

# Beyond *Rivonia*: Transformative constitutionalism and the public education system

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## 1 Introduction

The after effects of apartheid education are still felt acutely in our present education system. According to statistics released by the Department of Basic Education, one quarter of South African schools are overcrowded.<sup>1</sup> This denotes a critical shortage of classrooms countrywide, particularly in the former black schools that continue to be overcrowded. Gauteng is not an exception to the nationwide norm. Former black schools in the province have average learner-educator ratios as high as 1:54 per class in comparison to former Model C schools<sup>2</sup> with learner-educator ratios as low as 1:19 per class.<sup>3</sup>

Rivonia Primary School is one of the former Model C schools in Gauteng which maintains low learner-educator ratios due to its ability to remunerate additional teachers from the school's affluent budget. In 2010, in an effort to preserve the *status quo*, the school refused admission to a Grade 1 learner. This decision was ultimately challenged in the South Gauteng High Court which delivered a judgment that fundamentally altered the powers of school governing bodies to determine the capacity of a school.<sup>4</sup> "Capacity" in this instance refers to the maximum number of learners a school can accommodate. The Court held

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<sup>1</sup>Department of Basic Education 'The National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment' (2010) GG No 33283 11 June GN 515, para 1.5.

<sup>2</sup>'Model C' is generally used to describe the former white schools as they existed under the previous regime. See South African Human Rights Commission *A report on racism, racial integration and desegregation in South African public secondary schools* (February 1999).

<sup>3</sup>Annexure 'LD9' of first to third respondents' answering affidavit in the matter between the Governing Body of Rivonia Primary School and the MEC for Education: Gauteng in the South Gauteng High Court.

<sup>4</sup>*Governing Body of Rivonia Primary School and Another v MEC for Education: Gauteng* 2012 1 All SA 576 (GSJ) ('the High Court judgment').

that the power to determine the maximum capacity of a school vests in the Department of Education and not the school governing body.<sup>5</sup> The High Court judgment was subsequently overturned by the Supreme Court of Appeal. However, the Constitutional Court made a final pronouncement on the matter by agreeing with the High Court that the Department may intervene in the admission policy of a public school.<sup>6</sup>

The Rivonia judgments exposed (again) the deep divisions within the public education system. My interest here is not to analyse the legislation applicable to the case or to engage in a detailed rights-based analysis. I am concerned with the broader issues of race, inequality and the transformation of the public education system as they were highlighted in the judgments of the High Court and the Constitutional Court.

Part 2 of the article provides the relevant context by describing the current public education system which is riddled with inequalities from the past. The third part focuses on how transformation is understood, examines the judiciary's role in advancing transformation and explores the limitations placed on transformative constitutionalism. Part 4 looks at the High Court and Constitutional Court judgments and determines whether the interpretive approach by these courts accords with the principles of transformative constitutionalism. In the next part of the article, I question whether the Rivonia judgments will have an impact on the transformation of the public education system. Part 6 provides the conclusion.

## 2 The South African public education system

The South African public education system, deeply scarred by the legacy of the past, is in dire need of transformation. It is trite that South Africa, in reality, still harbours separate education systems in its public school domain: the one consists of the former Model C schools, which are adequately resourced, and the other of the former black schools, entrenched in abject poverty.<sup>7</sup> The legacy of apartheid education is manifested in a minimum level of resources, lack of qualified teachers, high teacher-pupil ratios, lack of libraries and laboratories and a shortage of classrooms at the latter schools. On the other hand, most of the former Model C schools are equipped with modern computers, well-resourced libraries and laboratories and well-qualified teachers.<sup>8</sup> The root of this disparity is found in the education policy of the previous regime. One of the key features

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<sup>5</sup>The High Court judgment (n 4) para 59.

<sup>6</sup>*MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 BCLR 1365; 2013 6 SA 582 (CC) ('the Constitutional Court judgment').

<sup>7</sup>South African Human Rights Commission *Socio-economic rights report* (2001) 88.

