the Constitution and therefore void.

Damages for constitutional rights violations have a long history.³¹⁶ Further, the constitution specifically allows for moneys from the Consolidated Fund to be paid out by

³¹⁵ *The Free Primary Education Bill 2009*, sec. 13(2).

³¹⁶ At least in the United States, see Gene R Nichol, "Bivens, Chillicky and Constitutional Damages Claims" 75 *Virginia Law Review* 1117 (1989), but as is evidenced by the *Free Education Bill 2009*, the Swazi government also acknowledges this possibility.

order of the court without legislative approval. In this way the normal budgetary and legislative process can be usurped to make the claims for FPE a genuine “super trump” or claim to trump all other claims in the system of needs. Claimants would be given an order for an award of damages from the government, in the same form as a normal award governed by the *Government Liabilities Act 1967*. This damages claim would therefore be paid out of the Consolidated Fund by the Accountant-General. The 2005 Constitution specifically provides for the use of this Act where it says:³¹⁷

- “199 (1) Monies shall not be withdrawn from the Consolidated Fund except:
- (a) to meet expenditure that is charged upon the Fund in terms of this Constitution or any other law in force in Swaziland; or
 - (b) where the issue of those monies has been authorized by:
 - (i) An Appropriation Act...

The *Government Liabilities At 1967* was an Act in force at the time of the enactment of the Constitution and remains in force to the present time. It unequivocally authorizes the Accountant-General to make payments out of the “revenues of Swaziland” in accordance with the “judgment or order of [a] court.”³¹⁸ The High Court therefore has the power to hang financial muscle on the bones of the Bill of Rights by awarding damages to each individual child for the violation of their right to FPE.

There are two outstanding problems with this approach: calculating the amount to be awarded and calculating how such an amount should be paid. Calculating the amount is a particularly tricky business. Would the sum be calculated at a flat rate for each child or would there be a means test which paid poorer children more? This is a particularly difficult

³¹⁷ 2005 Constitution, sec. 199, my emphasis.

³¹⁸ *Government Liabilities Act*, 1967, sec. 4.

area and not one that is familiar to constitutional law. However, while there are difficulties it is not wholly insurmountable – estimates of the cost of educating a child in Swaziland at a *per annum* rate are in existence.³¹⁹ The trick will be to establish how much of this money needs to stay with the state for the running of schools, payment of teachers, and so on. But all this is certainly not an overly complex challenge – it will be a question of the quality of the application and how well the applicants can explain their analysis to the Court. Some of the earlier stages of the litigation may already have brought some clarity to the calculation. And actually having to focus on calculating costs may be exceedingly helpful in pointing out to the government where the gaps are and the areas where spending needs to be increased. Framing the analysis as a damages claim may be a particularly powerful way of overcoming problems or delays. Once an individual sum is settled upon, there remains the problem of how such an amount ought to be paid. It is clear that the claim for compensation can be made on behalf of “a group of which [a] person is a member.”³²⁰ Therefore, group claims are permitted under the Bill of Rights. But a simple pay out to each member is unlikely to “enforc[e] or secur[e] the enforcement”³²¹ of FPE. Many guardians or even children themselves might not be able to resist the temptation to take the money and run. Instead, it might be appropriate for the Court to order a trust to take care of the funds as a kind of *guardian ad litem* for all children in the Kingdom.³²² This admittedly would be highly unusual, but the High Court must bear in mind that it is legally considered the upper guardian

³¹⁹ Although, having reviewed all the documents, these are neither readily available nor readily understandable, see Alice Peslin, *Planning Workshop Report* (Swaziland: Ministry of Education, 2007) and the latest figure brought out by the Ministry of Education in the *Free Education Bill 2009* are hotly disputed by principals Mduzuzi Magagula, “Free Education Not Free,” *Times of Swaziland*, April 26, 2009.

³²⁰ 2005 Constitution, sec. 35(1).

³²¹ Ibid., sec. 35(2).

³²² Which it should be able to do under the power of Upper Guardianship (see following note).

of all children and is under a solemn and overriding obligation to meet their best interests.³²³

If an unusual or novel type of trust remedy is thought to be feasible by the Court, and likely to do a better job than the government in getting all children in school and keeping them there, then the Court must not wash its hands of its own constitutional obligations.

