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The Basic Education Laws Amendment Bill: A case study in transformative constitutionalism beyond the courts

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Summary: *The Basic Education Laws Amendment Bill (BELA Bill) is one of the most significant reforms to the South African basic education legal framework since 1994. While the amendments impact on a wide range of issues, this article focuses specifically on the BELA Bill's amendments to the policy-making functions of the localised structures in education governance, known as school governing bodies (SGBs), in particular, changes to the unchecked autonomy the SGBs in making language and admission policies for schools. The article notes that the model of education decentralisation that was adopted in post-1994 democratic South African has been highly contested. This manifested during the country's 1994 negotiated transition, continued in the school governance litigation and in the BELA Bill public participation processes. The article argues that the jurisprudence emanating from school governance litigation acknowledges the history of racism and apartheid spatial injustice that has had the effect of limiting access to well-resourced schools for black people in South Africa. The South African Constitutional Court, therefore, placed a duty on SGBs when formulating policies to be cognisant of the broader systemic concerns in education impacting on the access rights*

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of learners. The jurisprudence has now been codified into law in the school governance reforms in the BELA Bill. The article illustrates how the formulation of school governance principles, and their ultimate inclusion in the BELA Bill, exists as a case study in transformative constitutionalism beyond the courts. This is due to a range of contributing factors, such as the interventions of progressive amici *in these cases; a degree of judicial activism displayed by the Constitutional Court in the school governance litigation; the proactive codification by the state of the jurisprudential principles; and the progressive support for the inclusion of the school governance amendments in the BELA Bill during the public participation processes.*

Key words: *Basic Education Laws Amendment Bill; basic education; school governing bodies; transformative constitutionalism*

1 Introduction

The Basic Education Laws Amendment Bill (BELA Bill)[1] constitutes one of the most significant reforms to the South African legal framework for basic education since 1994. The BELA Bill entails amendments to the South African Schools Act of 1996 (Schools Act) and the Employment of Educators Act of 1998.

The BELA Bill covers a wide array of amendments to the legal framework, including, but not limited to, the tightening of the prohibition against corporal punishment; the extension of the compulsory phase of education to include grade R; the imposition of criminal sanctions on parents who fail to send their children to school during the compulsory phase of education; and the registration of home schooling. A significant and highly-contested aspect of the amendments, and which is the focus of this article, is the alignment of the legal framework with the school governance jurisprudence of the South African Constitutional Court (Constitutional Court), in particular, the language and admission policy-making functions of the localised structures in education governance known as the school governing bodies (SGBs).

The BELA Bill was first published for comment in 2017 by the Department of Basic Education and received more than 5 000 written submissions. A revised version was introduced to Parliament

1 GG 45601 of December 2021.

four years later, in 2021.[2] Public hearings on the BELA Bill were held both nationally and provincially.[3] Following further amendments, the BELA Bill was passed in the National Assembly on 16 May 2024. As at the date of national elections at the end of May 2024, the BELA Bill was on President Ramaphosa's desk waiting to be signed into law. This version of the BELA Bill contains significant changes to earlier iterations.

South Africa's transition to a constitutional democracy in 1994 was characterised by, among others, the inclusion of a Bill of Rights in the Constitution; the recognition of the necessity to redress apartheid inequalities; the principle of cooperative governance between national, provincial and localised structures of government; and the notion of a participatory democracy. In basic education, this necessitated the complete overhaul of a system of centralised and authoritarian control of school governance to a three-tier model of decentralised and devolved system of governance.

Within this model, the Department of Basic Education establishes broad-based norms and policies.[4] The implementation of law and policy and the provision of schooling is a provincial function. SGBs, which are made of up parents, educators, non-educator staff and older learners, are designated specific functions by the Schools Act to facilitate the smooth running of their schools and to make school-based policies.

The policy-making functions of SGBs include determining the mission statement of a school;[5] admissions policy;[6] language policy;[7] the school's code of conduct, including pregnancy policies;[8] religion policy;[9] and the fees to be charged at a school.[10]

The aim of this article is to illustrate how the school governance amendments in the BELA Bill serve as a case study in transformative constitutionalism beyond the courts. The article sets out how

2 Some of the more highly-contested provisions included the school governance amendments, the sale of alcohol on school premises and the home schooling provisions. See Parliament of the Republic of South Africa 'The Basic Education Laws Amendment Bill [B2-22] Draft National Report' (August 2023) 9 (Draft National Report).
3 According to a parliamentary report on the hearings, there were 11 264 participants who attended the public hearings and 32 941 made written submissions. Draft National Report (n 2) 14 & 37.
4 Sec 3 National Policy Act of 1996.
5 Sec 20(1)(c).
6 Sec 5(5).
7 Sec 6(2).
8 Sec 7.
9 Sec 8.
10 Sec 39.

the progressive principles developed by the school governance jurisprudence are codified by the amendments in the BELA Bill and are now infused into the SGB policy-making processes. It is hoped that this will have the effect of constraining the hitherto unchecked autonomy that SGBs of former predominantly white schools utilised to determine who may access these schools. The article further aims to illustrate how the formulation of these principles, and their ultimate inclusion in the BELA Bill, is due in parts to a degree of judicial activism displayed by the Constitutional Court in the school governance litigation; the interventions of progressive *amici* in these cases;[11] the codification by the state of these principles; and the progressive support for the amendments during the public participation in the legislative processes.

Part 2 of the article discusses the doctrine of transformative constitutionalism and the critique of this doctrine as being too court centric, with limited permeation of progressive legal principles beyond the courts to redress structural inequality. Part 3 provides an historical overview to some of the education decentralisation debates that led to the formulation of the original SGB policy-making functions in the Schools Act. Part 4 highlights some prevailing commentary on how SGB functions have been exploited by predominantly former white schools to limit access to these schools. The part then summarises the school governance litigation that occurred mainly between SGBs and provincial education departments and extracts the main principles from this jurisprudence. Part 5 discusses the BELA Bill and the submissions made to the Bill, and finally provides some analysis on the transformative potential of the Bill.