<sup>8</sup>Veriava and Coomans 'The right to education' in Brand and Heymans (eds) *Socio-economic rights in South Africa* (2005) 60.

of apartheid education was the gross inequality in the funding of public schools which occurred primarily on the basis of race, with black learners receiving the least.<sup>9</sup> However, the post-apartheid financing system is heavily reliant on school fees and reinforces the existing inequality between former black and white schools.<sup>10</sup> Wealthy schools (predominantly former Model C schools) can sustain their position of privilege by charging high school fees which enable them to operate on budgets far exceeding those of poor schools which cannot charge similar amounts.<sup>11</sup> Besides a difference in resources, a marked disparity in quality of education also distinguishes these two systems. Learners at former Model C schools are on average outperforming their counterparts at disadvantaged schools.<sup>12</sup> The learners who are regularly branded as 'being among the worst of the world'<sup>13</sup> in literacy and numeracy tests are mostly found at disadvantaged schools (mostly township and rural schools) which have been described as 'sinkholes' where 'learners are warehoused and deprived of an education 'of any meaningful quality'.<sup>14</sup> A good education in South Africa has therefore become a commodity. It is mostly the elite and middle class that send their children to former Model C schools because they have the means to do so whilst the poor majority remain trapped in dysfunctional schools.<sup>15</sup>

The *Rivonia* judgments highlighted the existence of the two unequal systems described above. The High Court was in particular acutely aware of the danger of preserving the historical privilege of former Model C schools and perpetuating patterns of disadvantage if a school governing body has the final say in the capacity of a school.

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<sup>9</sup>*Ibid.*

<sup>10</sup>Roithmayr 'Access, adequacy and equality: The constitutionality of school fee financing in public education' 2003 (19) 3 *SAJHR* 382. I use the terms 'black schools' and 'white schools' to distinguish between former Model C schools (which only admitted white children under the previous regime) and previously disadvantaged schools which served the interests of black learners under the apartheid government. Post 1994, however, the racial lines have become blurred. An increasing number of black learners are attending former Model C schools. However, the majority of black learners are situated at the former black schools.

<sup>11</sup>*Ibid.* South African schools are divided into five national quintiles ranging from the poorest school to the least poor school. The richest schools (quintiles 4 and 5) are entitled by the Schools Act 84 of 1996 to charge school fees. The poorest schools in quintiles 1–3 are declared no-fee schools. See South African Schools Act 84 of 1996: Amended National Norms and Standards for School Funding (GG 29179 of 2006) para 87.

<sup>12</sup>Bloch *The toxic mix: What's wrong with South Africa's schools and how to fix it* (2009) 59.

<sup>13</sup>*Id* 17.

<sup>14</sup>*Id* 59.

<sup>15</sup>An assumption which brands all former black schools as 'dysfunctional' should be avoided. Previously disadvantaged schools that perform on par with former Model C schools do exist. However, they are in the minority. See Bloch (n 12) 132.

### 3 Transformative constitutionalism

The South African Constitution embodies a transformative model of constitutionalism.<sup>16</sup> This differs from traditional liberal constitutions which only place restraints on the exercise of state power.<sup>17</sup> Besides providing measures to curb an abuse of state power, the transformative Constitution also requires of government to take steps 'to advance the ideals of freedom, equality, dignity and social justice.'<sup>18</sup> The Constitution endorses a substantive approach to equality which acknowledges that there are levels and forms of social differentiation and systematic underprivilege that still persist as a result of the racist policies of the previous regime.<sup>19</sup>

Central to the idea of transformative constitutionalism is the understanding that 'transformation is a social and economic revolution' without which the economic playing fields will not be levelled<sup>20</sup> and access to decent socio-economic living standards will remain unattainable for the majority of South Africans. Remedial measures are therefore required to rectify the material consequences of the oppressive apartheid system.<sup>21</sup>

The transformative character of the Constitution is further recognised by the inclusion of justiciable socio-economic rights in the Bill of the Rights.<sup>22</sup> The justiciability of these rights imposes a constitutional obligation upon the state to 'realise housing, educational and social security objectives which cannot be left merely to the free market for fulfilment'.<sup>23</sup> Therefore, '[t]he purpose of the transformative Constitution is not merely to protect [existing] rights, but also to empower disadvantaged persons and to contribute to the amelioration of social evils such as poverty, illiteracy and homelessness'.<sup>24</sup> The underlying political philosophy of socio-economic rights therefore involves implementing policies to alleviate the plight of the disadvantaged in our society.<sup>25</sup> In sum, the proponents of transformative constitutionalism recognise that political emancipation is meaningless without socio-economic change.

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<sup>16</sup>Brand 'Introduction to socio-economic rights in the South African Constitution' in Brand and Heyns *et al* (eds) *Socio-economic rights in South Africa* (2005) 1.

<sup>17</sup>*Ibid.*

<sup>18</sup>*Ibid.*

<sup>19</sup>*Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 142.

<sup>20</sup>Langa 'Transformative constitutionalism' 2006 (17) *Stell LR* 352.

<sup>21</sup>Pieterse 'What do we mean when we talk about transformative constitutionalism?' 2005 (20) *SAPL* 160.

<sup>22</sup>Brand (n 16) 3.

