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Lessons from the 'minimum core' approach to the right to basic education in South Africa

Nurina Ally
Senior Lecturer, Department of Public Law; Director, Centre for Law and Society, Faculty of Law, University of Cape Town, South Africa
https://orcid.org/0000-0003-1587-7676

Tatiana Kazim
Legal Researcher, Equal Education Law Centre, Cape Town, South Africa
https://orcid.org/0009-0003-2804-2990

Summary: *South Africa's Constitutional Court has seemed notoriously reluctant to accept that socio-economic rights have a 'minimum core'. Following* Mazibuko v City of Johannesburg*, the Constitutional Court is generally viewed as having rejected a minimum core approach altogether. However, the position in relation to the right to basic education has been much less clearcut. The courts have never expressly disowned a minimum core approach to basic education. In fact, the Constitutional Court in* AB v Pridwin Preparatory School *implicitly acknowledged that the state is obliged to provide education of a certain quality or standard. There is also a line of case law in which the right to basic education has been given minimum content: The courts have held that it includes a right to textbooks, classroom furniture, basic infrastructure, sufficient teachers, transport and, more recently, nutrition. We argue that three lessons may be drawn from this 'minimum core' type approach. First, there is scope*

* BA LLB (Wits) MSc (Edinburgh) MSt (Oxford); Nurina.Ally@uct.ac.za. We are grateful to Leo Boonzaier, Sandra Fredman, Faranaaz Veriava and Robyn Beere for their helpful comments on earlier drafts. Any errors remain our own.
** BSc (LSE) BA Jurisprudence (Oxford) BCL (Oxford); tatiana@eelawcentre.org.za

for courts to further develop the content of the right to basic education by specifying not only minimum inputs but also minimum outcomes entailed by the right. This shift in the jurisprudence, from inputs to outcomes, may be needed to hold government to account and ensure that the right to basic education is more than just an on-paper promise. Second, the 'minimum core' approach in the basic education context could also be applied to the interpretation and development of other immediately realisable rights recognised by the Constitution, such as the right of every child to basic nutrition. Third, jurisprudence on the right to basic education demonstrates the potential for developing the minimum content of progressively realisable socio-economic rights.

Key words: *basic education; socio-economic rights; minimum core; immediately realisable rights; progressively realisable rights*

1 The concept of the 'minimum core'

The idea that socio-economic rights have a 'minimum core' emanates from General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights:[1]

> [A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, 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.

Supposedly, South Africa's courts, up to and including the Constitutional Court, have been reluctant to accept this idea. Especially following the Constitutional Court judgment in *Mazibuko v City of Johannesburg* (*Mazibuko*),[2] some concluded that the minimum core approach had been rejected altogether.[3] They can be forgiven for doing so; *Mazibuko* did contain strong statements against the

1 General Comment 3: The nature of states parties' obligations (art 2 para 1 of the Covenant) (14 December 1990) UN Doc E/1991/23 (1990) para 10.

2 2010 (4) SA 1 (CC).

3 See, eg, S Majiedt '"Dreams and aspirations deferred?": The Constitutional Court's approach to the fulfilment of socio-economic rights in the Constitution' (2022) 26 *Law, Democracy and Development* 6 (the Court has 'firmly rejected' the minimum core concept); L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 754 (the Court has 'failed to recognise minimum core obligations' and the 'door seems to be closed at least for the foreseeable future' on revisiting its approach); D Roithmayr 'Lessons from *Mazibuko*: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 322-323 (the Court has rejected recognition

minimum core. However, in this article we argue that the courts have in fact taken a minimum core approach (or something very close) to at least one type of socio-economic right, namely, the right to basic education.

While there is no real consensus on what a 'minimum core' approach entails,[4] the concept can be said to have at least two dimensions. The first concerns the *content* of the right – that is, the minimum entitlements of rights holders. The minimum entitlements may be specified at a concrete level (for instance, the provision of at least 50 litres of water per person per day)[5] or a more abstract level (for instance, sufficient water to lead a dignified life).[6] The applicability of statements about the minimum content of the right may also range from being universally applicable, on the one hand (applying to all people at all times) to more context-specific on the other (applying only to a more specific group or section of the population, in specific circumstances).[7] The second dimension concerns the *time scale* or *urgency* with which the right must be realised by the relevant duty bearer. The minimum core of the right is generally considered to represent the floor below which no person can fall, meaning that the state (as duty bearer) must prioritise its realisation when allocating resources.[8]

We will argue that South African courts have been willing to give both abstract, universally-applicable content to the right to basic education and, in some cases, also more concrete content. In this sense, at least, one could say that the South African courts have taken a 'minimum core' approach to the right to basic education.

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of minimum core approaches and 'retreated behind principles of reasonableness and progressive realisability').

4 Young provides an illuminating analysis of the 'inconsistencies and controversies' that have accompanied the concept; see K Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 116.

5 As Young (n 4) 115 notes, one of the questions arising from the minimum core concept is whether it involves 'a more general or more precise instantiation of the parent right'.

6 See, eg, D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 488 ('the role of the court in this respect would be to set the general standard that must be met for the state to comply with its minimum core obligation').

7 As we discuss below, the Constitutional Court seemed open to the context-specific approach in two of its early socio-economic rights cases. Some scholars take the view that context-specific determinations are inconsistent with a minimum core approach; see Bilchitz (n 6) 489; Young (n 4) 131.

8 The minimum core approach has been described as a 'means of specifying priorities', requiring the state to most urgently address the needs of 'those in a condition where their survival is threatened'; D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 15-16.

Applying the second dimension of the minimum core concept to the right to basic education is more complicated. The right to basic education is a socio-economic right, in that it gives people entitlements to the resources, opportunities and services needed to lead a dignified life.[9] However, it is distinct from many other socio-economic rights contained in the South African Constitution in that it is unqualified or 'immediately realisable'. Most other socio-economic rights contain what is often described as a 'progressive realisation clause'. For example, while everyone has the right to have access to adequate housing under section 26 of the Constitution, this right is qualified: The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 27, which gives everyone the right to have access to healthcare services, sufficient food and water, and social security, contains an almost identical clause. Section 29(1)(a) contains no such clause; it states, without qualification, that everyone has the right to a basic education.

On one view, the minimum core concept – especially in light of its second dimension – has no application except in relation to progressively-realisable socio-economic rights. On this view, qualified or progressively-realisable rights have two tiers: (i) the minimum core of the right, to which resources must be devoted as a matter of priority; and (ii) the full content of the right (beyond the minimum), which must be realised progressively, within the resources available once constitutional priorities have been taken into account.[10] By contrast, unqualified or immediately-realisable rights have just one tier: The entire content of right must be realised as a matter of priority, with state resources to be allocated accordingly. Put differently, one might say that the entirety of the right to basic education (an unqualified or immediately realisable right) is on par, constitutionally speaking, with the minimum core of the right to access to housing (a qualified or progressively realisable right) and they warrant the same degree of prioritisation when it comes to the allocation of state resources.[11]

9 That said, the distinction between socio-economic and civil and political rights should not be overstated. As Tobin notes, the right to education, which enables the enjoyment of various other rights, 'defies any watertight classification'; J Tobin 'Article 28: The right to education' in J Tobin *The UN Convention on the Rights of the Child: A commentary* (2019) 1058.

10 Bilchitz (n 8) 11-12, eg, sees the minimum core requirement as an incident of progressive realisation ('[t]he notion of progressive realisation must thus be read to include as a base-line the provision of minimum essential levels of a right').