2 Transformative constitutionalism ought not to end on the steps of the court

Klare in his seminal article outlining his vision of the doctrine describes transformative constitutionalism as

> a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in historical context of conducive political developments) to transforming a

11 Progressive civil society organisations include organisations advocating equal access to quality education for all. These include organisations such as Equal Education, the Equal Education Law Centre, the Legal Resources Centre, the Centre for Child Law and Section27. See F Veriava *Realising the right to basic education: The role of the courts and civil society* (2019) 155-159.

> country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.[12]

Klare goes on to identify a host of features within a constitution that justify the description of it as having transformative potential. This includes a substantive or 'redistributive' conception of equality; the inclusion of several socio-economic rights that impose duties on government to reduce inequality; the notion of participatory governance; the horizontal application of the Bill of Rights; multiculturalism and ubuntu; and, significantly in the context of this article, which analyses how access to a quality education was racialised, a commitment to the redress of the apartheid legacy.[13]

Critics of the doctrine of transformative constitutionalism, however, charge the doctrine with being too 'court centric'.[14] These critics argue that there is an over-reliance on the courts and on rights discourse to address the deep structural issues of inequality in South African society and that this approach has failed to address these issues. Critical legal scholar Sibanda notes that

> [f]rom the literature, there is little evidence of other sustained work within the discourse *directed at inculcating or influencing institutional or structural power shifts or far-reaching redistributive innovations beyond the courts*.[15]

> So, while it certainly is arguable that transformative constitutionalism has successfully established some measure of internal discursive coherence, I argue that this has been possible largely through proponents focusing their discursive interventions on institutional and rights-related adjudication, whilst rarely demonstrating how transformative constitutionalism grapples with undoing the realities of South Africa's largely-undisturbed racial, social, cultural and epistemic hierarchies that obviously are fertile ground for what undoubtedly is a growing sense of disillusionment with respect to the Constitution and its popular promise to 'improve the quality of life of all citizens'.

This article submits that the BELA Bill case study provides a counter-narrative to the view that the doctrine of transformative constitutionalism is ineffective due to it being overly court centric. The BELA Bill case study illustrates how the principles from the school governance jurisprudence emanating from the courts have served to guide the legislative process. Furthermore, the reforms introduced

12 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 150.
13 Klare (n 12) 155.
14 S Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 3 *Stellenbosch Law Review* 390.
15 Sibanda (n 14) 402 (my emphasis).

within this legislative process have the potential to transform the institutional power relationships, specifically those of SGBs of former white schools that have continued to maintain patterns of apartheid spatial geography, thereby limiting access to these schools. As such, the case study is in alignment with the approach adopted by scholars such as Brickhill and Van Leeve in analysing transformative constitutionalism. They assert that it is the executive and legislature, through law and policy making, that play the primary role in structural change. They note further that this places a

> greater responsibility on rights claimants who must, in addition to legal battles, engage in political struggles with these two branches of government to develop the content of socio-economic rights as a basis for transforming the quality and access to social and material resources and services necessary to live a dignified life.[16]

3 Decentralisation debates during the negotiated transition

Van der Westhuizen has noted that during the negotiations prior to South Africa's 1994 transition, minority groups had proposed that while schools be open to all children living in the neighbourhood, the system be 'flexible' enough, to allow for schools to serve 'the particular language, religious, cultural and philosophical needs' of communities.[17] Van der Westhuizen disagreed with this, noting:[18]

> Public schools exclusively or specifically for cultural, religious, or linguistic groups would not seem to be acceptable either. Not only would such a state of affairs serve to perpetuate apartheid in disguise with state funding and official blessing, but as a practical matter, it would be extremely difficult to allocate funds and other supporting facilities on an equal basis.

The prevailing education scholarship on the education decentralisation debates that occurred during South Africa's negotiated transition highlight how the negotiations translated into the imperfect architecture of the basic education legal framework. Sayed, for example, notes that both the previous ruling National Party and the liberation movements, including the current ruling party, the African National Congress (ANC), shared a commitment

16 J Brickhill & Y van Leeve 'Transformative constitutionalism – Guiding light or empty slogan?' in A Price & M Bishop (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 150-151.

17 J van der Westhuizen 'A post-apartheid educational system: Constitutional provisions' (1989) 21 *Columbia Human Rights Law Review* 130. Van der Westhuizen was involved in the drafting of the Constitution. He would later serve as a justice of the Constitutional Court.

18 Van der Westhuizen (n 17) 130.

to some form of educational decentralisation albeit for very different political and ideological reasons.[19]

For the National Party, education decentralisation was about parental choice and parental autonomy for those who paid school fees. Sayed notes: [20]

> The National Party in the last years of apartheid was committed to the ideal of total individual freedom of choice without any forms of intervention or regulation by the state. Underlying this ideal was the notion of the 'individual as consumer' reflected in the discourse of 'parental choice' and 'consumer power'.

The notion of parental choice has been entrenched in the education clauses of certain international and regional instruments to ensure the protection of minority rights.[21] In South Africa it has often been used as proxy by conservative white groupings to justify an entitlement to ethnic and cultural separateness.[22]

On the other hand, for the ANC, decentralisation was rooted in resistance politics.[23] Sayed notes:[24]

> The notion of grassroots community participation was constituted in the context of a state which was oppressive and where the state itself was the primary apparatus of oppression. Thus, grassroots community control was the antithesis of state control. Power to the people as opposed to that of the state reflected a strong commitment to participatory democracy and the decentralisation of control.

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19 See, eg, Y Sayed 'Discourse of the policy of educational decentralisation in South Africa since 1994: An examination of the South African Schools Act' (1999) 29 *Compare: A Journal of Comparative and International Education* 141; N Carrim 'Democratic participation, decentralisation and educational reform' in Y Sayed & J Jansen (eds) *Implementing educational policy: The South African experience* (2001) 98.

20 Carrim (n 19) 142.

21 Art 13(3) of the International Covenant on Economic Social and Cultural Rights (ICESCR) requires states to respect parents' rights to establish schools 'to ensure the religious and moral education of their children in conformity with their own convictions'. Art 2 of Protocol 1 to the European Convention on Human Rights (ECHR) requires states to 'respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions'.

