

## CHAPTER THREE

### SCHOOL GOVERNANCE, TEACHER APPOINTMENT AND SOUTH AFRICAN LAW

#### 3.1 Introduction and Purpose

As indicated in Chapter One, the conceptual framework within which this study is lodged is a legislative/governance one. More specifically, the study examines the impact of amendments to the Employment of Educators Act 55 of 1998 regarding teacher selection and employment. These amendments, as already indicated in Chapters One and Two, were promulgated in the Education Laws Amendment Act (Act 24 of 2005).

In this chapter I discuss the notion of school governance in general, relating this to the system of school governance adopted in South Africa. In this regard I focus specifically on the devolution of certain powers to school governing bodies as stipulated in the South African Schools Act of 1996. With a view to explaining changes to the role of school governing bodies as regards the selection of teachers for appointment at public schools, I also describe the context – social and legislative - that gave rise to the amendments contained in the Education Laws Amendment Act of 2005.

In linking my discussion of governance to a description of legislation related to school education, with specific reference to the selection and appointment of public school educators, I cite the changes to the selection and employment of teachers promulgated in the Education Laws Amendment Act (Act 24 of 2005). My specific focus is on the response of stakeholders to what they perceive to be the intent of changed legislation, namely to impose racial integration on all

schools to the detriment of education of quality. In doing so, I argue that the amendments lend themselves to different interpretations, as evidenced by stakeholder response and various court cases. In discussing these interpretations I argue that they are informed by past traditions and practices on the one hand and by a disjuncture between government expectations and institutional capacity on the other.

### **3.2 Conceptualizing School Governance**

Boyd and Miretzky (2003), having studied various forms of school governance, define it as the kind of relationship established between ‘the people in schools and state legislators’. This relationship, according to Simkins (2002) and Naidoo (2004), involves the devolution, redistribution or sharing of state powers with others, a complex process that typically involves some form of decentralization (Naidoo, 2004). Beckmann (2002) defines decentralization as the devolution of authority to the lowest possible level, while Arnott & Raab (2000) define it as a process aimed at the promotion of greater institutional autonomy, a process that often leads to the strengthening of some management functions at the expense of others.

The notion of decentralization originates from the belief that, since the state alone cannot control schools it should form partnerships with other stakeholders, in particular with those most closely associated with the school (Marishane, 1999:78). The extent to which power is devolved and the forms such devolution takes, are, however, primarily determined by those who have authority over, access to, and influence over education goods (Elmore, 1993). Given the dynamic interplay between the State and those to whom it has devolved powers, according to Vongalis-Macrow (2007), decentralization and the resultant devolution of power typically result in school governors finding themselves in

the position of having to promote State-initiated reforms at institutional level while struggling to make sense of new legislation and conditions at macro-level. This is particularly the case when the State initiates reforms, passes laws and develops policy frameworks and procedural guidelines regarding various school activities in an attempt to retain its power while simultaneously trying to create a balance between centralization and decentralization. When this happens school governing bodies typically find themselves in the curious position of being both servants to and agents for the State, especially as regards State-initiated reforms.

In order to effectively perform these roles, school governing bodies should, by implication, not only have the political will to effect reforms but also the requisite knowledge and capacity to do so. Without these they will find it extremely difficult to live up to the State's expectations on the one hand and those of the school communities they serve on the other. Differing capacity and resources in school communities, and the lack of specific programmes to deal with governance practice and relationships at school level, might according to Kruss (2001:45), result in school governors feeling 'vulnerable'. If, moreover, a school governing body is regarded as nothing more than a 'non-expert body', a part-time, unpaid, volunteer workforce (Thody, 1998) that is 'new' to democracy, it might not stand ready, willing and able to run the institution in its care. After all, 'novice citizens of a democracy do not simply arrive at maturity' (Peters, in Aspin, 1995:56). Rather, they grow into it.

Karlsson, (2002) concurring with these views, points out that a lack of knowledge and expertise, coupled with a lack of resources, time constraints, and disagreement about the means by which results are achieved, may well result in indifference or apathy on the side of school governors. If, on the other hand, school governors have a sound knowledge and accurate understanding of legislation, they might be willing and able to accept responsibility not only for

school maintenance and/or resource management (Thody, 1998), but also for professional decisions related to the performance of the schools they govern (Kogan, Johnson, Packwood, & Walker (1984:184). However, since central government authority for educational decision-making is never actually surrendered, decentralization seldom results in real transfer of power, hence the claim that decentralization affects the redistribution of authority remains moot (Carrim & Tshoane, 2000; Sayed, 1999; Weiler, 1990).