11 Viljoen illustrates this conception with reference to the unqualified right of every child to 'shelter' (set out in sec 28(1)(c) of the Constitution) and the progressively-realisable right of everyone to have access to 'adequate housing' (in sec 26 of the Constitution); see F Viljoen 'Children's rights: A response from a South African perspective' in D Brand & S Russell (eds) *Exploring the content of socio-economic rights: South African and international perspectives* (2002) 206. See also C Scott & P Alston 'Adjudicating constitutional priorities in a transnational

One may object to this characterisation. It seems to imply that, once the minimum entitlements entailed by the right to basic education are fulfilled, the state can have no further constitutional duties in respect of that right. Why should the right to basic education have a ceiling that is equivalent to its floor, when the same cannot be said for other, progressively-realisable socio-economic rights?[12] Given the repeated statements from South Africa's courts, as well as international treaty bodies, about the special importance of education, this may seem odd.[13] A possible response is that the right to basic education constitutes the minimum core of the broader right to education. This broader right includes the right to further education, which is progressively realisable.[14] However, even if one accepts that the second dimension of the 'minimum core' concept does not straightforwardly apply to the right to basic education, one must still ask: What is the minimum *content* of the right to basic education? What minimum entitlements does the right entail? In this sense, as Scott and Alston note, 'a minimum core content analysis is also unavoidable' even in respect of immediately realisable rights.[15] As we see it, regardless of whether one argues that the right to basic education *has* a minimum core or *just is* the minimum entitlement of each person, the key point remains: The minimum content of the right has been specified by the courts on a number of occasions and in some detail.

2 Discourse on the minimum core approach to socio-economic rights in South Africa

The Constitutional Court has been urged to adopt a minimum core approach in three landmark socio-economic rights cases. In the first case, *Government of the Republic of South Africa v Grootboom* (*Grootboom*),[16] a community of around 400 adults and 500 children

context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *South African Journal on Human Rights* 260.

12 For this reason, Viljoen (n 11) 203 is wary of employing the concept of minimum core obligations in relation to immediately-realisable rights. It risks, he says, the 'danger of a "floor" (a minimum) becoming a "ceiling" (a maximum)'.

13 In *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (4) SA 546 (CC) para 1, eg, Moseneke J emphasised that 'education's formative goodness to the body, intellect and soul' has been 'beyond question from antiquity'.

14 This view is advanced by C Simbo 'The right to basic education, the South African Constitution and the *Juma Musjid* case: An unqualified human right and a minimum core standard' (2013) 17 *Law, Democracy and Development* 499. Even on this approach, one still needs to determine the minimum entitlements necessary for basic education, on the one hand, and for further education, on the other.

15 Scott & Alston (n 11) 264.

16 2001 (1) SA 46.

had been rendered homeless following an eviction from their informal homes by the City of Cape Town. The applicants sought an order requiring the municipality to provide them with temporary shelter or housing pending their securing of permanent accommodation. In support of the applicants' case, two *amici curiae* contended that the right of access to adequate housing entailed a minimum obligation on the part of the state to provide shelter to the claimants.

Yacoob J rejected this contention,[17] but in doing so he was careful not to foreclose the possibility of a minimum core approach to the interpretation of rights. Instead, he expressly contemplated that it may be 'possible and appropriate' to 'have regard to the content of a minimum core obligation' in determining the reasonableness of measures taken by the state to realise the right in question.[18] Such a determination, however, would require context-specific information on the 'needs and the opportunities for the enjoyment' of the relevant right.[19] In the absence of such information, Yacoob J opted to leave open the question as to whether it is 'appropriate for a court to determine in the first instance the minimum core content of a right'.[20] He proceeded to determine the issue based on an assessment of whether, under section 27(2), the measures adopted by the state to progressively realise the right to access adequate housing were reasonable. The Court held that the state's housing programme was unreasonable and unconstitutional as it failed to make provision for those in most desperate need.

Following *Grootboom*, the Court in *Minister of Health v Treatment Action Campaign (No 2)* (*TAC II*)[21] also relied on a reasonableness framework when determining a claim based on the right to have access to healthcare services. At issue was the government's decision to restrict the availability of nevirapine, an anti-retroviral drug used to prevent pre-natal transmission of HIV, to only certain sites in the public sector. Writing collectively as 'the Court', the justices held that such restrictions were unreasonable and unconstitutional. The state was ordered to take reasonable measures to facilitate and expedite the use of nevirapine beyond the identified sites.

The Court in *TAC II* definitively rejected arguments by the *amici* that the right to have access to healthcare services, as set out in section 27(1), includes a minimum core entitlement to which every

17 Yacoob J disagreed with the suggestion that shelter constitutes an 'attenuated form of housing'; see *Grootboom* (n 16) paras 72-73.
18 *Grootboom* (n 16) para 33.
19 *Grootboom* (n 16) para 32.
20 *Grootboom* (n 16) para 33.
21 2002 (5) SA 721 (CC).

person in need is *immediately* entitled. According to the Court, this account of minimum core obligations was incompatible with section 27(2) of the Constitution, which obliges the state to adopt reasonable measures to *progressively* realise the right within its available resources. The Court also cautioned that the determination of minimum-core standards requires 'wide-ranging factual and political enquiries' for which 'courts are not institutionally equipped'.[22] Nonetheless, despite this definitive stance, the Court did not contradict the suggestion in *Grootboom* that context-specific evidence in a particular case may 'show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable'.[23]

The approach to socio-economic rights adjudication in *Grootboom* and *TAC II* generated significant scholarly attention.[24] Some commentators praised the Court's reasonableness framework as a 'novel and promising approach to judicial protection of socio-economic rights'.[25] Others criticised the Court for its unwillingness to recognise that socio-economic rights include minimum core protection of every individual's 'most urgent survival interests'.[26] However, even critics of the Court's approach endorsed the practical outcome in both cases, with some optimism that the Court may still be open to supplementing its reasonableness framework with an analysis of the 'minimum core' content of rights.[27]

22 *TAC II* (n 21) para 37.
23 *TAC II* (n 21) para 34.
24 A non-exhaustive list of discussions includes Chenwi (n 3); S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 146-183; Young (n 4); K Lehmann 'In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22 *American University International Law Review* 163-198; M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882-905; D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for?"' in H Botha and others (eds) *Rights and democracy in a transformative constitution* (2003) 33-56; MS Kende 'The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective' (2006) 6 *Chapman Law Review* 137-160; Bilchitz (n 8); Bilchitz (n 6); T Roux 'Understanding *Grootboom* – A response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41-51; CR Sunstein 'Social and economic rights – Lessons from South Africa' (2000) 11 *Constitutional Forum* 123-132.
25 Sunstein (n 24) 123. Lehmann (n 24) and Kende (n 24) also defended the Court's approach.
26 Bilchitz (n 8) 2. For similar critiques, see Pieterse (n 24) 897-898; Brand (n 24) 46-49.
27 Liebenberg, eg, suggested possibilities for 'reconceiving reasonableness'; see Liebenberg (n 24) 173-186. For more recent commentary, see S Liebenberg 'Reasonableness review' in M Langford & K Young (eds) *The Oxford handbook of economic and social rights* (2022) C48S1-C48N156.

Then came *Mazibuko*. That case concerned the right of access to 'sufficient' water under section 27(1)(b) of the Constitution.[28] The applicants were five people living in Phiri, Soweto. They challenged two actions of the City of Johannesburg: first, the implementation of the municipality's free basic water policy, under which six kilolitres of free water was supplied every month to every account holder in the city and, second, the installation of pre-paid water meters. The applicants argued that six kilolitres of water was not sufficient, and the free basic water policy, therefore, was contrary to their rights under section 27(1)(b). They said that a sufficient amount of water for a dignified life is 50 litres per person per day and they asked the Court to declare as much.

Overturning the decisions of the High Court and Supreme Court of Appeal, the Constitutional Court rejected these arguments and held that the free basic water policy fell within the bounds of reasonableness and, therefore, was not in conflict with section 27 of the Constitution. O'Regan J described the applicants' argument in relation to the free basic water policy as 'similar to a minimum core argument though ... more extensive because it goes beyond the minimum'.[29] She stated that the argument 'must fail for the same reasons that the minimum core argument failed in *Grootboom* and *Treatment Action Campaign No 2*'.[30] These reasons were two-fold. First, the claim that minimum core obligations must be realised immediately is irreconcilable with the text of the Constitution, which specifically makes some rights progressively realisable and subject to available resources. Second, it is not appropriate for courts to determine the precise steps that must be taken by the legislature and executive to progressively realise socio-economic rights. As O'Regan put it:[31]

> [O]rdinarily *it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.* This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.