22 See, eg, *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC). The *amicus curiae,* the South African Foundation for Education and Training, made arguments relying on parental choice and the protection of minority rights. The mission of the Foundation was described as 'to support a Christian value system and prescribe to the principle of mother tongue education. The Foundation also aspires to promote education in the South African community as a whole with special reference to the Afrikaans medium education.'

23 Sayed (n 19) 143.

24 As above.

Macfarlane, in a 2022 article responding to the condemnation of the BELA Bill by various organisations such as AfriForum and Solidariteit,[25] makes similar observations. She states that while the liberation movements advocated parental involvement, particularly following the 1976 Soweto uprising and as response to the authoritarian style of education of the apartheid regime,'[f]or the Nats, placing as much power as possible – and the ability to raise funds – at the school level would largely isolate former white schools from significant changes after the transition'.[26] She describes this as 'transition tricks'.[27] She then goes on to describe how in 1992, shortly before the transition to democracy and while negotiations with the ANC were under way, the apartheid government converted most white public schools to model C schools[28] and control of these schools was handed to SGBs elected by parents.[29] McFarlane notes further that that the current arrangement of total autonomy of SGBs in policy making as provided in the Schools Act was because of pressure to reach a negotiated settlement at a time when South Africa was on the brink of civil war.[30]

On the model of decentralisation that was adopted by the Schools Act, Woolman and Fleisch note:[31]

> The new government realised that various political and legal choices would have a number of unintended consequences. The drafting history is as a result, replete with references to the 'provisional' nature of the structure being created by the state's commitment to revisiting

25 Afriforum and Solidariteit are both civil society organisations representing white minority interests. AfriForum describes itself as a civil rights organisation that 'mobilised Afrikaners, Afrikaans-speaking people and other minority groups in South African and protects their rights', http://AfriForum.co.za/en/ (accessed 13 December 2023).

26 R McFarlane 'School Bill is not betrayal, it's a belated moved to update the law' *Sundays Times* (Johannesburg) 3 July 2022, http://www.timeslive.co.za/sunday-times/opinion-and-analysis/opinion/2022-07-03-schools-bill-is-no-betrayal-its-a-belated-move-to-update-the-law/ (accessed 25 October 2023).

27 As above.

28 In its dying days, the apartheid government developed a set of governance options for white schools that would pass substantial powers to the parent bodies of these schools. Under Model A, the school would become fully private; under Model B it would remain a state school; and under Model C the school would become state-aided or semi-private, with SGBs and determining the school fees for the hiring of more teachers beyond that provided by the state and maintenance of facilities.

29 McFarlane (n 26).

30 The FW de Klerk Foundation in its submission has argued that the amendments would amount to an 'irreparable, unilateral and permanent violation' of the 1994 settlement with ANC. FW de Klerk Foundation 'Comments on the Draft Basic Education Laws Amendment Bill, 2022' para 12, http://15-08-2022-FW-de-Klerk-Foundation-submissions-on-BELA-Bill14897.pdf (fwdeklerk.org) (accessed 25 October 2023).

31 S Woolman & B Fleisch *The Constitution in the classroom: Law and education in South Africa 1994-2008* (2009) 6.

and revamping those structures as it consolidated its power and shifted its policy imperatives.

Thus, it appears that the original policy-making functions of SGBs in the Schools Act were legislated within the political context of the negotiated transition wherein the then National Party sought to entrench group rights through an absolutist model of decentralisation. Liberation movements conceded to this to avoid a stalemate, but as suggested by Sayed, a more cooperative governance model, where centralised norms were established, was imagined by the liberation movements to transform the education system.[32] Woolman and Fleisch also note that the model that was adopted during the transition was never meant to be immutable, particularly once it was tried and tested.[33]

4 The school governance jurisprudence

4.1 Context in which the school governance litigation emerged

The various policy-making functions of SGBs were highlighted in the introductory part of this article. According to Brickhill and Van Leeve, the SGBs of former white schools have used their policy-making functions to determine who has access to their schools. They note that these schools have often utilised their powers to 'act as gatekeepers at the "doors of learning", purporting to represent both the internal and broader community within which a school is located'.[34]

In this context, language disputes in former white schools have had racial overtones as they at times have excluded African learners in single-medium Afrikaans-language schools.[35] Similarly, in admission disputes where these schools have capped learner enrolment and only allowed access to feeder communities in historically-white areas, this has also had the impact of restricting access for learners who are not white to these schools. Furthermore, school fees have tended

32 Sayed (n 19) 150.
33 Woolman & Fleisch (n 31).
34 J Brickhill & Y van Leeve 'From the classroom to the courtroom: Litigating education rights in South Africa' in S Fredman and others (eds) *Human rights and equality in education* (2018) 152.
35 In *Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (WLD) the High Court held that black learners had been unfairly discriminated against when their application to a dual-medium school had been rejected on the basis that the school had an exclusively Afrikaans culture and ethos, which would be detrimentally affected by admitting learners from a different cultural background.

to weed out poor learners at wealthy schools, particularly when exemption policies are not implemented.[36] Homogenous Christian schools have been unwelcoming spaces for learners who are secular or of other religions.[37] Codes of conduct that prohibit pregnant learners from school have discriminated against girl learners on the grounds of gender and pregnancy.[38]

Thus, within these ongoing disputes, provincial education departments have sought to curb the powers of the SGBs as gatekeepers. Unfortunately, this has often occurred unlawfully with provincial education departments bypassing the due process procedures outlined in the Schools Act. This has resulted in litigation initiated by SGBs against provincial education departments framed as lawfulness disputes, without delving into the rights implications for the learners impacted by the SGB policies.

Various progressive civil society organisations, therefore, entered the fray as *amici* to highlight the rights violations of learners and the broader systemic concerns at play. Another noteworthy repeat player in these disputes has been the Federation of Governing Bodies for South African Schools (FEDSAS). FEDSAS is a national representative organisation of SGBs that is largely representative of former white schools. FEDSAS has litigated, both as a party to litigation as well as by intervening as *amicus curiae* in cases, to argue for the autonomy of SGBs to formulate their own policy on issues such as language, admissions and religious policy at former white schools.[39]

4.2 The school governance case law

The first school governance case before the Constitutional Court was *Head of Department, Mpumalanga Education Department v Hoerskool Ermelo (Ermelo)*.[40] The school was a single-medium Afrikaans school

36 See *Centre for Applied Legal Studies & Others v Hunt Secondary* [2007] ZAKZHC 6, in which the Centre for Applied Legal Studies assisted parents who were being sued by the schools for outstanding school fees, despite being legally entitled to exemptions. See also *Western Cape Education Department v S* 2018 (2) SA 418 (SCA). A single mother was refused an exemption because she could not give details of the income of the child's father.