### **3.3 School governance in South Africa**

Given the emphasis on self-determination and the right to freedom of association and democracy (Boyd & Miretzky, 2003) in the South African Constitution and Bill of Rights, the creation of a decentralized education system for South Africa seemed logical at the time. Not only would the devolution of power create opportunities for those at grassroots level to have a say in the kind of education they wanted their children to have, but it would also signal to the rest of the world that South Africa had truly embraced the democratic values of participative decision-making that inform the many decentralized education systems across the globe. To this purpose, amongst others, the South African Schools Act of 1996 devolves the responsibility and authority for the governance of public schools to the governing bodies of those schools. This in itself is an acknowledgement by the State that it cannot control schools by itself: it should form partnerships with other stakeholders, in particular with those closely associated with the school (Marishane, 1999:78).

Beckmann (2002), following the argument of other researchers (Carrim & Tshoane, 2000; Sayed, 1999; Weiler, 1990) that governments seldom surrender real power even when they purport to have done so, claims that any restrictions on the devolution of power serve to safeguard the State's position of power,

allowing it to withdraw, on reasonable grounds, any of the functions allocated as and when deemed necessary. On the one hand the South African Schools Act (SASA, 1996) limits the powers and rights of school governing bodies to those 'functions', 'obligations' and 'rights' prescribed by the Act' [Section 16 (1)], while allowing these bodies to apply for additional functions should they deem themselves competent to perform these, (SASA, 1996;) on the other. It would seem, therefore, that, in South Africa's case, the State uses its authority over, access to, and influence over education goods (Elmore, 1993) to determine how much of its power should be devolved to schools. That the State does not intend to give up its powers as regards the professional management of schools is indicated by the fact that this function is not devolved to school governing bodies. Instead, it is allocated to school principals, who have to exercise it under the 'authority' of the Head of Department [SASA, 1996: Section 16(3)], the State's representative in this case.

As regards the mandatory functions and obligations devolved to school governing bodies, one would assume that the State, in deciding on these, would have considered the capacity of school communities and/or school governing bodies. Instead, according to Bush and Gamage (2001:39), the State seems to have regarded the implementation of legislation by school governing bodies as a 'matter of faith'. Given the vast discrepancies between the capacity of formerly advantaged (mostly white) and formerly disadvantaged (mostly black) schools and their governing bodies one would expect only administrative functions to be mandatory. Since this is not the case one could infer that the State failed to take cognizance of the social reality of different communities in the South African context and/or of the capacity and desire of different school communities to make the kind of decisions expected of them (Beckmann, 2002; Ministerial Review Committee, 2003: iv;). Instead of initially limiting school governing body functions to administrative matters and gradually adding others in relation to

demonstrated performance, the State mandated all school governing bodies to take responsibility for adding subjects to the school curriculum, deciding on extra-curricular activities, purchasing textbooks and other educational materials/equipment [SASA, 1996: Section 21(1)], developing a school vision and mission, adopting a constitution and school code of conduct, administering and controlling school property and finances, and selecting and recommending to the provincial Head of Department (HoD) teaching and non-teaching staff for appointment [SASA, 1996: Section 20(1)] at the schools for whose governance they are responsible.

The effective execution of functions like the ones mandated in the South African Schools Act, assumes that the governing bodies of all South African schools are knowledgeable, competent and committed to do what is required of them. Indications are, however, that this is not the case. The governing bodies of historically black schools, for example, constrained and/or disabled as they are by their historical environment, resources, and lack of governance expertise are hampered in their ability to contribute to transformation, increasing their vulnerability and ‘unbalancing’ their schools even further (Kruss, 2001:45). Historically white schools, on the other hand, having had the experience of ‘managing’ what was formerly known as ‘Model C’ schools, experience relatively few problems regarding governance per se, giving them the opportunity to ‘bask in their superiority’ (Ministerial Review Committee, 2003: iv).