28 The section provides that everyone has the 'right to have access to sufficient food and water'.

29 This was because the applicants asked the Court to declare what level of provisioning would be 'sufficient'; see *Mazibuko* (n 2) para 55.

30 *Mazibuko* (n 2) para 55. The suggestion that the minimum core argument failed in *Grootboom* is misleading. As we have noted, Yacoob J left that question open (*Grootboom* (n 16) para 33).

31 *Mazibuko* (n 2) para 60 (our emphasis).

In *Mazibuko*, O'Regan J seemed to go further than merely rejecting what she described as the minimum core argument put forward in that particular case. She appeared to reject a minimum core approach to socio-economic rights altogether. While not dismissing it, her opinion does not engage the possibility, raised in *Grootboom* and *TAC II*, that a context-sensitive and evidence-based determination of minimum core obligations may inform an assessment of the reasonableness of the state's measures in some cases. Instead, she emphasised that '[t]he concept of reasonableness places context at the centre of the enquiry' and cautioned that '[f]ixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context'.[32]

Mazibuko has been widely interpreted as delivering the death blow to the adoption of a minimum core approach in South Africa.[33] In the 15 years since the judgment was handed down, the Constitutional Court has not directly engaged minimum core arguments in respect of socio-economic rights.[34] Critics have since bemoaned the Court's 'proceduralisation' of socio-economic rights and the adoption of on 'an over-flexible, abstract and decontextualised'[35] reasonableness standard, which they say offers claimants little more than a right to a reasonable government plan (as opposed to a right to concrete socio-economic goods and services).[36]

At first blush, the Court's approach in *Grootboom*, *TAC II* and *Mazibuko* seems to leave little room for developing any minimum substantive content for socio-economic rights. However, it is important to recognise that the Court's pronouncements in these

32 *Mazibuko* (n 2) para 59.

33 *Mazibuko* (n 2). Compare J Fowkes 'Socio-economic rights' in J Fowkes *Building the Constitution – The practice of constitutional interpretation in post-apartheid South Africa* (2016) 297-300 (*Mazibuko* was neither as definitive nor as restrictive as critics suggest).

34 The concept of minimum core obligations was raised obliquely in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC) (*Eskom Holdings*). The applicants sought an interim interdict restraining the reduction of their electricity supply by the national electricity supplier. Madlanga J, leading the Court's majority, upheld the interim interdict. Writing for the minority, Unterhalter J characterised the majority's approach as imposing an obligation on the state to supply a specific resource at a specific level (paras 129-135).

35 S Wilson & J Dugard 'Constitutional jurisprudence: The first and second waves' in M Langford and others (eds) *Socio-economic rights in South Africa – Symbols or substance?* (2013) 56.

36 See, eg, Roithmayr (n 3); P O'Connell 'The death of socio-economic rights' (2011) *74 Modern Law Review* 552 (*Mazibuko* recast socio-economic rights guarantees as 'some form of hyper-procedural requirement' as opposed to 'a guarantee of substantive material change'). As noted earlier, some commentators had already taken a grim view of the Court's jurisprudence following *Grootboom* and *TAC II*; see, eg, Pieterse (n 24) 897-898; Brand (n 24) 46-49; Bilchitz (n 8); Bilchitz (n 6). For recent defence of the Court's approach, see Majiedt (n 3).

cases were in response to a particular conception of minimum core obligations, as contended for by the *amici* and the applicants. Those claims, which engaged progressively-realisable rights, asked the Court to adopt the thickest version of both the content and temporal dimensions of a minimum core approach; that is, (i) immediate provisioning (ii) of certain resources (iii) at a concrete level (iv) for all people. It was this type of claim that the Court rejected. However, this should not, in our view, be read as foreclosing the development of the minimum *content* of socio-economic rights altogether.

3 The approach to the right to basic education

The judgment in *Mazibuko* notwithstanding, there are good reasons to think that the right to basic education entails minimum individual entitlements.

One of the foremost Constitutional Court cases on the right to basic education was *Governing Body of the Juma Musjid Primary School v Essay NO* (*Juma Musjid*).[37] Nkabinde J, having regard to the purpose of the right to basic education, established that one component of the right to basic education is access to school:[38]

> [B]asic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.

The courts have since developed the jurisprudence on access to school, and have held that the scope of the right to basic education extends at least up to grade 12. Khampepe J in the Constitutional Court case of *Moko v Acting Principal of Malusi Secondary School* (*Moko*)[39] said that

> [t]o limit basic education under section 29(1)(a) either to only primary school education or education up until grade 9 or the age of 15 is … an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right.[40]

37 2011 (8) BCLR 761 (CC).
38 *Juma Musjid* (n 37) para 43.
39 2021 (3) SA 323 (CC).
40 *Moko* (n 39) para 32.

Accordingly, she held that 'the applicant's matric examinations fell within the definition of basic education'.

There have also been some indications that the scope of the right extends down to early learning delivered at early childhood development (ECD) programmes. For example, the recent High Court case of *Sernė NO v Mzamomhle Educare* (*Sernė*)[41] involved the attempted eviction of an ECD centre from land in Wallacedene, Cape Town. The High Court stated that this was an ECD centre in which 'young and vulnerable children are educated'[42] and asked itself 'whether the applicants by instituting the eviction proceeding … are not hampering the best interests of the child as entrenched in section 28(2) of the Constitution and a right to basic education as protected in section 29(1) of the Constitution'.[43] Having regard to the likely impact on children's rights under sections 28 and 29 of the Constitution, the application for the eviction was dismissed.

In addition to establishing that the right to basic education includes access to school, the Constitutional Court in *Juma Musjid* also established that the right to basic education is immediately realisable and may only be limited in terms of a law of general application, as per section 36 of the Constitution. The facts of *Juma Musjid* involved the attempted eviction of a public school from the applicant's private property. Technically, then, the case did not directly concern state obligations in respect of the right to basic education. Nonetheless, in a much-quoted passage, the Court stated:[44]

> It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). *Unlike some of the other socio-economic rights, this right is immediately realisable*. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. *The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'*.[45]

41 [2021] ZAWCHC 189.
42 *Sernė* (n 41) para 5.
43 *Sernė* (n 41) para 63. On the relationship between the right to basic education, the best interests of the child, and children's broader rights to development, see N Ally, R Parker & TN Peacock 'Litigation and social mobilisation for early childhood development during COVID-19 and beyond' (2022) 12 *South African Journal of Childhood Education* 6-9; J Sloth-Neilsen & S Philpott 'The intersection between article 6 of the UN Convention on the Rights of the Child and early childhood development' (2015) 2 *Stellenbosch Law Review* 316-317.
44 *Juma Musjid* (n 37) para 37.
45 Our emphasis.

This begs the question: What, exactly, is it that must be immediately realised? 'Education' is an ambiguous and complex concept. In the absence of a clear articulation of its content, it would be difficult to know whether or not the right to basic education has in fact been realised for any given learner. As it happens, the courts lost little time in providing an answer. Building on *Juma Musjid*, there is a line of case law in which the content of the right to basic education has been fleshed out: The courts have held that it includes a right to basic school infrastructure, textbooks, classroom furniture, teachers, transport and, more recently, nutrition.[46]

The first major set of cases that presented the opportunity to develop the content of the right to basic education concerned school infrastructure. These cases are sometimes referred to as the *Mud Schools* cases.[47] The first *Mud Schools* case was brought by seven schools in the Eastern Cape. The seven applicant schools were some of many schools across the country that had been built by members of the local community using mud bricks and wooden frames, in response to the neglect of the apartheid government. These structures were generally in a bad state of repair and were not considered safe or adequate, and in 2004 President Mbeki committed to improving or replacing these. Yet, by 2011 many mud schools remained. The case was settled before the hearing began.[48] The national and provincial Department of Basic Education (DBE) committed to providing safe structures for the seven applicant schools. Importantly, the national DBE also committed to eradicating all mud schools in the country. They allocated R8,2 billion over four years and also launched the Accelerated Schools Infrastructure Development Initiative (ASIDI), to 'eradicate' mud schools and provide water, electricity and sanitation in the Eastern Cape. The second *Mud Schools* case was brought three years later, in response to delays in implementing ASIDI. This second case was also settled, with the settlement being made an order of court.[49]

46 For discussion, see S Fredman *Comparative human rights law* (2018) 393-396. See also F Veriava *Realising the right to basic education – The role of the courts and civil society* (2019) for an enlightening analysis of the contribution of courts and civil society to a 'transformative constitutionalist narrative' on the right to basic education.