37 *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* 2017 (6) SA 129 (GJ) (*OGOD*).

38 *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC) (*Welkom*).

39 FEDSAS intervened as *amicus curiae* in *Rivonia*. In *Federation of Governing Bodies for South Africa v MEC for Education, Gauteng* 2016 (4) SA 546 (CC) FEDSAS was the applicant. In *OGOD* (n 37) the CEO of FEDSAS was the main deponent on behalf of the respondent schools.

40 2010 (2) SA 415 (CC). In an earlier language case of *Laerskool Middelburg v Departmentshoof: Mpumalanga Department van Onderwys* 2003 (4) SA 160 (T)

that was not filled to capacity. There were African learners struggling to find spaces in English-medium schools as these were full. The head of department (HOD) of the Mpumalanga Provincial Department of Education, therefore, requested that these learners be admitted to Ermelo High School. When the SGB refused, the HOD withdrew the functions of the SGB and appointed an interim SGB that altered the school's language policy to a dual-medium school.

The Constitutional Court considered whether the HOD had the power to override the SGB's power to determine the language policy and to appoint a new SGB. The Court held that an HOD could only do this on 'reasonable grounds and in order to pursue a legitimate purpose', and in accordance with specified due process provisions, which were not followed in this instance. Despite this finding, the Court nevertheless directed the school to review its language policy to accommodate English-speaking learners.

In *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* (*Welkom*)[41] the Constitutional Court was asked to address the legality of an instruction from the HOD in the Free State to two school principals to ignore the pregnancy policies developed by their respective SGBs. The principals at both schools had in terms of their SGB policies prohibited two learners from returning to school in the year they had given birth. The HOD in both cases instructed the principals to immediately readmit the learners. The Centre for Child Law and Equal Education intervened as *amici* to argue that the pregnancy policies were discriminatory and violated the rights of girl learners. Equal Education further argued that provincial education departments ought to be permitted to raise the unconstitutionality of pregnancy policies.[42] The schools

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the HOD instructed an Afrikaans-medium school to admit 20 learners seeking English medium instruction. The SGB challenged the authority of the provincial department to do this. However, the High Court held that the learners' right to choose their medium of instruction could not be undermined where there was a need to share the school's facilities. A different stance was adopted in *Minister of Education, Western Cape v Governing Body Mikro Primary* 2006 (1) SA (SCA) 66. Noteworthy also is *Governing Body Hoerskool Overvaal v Head of Department of Education* [2018] ZAGPPHC (1) that occurred after *Ermelo.* The High Court set aside a provincial department instruction to change the Afrikaans school to a dual-medium school and admit 55, predominantly African, learners seeking English instruction. The Court held that the provincial department was not entitled to override the school's language and admission policies, particularly when English-medium schools in the area had the capacity to accommodate the 55 learners. This case is distinguishable from the other language cases specifically because schools in the area did have capacity. Despite this, those organisations arguing for SGB autonomy rely on this case as precedent in their favour.

41 *Welkom* (n 38).

42 Equal Education's heads of argument 12 February.

had argued the constitutionality of the pregnancy policies were not before the Court.

The Court held that SGBs had the power to develop pregnancy policies, even though the policies undermined the rights of pregnant learners. The HOD, therefore, could not merely override these policies but had to follow the processes set out in the Schools Act. The Court nevertheless ordered the two schools to review their respective pregnancy policies in terms of section 172(1)(b) of the Constitution, which gives the court a wide discretion to make any order that is just and equitable on the basis that the policies *prima facie* violated several of the girl learners' rights.

The case of *MEC for Education in Gauteng v Governing Body of Rivonia Primary* (*Rivonia*)[43] arose because of a dispute between Rivonia Primary, a former model C school, and the Gauteng Department of Education when a learner was refused a place in grade one at the school. The school's reason for its refusal was that it had reached its capacity in terms of its admission policy determined by the SGB. The HOD overturned the school's refusal of the application and issued an instruction to the principal to admit the learner. The school approached the courts for a determination of whether the HOD had the power to override the SGB's admission policy, specifically, its capacity determination, and thereby direct the school to admit the learner to the school. Equal Education and the Centre for Child Law jointly intervened as *amici curiae*, as did FEDSAS.[44]

The Constitutional Court held that the way in which the HOD had changed the SGBs admission policy was not done fairly or reasonably.[45] Despite this, the Court held that the school could not be completely inflexible in their policies when deciding the fate of an individual learner. It held that while SGBs have the power to determine their

43 *Rivonia* (n 10).

44 Equal Education and the Centre for Child Law argued that any interpretation of the Schools Act must consider the socio-economic context, in particular, the systemic inequality that persists in public education. Such an interpretation should also promote the rights to equality and basic education. They argued that an 'appropriate balance' must be sought between the powers of the SGB to make a capacity determination to develop its own admission policy, and that of the obligation of the provincial department in terms of the Schools Act to ensure that every eligible learner had a place in a school. Their intervention, therefore, sought to develop criteria setting out the conditions and circumstances when it would be appropriate for the provincial department to intervene to admit children, in excess of the initial capacity determination of the SGB. See Heads of argument of Equal Education and the Centre for Child Law 18 April 2013 paras 45-46. FEDSAS, by contrast, argued that the Schools Act grants the power to admit learners to the individual SGBs and not to the provincial department. See FEDSAS' Heads of argument 23 April 2013.

45 *Rivonia* (n 10).

admission policy in terms of the Schools Act, that power is never final but is subject to provincial department confirmation[46].