<sup>23</sup>Devenish 'The nature, evolution and operation of socio-economic rights in the South African Constitution' 2007 *THRHR* 85.

<sup>24</sup>*Ibid.*

<sup>25</sup>*Ibid.*

### **3.1 *The judiciary and transformative constitutionalism***

The achievement of transformation is dependent on a 'collaborative enterprise' by state and non-state actors.<sup>26</sup> The Bill of Rights binds the legislature, executive, judiciary and all organs of state.<sup>27</sup> Moseneke J (as he was known then), in his seminal lecture on transformative adjudication, affirms that the task of the judiciary is to advance the 'transformative design' of the Constitution.<sup>28</sup> At a practical level, courts are required to 'search for substantive justice' in order to facilitate the achievement of transformation.<sup>29</sup> Moseneke singles out the achievement of substantive equality as the central feature of transformative constitutionalism.<sup>30</sup> This necessitates a contextual method of interpretation which requires the courts to examine the historical and socio-economic conditions of the groups concerned 'in the light of social patterns, power relations and other systematic forms of deprivation, which may be relevant'.<sup>31</sup> When confronted with structural forms of inequality and past patterns of systemic disadvantage, the role of the judiciary then is to use the Constitution as a tool to 'intervene in these unjust and uneven power and resource distributions' so as to achieve a society built on substantive equality and social justice.<sup>32</sup>

### **3.2 *The limitations placed on transformative constitutionalism***

Although 'transformative constitutionalism' has been widely accepted in academic and non-academic circles as the appropriate concept to describe South Africa's form of constitutionalism and as a means to define our constitutional project,<sup>33</sup> it is not without its limitations.

Klare laments the traditional South African legal culture which he perceives as a threat to the 'substantively transformative aspirations' of the Constitution.<sup>34</sup> According to Klare, for these aspirations to be fulfilled, a politically progressive judiciary is required to interpret the provisions of the Constitution in accordance with the transformative vision of the Constitution. However, most jurists, steeped in the traditional South African conservative legal culture believe that it not within

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<sup>26</sup>Rosa 'Transformative constitutionalism in a democratic developmental state' in Liebenberg and Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 103.

<sup>27</sup>Ss 7(1) and (2); 8(3) and (4) of the Constitution of the Republic of South Africa, 1996.

<sup>28</sup>Moseneke 'The Bram Fisher Memorial Lecture: Transformative adjudication' (2002) 18 *SAJHR* 314.

<sup>29</sup>*Id* 316.

<sup>30</sup>*Id* 316.

<sup>31</sup>*Ibid.*

<sup>32</sup>*Ibid.*

<sup>33</sup>Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism, and the struggle to eradicate poverty' in Liebenberg and Quinot (n 26) 45.

<sup>34</sup>Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 170.

their domain to pursue political goals through their judgments.<sup>35</sup> In this regard, Pieterse observes that:

South African legal culture, with its pronounced preference for 'political neutrality' in adjudication (which requires lawyers and judges to remain 'neutral' in their interpretation and application of legal texts by abstaining from interpretations or orders that have 'political' (or social, or economic) significance or consequences) has, like other Anglo-Saxon legal cultures, rightly been accused of masking a strong preference for the political structures and rights discourses associated with classical liberalism and accordingly of condoning the inequalities occasioned, reinforced and sustained by the unfettered operation of classical liberal economic and social structures.<sup>36</sup>

The post-apartheid judiciary's methods of interpretation are at times reminiscent of the old order where a strong deferential stance was adopted *vis-à-vis* the executive.<sup>37</sup> Such an approach may have been justifiable under the previous system of parliamentary sovereignty, but the Constitution now reigns supreme and as such, jurists are empowered by an enabling constitutional text to effect transformation. In order to attain the truly equal society envisioned by the transformative Constitution, judges are required to accept the 'politics of law' and justify their decisions 'in terms of the rights and values of the Constitution' and not 'on the say-so of parliament or technical readings of legislation'.<sup>38</sup>

The transformative project is also threatened by the specific politico-economic system to which the South African government subscribes to. According to Terreblanche, the post-apartheid politico-economic system '... is a neo-colonial satellite of the American-led neo-liberal global empire that systematically excludes the poorest part of the population from participating in the global economy'.<sup>39</sup> Terreblanche points out that pre-1994 an 'elite compromise' was reached between the ANC and various local and foreign groups on the South African economy.<sup>40</sup> This compromise prohibited the ANC from adopting an effective redistribution policy which was regarded as unaffordable by the parties at the secret negotiation process.<sup>41</sup> The interests of the 'old white corporate elite and the emerging black elite' were given preference and this resulted in white

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<sup>35</sup>*Id* 171–172.