47 For more detailed discussion, see S Budlender, G Marcus & N Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2014) *Atlantic Philanthropies* 79-81.

48 Budlender and others (n 47) 80 record that applicants' lawyers initially wanted to use the matter as a test case for establishing a minimum core approach in respect of basic education. Given the precedents in *Grootboom* and *TAC II*, however, it was thought that this would be 'unhelpful and counterproductive'. Instead, the case was framed using a reasonableness inquiry.

49 See J Brickhill 'Strategic litigation in South Africa: Understanding and evaluating impact' PhD thesis, University of Oxford, 2021 192.

While the *Mud Schools* cases did not result in binding precedent, subsequent litigation would build on the practical foundation they established. Following advocacy and litigation by the social movement, Equal Education, the DBE eventually promulgated minimum norms and standards for school infrastructure.[50] The regulations required the state, within certain timelines, to ensure that all public schools complied with various basic infrastructure requirements (such as the provisioning of toilets and water, libraries, classrooms and electricity). Concerned that the regulations failed to give proper effect to the right to basic education, Equal Education approached the High Court to declare certain of its provisions unconstitutional. The impugned provisions included, for example, a so-called 'escape clause': a provision making the DBE's obligation to implement the norms and standards 'subject to the resources and co-operation' of other government agencies.[51] Upholding Equal Education's challenge,[52] Msizi AJ held that it is 'indisputable' that school infrastructure 'plays a significantly high role in the delivery of basic education'[53] and that the right to basic education 'includes the provision of proper facilities'.[54] In other words, the High Court made it clear that, at minimum, the right to basic education requires the provision of basic infrastructure.[55]

Another major set of cases concerned the provision of textbooks. The most authoritative judgment was given by the Supreme Court of Appeal. Navsa J described the issue in dispute as follows:[56]

> *The centrality of textbooks in the realisation of the right to a basic education is uncontested. The DBE, however, insisted that the right to a basic education did not mean that each learner in a class has the right to his or her own textbook.* It adopts the position that its own policy documents indicate only that the DBE set itself the 'lofty' ideal of

50 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure Government Notice R 920 published in *Government Gazette* 37081 of 29 November 2013 ('School Infrastructure Regulations'). For a comprehensive account of the campaign and litigation, see Budlender and others (n 47) 81-84.

51 Regulation 4(5) of the School Infrastructure Regulations (n 50).

52 *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) (*Equal Education*).

53 *Equal Education* (n 52) para 170.

54 *Equal Education* (n 52) para 176. See Veriava (n 46) 98-99 for general discussion on the case.

55 It is notable that the Constitutional Court recently held that a decision by the national power utility to reduce electricity supply to two municipalities infringed, among others, the right to basic education (*Eskom Holdings* (n 34)). As Madlanga J put it: 'Does the negative impact on schooling caused by the reduced supply of electricity not infringe the right to basic education? Surely, it does' (para 288). Writing for the dissent, Unterhalter AJ took the view that the mere fact that electricity may be a means to secure the enjoyment of the right 'does not make that means the subject matter of the right' (para 113).

56 *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) (*BEFA*) para 41 (our emphasis).

> providing a textbook for each learner but that it could not be held to that ideal or what it describes as the 'standard of perfection'.

Rejecting the DBE's argument, Navsa J held that 'the DBE is obliged to provide a textbook to every learner to ensure compliance with s 29(1)(a) of the Constitution'.[57] As indicated in the passage quoted above, the DBE had already adopted a policy of providing each learner with a copy of each prescribed textbook. It had not, however, met this standard and teachers at the applicant schools were forced to write out the content of the textbooks on blackboards, make copies, or borrow from other schools. The Supreme Court of Appeal did not accept that the provision of a textbook to each learner was a mere policy goal; it held that, in the circumstances, it was a binding component of the right to basic education. For the learners at the applicant schools, this right was being violated.

Veriava has critiqued the Supreme Court of Appeal's reliance on government's policy prescriptions as a basis for determining the content of the right to basic education.[58] We agree that courts should avoid making the content of rights contingent on the state's own policy statements and commitments. It is notable, however, that in *BEFA* Navsa J did recognise that textbooks are inherently necessary to the realisation of basic education, independent of government determinations. In holding that the failure to provide textbooks to learners in schools in Limpopo was a violation of the learners' rights to a basic education, Navsa J cited with approval the earlier High Court case of *Section 27 v Minister of Education* (*Section 27*).[59] In that case Kollapen J stated that 'the provision of learner support material in the form of textbooks, as may be prescribed, is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right'.[60] He went on by stating that '[i]n fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks'.[61] This last sentence, in particular, indicates an independent assessment on Kollapen J's part that textbooks are part of the right to basic education. The fact that Navsa J agreed with Kollapen J's judgment, in our view, is instructive.

Recently, in *Blind SA v Minister of Trade, Industry and Competition* (*Blind SA*)[62] the Constitutional Court affirmed the importance of

57 *BEFA* (n 56) para 50.
58 Veriava (n 46) 112-113.
59 2013 (2) SA 40 (GNP) cited by Navsa J in *BEFA* (n 56) para 46.
60 *Section 27* (n 59) para 25.
61 As above.
62 [2022] ZACC 33.

textbooks to both basic and further education. Blind SA, the applicant, challenged the constitutionality of national copyright laws,[63] which limited the ability of persons with visual and print disabilities to access published works in an accessible format. Declaring that the impugned provisions infringed sections 29(1)(a) and (b) of the Constitution, Unterhalter AJ held:[64]

> Children, and especially poor children, cannot secure the textbooks they require. Others who are admitted to university cannot access the articles and books they need, a substantial impairment to the benefits of a higher education. *The right of persons with print and visual disabilities to basic education, as set out in section 29(1)(a) of the Constitution, is thus plainly infringed.* That is also so in respect of the right to further education protected in terms of section 29(1)(b) of the Constitution.[65]

The right to basic education has also been held to include furniture. In *Madzodzo v Minister of Basic Education* (*Madzodzo*)[66] Goosen J specifically declared that the respondents had breached the right of learners under 29(1)(a) of the Constitution 'by failing to provide adequate, age and grade appropriate furniture which will enable each child to have his or her own reading and writing space'.[67] This clear statement of the minimum content of the right to basic education encompasses not only the *type of input* – namely, furniture – but also the *standard* of furniture required. Notably, the Court specified the standard at a concrete level (that is, age and grade appropriate furniture enabling every learner to their have *own* reading and writing space). Moreover, in articulating this standard, the Court did not merely affirm a pre-existing government policy. Instead, the Court determined the minimum content of the right independent of the state's policy prescriptions.

There has also been jurisprudence establishing that the right to basic education includes teachers. In 2015 the High Court gave judgment in the case of *Linkside v Minister of Basic Education* (*Linkside*),[68] a class action brought by 90 public schools in the Eastern Cape where the provincial education department had repeatedly failed to fill teacher vacancies. In some instances, these failures had forced schools to appoint and pay teachers themselves. The High Court held that 'the ongoing failure by the Eastern Cape Department of Basic Education (the Department) to appoint educators in vacant posts at various public schools throughout the province' amounted

63 Copyright Act 98 of 1978.
64 *Blind SA* (n 62) para 73.
65 Our emphasis.
66 2014 (3) SA 441 (ECM).
67 *Madzodzo* (n 66) para 41.
68 [2015] ZAECGHC 36; 2015 JDR 0032 (ECG).

to 'a violation of the right of the children at those schools to basic education as guaranteed by section 29 of the Constitution'.[69]

Importantly, the *Linkside* judgment contains some indications that the right to basic education includes an element of quality. The judgment states:[70]

> For those people in this country who take for granted not just education but quality education, *the notion of a school with insufficient educators, or no educators, is unthinkable and incomprehensible*. In some instances, lost academic years might never be recovered. Who knows the extent to which the futures of some children … will be adversely affected? The children of poor families will suffer the most because the schools they attend cannot afford to pay educators to occupy the vacant posts. A *decent education* is probably the only means of escape for these children from the confines of their poverty.