In the Constitutional Court case of *Federation of Governing Bodies for South Africa v MEC for Education, Gauteng (FEDSAS)*,[47] FEDSAS brought an application challenging the validity of specific provisions of the Gauteng regulations concerning the admission of learners to public schools. The most contentious was an interim provision that, until the MEC has determined a feeder zone for schools, parents must enrol their children in schools within a five kilometre radius of their homes or place of work. FEDSAS argued that the provision entitling the MEC to declare school feeder zones undermined the powers of SGBs to formulate their own policies.

Equal Education intervened as *amicus curiae*. The nub of their intervention was that the interim provision entrenched current discriminatory practices that resulted in the exclusion of poorer learners from more affluent schools, because it was largely affluent people that lived in these areas. Equal Education requested that the Constitutional Court compel the MEC to determine the feeder zones within a specific time frame so as to facilitate the redress of the legacy of apartheid spatial planning.[48] The Court stated in relation to the *amicus curiae* intervention:[49]

> The *amicus* also made a substantive attack on the constitutional validity of the default feeder zones presently prescribed in regulation 4(2) on the ground that they unfairly discriminate by perpetuating apartheid geography. The gut of the objection is that default feeder zones are defined in spatial terms of place of residence or of work. *Since the apartheid residential and workplace lines remain firm, the impact of the criteria of the MEC is to prolong and legalise racial exclusion.*

The Court held that there was traction in the contention of the *amicus curiae* that the default feeder zone position had the impact of prolonging racial exclusion, but held that the *amicus curiae* was potentially introducing a new cause of action that the Court was not certain was permissible.[50]

46 This was in terms of sec 5 (7) of the Schools Act.
47 *FEDSAS* (n 39).
48 EE argued further that the obligations imposed by the right to equality and the right to basic education required that the state 'not only provide education but … also simultaneously redress past imbalances caused by the racially discriminatory laws and practices of the apartheid era'. See Equal Education's heads of argument 14 April 2016 546 (CC) paras 9-10.
49 *FEDSAS* (n 39) paras 38-39.
50 As above.

The Court held that the regulations, including the power of the MEC to declare feeder zones, were valid, but simultaneously held that such feeder zones had to be finalised within one year from the judgment, thus ensuring that the default interim provision did not exist indefinitely.

Religion policies of SGBs were in issue in the case of *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* (*OGOD*).[51] While this was not a Constitutional Court case, it is worth mentioning because the case relied on the principles established in the *Ermelo* matter. The applicants instituted proceedings against six public schools, challenging the Christian-only religious practices at these schools on the basis that they violated the National Policy on Religion and Education (Religion Policy)[52] and various constitutional rights of learners. In response, the schools, supported by FEDSAS, challenged the constitutionality of the Religion Policy as violating the religious freedom of the schools in terms of section 15 of the Constitution to single religion practices within largely homogenous Christian schools.

The Council for the Advancement of the South African Constitution (CASAC) intervened as *amicus curiae*.[53] CASAC argued that the constitutionality of the Religion Policy was underpinned by the principles of diversity and equity and that the policy was premised on undoing the harms of Christian national education under apartheid. CASAC argued that SGB religious policies must conform to the Religion Policy as this was consistent with the Constitution. This would enable SGBs to issue rules accommodating the school's circumstances, provided that these rules are consistent with national policy and the Constitution. CASAC further argued that single religion schools constituted a state endorsement of a particular religion, which it asserted was unlawful.

The High Court confirmed that public schools were not permitted to promote, or allow their staff to promote, only one or predominantly one religion to the exclusion of others. It explained that '[f]irst, feeder communities continually evolve, and must be encouraged to evolve, given an unnatural residential demographic configuration that has resulted from historic laws that were racially skewed'.[54]

51 *OGOD* (n 37).
52 GG 25459 of September 2003.
53 A plethora of other *amici* were also admitted in support of the SGB religion policies, including Afriforum and Solidariteit.
54 *OGOD* (n 37) para 92.

The next part distils some of the key principles that have emerged from these cases and which this article submits is now being codified in the BELA Bill amendments.

4.3 Key principles regarding school governance

4.3.1 The duty on SGBs to be cognisant of systemic concerns in education

A significant aspect of the Constitutional Court's education jurisprudence in the school governance cases and, in fact, in all its education cases,[55] is the acknowledgment of the impact of apartheid education in perpetuating inequality and the necessity to redress this. As noted in part 2, redressing apartheid racial inequality is one of the central features of the doctrine of transformative constitutionalism. The Constitutional Court stated in *Ermelo:*[56]

> It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.
>
> In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.

Flowing from this, the Court held that the powers of SGBs at individual schools cannot be exercised in isolation from the broader systemic issues in education, but must be understood within the context of the broader constitutional scheme and the imperative to redress the legacy of apartheid education. The Court held that while an SGB is enjoined to promote the best interests of the school and all learners at it, it

> must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the

55 See, eg, *Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay NO* 2011 (8) BCLR 761 (CC) para 42; *Rivonia* (n 10) para 2; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 121-124.

56 *Ermelo* (n 40) paras 46-47.

> broader community in which the school is located and in the light of the values of our Constitution.[57]

In the *FEDSAS* case, in requiring that the provincial department develop feeder zones within a year to redress racial inequality entrenched by apartheid spatial geography, the Constitutional Court notes:[58]

> It is trite that the admission policy of a school must conform to all applicable law including provincial law. It cannot be otherwise because that is what the rule of law requires. It is so that when a school fashions its admission policy it will be actuated by the internal interests of its learners. It is also quite in order that a school seeks to be a centre of excellence and to produce glittering examination and other good outcomes. *But public schools are not rarefied spaces only for the bright, well-mannered and financially well-heeled learners. They are public assets which must advance not only the parochial interest of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education.*

So too, in *OGOD,* in concluding that single-religion schools were unconstitutional, the High Court relying on *Ermelo* stated:[59]

> At the level of principle then, the overarching constitutional theme is that our society is diverse, that that diversity is to be celebrated, and that specific rights are conferred and dealt with in pursuance of that principle. *Within this context, public schools are public assets which serve the interests of society as a whole.*

Thus, in the development of admission, language and religion policies, while SGBs may make policies in the interests of its school community, they also have a fiduciary duty to be cognisant of and, if necessary, balance the interests of the school community against the wider systemic concerns relating to educational inequality. This means acknowledging the profound impact that racism and apartheid spatial geography have had on limiting access to former white, well-resourced schools and redressing that.