<sup>36</sup>Pieterse (n 21) 164 (references omitted).

<sup>37</sup>See for example *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

<sup>38</sup>Langa (n 20) 353.

<sup>39</sup>Terreblanche *Lost in transformation: South Africa's search for a new future since 1986* (2012) 2.

<sup>40</sup>The 'elite compromise' was reached between the White Triple Alliance (under the leadership of the Minerals Energy Complex, which consists of a cluster of mining and energy industries), a leadership core of the ANC and American and British pressure groups. See Terreblanche (n 39) ch 4.

<sup>41</sup>Terreblanche (n 39) ch 4.

corporations and citizens being able to transfer their wealth '... almost intact to the new South Africa'.<sup>42</sup> In terms of the negotiated settlement the ANC were 'allowed' to adopt black economic empowerment and affirmation action measures that led to the emergence of a black elite but left the ANC fiscally restricted to adopt a 'comprehensive redistribution policy' to address the severe socio-economic deprivation of the majority of black South Africans.<sup>43</sup> The economic and social revolution required by transformative constitutionalism is therefore in danger if the ANC led government remains invested in the neo-liberal economic agenda that it has adopted.

## 4 The *Rivonia* judgments and transformative constitutionalism

The dispute before the High Court and the Constitutional Court concerned section 5(5) of the Schools Act which provides that:

Subject to the [Schools Act] and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.

Both courts were requested to determine whether the school governing body or the Department of Education has the final say in determining the capacity of a public school. Although the High Court and the Constitutional Court reached the same outcome,<sup>44</sup> I argue that in light of the tenets of transformative constitutionalism discussed above, the court *a quo* offered an interpretive approach that is more suitable for a judiciary that is constitutionally bound to obey the transformative vision of the South African Constitution.

### 4.1 *The High Court judgment*

The Court, from the outset, recognised that this was not merely a case about one child being turned away by a school governing body claiming that the school had reached its capacity. Instead, the Court was concerned with the broader patterns of historical inequality and privilege that may be perpetuated by allowing school governing bodies to have the final say in the capacity of public schools. Mbah J preferred a contextual approach to interpretation by examining the historical and

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<sup>42</sup>Terreblanche (n 39) 109.

<sup>43</sup>*Id* 127.

<sup>44</sup>Both courts agreed that the Department of Education has the final say in the capacity of a school. However, the Constitutional Court added that the 'relevant functionary and the school governing body are under a duty to engage with each other in good faith on any disputes, including disputes over policies adopted by the governing body. The engagement must be directed towards furthering the interests of learners' para 49.

social conditions of the groups concerned.<sup>45</sup> He emphasised the privileged nature of former Model C schools such as Rivonia Primary which are better resourced and have lower learner-teacher ratios than other (disadvantaged) schools because of the racially discriminatory funding system of the apartheid government.<sup>46</sup> The Court also displayed its concern with the disparity in the quality of education between former Model C schools and disadvantaged schools. This is evident from its contention that allowing schools to determine their own capacity without government interference will result in privileged schools crafting 'admissions policies that allow them to continue to offer a premium education to their learners, while ignoring the increased demand their action places on [underprivileged] schools in the area which are operating on fewer resources and higher learner-to-class ratios.'<sup>47</sup> In response to the Rivonia School Governing Body's argument that it built nine additional classrooms and employed supplementary teachers out of their own pocket to ensure that they maintain a low learner-educator ratio, the Court held that although the school's 'desire to offer the best possible education for its learners is laudible, the Constitution does not permit the interest of a few learners to override the right of all other learners in the area to receive a basic education'.<sup>48</sup> In sum, Judge Mbah correctly identified the past patterns of inequality and power relations that still persist within the public education system. In the words of the Court:

Denying government the power to distribute and equalise schooling resources is a serious barrier to ... eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege.<sup>49</sup>

The High Court properly recognised the entrenched forms of inequality and disadvantage that continue to plague the public education system. True to the principles of transformative constitutionalism, it actively sought substantive justice by using the Constitution as a tool to intervene in the unequal state of affairs.

#### ***4.2 The Constitutional Court judgment***

Mhlantla AJ, writing for the majority of the Constitutional Court started on a very promising note. The first line of the judgment proclaims that '[s]ection 29 of the Constitution guarantees everyone the right to basic education'.<sup>50</sup> In the next two paragraphs, the Court laments the 'painful legacy' of the apartheid education

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<sup>45</sup>The High Court judgment paras 17–32.

<sup>46</sup>*Id* para 70.