Even if such an amount was ordered to be put into such a Trust, of course, there is no guarantee that it would be made. The money needs to be signed off by the Auditor-General, who is accountable to the Minister of Finance.³²⁴ As a damages claim would possibly take up a substantial part of the budget, it is unlikely that the Auditor-General would pass the cheque, as sometimes happens in controversial or large awards in Swaziland.³²⁵ Parliament itself could probably also find other ways to circumvent such a ruling: perhaps through an Act of Parliament to that effect. But if the ruling was well-designed enough there is some chance that a Trust would stand and be effective in achieving FPE where government has thus far failed. And if not, there are infinitely greater benefits to undertaking such an analysis and attempting to fashion a damages remedy than stopping short of such an approach. For starters policy-makers, legislators and civil society will be able to readily analyze the amounts needed to realize FPE, and importantly where interventions are most needed. In addition, such an analysis and debate within government might help the relevant ministries overcome some of the internal bureaucratic barriers that seem to be hampering effective action. Debates specifically relating to quantifiable resource allocation need to be brought out of the corridors of government and into a potentially more neutral forum. The threat of a

³²³ The Upper Guardian law is actually a Roman-Dutch common law rule that is not only taken seriously by the courts, but widely understood in the community. It gives the High Court a virtually unrestrained jurisdiction over children.

³²⁴ Despite my best efforts, I have been unable to find which law requires this, although there is agreement that this is indeed the law.

³²⁵ Conversation with unnamed judicial officer, May 2009.

damages claim may be a particularly effective way of forcing this relocation. So even if the Auditor-General decides that the moneys cannot be paid out from the case, most of the good work that such a suit could do would already have been achieved. As discussed, the idea that the refusal by the government to follow orders of the courts would bring the constitution into disrepute does not apply to a jurisdiction where the constitution is already being disregarded. On the contrary, the fact that a suit can bring substantial pressure onto the government in Swaziland justifies even a constitution that is being disregarded in some crucial areas. The lack of a suit, or in this part the discretion not to pursue a damages claim, is a far worse outcome than if the government refuses to abide by the decision of the High Court. And that is the case for each step of the compliance remedies here outlined.

CONCLUSION

Each of these compliance remedies applies whether the High Court adopts a ‘minimalist’ right, a ‘flexible minimum core’ or a ‘benchmark minimum core.’ But the important step to be taken by the High Court is to issue a structural interdict, which will then allow it to undertake these types of compliance remedies. Only then will a proper dialogue commence between the courts, the government, the parliament and civil society about the proper scope of FPE and its universal implementation. Whether action by the High Court will lead to the faster realization of the right for Swazi children is difficult to say. My own sense is that it will. But there is a larger structural aspect at issue here. This case essentially asks where authority lies in Swaziland. Of course, a stronger form of judicial review by the High Court will not and cannot answer that question definitively. But it could create a lasting shift in the balance of power. And if that shift is towards increased procedural fairness and the further development of democracy, then the High Court of Swaziland must take a stand.

APPENDIX 1: Example of indicators

(taken from Hugh Hawes, *Questions of Quality: Primary Education and Development* (Essex: Longman Group Ltd, 1990), 7)

CONCERN FOR QUALITY

is only in the last years and against massive professorial opposition that universities in anglophone Africa have begun to face the crucial task of preparing leadership for this level. When attempts were being made in Kenya to steer the B.Ed. Primary Education, designed for precisely such a purpose, through the university senate, one professor remarked

TABLE I

Summary: School factors and achievement in the Third World

School quality indicator	Expected direction of relationship	Total number of analyses	Number of analyses confirming effect
SCHOOL EXPENDITURES			
1 Expenditures per pupil	+	11	6
2 Total school expenditures	+	5	2
SPECIFIC MATERIAL INPUTS			
3 Class size	-	21	5
4 School size	+	9	4
5 Instructional materials			
Texts and reading materials	+	24	16
Desks	+	3	3
6 Instructional media (radio)	+	3	3
7 School building quality	+	3	2
8 Library size and activity	+	18	15
9 Science laboratories	+	11	4
10 Nutrition and feeding programs	+	6	5
TEACHER QUALITY			
11 Teacher's length of schooling			
Total years of teacher's schooling	+	26	12
Years of tertiary & teacher training	+	31	22
12 In-service teacher training	+	6	5
13 Teacher's length of experience	+	23	10
14 Teacher's verbal proficiency	+	2	2
15 Teacher's salary level	+	14	5
16 Teacher's social class background	+	10	7
17 School's percentage of full-time teachers	+	2	1
18 Teacher's punctuality & (low) absenteeism	+	2	0
TEACHING PRACTICES/CLASSROOM ORGANIZATION			
19 Length of instructional program	+	14	12
20 Homework frequency	+	8	6
21 Active learning by students	+	3	1
22 Teacher's expectations of pupil performance	+	3	3
23 Teacher's time spent on class preparation	+	5	4
SCHOOL MANAGEMENT			
24 Quality of principal	+	7	4
25 Multiple shifts of classes each day	-	3	1
26 Student boarding	+	4	3
27 Student repetition of grade	+	5	1

Summary from a review undertaken by Bruce Fuller (1987) for the World Bank.

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