As regards the impact of school governors’ history on their knowledge base and competence, Sayed (2002), following Beck and Murphy (1996), contends that it is not only the knowledge base of school governing bodies that is affected by historical circumstance but also the authority that the governing bodies of formerly white and black schools respectively wield. A case in point is the difference in school governing bodies’ ability to raise additional funds for their

schools. Formerly white (HoA) schools, having both the business contacts and experience gained in the previous dispensation – as Model C schools – are able to raise funds while the majority of black (DET) schools do not. Given South Africa’s political history, I would argue that, although social, economic and political conditions are often glossed over in models of school effectiveness/ineffectiveness (Fleisch & Christie: 2004), they constitute a major force in the transformation or not of South Africa’s public schools. The status attached to being a school governing body member might not be sufficient motivation for members of poor, primarily black communities to offer their services as unpaid volunteers which, as Thody (1998) points out, is effectively what is expected of them.

Socio-economic circumstances, coupled with historical structures and/or school culture could, according to Fullan (2001) and others (Apple, 2001; Farrell, 1999; Grieves & Hanafin, 2005: 21-22; Rees & Rodley, 1995; Wallace & Pocklington, 2002) lead to different interpretations of legislation, racial bias, limited or enhanced capacity, and the effectiveness or not of school governance activities. Literature on the topic (DiMaggio, 1982; Grant & Motala, 2004; and Hallinan, 2000) and the influence of institutional growth or decline, diversification and bureaucratisation (Baker, 1999; and Baker, Fuller, Hannum & Werum 2004) suggest the existence of various links between school structure, culture, the creation of educational opportunities, class divisions and other forms of stratification. Given the effect that school culture has on decisions in this regard (Baker, et al., 2004:2) legislators need to take cognisance of these inter-relations to ensure that they do not unintentionally exacerbate inequalities (Werum, 2003).

Closely linked to historical circumstance, especially in South Africa, is the political will of stakeholders, school governing bodies in particular, to contribute to transformation. The fact that former House of Assembly (HoA) schools,



although integrated as far as learner population is concerned, are still primarily white as far as teaching staff and governing body membership is concerned (Chabalala, 2005; DoE, 2005) could suggest resistance to transformation (Grier, 2002; Haychock, 2001) as does the Democratic Alliance's vehement objections to the prioritization of equity and representivity in the selection of teachers as proposed in the Education Laws Amendment Bill (News 24, 2005:1). However, it could simply be that the governing bodies of these schools, like their counterparts in former Department of Education and Training (DET) schools, are merely democratically 'immature', making them 'novice citizens of a democracy' (Peters, in Aspin, 1995:56) who have not had sufficient time to change their historical mindsets.

As regards the capacity of governing bodies to live up to the expectations that the State seems to have of them, it could also be argued that there is a link between school governors' understanding of legislation on education and their ability to ensure its effective implementation at school level. The reality in South Africa is that governance posts are filled with people with little/no understanding and no experience of what it means to run an education system (Davies, 2003). Given that the promulgation of new legislation is a feature of new governments, one could argue that school governing bodies struggle to keep up with new legislation. If, as argued earlier, these bodies are moreover handicapped by historical circumstances they might battle to understand the legal jargon and/or to relate legislation to their particular circumstances. Consequently they might, as Vongalis-Macro (2007) claims, find themselves struggling to make sense of new legislation that is meant to help them implement State-initiated reforms. This, in turn, could be ascribed to insufficient training in legislative/governance matters (Kruss, 2001:45; Van Wyk, 2006) or to their lack of involvement in legislative processes and/or procedures.



School governors' inability to effectively implement legislation could also be ascribed to the fact that they in no stage had the opportunity of participating in the legislative process, something that could be hampering them in the effective performance of their duties (ELRS, 1999: 2A-18). Not having experienced the democratic process first hand they are unable to imitate it in their own governance practices. This might well be one of the reasons for the seeming disjuncture between government expectations in South Africa, as expressed in legislation, and the reality of its implementation at school level (Nieto, 2005). Such inability could lead to a perpetuation of top-down management and inequality on the one hand and retardation or inhibition of the deracialization of the teaching corps on the other (Jansen, 2005; Wong, 2000). Adams & Waghid (2005: 8), for example, in studying the way in which SGBs in selected schools in disadvantaged communities in the Grassy Park area of the Western Cape went about governing their schools, discovered multiple instances where SGB members misinterpreted government legislation simply because they had little or no understanding of the constitutional principle of freedom of association and were consequently unable to implement said policies as expected. Contrarily, Bush & Heystek (2003), studying the extent to which the principals and other SGB members of six schools in the Gauteng Province understood legislation on democratic practice, found that, despite significant difficulties in understanding legislation, the ways in which they implemented it adequately reflected the requisite democratic spirit.