<sup>47</sup>*Ibid.*

<sup>48</sup>*Id* para 72.

<sup>49</sup>*Id* para 74.

<sup>50</sup>The Constitutional Court judgment para 1.

system and recognises that the '[c]ontinuing disparities in accessing resources and quality education perpetuate socio-economic disadvantage, thereby reinforcing and entrenching historical inequity.'<sup>51</sup>

The tone set in the introductory paragraphs gives the impression that the Court will subsequently adopt a contextual approach to interpretation as required in terms of the tenets of transformative constitutionalism. This approach would have entailed that the Court at least examine the historical and social context of privileged schools such as Rivonia Primary 'in the light of social patterns, power relations and other systematic forms of deprivation'<sup>52</sup> which are relevant if the power to determine the capacity of a school remains in the exclusive domain of public schools. Instead, from the outset, the Court wrongly characterises the case as 'a reflection of [the] type of failure [that ensues] ... when we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet the educational needs of our children'.<sup>53</sup> Here the Court refers to the suffering endured by the affected learner as a result of the 'power contest' that erupted between the Department of Education and the Rivonia School Governing Body after the learner was initially denied admission to the school. At the risk of sounding insensitive, this case is not a reflection about the failure to protect the best interests of one learner. Instead, an adjudicator sensitive to the court's role in achieving a transformed education system would have characterised the case as one which reveals two issues: firstly, the stark inequality between former Model C schools and disadvantaged schools which may be perpetuated by school governing bodies holding the power to determine the capacity of public schools and secondly, the impact of this power on the right to education of *all* learners.<sup>54</sup>

Although the Department of Education, in their submissions before the Court, relied on section 39(2) of the Constitution,<sup>55</sup> the Court did not engage in a contextual interpretation of section 5(5) of the Schools Act. Mhlantla AJ briefly refers to a contextual understanding of section 5(5):

... [T]here is an important textual qualifier in section 5(5) subjecting a school governing body's power to other provisions of the Schools Act, as well as to applicable provincial law. The effect of this is that the determination of admissions may be subject to provincial government's intervention in terms of the Schools Act, or applicable provincial law if the intervention is provided for in those

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<sup>51</sup>*Id* paras 1 and 2.

<sup>52</sup>Moseneke (n 28) 318.

<sup>53</sup>The Constitutional Court judgment para 2

<sup>54</sup>[My emphasis].

<sup>55</sup>Section 39(2) provides: 'When interpreting any legislation ... every court ... must promote the spirit, purport and objects of the Bill of Rights'.

instruments. *Of course, it should be emphasised that any powers of the governing body must also be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress.*<sup>56</sup>

Upon reflection of this paragraph and the judgment as a whole, one gets the sense that the ‘broader constitutional scheme’ in which the powers of school governing bodies should be understood is regarded as superfluous by the Court because Mthlantla AJ does not engage with the constitutional context at all. A further observation relates to the Court’s erroneous understanding of the right to basic education. The Court mentions that the powers of the school governing body should be understood within the broader constitutional scheme *to make education progressively available and accessible to everyone*.<sup>57</sup> The implicated right in this case is the right to basic education which is an immediately realisable right and not subject to progressive realisation as was confirmed by the Constitutional Court in 2011.<sup>58</sup>

The Court’s failure to adopt a contextual method of interpretation as required by section 39(2) is puzzling since the Court had previously held that the section 39(2) duty is one in respect of which ‘no court has a discretion’ and must ‘always be borne in mind’ by the courts, even if a litigant has failed to rely on section 39(2).<sup>59</sup> Instead, the Court reached its decision based on a technical reading of the Schools Act<sup>60</sup> and not in terms of the rights and values of the Constitution.<sup>61</sup> This approach is typical of the conservative South African legal culture and disregards the principles of transformative constitutionalism.

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<sup>56</sup>Para 41 [my emphasis].

<sup>57</sup>[My emphasis].

<sup>58</sup>*Governing Body of Juma Masjid Primary School v Essa* 2011 8 BCLR 761 (CC).

<sup>59</sup>*Phumelela Gaming and Leisure Ltd v Grundlingh* 2007 6 SA 350 (CC) paras 26 and 27 as referred to in the High Court judgment para 20.

<sup>60</sup>The Constitutional Court held that although public schools may make a decision as to capacity in terms of s 5(5) of the South African Schools Act, this power is not absolute. Section 5(5) is subject to other provisions of the Schools Act and provincial law. The Court referred to s 5(9) of the Schools Act which allows the MEC to overturn admission decisions taken at school level and Regulation 13(1) of the Gauteng Regulations that empowers the HOD to overturn a school’s decision to reject a learner. Furthermore, the Court investigated the status of a schools admission policy and held that a policy is merely a guide to decision-making and does not bind the decision-maker rigidly. Therefore, Rivonia Primary’s admission policy does not inflexibly limit the discretion of the Gauteng HOD. See the Constitutional Court judgment paras 35–56.