This principle of being cognisant of the broader needs of the community and, therefore, the imperative to address systemic issues in education, established in *Ermelo*, is the *leitmotif* that permeates the successive school governance judgments.[60] As highlighted in the discussion of cases, what these systemic issues are in each of the school governance was often brought to the fore by the progressive *amici curiae* that intervened in these cases.

57 *Ermelo* (n 40) para 80.
58 *FEDSAS* (n 39) para 44 (my emphasis).
59 *OGOD* (n 37) para 89 (my emphasis).
60 *Rivonia* (n 10) para 70 and *FEDSAS* (n 39) para 44.

It may also be argued that the duty to be cognisant of the broader needs of the community is the rationale for the remedies the Court adopted requiring the respective SGBs to revise their language policy in *Ermelo* and pregnancy policies in *Welkom*. Thus, while the Court did not establish normative human rights principle in respect of language or pregnancy rights, restricting itself to the issue of lawfulness of the provincial departments only, it nevertheless employed its wide remedial powers to remedy the rights issues at play in these cases at a school level. This principle is also the rationale for the SGB-related amendments to the BELA Bill and which is likely to form the basis for any justification by the state to threatened challenges to the BELA Bill.[61]

4.3.2 Cooperative governance and meaningful engagement

The other significant principle identified by the Constitutional Court is that of cooperative governance. *Ermelo* referred to SGBs, provincial government and the national government as the 'three crucial partners' that run public schools.[62] It held:[63]

> An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role it is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercise defined autonomy over some of the domestic affairs of the school.

Pursuant to the relationship of cooperative governance and intrinsic to this relationship, first in *Welkom*[64] and then in *Rivonia*, the Court imported the doctrine of 'meaningful engagement' from the Constitutional Court's housing evictions jurisprudence into its school governance jurisprudence. It emphasised that, in terms of the 'partnership model', provincial departments and SGBs are legally

61 Organisations have threatened to challenge the amendments if they were passed into law. See Afriforum Press Statement 'Afriforum continues preparation for litigation after National Assembly approves BELA Bill', http://AfriForum continues preparations for litigation after National Assembly approves Bela Bill - AfriForum (accessed 26 October 2023).
62 *Ermelo* (n 40) para 187.
63 *Ermelo* (n 40) para 56.
64 *Welkom* (n 38) paras 120-124.

obliged to negotiate with one another in good faith and in the 'best interests of the learners' before resorting to litigation.[65]

4.3.3 Grassroots democracy

The Court in *Ermelo* emphasised the importance of participative or local democracy, referring to an SGB as a 'beacon of grassroots democracy'.[66] This was affirmed in *Welkom*[67] and again in *Rivonia.*[68]

The point that is made in this article, however, is that grassroots democracy is not a stand-alone principle. SGBs form part and parcel of the tripartite, cooperative model of governance. In *Rivonia* the Constitutional Court stated that '[s]uch cooperation is rooted in the shared goal of ensuring *that the best interests of learners are furthered and the right to a basic education is realised*'.[69]

Both provincial government and individual schools have to grapple with systemic capacity problems and their impact on education. *At school level, parents and governing bodies have an immediate interest in the quality of children's education, and they play an important role in improving that quality by supplementing state resources* with school fees. However, the needs and interests of all other learners cannot be ignored.

Thus, highlighting that while parents pay school fees and have an immediate interest in the quality of education at their own school, this function cannot exist in isolation of the broader educational needs of society.

5 Codifying the school governance jurisprudence

5.1 An overview of the school governance amendments in the BELA Bill

The Department of Basic Education in 2017 took the assertive step to align the legal framework with these jurisprudential developments discussed.

65 *Rivonia* (n 10) para 78.
66 *Ermelo* (n 40) para 57.
67 *Welkom* (n 38) para 49.
68 *Rivonia* (n 10) para 40.
69 *Rivonia* (n 10) paras 69-70 (my emphasis).

The iteration of the BELA Bill that was introduced into Parliament in 2021 required that SGBs submit their admission[70] and language policies[71] to the HOD for approval. The HOD could approve or return these to the SGB with the necessary recommendations and reasons. When considering admission policies, the HOD had to be satisfied that SGBs considered the needs of the broader community in the specific education district in which the school is located. This was directly derived from the school governance jurisprudence. The HOD also had to consider certain other factors, including the best interests of the child principle, which is provided for in section 28 of the Constitution; equality as provided for in section 9 of the Constitution; whether there are other schools in the community that are accessible to learners; the efficient and effective use of state resources; and the space available at the school. In respect of language policies, a few additional criteria had to be considered, such as sections 6(2) and 29(2) of the Constitution as well as the changing number of learners who speak the language of learning and teaching at the public school.

SGBs also had to review their admission and language policies every three years or whenever some of the factors above have changed. This made the approval process subject to clear normative and rights-based criteria. The amendments provided for appeal procedures by the SGBs – or, in the case of an admission decision, even by a learner – to the MEC of a decision taken by the HOD.

The amendments further codified the holding in *Rivonia* in respect of admissions that, after consultation with the SGB, the HOD has the final authority to admit a learner.[72] Furthermore, the amendments gave the HOD the power to direct a school to adopt more than one language of instruction after following specified stringent procedural requirements.[73] For example, the Bill obliges a HOD to hold public hearings and afford parents, SGBs and members of the school community opportunities to make representations before making the decision.

The April 2024 iteration of the BELA Bill removes the HOD approval process. SGB admission and language policies need not be approved by the HOD, but the policies must reflect the normative and rights-based criteria that would have informed the HOD approval processes. SGBs must still review their policies every three years or when some

70 Clause 4.
71 Clause 5.
72 Clause 4.
73 Clause 5.

of the factors listed above have changed. The HOD can still direct a school to admit learners or to adopt an additional language. SGBs can appeal these directives.

5.2 The contestation in the BELA Bill public participation process

The contestation that occurred around the BELA Bill during the public participation process has largely mirrored that which occurred during the negotiations prior to South Africa's democratic transition and the kind of school governance disputes that have taken place in the courts.