A final causal factor in the disjuncture between government expectations of what legislation can achieve and the reality of what is happening at schools could be school governors' sense that they are being forced to compromise their own identities and expectations for the sake of legislative compliance, causing frustration and an eventual lack of passion for the task of school governance. It might well be that the struggle to retain their own identities is one of the reasons

for the lack of transformation in former HoA and DET schools. It may also be the basis for the way in which they choose to interpret legislation relating to school governance. Jansen (2005) argues, for example, that the lack of transformation in the staff composition of public schools is a direct result of the way in which governing bodies interpret clauses in the Schools Act (SASA, 1996) that focus on the selection and recommendation of teachers for appointment at their schools. Instead of focusing on the principles of equity, representivity and the need to redress past injustices in conjunction with the ability of the candidate, as intended in the Act [SASA 1996: Section 20(8)], governing bodies use their right to select and recommend teachers for appointment to perpetuate past divides in public education (Motala & Pampallis, 2001). It is the existence of loopholes like these in the Schools Act which, according to Boyd and Miretzky (2003) as well as Hope and Pigford (2002) that led to the promulgation of the amendments to the Employment of Educators Act - stipulated in the Education Laws Amendment Act of 2005.

Given the vast discrepancies between schools as regards capacity and the desire for change, the creation of a more democratic, decentralized education system might therefore not have been such a sound decision for South Africa. Instead of leveling the playing field, this move has served only to highlight the existence of huge differences between the will and ability to change in the different (school) communities in the South African context (Beckmann, 2002; Ministerial Review Committee, 2003: iv). Without clarity on how they should work in practice school governing bodies' task simply became another difficult burden (Farrel, 1999), one that they bore with seeming indifference and apathy (Hope & Pigford 2002). Instead of empowering them the State has, in fact, set them up for the kind of failure that would over-burden and unbalance schools even further (Hope, & Pigford 2002:40). Also, instead of participation and power sharing, decentralization might well have exacerbated inequity and disrespect for human

rights, causing conflict between schools and the department over the definition of powers and functions (Sayed, 2002a).

### **3.4 Legislation on the selection and appointment of teachers**

As indicated in Chapter One, the primary purpose of this study is to determine whether or not selected school governing bodies whose schools were formerly under the administration of the HoA and DET respectively interpret legislation on teacher selection differently and whether such differences are reflected in the way they implement legislation in this regard. It is therefore necessary to briefly summarise the gist of the relevant pieces of legislation prior to discussing various sectors' response to recent changes in this regard.

In terms of education, the following pieces of legislation are aimed at the promotion and advancement of the constitutional values and principles as well as at the protection and advancement of the human rights contained in the Bill of Rights: the National Education Policy Act (Act 27 of 1996), the South African Schools Act (Act 84 of 1996), the Labour Relations Act (Act 66 of 1995), the Employment Equity Act (Act 55 of 1998), and the Employment of Educators Act (Act 76 of 1998). While the focus of the study is on the amendments to the Employment of Educators Act (Act 76 of 1998) regarding the appointment of teachers as promulgated in the Education Laws Amendment Act (Act 24 of 2005), other pieces of legislation related to these amendments are also briefly discussed in this section. Since all legislation has to reflect the values of the Constitution, it follows that a brief discussion of the Constitution should be included here.

### 3.4.1 The Constitution

The Constitution of the Republic of South Africa (1996), hereafter referred to as the Constitution, forms the basis and frame of reference for the way people conduct themselves in the country, including the way they relate to one another and the rules and regulations they make to ensure that each and every citizen has an equal chance to live a productive and meaningful life.

The values on which the Constitution (1996)<sup>3</sup> [Section (1)] are founded are human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; the supremacy of the constitution and the rule of law; universal and adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, which should ensure accountability, responsiveness and openness.

To ensure that these founding values are not simply empty words on paper, Chapter Two of the Constitution, which contains the Bill of Rights, 'enshrines the rights of all people' in the country, 'affirms the democratic values of human dignity, equality and freedom' [Section 7(1)] and declares that the State has no choice but to 'respect, protect, promote and fulfill' these rights for all those inhabiting the country [Section 7(2)]. Not only does the Bill of Rights apply to 'all law', binding the 'legislature, the executive, the judiciary and all organs of state' [Section 8(1)], but it also applies to any and all natural and juristic persons who have to protect and advance these rights, and, if it is applicable, fulfill 'any duty imposed by the right', taking the nature of the right into account [Section 8(2)].