<sup>61</sup>Langa (n 20) 353.

## 5 The impact of *Rivonia* on the transformation of the public education system

The impact of the *Rivonia* judgments on the transformation of the public education system can only be assessed once there is a clear understanding of what a transformed public education system will look like. First, the education system will remain untransformed if the two separate, unequal systems referred to elsewhere in this article continue to exist in the same public school domain. Secondly, every learner in the public school system must have an equal opportunity to access education. Thirdly, learners must be educated under the same conditions: in other words it is untenable that some learners are educated under a tree and in classes with unreasonably high teacher-learner ratios, whilst others receive their education in a state-of-the-art school with all the necessary facilities and comfortably low learner-teacher ratios. Fourthly, all learners must receive the same quality of education delivered by qualified teachers.

I will now return to the current state of affairs and investigate the impact of the *Rivonia* judgments on the transformation of the public education system. In situations where overcrowding occurs (principally at disadvantaged schools), government has now theoretically gained the power to instruct public schools with low learner-educator ratios to admit more learners. When considering the relevant low learner-teacher ratios of former Model C schools, it seems, on the face of it, that the impact of *Rivonia* will mostly be experienced by these schools. The arguments of the Department of Education seemingly echo my observation. The Department contend that:

... [T]he Department must ensure that the existing public school infrastructure in the province is utilised as efficiently as possible in relation to the schooling needs of the learners of the province. In particular, the Department strives to avoid a situation where some public schools operate at levels considerably below the capacity that their infrastructure should support, while other public schools are overcrowded and some learners are unable to find places within the public school system.<sup>62</sup>

The Education Department reasons further that the teacher-learner ratio of 1:27 at Rivonia Primary is far below the departmental norm of 1:40<sup>63</sup> and

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<sup>62</sup>The Constitutional Court judgment para 28.

<sup>63</sup>First to third respondents' answering affidavit (n 3) para 45.1. The ratio of 1:40 is the 'highest ideal maximum class size' for grades 1 to 9 according to the post provisioning model. In terms of this model, available posts are allocated to schools in proportion to the number of weighted learners at a school. Learners are 'weighted' according to factors such as 'class size, the range of subjects offered, whether the school caters for disabled children, the number of different language streams in a school and the level of poverty in the community served by the school'. The higher the total

contrasts the school's learner-educator ratio with that of previously disadvantaged schools in the region which accommodate classes consisting of up to 55 learners.<sup>64</sup> The Department's argument appears to be that public schools with a learner-teacher ratio of less than 1:40 must be able to enrol a number of learners so as to reach the departmental norm in order to 'correct the skewed imbalances that continue to plague our education system...'<sup>65</sup>

But, what does this mean for transformation? Will former Model C schools, post *Rivonia*, be instructed by the state to enrol large numbers of learners from disadvantaged schools to relieve the overcrowding at the latter schools? For the reasons that follow, the answer is 'probably not'. First, the situation must present itself for the above-mentioned scenario to take place. In theory this will occur where a fairly sizeable number of disadvantaged learners apply to a former Model C school which turns them away because it had reached its capacity in terms of the admission policy of that school. A dispute will ensue and the Department of Education, after following and thus obeying the principles of engagement and procedural fairness laid down by the Constitutional Court, will then instruct the school to admit the learners. However, in reality, it is unlikely that this group of learners will apply to a former Model C school in the first place for the simple reason that they are unable to afford the high school fees charged by these schools. Bar the exceptions, most learners who will seek a placement at former Model C schools are part of middle class or elite households. The overwhelming majority of disadvantaged learners in South Africa will continue to apply to the former black schools because of the fee-free status of these schools.<sup>66</sup>

Therefore the transformation of the public education system is limited by 'the liberal democratic constitutional paradigm'<sup>67</sup> in which the transformative project is embedded. South Africa has joined other liberal capitalist democracies where

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weighting of the learners in a school, the more likely it is that the school will benefit from the deployment of teachers' posts. See Post Distribution Model for the Allocation of Educator Posts to Schools, Reg 1451 of 2002, available at: <http://www.education.gov.za/LinkClick.aspx?fileticket=8Jb8bgbx%2bxc%3d&tabid=193&mid=485> (accessed 2013-03-16). According to the South African Democratic Teachers Union (SADTU), the post provisioning model is flawed to the extent that it uesconsiders the number of learners and not the subject needs of a specific school. The Union argues that his model has led to the phasing out of many subjects in township schools because of the number of teacher vacancies in these schools. It also causes an increase in class sizes at disadvantaged schools and ultimately contributes to maintaining the inequality between disadvantaged and former Model C schools. See Nkosi 'No money means poorer education' *Mail & Guardian* (2012-10-26), available at <http://mg.co.za/article/2012-10-25-no-money-means-poorer-education> (accessed 2013-03-16).