The Parliamentary Report that analysed the BELA Bill during the National Assembly public participation process notes that

> [t]he Bill was in the main rejected by an organisation from the Home-Schooling Sector, the Democratic Alliance, African Christian Democratic Party, AfriForum and Freedom Front Plus. The Federation of School Governing Bodies of South Africa (FEDSAS) and the Suid-Afrikaanse Onderwyser Unie (SAOU) partially rejected the Bill as they specified the clauses they rejected.[74]

Most of the parties listed here objected to the school-governing provisions. Some of the other organisations not listed in that section of the report but who also objected to the school governance amendments include the South African Institute for Race Relations (SAIRR); Solidariteit; Cause for Justice; and the FW de Klerk Foundation.

The Parliamentary Report notes that '[t]hose that rejected the Bill argued that the centralisation of power to determine the language and admission policy was counterproductive as it will create an unnecessary burden for the Head of Department'.[75] A reading of the submissions suggests a much wider, ideological critique of the amendments underpinned by notions of parental choice and which aligns with the early attempts of minority parties to create language, religious and cultural enclaves. The Afriforum submission, for example, refers to the amendments as 'a calculated attack on the Afrikaans language'.[76]

74 Draft National Report (n 2) 17.
75 Draft National Report (n 2) 9.
76 AfriForum 'Afriforum's oral submission to the Portfolio Committee on Basic Education on the Basic Education Amendment Laws Bill (B2-22)' 15 November 2022 4 (copy on file with author).

Many of these submissions rely on the case law discussed – albeit selectively – to argue that the BELA Bill contradicts the principles established in the school governance jurisprudence. Some assert that by imposing a model of centralised control of decision making on schools, the partnership model of cooperative governance is violated.[77] Many argue that the principle of grassroots democracy is undermined by requiring admission and language policies be ratified by the HOD.[78] Interestingly, none of the organisations that assert the jurisprudence as the basis for their submissions mention the duty of SGBs to be cognisant of the broader systemic concerns in education. The submissions also allege violations of education rights, especially language rights in education. Organisations such as the FW de Klerk Foundation also assert specific group rights such as section 30 in respect of language and culture, and section 31 in respect of cultural, religious and linguistic communities.[79] Some of the submissions emphasise the rights of parents to choose.[80] Finally, some of the submissions such as the Afriforum submission argue that former white schools are being forced to take on more learners to overcome the provincial department failures to provide infrastructure in provinces where infrastructure is lacking.[81]

On the other hand, progressive civil society organisations such as Equal Education, the Equal Education Law Centre and SECTION27, while they objected to certain amendments, such as the sale of alcohol on school grounds and the extent of the criminal sanctions of parents who do not send their children during the compulsory phase of education, these organisations supported the amendments relating to the language and admission policy-making functions of SGBs.[82] The parliamentary report notes that '[t]he participants in the public hearings who supported the Bill *stressed the transformative nature of the Bill particularly in language and admission policies*, as historically disadvantaged children are denied access to former Model C schools due to language and admission policies'.

77 As above. 'South African Institute of Race Relations 'Submission to the Portfolio Committee on Basic Education regarding the Basic Education Laws Amendment Bill of 2022 [B2-2022]' 15 June 2022, http://irr-submission-bela-bill-2022-15-june-2022-1.pdf (accessed 25 October 2023).

78 AfriForum's submission (n 76). Cause for Justice Submissions to the Basic Education Laws Amendment Bill', http://Cause for Justice submission_10.01.2018 (accessed 25 October 2023).

79 FW de Klerk Foundation (n 30) para 6.

80 Cause for Justice (n 78).

81 AfriForum's submission (n 76).

82 Equal Education and Equal Education Law Centre 'Joint submission on the Basic Education Laws Amendment Bill – 2022' 15 June 2022, http://FINAL DRAFT DOC 220526 BELA Combined submission and exec summary (equaleducation.org.za) (accessed 25 October 2023); SECTION27 'Submission on the Basic Education Laws Amendment Bill' (15 June 2023), http://Section27s-BELA-submission-FINAL-June-2022.pdf (accessed 25 October 2023) (my emphasis).

Despite this, organisations opposing the BELA Bill have managed to maintain a sustained and well-resourced campaign that has threatened litigation as noted above, packed the various public participation processes, and engaged in various other tactics.[83] This undoubtedly led to the further amendment to the BELA Bill withdrawing the necessity of the HOD approval process.

5.3 Analysing the school governance amendments in the BELA Bill

5.3.1 Adopting substantive human rights norms to guide SGB policy making

According to Brickhill and Van Leeve, while the courts in the school governance cases have acknowledged that in appropriate cases the HOD can intervene in policy-making decisions, and in accordance with procedural safeguards:[84]

> [T]he courts have paid insufficient attention to the conflict of interests among the insular school governing bodies, the state and those who are outside of the school. It is generally being left to the parties and friends of the court (amici curiae) to ensure that these considerations are properly before the courts by introducing relevant evidence and argument that broadens the scope of the issues.

Therefore, they suggest that 'education departments must take an assertive approach in mediating these contestations through appropriate regulatory or policy guidance, instead of leaving it up to the school governing bodies or the courts to resolve'.[85]

Fredman goes a step further in her critique of the Constitutional Court's approach in school governance cases. She argues:[86]

> Local democracy by its nature serves the interests of insiders … it is not sufficient to leave the resolution of basic human rights to these bodies alone. Nor is it enough to expect co-operation and meaningful

83 Afriforum has an Afrikaans campaign 'Red Afrikaanse skole', translated meaning 'Save Afrikaans schools'. This has included billboards on South Africa's highways, https://afriforum.co.za/tag/red-afrikaanse-skole/ (accessed 25 April 2024).
84 Brickhill & Van Leeve (n 34) 156.
85 Brickhill & Van Leeve (n 34) 157.
86 S Fredman 'Procedure or principle: The role of adjudication in achieving the right to education' (2016) 6 *Constitutional Court Review* 197. In a reply to Fredman, Van Leeve argues that ensuring respect for the rule of law and the principle of legality by provincial governments is as important as substantive human rights principles. See Y van Leeve 'Executive heavy handedness and the right to basic education – A reply to Sandra Fredman' (2014) 6 *Constitutional Court Review* 211.