As regards human dignity, Section 10 of the Constitution declares that everyone has 'inherent dignity and the right to have their dignity respected and protected'.

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<sup>3</sup> Hereafter referred to as the Constitution

As regards equality, Section 9 states that 'everyone is equal before the law and has the right to equal protection and benefit of the law [9(1)], explaining that this includes 'full and equal enjoyment of all rights and freedoms' [9(2)]. While the State may not 'unfairly discriminate, directly or indirectly, against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth' [9(3)], it may take legislative and other measures to 'promote the achievement of equality' and/or to 'protect or advance persons or categories of persons disadvantaged by unfair discrimination' [9(2)]. In other words, national legislation may be used to prevent or prohibit unfair discrimination.

#### **3.4.2 The National Education Policy Act**

The National Education Policy Act (Act 27 of 1996), which replaced the National Policy for General Education Affairs Act of 1984, was implemented as of 24 April 1996. Its promulgation was one of many means the State used to 'facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights' (Preamble to the Act). Emphasizing the need to uphold every person's fundamental rights, this Act serves as basis and frame of reference for subsequent Education Acts, including the one that is the focus of this study, namely the Education Laws Amendment Act, 2005, in terms of which specific sections dealing with the selection and appointment of educators in the Employment of Educators' Act (Section 6 of Act 76 of 1998, as amended by section 15 of the Act 48 of 1999 and section 7 of Act 53 of 2000) have now been changed.

The objectives of the National Education Policy Act (Section 2) are to lay the basis for:

- The determination of national education policy by the Minister in accordance with certain principles;
- Consultations to be undertaken prior to the determination of policy, and the establishment of certain bodies for the purpose of consultation;
- The publication and implementation of national education policy, and
- The monitoring and evaluation of education.

In terms of this Act, the Minister of Education not only has the right to 'determine national legislation for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system' [Section 3(4)] but also to override provincial legislation should it conflict with national legislation [Section 3(3)]. In addition, the Minister may devolve his/her authority to others, if and when required. This is an important point to remember when considering stakeholder response to the amendments regarding teacher selection by school governing bodies later on in this chapter.

### **3.4.3 The South African Schools Act**

The South African Schools Act (Act 84 of 1996), hereafter referred to as the Schools Act, has the creation/establishment of a uniform system for the organisation, governance and funding of schools as purpose. Replacing previous apartheid legislation on education by means of a number of Education Laws Amendment Acts (ELAA 100 of 1997; ELAA 48 of 1999; ELAA 53 of 2000, ELAA 57 of 2001 and ELAA 50 of 2002), the Schools Act defines the legal status of public schools (Bray, 1997) in South Africa and stipulates what such schools may and may not do. In particular, it compels all public schools not only to function

in accordance with what is stipulated in the Act but also to promote the values and principles of the Constitution of South Africa, and to protect the human rights accorded to all individuals in the Bill of Rights (DoE/White Paper, 1995: 67-70).

Informing the promulgation of this Act were three interdependent premises (Preamble to the Act), namely that:

- The 'achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation;
- The 'country requires a new national system for schools that will redress past injustices in educational provision;
- Providing an education of progressively high quality to all learners would lay a strong foundation for the development of all South Africans' talents and capabilities.

The latest Education Laws Amendment Act (Act 24 of 2005), informed by these premises, takes the democratic transformation of society further by specifically addressing the remains of racism, sexism and all other forms of unfair discrimination and intolerance. Of importance to the focus of this study is the emphasis the Act places on the eradication of racial inequality, segregation, and unfair discrimination in the selection and appointment of teachers at public schools. In this regard the Education Laws Amendment Act (Act 24 of 2005), which is also aimed at the promotion of tolerance, the protection of educator rights, the transformation of society, the setting of uniform standards for and the promotion of partnerships between the State and school communities in school governance, strengthens similar principles first stated in the Schools Act.