This paragraph comes immediately after an acknowledgment that the right to basic education is an 'important socio-economic right', providing the 'foundation for a child's lifetime learning and work opportunities' and is particularly significant 'in light of the legacy of apartheid'.[71]

Our interpretation of this part of the *Linkside* judgment is that, because a *decent* education at a school with *sufficient* educators is the standard required in order to improve a child's future prospects and enable them to escape poverty, then it is also part of the minimum content of the right to basic education. If this were not so, then the right to basic education would not be meaningful and its purpose would be defeated. In our view, the judgment can be taken as authority for the proposition that the right to basic education includes not only teachers, but sufficient numbers of teachers with suitable qualifications.

In *Tripartite Steering Committee v Minister of Basic Education* (*Tripartite* case)[72] Plasket J affirmed that the components of the right to basic education include teachers, administrators, furniture and textbooks and added that they also includes scholar transport:[73]

> [I]n instances where scholars' access to schools is hindered by distance and an inability to afford the costs of transport, the state is obliged to provide transport to them in order to meet its obligations, in terms

69 *Linkside* (n 68) para 2.
70 *Linkside* (n 68) para 25 (our emphasis).
71 *Linkside* (n 68) para 24 quoting *Juma Musjid* (n 37) paras 42-43.
72 2015 (5) SA 107 (ECG).
73 *Tripartite* (n 72) para 18 (our emphasis).

> of s 7(2) of the Constitution, to promote and fulfil the right to basic education.

Plasket J further held that the Eastern Cape's provincial policy, stating that learners who have to walk more than 10 kilometres to and from school, or five kilometres each way, qualify for free scholar transport, was 'the framework within which scholar transport as an aspect of s 29 of the Constitution is applied'.[74] However, the judgment makes clear that the policy must be applied 'flexibly':[75]

> The distance requirement of five kilometres from school is arbitrary, but understandably and unavoidably so: a distance had to be settled upon and it could just as easily have been four or six kilometres. This element of arbitrariness is one reason why the policy has to be applied flexibly. Otherwise deserving scholars may live 4,9 or 4,8 kilometres from their schools; or a very young scholar who is no longer in grade R may only live 4,7 kilometres from school. *In my view, the distance requirement is a guideline which has to be applied flexibly in order to achieve the ultimate purpose of providing scholar transport to all of those who need it.* Precisely the same considerations apply to all of the other aspects of the policy. In its application, it must be borne in mind that *the policy is not an end in itself but a means to the department's end of meeting its obligations in terms of s 29 of the Constitution.*

This passage implies that the scholar transport component of the right to basic education exists independently of the provincial policy, and the minimum requisite provisioning thereof may be more demanding than the policy stipulates. The minimum standard set by Plasket J is one of 'need': If a learner demonstrates that they 'need' scholar transport, then section 29 of the Constitution gives them an entitlement to it. This contextually-sensitive approach caters for the differing circumstances of learners. If a learner's walk to school is short but dangerous – passing through violent communities or across busy roads or difficult terrain, for example – then it is likely that they will have a need for, and a constitutional entitlement to, scholar transport. This will be so even if their total walking distance is less than 10 kilometres.

Most recently, the High Court added to the jurisprudence on the content of the right to basic education in the case of *Equal Education v Minister of Basic Education* (*School Meals* case).[76] This case concerned the cessation of the provision of school meals under the National School Nutrition Programme (NSNP) during the COVID-19 lockdown. The Court unequivocally stated that '[t]he Minister and

74 *Tripartite* (n 72) para 20.
75 *Tripartite* (n 72) para 57 (our emphasis).
76 2021 (1) SA 198 (GP).

MECs have a constitutional and statutory duty to provide basic nutrition in terms of s 29(1)(a)'.[77] Again, this was a judgment involving the affirmation of a pre-existing government policy. However, while the DBE's position was that the provision of nutrition under the NSNP was merely a 'by-product' of their duty to educate,[78] the High Court was clear that basic nutrition is a component of the right to basic education.[79]

In addition to the jurisprudence on the 'components' or types of input to which people are entitled as part of the right to basic education, the Constitutional Court in *AB v Pridwin Preparatory School* (*Pridwin*)[80] has also acknowledged that the state is obliged to provide education of a certain *standard*. In this way, the Constitutional Court cemented the position that the Eastern Cape High Court began developing in *Linkside.*

Pridwin concerned two children who had been expelled from their private school on the basis of their father's unruly behaviour. In deciding whether the expulsions amounted to breaches of the children's rights to basic education, the Court remarked on the content of that right. The Court stated:[81]

> [T]he term 'basic education' refers primarily to the content of the right to education. On this understanding of the term, children attending non-subsidised independent schools are undoubtedly receiving and enjoying a basic education. *The quality of the education may, at times, extend beyond what section 29(1)(a) requires from the state.* But that does not mean that children stop receiving a basic education the moment they enrol at these independent schools.

In our view, the clear implication of this passage is that the state is 'required' to provide education of a minimum standard or 'quality', albeit that the standard of education in fact provided at a school (whether public or private) may exceed this minimum.

In light of this jurisprudence one might feel that existing debates on the reception and application of the minimum core concept in South African law obscure more than they reveal. Our analysis

77 *School Meals* (n 76) para 42.
78 *School Meals* (n 76) para 40.
79 See F Veriava & N Ally 'Legal mobilisation for education in the time of COVID-19' 2021 37 *South African Journal on Human Rights* 239-242.
80 2020 (5) SA 327 (CC).
81 *Pridwin* (n 80) para 164 (our emphasis). *Pridwin's* treatment of the right to basic education is discussed in N Ally & D Linde '*Pridwin* – Private school contracts, the Bill of Rights and a missed opportunity' (2021) 11 *Constitutional Court Review* 282-286; T Lowenthal '*AB v Pridwin Preparatory School:* Progress and problems in horizontal human rights law' (2020) 36 *South African Journal on Human Rights* 261-274.

exposes an important fact: The courts, in a long line of cases, have given minimum content to the right to basic education. Given this clear and detailed articulation of the content of the right to basic education by the courts, it perhaps is unsurprising that they have never expressly denied that the right to basic education has a minimum core. The jurisprudence tells us that basic education must, at minimum, be available up to grade 12. It must, at minimum, include textbooks, classroom furniture, sufficient teachers, basic infrastructure, transport, and nutrition, and it must be of a minimum standard or quality.

The courts have thus given abstract and universally-applicable minimum content to the right to basic education (that is, the right requires basic infrastructure, adequate furniture, textbooks, teachers, and nutrition for all learners). In some cases, this has extended to more concrete content – such as the requirement that every learner is entitled to their *own* textbook, or that every learner is entitled to their *own* reading and writing space. In this sense, at least, South African courts have in fact taken a 'minimum core' approach to the right to basic education.

4 Lessons from the 'minimum core' approach to the right to basic education

In the previous part we argued that the courts have, in some senses, taken a 'minimum core' approach to the right to basic education. In this part we set out three lessons that can be learned from this approach.

4.1 Lesson one

The first lesson is that the courts can and should continue to specify the minimum content of the right to basic education.

In our view, this could include not only the minimum 'inputs' to which each person is entitled, but also the minimum 'outcomes'. It may also include a determination of the standard, level or amount of each input and outcome. For example, one of the minimum 'inputs' of the right to basic education might be teachers in the ratio of one teacher to 35 learners (put in concrete terms) or, alternatively, sufficient teachers to facilitate effective teaching and learning (put in more abstract terms). One of the minimum 'outcomes' might be the ability to read for meaning (in more abstract terms), or the ability to read for meaning in one's home language by grade 4 (as a more

concrete specification). This is reflected in the table below (Figure 1).[82]

It should be noted that the more concrete the statement of a minimum outcome or input, the less likely it is to have general applicability. This is true in both a normative sense and a factual sense: it would be less appropriate to apply a more concrete statement of the content of the right to all people at all times, and courts will likely be less willing to do so.