<sup>64</sup>First to third respondents' answering affidavit (n 3) para 45.2.

<sup>65</sup>*Id* para 46.

<sup>66</sup>See (n 11).

<sup>67</sup>Sibanda (n 33) 44.

significant political freedom far outweighs economic freedom.<sup>68</sup> According to Ntsebeza, South Africa's commitment to a neo-liberal capitalist agenda has made it improbable that political equality will translate into economic equality.<sup>69</sup> The overwhelming majority of South Africans, regardless of race and class, enjoy traditional liberal freedoms, such as the right to vote in free and fair elections. However, it is the black majority that remains entrenched in abject poverty as a result of the racist policies of the past. The minority who has benefited from these unjust policies continue to enjoy their inherited privilege due to a capitalist system that serves the interests of the elite and middle class. The South African public education system, despite some socialist interventions,<sup>70</sup> reflects this uncomfortable reality. The majority of learners are situated at disadvantaged schools because of the fee-free status of these schools. The interests of the elite and middle class are served by the former Model C schools which maintain their privilege as a result of the charging of school fees. The impoverished black majority have no choice but to remain at dysfunctional schools where they are confined to an education devoid of any meaningful quality.<sup>71</sup> The *Rivonia* judgment, therefore does not threaten the *status quo*. Its impact on the transformation of the public education system will be marginal because the majority of disadvantaged learners 'will remain in their place' due to their parents' economic inability to afford better schooling.

### ***5.1 The role of former Model C schools in transforming the public education system***

The Gauteng Education Department, in their submissions before the Constitutional Court, hinted at the role former Model C schools can play in relieving the overcrowding at disadvantaged schools.<sup>72</sup> Do the former schools, due to their inherited privilege, have an obligation to contribute to the transformation of the public education system?

All organs of state are required to collaborate in effecting transformative constitutionalism.<sup>73</sup> Bray argues that a public school is regarded as an 'organ of state' in terms of section 239 of the Constitution, because it exercises public power and performs public functions in terms of legislation.<sup>74</sup> Jafta J, writing for

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<sup>68</sup>Ntsebeza 'Land redistribution in South Africa: The property clause revisited' in Ntsebeza and Hall (eds) *The land question in South Africa: The challenge of transformation and redistribution* (2007) 125.

<sup>69</sup>*Id* 127.

<sup>70</sup>Here I refer primarily to the state's decision to abolish school fees in the poorest schools.

<sup>71</sup>Bloch (n12) 59.

<sup>72</sup>The Constitutional Court judgment (n 12) para 28.

<sup>73</sup>Rosa (n 26) 103.

<sup>74</sup>Bray 'Education law' in Boezaart (ed) *Child law in South Africa* 462.

the minority in the Constitutional Court judgment, affirms the status of public schools as 'organs of state'.<sup>75</sup> A school is therefore not only concerned with its own interests but also those of the larger community that it serves. In *Ermelo*, the Constitutional Court held that:

The governing body of a public school must ... 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 broader community in which the school is located, and in the light of the values of our Constitution.<sup>76</sup>

As an organ of state, a public school is therefore obliged to advance and uphold the principles of transformative constitutionalism. Transformative constitutionalism requires the employment of remedial measures to rectify the material consequences of the oppressive apartheid system. An argument may thus be put forward that former Model C schools are obliged to take restitutionary measures to advance the plight of disadvantaged learners. Parktown Girls High in Johannesburg provides an example of how former Model C schools can contribute to transformation. The former Model C school has joined forces with two previously disadvantaged schools in Soweto and the schools have developed 'professional communities of interest' by exchanging teachers.<sup>77</sup>

However, these measures are only the proverbial drop in the ocean. The vast inequality in our education system will not be eradicated<sup>78</sup> by employing these restitutionary measures only. Former Model C schools constitute approximately 10 per cent of schools in the public school domain.<sup>79</sup> Even if the capacity at these schools is increased to admit more learners, it will never be enough for 'access itself to become the solution'.<sup>80</sup> The majority of learners in the public education system will still be located at disadvantaged schools.