> engagement on issues which have already triggered fundamental conflict.

She, therefore, suggests that a procedural approach has been favoured by the courts at the expense of the courts adopting substantive human rights principles that could provide a guiding framework for SGBs. Perhaps so but, as the Court stated in *FEDSAS,* this would be introducing a new cause of action into the case. Fredman's critique also does not interrogate the failure of the Department of Basic Education to set norms and standards protecting learners' rights which is its role and function within the cooperative governance framework and to which SGBs would have to conform.

It is worth mentioning that while the Constitutional Court did not establish any normative principles in *Welkom* in respect of discrimination on the grounds of pregnancy, in 2021 a policy titled Department of Basic Education Policy on the Prevention and Management of Learner Pregnancy in Schools was finalised. The policy expressly provides that a school may not discriminate against a learner based on her pregnancy status. Furthermore, subsequent and, pursuant to the *FEDSAS* judgments, regulations relating to the admission of learners to public schools in Gauteng were passed. These regulations require that the learner's residence must be within 30 kilometres of the school.[87]

While the latest iteration of the school governance amendments reflects a significant shift from previous iterations by removing the approval process of the HOD, the SGB policy-making processes must still be guided by the specific normative and rights-based criteria that were introduced by the Department of Basic Education and then into the parliamentary processes. Thus, it is asserted, the appropriate regulatory guidance endures into this last iteration of the BELA Bill.

5.3.2 The amendments do not violate the principles developed in the jurisprudence

Those who opposed the National Assembly draft of the BELA Bill asserted that it constituted a usurpation of grassroots democracy and as undermining of the principles of cooperative governance.

These principles remain intact and are potentially enhanced within the tripartite relationship between the Department of Basic

87 G Ritchie 'Gauteng school feeder zones expanded to 30 km' *Mail and Guardian* (Johannesburg) 16 November 2018.

Education, provincial authorities and SGBs. This is because the Department of Basic Education has fulfilled its function through the development of normative rights-based principles to guide SGB policy making. The HOD must oversee the implementation of these criteria and must meaningly engage in a dialogue with SGBs where polices require adjustment. SGBs may appeal a directive of the HOD where an agreement cannot be reached. For provincial departments, where an agreement cannot be reached and SGBs policies do not reflect normative rights-based principles, the department may take SGBs on review and these reviews will be considered against the normative rights-based criteria.

Furthermore, given that these principles remain intact, the amendments are likely to withstand constitutional challenges from those who continue to oppose even this latest iteration of the BELA Bill.[88]

5.3.3 The remaining systemic concerns

Certain systemic concerns remain.

First, space and overcrowding in schools remain a systemic problem in South African education.[89] Redressing the school infrastructure backlog is a significant concern and an impediment to a quality education for all. This is also why many of the progressive civil society organisations that supported the BELA Bill simultaneously advocated the implementation of minimum standards in school infrastructure. Requiring that more schools and classrooms be built does not, however, negate the necessity for the school governance reforms. The two issues are not mutually exclusive. In fact, both are necessary to ensure access to a quality education.

A second issue is that former white schools continue to charge high school fees to ensure that schools remain well sourced. While these schools are required to provide exemptions from school fees, access to well-resourced schools remains out of reach of the poorest families.[90] Most poor learners attend fee-free schools that are under-

88 J Botha 'BELA: Afrikaans remains in jeopardy – Solidarity' *Politics Web* (Johannesburg) 24 April 2024, http://BELA: Afrikaans remains in jeopardy – Solidarity - POLITICS | Politicsweb/ (accessed 25 April 2024).

89 See, eg, Equal Education 'No space for us' (23 November 2021), http://equal-education-no-space-for-us-overcrowding-booklet-digital-sgl-pages-agent-orange-design-20211123 (equaleducation.org.za) (accessed 30 October 2023).

90 The Schools Act of 1996 introduced school fees at all public schools. However, pursuant to a review due to the unaffordability of schooling for the poorest learners and the likelihood of a constitutional challenge to the charging of school fees, significant policy reforms were introduced from including that

resourced and which provide an inferior education. Thus, while language and admission barriers may be addressed by the BELA Bill's school governance amendments and facilitate improved access to former white schools, overwhelmingly, the class barriers to access well-resourced and high-performing schools remain as structural constraint.

6 Conclusion

This article has noted that the decentralisation model adopted in the Schools Act occurred in the political context of the negotiated transition and has remained highly contested. The experience of the school governance litigation has highlighted how SGB power in policy-making functions has been exploited by some former white schools. The article has argued that while the jurisprudence has affirmed the principles of cooperative governance, grassroots democracy and meaningful engagement, the overwhelming *leitmotif* of the Constitutional Court jurisprudence has been to place a duty on SGBs to be cognisant of the broader systemic concerns in education so as to ensure redress of apartheid education. This jurisprudence has been codified in the BELA Bill. Thus, SGBs must now develop their policies in accordance with the normative rights-based principles emanating from this jurisprudence. Rather than undermining the notion of tripartite governance, the codification of these normative rights-based principles in fact may enhance the relationship.

Finally, the article illustrates how the systemic concerns that underpinned the school governance disputes were highlighted by progressive *amici*. This in turn led to the development of progressive principles in the Constitutional Court. The Department of Basic Education, as the executive, and then the legislature, has sought to address this through their respective law-making functions by codifying these principles in the BELA Bill. Thus, the BELA Bill serves as an example of how a process to address systemic concerns may be initiated through the courts, but which then can be codified by executive and legislative processes.

As McFarlane correctly notes of these policy changes, 'rather than signifying a betrayal of the 1994 settlement, it is to be expected

60% of the poorest schools were made fee free while schools in the wealthier areas continued to charge schools fees. See, eg, F Veriava 'The amended legal framework: A boon or a barrier?' (2007) 23 *South African Journal on Human Rights* 180; D Roithmayr 'Access, adequacy and equality: The constitutionality of school fee financing in public education' (2003) 19 *South African Journal on Human Rights* 382.

that in the almost 30 years since then, some rethinking of these arrangements is necessary'.[91]

91 McFarlane (n 26).