	Outcomes	**Inputs**
Type	eg The ability to read	eg Teachers
Standard, level or amount	eg The ability to read for meaning in their home language and/or language of teaching and learning by grade 4	eg The ratio of teachers to learners should be 1:35

These outcomes and inputs are not to be plucked out of thin air; rather, they must be informed by the purposes of the right to basic education, as articulated in cases such as *Juma Musjid*. We suggest that 'outcomes' are logically prior to 'inputs' (even though, empirically speaking, the outcomes will flow from the inputs). The purposes of the right to basic education inform the minimum outcomes required if those purposes are to be met, and the minimum outcomes inform the minimum inputs necessary for achieving the outcomes. For example, *Juma Musjid* tells us that the purposes of the right to basic education include the development of a person's personality, talents, and mental abilities and the provision of a foundation for lifetime learning and work opportunities.[83] One of the minimum outcomes required to meet this purpose is likely to be the ability to read for meaning by a certain developmental stage. The minimum inputs necessary to achieve that outcome may include early grade reading material for each learner and sufficient teachers trained in teaching reading skills.[84] Another minimum outcome may be the ability to

82 Others, including Brickhill, have also analysed basic education and the associated jurisprudence using a distinction between inputs and outcomes. See Brickhill n (50) 238-239, 258-259, 273-277.

83 *Juma Musjid* (n 37) para 43.

84 Our model of the relationship between purposes, outcomes and inputs bears similarity to that proposed by McConnachie and McConnachie (C McConnachie & C McConnachie 'Concretising the right to a basic education' (2012) 129 *South African Law Journal* 567-568). They suggest that identifying the substantive content of the right to basic education should proceed through a three-stage inquiry, which identifies, first, the purposes of education; second, basic learning

emotionally self-regulate and resolve conflict in a non-violent and pro-social manner.[85] The minimum inputs necessary to achieve this outcome may include teachers trained in positive discipline and restorative justice and access to social workers at school.[86]

Already, the courts have drawn on the purposes of the right to basic education to specify some of the constituent inputs – textbooks, teachers, classroom furniture, basic infrastructure, transport, and nutrition – and could continue to do so. For the most part, when specifying these minimum inputs, courts have relied on pre-existing government policies. In future, however, the courts should not feel straitjacketed by such policies. Following the example set in *Madzodzo*, they could exercise independent judgment and, if presented with the appropriate evidence, hold that pre-existing government policies would not – even if properly implemented – be sufficient. They may conclude, based on the evidence before them, that a necessary *type* of input is missing from existing policies, or that the *standard, level or amount* of a given input must be higher than specified in the policies.[87]

Though they have not yet done so, the courts could similarly specify what minimum outcomes are part of the right to basic education. Indeed, with South Africa's education system in a widely-recognised and ongoing crisis,[88] a shift in the jurisprudence, from inputs to outcomes, may be needed to hold government to account

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needs in light of these purposes; and, third, the inputs required to meet those needs. While this framework is useful, the concept of 'learning needs' appears to overlap with both 'purposes' and 'inputs', which may result in some slippage between the proposed stages of the inquiry.

85 See, eg, UN Committee on the Rights of the Child, General Comment 1: Article 29(1): The aims of education (17 April 2001)UN Doc CRC/GC/2001/1 (2001) para 9: 'Education must also be aimed at ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life. Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.'

86 For discussion, see M Reyneke & R Reyneke *Restorative school discipline: The law and practice* (2020).

87 Even in relation to progressively realisable rights, *Grootboom* and *TAC II* left open the possibility that a context-sensitive and evidence-based determination of the 'minimum core' content of a right may inform an assessment of the reasonableness of the state's measures. While *Mazibuko* did not raise this possibility, the Court did not expressly reject it. Judges can also ensure that necessary evidence and information is placed before the court through requests for further submissions and evidence (see, eg, *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12 para 3).

88 See, eg, S Schirmer & R Visser 'The silent crisis: South Africa's failing education system' in A Bernstein (ed) *The silent crisis: Time to fix South Africa's schools* (2023) (Centre for Development and Enterprise).

and ensure that the right to basic education is more than just an on-paper promise.

The results of the 2021 Progress in International Reading Literacy Study were released in May 2023. Notoriously, the study found that 81 per cent of grade 4 learners in South Africa cannot read for meaning in any language, including their home languages.[89] What is more, South Africa performed significantly worse than it did in the 2016 assessments, with the results reflecting the same levels of literacy as in 2011. The study acknowledges the role of the COVID-19 pandemic in undoing South Africa's slow progress in improving reading outcomes. However, it seems clear that the pandemic only deepened existing inequalities in the education system. Quintile 4 and 5 schools, teaching mostly in English and Afrikaans, did not experience a decline in reading outcomes. The decline was experienced only by quintile one to three schools, teaching mostly in African languages. Against this backdrop, it may be helpful if courts – when presented with the appropriate facts – make clear and explicit that one of the outcomes of the right to basic education is the ability to read for meaning. From this would follow the recognition that the state is obliged to ensure that the inputs needed for achieving this outcome are in place.

This is something that, according to the South African Human Rights Commission, thus far has been 'lacking' in the jurisprudence.[90] In a recent report, they ask: 'What is the minimum set of knowledge, skills and dispositions that an individual must possess for their right to a basic education to be said to have been realised?' They argue that one of the 'minimum core outcomes' of the right to a basic education is the ability to read and write 'with understanding, at a basic level' in one's home language by the age of 10. In our view, existing case law leaves the door open for the courts to, in the least, specify that the ability to read and the ability to write as at least some of the minimum outcomes of the right to basic education. The courts arguably could go further, specifying that basic education requires literacy at a certain standard or level by a certain developmental stage – though we accept that, if the courts want to articulate minimum outcomes in more concrete terms, they may have to adopt a more tailored, context-specific approach in order to ensure that they do not overstep their institutional competence.

89 I Mullis and others 'PIRLS 2021 international results in Reading' (2023) (Boston College, TIMSS & PIRLS International Study Center).

90 A Nkomo and others 'The right to read and write' (2021) (South African Human Rights Commission).

An outcomes-oriented approach may attract some criticism. McConnachie and Brener, for example, have cautioned that '[t]he litigation process lends itself to focusing on education inputs' and that courts may be reluctant to adjudicate more complex 'outputs' claims.[91] We agree that outcomes-oriented litigation raises complex issues. One such issue is the separation of powers.[92] Moreover, when shifting from inputs to outcomes, it is important to recognise that the state cannot, and should not try to, exercise the same degree of control over the latter. While the state may have a duty to identify and create the conditions needed for children to read, monitor reading outcomes, or create accountability mechanisms, it would be difficult, and potentially dangerous,[93] to argue that the state has a duty to *guarantee* that every child can *in fact* read by a particular age, grade, or developmental stage.

However, recognising this complexity should not, in our view, dissuade litigants. Instead, as we have sought to demonstrate, there is scope for courts to make more explicit the link between the minimum 'inputs' required by a right to basic education, and the minimum 'outcomes' that those inputs are geared toward.[94] This outcomes-oriented approach may enable courts to better articulate the full range of state duties in relation to the right. If the courts restrict themselves to merely specifying the inputs that are part of the right to basic education, without reference to the outcomes sought to be achieved through those inputs, then they will ultimately have very limited traction on issues like the reading crisis. If, however, the courts were to specify that the right to basic education aims toward certain reading outcomes, among others, then more possibilities

91 C McConnachie & S Brener 'Litigating the right to basic education' in J Brickhill (ed) *Public interest litigation in South Africa* (2018) 302-303. They caution that 'learners with skill sets at particular levels, improved pass rates and better empowered parent bodies are all outcomes that may be too complex to be translated into specific relief in court papers'.