The role that former Model C schools can play in the transformation process is therefore secondary. The quality at these schools should not be compromised in an attempt by government to utilise 'existing public school infrastructure ... as efficiently as possible'.<sup>81</sup> In the long run, such an approach would not benefit any of our learners. Instead, the state should accept that it has the main responsibility to reform the deprived system of education that disadvantaged learners are

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<sup>75</sup>The Constitutional Court judgment para 83.

<sup>76</sup>*Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 80.

<sup>77</sup>Bloch (n 12) 145.

<sup>78</sup>[My emphasis].

<sup>79</sup>Bloch (n 12) 142.

<sup>80</sup>*Ibid.*

<sup>81</sup>The Constitutional Court judgment para 28.

subjected to.

## 5.2 *An evaluation of recent state policies*

The primary obligation to eradicate inequality, achieve access to education and improve the quality of education remains that of the state in terms of section 7(2), 9 and 29 of the Constitution. Therefore, government should primarily focus on building more schools, improving infrastructure and the quality of education at disadvantaged schools so as to put them on a par with former Model C schools.

Although the right to basic education is an immediately realisable right, the state's response to its constitutional obligations has been anything but urgent. In the provincial sphere, the Gauteng Education Department reckoned in 2011 that the 'historical school building backlog' in Gauteng will take 20 years to eradicate.<sup>82</sup> The approach taken by the provincial department is therefore one of *progressively* realising its obligations.

In the national sphere, the state is subscribing to the same approach. The national Department of Basic Education in *Action Plan 2014: Towards the realisation of Schooling 2025*<sup>83</sup> sets out 13 goals to improve learner performance and enrolment by the year 2025. The national Department does not commit itself to building new schools but rather emphasises the need to improve infrastructure at existing schools.<sup>84</sup> In terms of the *Accelerated Schools Infrastructure Delivery Initiative (ASIDI)*, the national Department's focus is similarly on the improvement of existing schools infrastructure, rather than the building of new schools. The upgrading of schools is essential, but it is questionable whether this is enough to curb the severe overcrowding at disadvantaged schools. The building of new schools, in my view, is imperative to transforming the public education system.

In terms of the recently published *Draft Minimum Norms and Standards on School Infrastructure*<sup>85</sup> 'classrooms, electricity, water, sanitation and perimeter security' are to be supplied by 2023, with the remainder of the norms (such as libraries) to be achieved by 2030. Apart from the fact that the timelines proposed by government do not correlate with the immediacy of an unqualified right, the *Draft Norms and Standards* contradicts other government policies which mention different deadlines. This confusion and lack of urgency on the part of government are detrimental to the transformation of the public education system.

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<sup>82</sup>First to third respondent's answering affidavit (n 3) para 15.2.

<sup>83</sup>General Notice 752 of 2010. The plan is not yet an official government policy. Action Plan 2014 sets out 27 national goals: 13 of these are output goals that aim to improve performance and enrolment of learners. The remaining 14 goals describe the steps to be taken in order to achieve the output goals.

<sup>84</sup>Action Plan 2014: Towards the realisation of Schooling 2025, 1–3.

<sup>85</sup>Notice 932 of 2013, South African Schools Act, 1996, Call for comments on the regulations relating to minimum uniform norms and standards for public school infrastructure.

Furthermore, the state has to reassess its school funding model which has led to a commodification of education.<sup>86</sup> This model is linked to the neo-liberal capitalist system which allows elite and middle class parents to 'purchase' an education of meaningful quality for their children. Although school fees in poor schools have been abolished, this should not be regarded as transformation. These schools remain dysfunctional despite their fee-free status. Transformative constitutionalism requires a large scale redistribution of resources to disadvantaged schools to put them on a par with former Model C schools.

## 6 Conclusion

The *Rivonia* judgments are a powerful reminder of the stark inequality in our public education system. In this article, I attempted to analyse the impact of these judgments on the transformation of the public education system. Although the High Court and the Constitutional Court came to the same conclusion, I argued that the High Court's approach to interpretation was more appropriate for a judiciary that is supposed to uphold the values of the transformative Constitution. The Constitutional Court, delivering a judgment reminiscent of the conservative South African legal culture, missed a golden opportunity to highlight the severe inequality in the public education system and to pressure the state to take more urgent measures to address this untenable situation. Although I am in agreement with the outcome of the *Rivonia* judgments, I reasoned that the neo-liberal capitalist system to which the government subscribes is hindering true transformation and that government needs to take a more urgent and coherent approach to transform the public education system.

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<sup>86</sup>See Part 2 ('The South African public education system') above.