92 Compare Skelton who, writing a decade ago, suggests that with South Africa's 'embarrassing record of under-achieving' it may 'be easy to convince a court of the government's failure to provide an adequate education'. However, while 'diagnosis' may be 'the easy part of the process', developing judicial remedies to improve education quality while respecting separation of powers is challenging. Even then, Skelton argues that such challenges are not intractable. She offers useful suggestions on the fashioning of participatory or other non-court-centric remedial interventions that can be aimed at improving the education quality. See A Skelton 'How far will courts go in ensuring the right to a basic education?' (2012) 27 *Southern African Public Law* 405.

93 One of the main dangers of this kind of argument is that it may encourage the state to take highly interventionist measures that violate people's privacy and autonomy.

94 Litigation on adequate education in the United States has made some strides in this direction; see discussion of relevant cases by McConnachie & McConnachie (n 85) 574-575, and Fredman (n 46) 391-393. These developments, however, have been uneven. For recent analysis, see LJ Obhof 'School finance litigation and the separation of powers' (2019) 45 *Mitchell Hamline Law Review* 539-577.

may open up: Essentially, the courts may be better able to impose duties on the state to monitor reading outcomes, regulate for reading and, crucially, identify which inputs will be necessary and effective to achieve better reading outcomes.

Litigants can also assist courts by bringing carefully-circumscribed and evidence-based cases. The case of *Pease v Government of the Republic of South Africa* (*Pease*)[95] offers an example of outcomes-oriented litigation seeking wide-ranging relief, based on broad, sweeping causes of action, and without sufficient supporting evidence.[96] The applicants, frustrated with the state of the country's education provisioning, cast their challenge as an abstract attack on the adequacy of the entirety of the basic education system. Amongst numerous claims,[97] they argued that the state had consistently failed to ensure that the majority of the country's learners were equipped with the skills needed to attain functional literacy, and that this violated the right to basic education. Given the manner in which the case was litigated, it is unsurprising that the High Court – in an unreported judgment – dismissed the case. Nonetheless, it is noteworthy that Erasmus J took the view that the right to basic education cannot be interpreted as requiring the achievement of certain outcomes. In part, this conclusion was informed by the mistaken belief that the Constitutional Court's rejection of the minimum core approach in some socio-economic rights cases constrains the ability of courts to develop the minimum content of the right to basic education.[98] As we have argued, this is not the case. This type of misapprehension is precisely why we consider it necessary and useful to highlight the ways in which courts can and have developed the minimum content of the right to basic education.

4.2 Lesson two

The second lesson, we suggest, is that the rights of children under section 28 of the Constitution – such as the right to basic education – also have minimum content. Courts should take the same approach to section 28 rights as they have to the right to basic education.

95 Case 18904/13, Western Cape Division of the High Court, 18 September 2015 (unreported judgment).
96 Veriava (n 46) 159-160 describes the case as a 'perfect example of litigation that does not conform to a model of strategic public interest litigation'.
97 This included challenging the government's systemic failure to equip the majority of children with functional literacy skills; deliver adequate learning and teaching support materials; professionalise educators; provide foundation phase mother-tongue instruction; and deliver comprehensive early childhood development services to children.
98 *Pease* (n 95) paras 140, 148-151.

Section 28(1)(c) of the Constitution gives every child the right to basic nutrition, shelter, basic healthcare services and social services, where a 'child' means a person under the age of 18 years.[99] In contrast to other socio-economic rights under sections 25, 26 and 27 – and in common with the right to basic education under section 29(1)(a) – there is no progressive realisation clause contained within section 28(1)(c). It follows that the rights of children under section 28(1)(c) share some key features with the right to basic education under section 29(1)(a): They, too, are unqualified and immediately realisable, and resources must be prioritised accordingly. Indeed, these features were clearly articulated by the High Court in *Centre for Child Law v MEC for Education Gauteng* (*Centre for Child Law*).[100] This case concerned the state's failure to provide sleeping bags, access control services, psychological support, and therapeutic services to children staying at the hostel attached to a school of industry in Gauteng. The Centre for Child Law alleged that the conditions at the hostel violated the pupils' rights under section 28, as well as their rights to not to be subjected to cruel, inhuman or degrading treatment under section 12 and to dignity under section 10. The Court contrasted children's rights with other socio-economic rights, noting that section 28 'contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation'. Hence, children's rights are 'unqualified and immediate'.[101]

Admittedly, the jurisprudence also points to an important difference between sections 29(1)(a) and 28(1)(c). In respect of section 29(1)(a), the state is the primary duty bearer. When it comes to section 28(1)(c), parents and caregivers are the primary duty bearers.[102] In *Centre for Child Law* the children concerned were in the care of the state, having been sent to the school of industry pursuant to section 15 of the (now repealed) Child Care Act 74 of 1983. However, in cases where children are in the care of their parents, grandparents or other relatives, it is they – and not the state – who have the primary duty to ensure that the child is properly fed and has a roof over their head. Nonetheless, the state must step in where parents are unable to meet these needs. This was made abundantly clear in *TAC II*, where the Constitutional Court recognised that the state is 'obliged to ensure that children are accorded the protection contemplated by section 28' in circumstances where 'the implementation of the right

99 Sec 28(3) Constitution.
100 2008 (1) SA 223 (T).
101 *Centre for Child Law* (n 100) 227-228.
102 As confirmed by the Constitutional Court in *Grootboom* (n 16) paras 75-77.

to parental or family care is lacking'.[103] The High Court in the *School Meals* case reiterated this point:[104]

> The Constitution does not contemplate that children whose parents cannot afford to feed them should be left to starve or must be removed from their parents. The Constitution envisages that section 28 of the Constitution will protect those children. In the *Grootboom* matter the Constitutional Court did find that s 28(1)(c) ensures that children are properly cared for by their parents and parents cannot shirk their parental responsibilities. But what is to happen when parents cannot provide basic nutrition to a child? … The state remains responsible to provide families with other socio-economic rights to enable them to provide for their children.

It may be suggested that, notwithstanding High Court jurisprudence, the Constitutional Court in *Grootboom* declared section 28(1)(c) to be subject to progressive realisation. Indeed, the Court did state:[105]

> The obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27 of the Constitution. Each of these sections expressly obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the rights with which they are concerned.

However, context matters. The Court in this passage was outlining the scope of the state's obligations as a *secondary* duty bearer (that is, in circumstances where parents are able to fulfil their responsibilities as primary duty bearers). The Court does not suggest that children's section 28 entitlements are progressively realisable as against their primary duty bearers. Understood in this light, High Court jurisprudence is not inconsistent with the Constitutional Court's approach in *Grootboom*. In fact, recognition that section 28 rights give rise to immediately-realisable obligations by primary duty bearers coheres with the textual interpretation of section 29(1)(a) that was adopted in *Juma Musjid*.[106]

Given the similarities between the rights under section 29(1)(a) and the rights under section 28(1)(c), the courts, in our view, should be similarly willing to articulate the minimum outcomes and inputs that constitute the rights of children under section 28(1)(c). Such an approach, for example, could help to facilitate significant gains in the provision of early childhood development services to children in South Africa. ECD programmes not only provide early learning

103 *TAC II* (n 21) para 79.
104 *School Meals* (n 76) para 51; for analysis of this aspect of the judgment, see Veriava & Ally (n 79) 240.
105 *Grootboom* (n 16) para 74.
106 *Juma Musjid* (n 37) para 37.

opportunities; they also facilitate early identification of disabilities and developmental delays and referrals to the necessary healthcare services, help to support child protection by offering a setting in which at-risk children can be identified, and often provide meals. Yet, currently, access to ECD programmes is limited. In 2022 only 31,5 per cent of children aged 0 to 4 were recorded as having attended an ECD programme.[107] Even for those children in programmes, most will not benefit from state funding and support. According to the Early Childhood Development Census 2021, only 33 per cent of programmes received the ECD subsidy.[108]

Relatedly, many young children continue to be malnourished. The Child Gauge 2020 noted that stunting affects more than one in four children (27 per cent).[109] Stunting rates are at their highest among children 18 to 27 months old, at 40 per cent. The Child Gauge 2020 also noted the prevalence of 'hidden hunger', whereby deficiencies in micro-nutrients impair immunity and cognitive development.[110]

By recognising that the rights of children under section 28(1)(c) are immediately realisable, by articulating the inputs and outcomes that constitute those rights, and by setting out the nature and extent of the state's duties to provide those inputs and outcomes, the courts could help to ensure universal access to much-needed ECD services for South Africa's young children.

4.3 Lesson three

The third lesson we draw from jurisprudence on the right to basic education is the potential scope for developing the minimum content of *progressively*-realisable socio-economic rights.

It is true that the Constitutional Court in *Mazibuko* definitively rejected two propositions: first, that progressively-realisable rights oblige the *immediate* provision of some resources to everyone; second, that it is appropriate for courts to independently establish a concrete, quantifiable and universally-applicable level at which a minimum core resource should be provided. Despite the rejection of these claims (which together amount to quite a thick conception of minimum core obligations) this should not be read as an absolute

107 Statistics South Africa 'General Household Survey 2022, Statistical Release P0318' (2023) 9.
108 Department of Basic Education 'ECD Census 2021: Report' (2022) 33.
109 W Sambu 'Child nutrition' in J May and others (eds) *South African child gauge 2020: Food and nutrition security* (2020) 171.
110 Sambu (n 109) 173.

bar on developing some minimum *content* of progressively realisable rights (as some critics have suggested).[111]

Rather, as has been established for the right to basic education, the minimum *types* of outcomes for a specific right, and related *types* of inputs, can be recognised at a higher level of abstraction, without necessarily specifying the *concrete levels* of provisioning for each component. Moreover, as we have shown, the courts in most cases have either (a) affirmed the level of provisioning prescribed by existing policies, as in scholar transport, or (b) left it to the government to specify the requisite amounts or standards. As Fredman has recently argued,[112] even though the right to basic education is immediately realisable, there is no principled reason why the substantive content of progressively realisable rights cannot be developed in a similarly deliberative manner.[113] The reasonableness of the state's measures would then be assessed having regard to such substantive content, thus mitigating the potential for the reasonableness standard to be employed in an 'over-flexible, abstract and decontextualised' manner.[114]

Indeed, there are examples of the Constitutional Court recognising the minimum content of the right of access to adequate housing in this way. In *Grootboom* Yacoob J recognised that the right entails 'more than bricks and mortar',[115] and went on to specify at least some of the minimum components (or types of input) required by the right:[116]

> [The right of access to adequate housing] requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. *For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling.*

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (*Joe Slovo*)[117] the Court recognised that even temporary

111 See, eg, the commentary cited at n 36.
112 S Fredman 'Adjudicating socio-economic rights: A lasting legacy' in N Ally & L Boonzaier 'Edwin Cameron: Influences and impact' (forthcoming).
113 It may be said that one can only sensibly refer to the 'minimum core' of a right to the extent that it is immediately claimable (that is, the temporal and content dimensions of the concept are inextricably linked). In our view, a modified conception of the minimum core approach, which de-links its content and temporal dimensions, would be useful in a South African context (where the Constitution clearly distinguishes between immediately and progressively-realisable rights).
114 Wilson & Dugard (n 35) 56.
115 *Grootboom* (n 16) para 35.
116 As above.
117 2010 (3) SA 454 (CC).

housing, provided in the context of an eviction, must meet some minimum requirements.[118] In that case, a housing development agency sought an order for the relocation of approximately 20 000 residents from an informal settlement, which had been earmarked for reconstruction and upgrading. The High Court granted an order requiring the residents to relocate to state-provided temporary accommodation, but did not stipulate any minimum conditions for such accommodation. On appeal, the Constitutional Court indicated that temporary housing has to provide 'sufficient protection and dignity' to residents,[119] and required the respondents to produce a draft order that would ensure the same. The order finally endorsed by the Court stipulated that the temporary accommodation provided by the respondents include basic services such as roads, electricity, water and toilet facilities.[120]

More recently, in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*Thubakgale*),[121] four judges of the Constitutional Court (led by Majiedt J) held that South Africa's legacy of spatial injustice must be considered when assessing the right to access adequate housing. In the context of that case, this meant that access to adequate housing required 'continued access to schools, jobs, social networks and other resources'.[122] While Majiedt J was in the minority on the central question in that matter (whether the applicants were entitled to the remedy of constitutional damages), his interpretation of the right to access adequate housing remains instructive for future cases.[123]

118 *Joe Slovo* concerned sec 26(3) of the Constitution, which provides: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

119 *Joe Slovo* (n 117) para 119. Cameron J adopted a similar approach in a minority opinion in *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 57. The applicants in that case challenged restrictive conditions placed on their residence at a temporary shelter. Cameron held that the right to access adequate housing was engaged, and that temporary accommodation 'entails more than just providing a roof and four walls'. Instead, it must include 'all that is reasonably appurtenant to making the accommodation adequate'. The majority of the Court held that the shelter's rules did not implicate sec 26 of the Constitution, but upheld the claim that the rules violated the applicants' rights to dignity, freedom and security of the person and privacy (see Fredman (n 112)).

120 O'Regan J's opinion emphasises this point (*Joe Slovo* (n 117) para 319). Interestingly, the respondents further concretised their commitments by, among others, stipulating that each temporary accommodation unit would be no less than 24m2 in size, have a galvanised iron roof, and be serviced with tarred roads. While the Court did not independently prescribe these standards, its willingness to accept the proposal indicates that these concrete measures were considered reasonable in the context of this case.

121 2022 (8) BCLR 985 (CC).

122 *Thubakgale* (n 121) para 110.

123 Fredman (n 113). Our analysis has focused on the positive obligations to which the minimum content of rights may give rise. The content of a right may also be established in relation to the negative protections it confers. A recent Supreme Court of Appeal judgment on the progressively realisable right to *further* education (sec 29(1)(b)) is illustrative. Unterhalter J (Acting Judge of Appeal)

5 Conclusion

After *Mazibuko*, the prevailing sentiment among observers of South Africa's socio-economic rights jurisprudence has been rather pessimistic. Some have even declared the 'death' of socio-economic rights.[124] However, jurisprudence on the right to basic education tells a different story. Courts across the country have demonstrated a willingness to develop the substantive content of that right. Rights holders and duty bearers have clarity that, at minimum, basic education requires textbooks, furniture, infrastructure, teachers, transport and nutrition. This case law offers fertile ground for further developing the right to basic education, as well as advancing other immediately-realisable rights. It also illuminates pathways for giving progressively-realisable rights meaningful content, notwithstanding the Constitutional Court's jurisprudence on minimum core claims.

Of course, while courts can (and should) give socio-economic rights 'teeth',[125] other institutions have a crucial role to play. A 'constitutional ethos' has to take root across all levels of government in order for socio-economic rights to translate into material impact,[126] and it is vital for activists seeking accountability and social change to engage with democratic mechanisms beyond constitutional litigation. After all, as Justice Cameron reminds us, 'courts cannot achieve social justice alone: far from it. Other branches of government and civil society activism are indispensable.'[127]

declared that a policy prohibiting prisoners from using personal computers in their cells to further their studies violated their right to a further education. In doing so, he held that the right 'at a minimum' entitles prisoners to the ability to enjoy the freedom to enrol in 'a course of study for which they qualify … and for which they have paid'. Even though the right may 'have a richer content', the 'negative freedom the right confers' restrains the state from, absent justification, interfering with this minimum entitlement. See *Minister of Justice and Constitutional Development & Others v Ntuli* [2023] ZASCA 146 para 20.

124 O'Connell (n 36) 532 (critiquing a perceived neo-liberal turn in the jurisprudence of apex courts in Canada, India and South Africa and the resultant 'end, in substantive terms, for the prospect of meaningful protection of socio-economic rights'.)

125 Bilchitz (n 6).

126 Scott & Alston (n 11).

127 E Cameron 'A South African perspective on the judicial development of socio-economic rights' in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning rights: Comparative judicial engagement* (2014) 338. See also Fowkes (n 33) 295 on the limitations of court-centric perspectives (emphasising that the Court is 'one institution among many').