As indicated earlier (see 3.3), the Schools Act categorically states that ‘the governance of every public school is vested in its governing body’, that these bodies may not perform any functions other than those prescribed by the Act [Section 16(1)] but that they may apply for an extension of these functions should they deem themselves capable of performing these. The Act also states categorically that the professional management of public schools is the responsibility of the principal, who will perform this function under the authority of the relevant provincial Head of Department. Of particular importance to the focus of this study are three provisions contained in this – the Schools Act, namely that:

- The governing bodies of all public schools have the right to make recommendations to the relevant (provincial) Head of Department regarding the appointment of educators to the schools for whose governance they are responsible, subject to certain stipulations in other relevant legislation (i.e. the Employment of Educators Act, 1998, and the Labour Relations Act, 1995).
- Subject to the Schools Act and any other applicable law, school governing bodies may ‘establish’ posts for educators (section 20 [4]) additional to the establishment determined by the member of the Executive Council in terms of Section 3(1) of the Educators’ Employment Act of 1994.
- The provincial Head of Department may, having determined that a school governing body has ‘ceased to perform functions allocated to it in terms of this Act, or has failed to perform one or more of such functions, ‘appoint sufficient persons to perform such functions’ for a stipulated period, ensure that a new governing body is elected, and/or see to it that the necessary capacity is built into the non-performing governing body so that it will be able to perform its governance functions as required.

#### **3.4.4 The Labour Relations Act**

The Labour Relations Act, which deals with relations between employers and employees, is aimed at the advancement of 'economic development, social justice, labour peace and the democratisation of the workplace' [Section 1]. Amongst others it gives effect to and regulates the protection of every employee's fundamental rights as enshrined in the Constitution [Section 1 (a)]. Of specific importance to this study is Section 5, which refers to the protection of employees and persons seeking employment. In terms of this section no person may discriminate against an employee for exercising any right conferred by this Act [Section 5 (1)], including the right to belong to a union and to participate in its activities, including lawful strikes [Section 5(2)]. Section 14 (4) allows, moreover, for interventions by labour union representatives in conflicts between employers and employees and/or in cases where employees are victims of discrimination and/or unfair labour practice should employees request such intervention. Such intervention would, it is assumed, also apply in cases of seemingly unfair selection and appointment procedures.

#### **3.4.5 The Employment Equity Act**

As indicated in its short title, the Employment Equity Act (Act 55 of 1998) is primarily aimed at restoring imbalances in the workplace, especially imbalances resulting from past discrimination and therefore requiring redress. This intention is explicitly stated in its Preamble, which declares that 'disparities in employment, occupation and income within the national labour market' can be ascribed to 'apartheid and other discriminatory laws and practices' and that such disparities create 'such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws'.

In terms of the Employment Equity Act [Section 2] equity in the workplace could, on the one hand, be achieved by promoting equal opportunity and fair treatment in employment. On the other hand it could be achieved through the elimination of unfair discrimination and the implementation of affirmative action measures aimed at redressing disadvantages in employment experienced by designated groups. Together, these two intentions, if realized, are meant to ensure equitable representation in all occupational categories and levels of the workforce.

The four specific objectives of this Act, as indicated in its Preamble, are particularly crucial to my study since they focus on:

- Promoting the constitutional right of equality and the exercise of true democracy
- Eliminating unfair discrimination in employment
- Ensuring the implementation of employment equity to redress the effects of discrimination
- Establishing a diverse workforce broadly representative of our people

To these purposes the Act categorically stipulates that employers must take deliberate steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice [Section 5]. Moreover, it prohibits unfair discrimination, 'directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth' [Section 6(1)], unless this is done in the interests of affirmative action [Section 6(2)]. In other words, employers are morally and legally obliged to implement affirmative

action in order to achieve employment equity [Section 13(1)], a stipulation that seems to be at the heart of the amendments to the Employment of Educators Act regarding the selection and appointment of teachers at public schools as promulgated in the Education Laws Amendment Act (2005).

### **3.4.6 The Employment of Educators Act**

The Preamble states that the Employment of Educators Act (Act 76 of 1998) serves as the legal framework for the 'regulation of conditions of service, discipline, retirement and discharge of educators and for matters connected therewith'. For the purposes of my study, Chapter Three of the Act is of key importance given that it deals with the appointment, promotion and transfer of educators at public schools.

Prior to the promulgation of the amendments contained in the Education Laws Amendment Act of 2005, the appointment, promotion or transfer of any educator in the service of a provincial department of education was the responsibility of the Head of Department of a province [Section 6(1b)], with the proviso that such appointment 'may only be made on the recommendation of the governing body of the public school' concerned' [Section (3a)]. This proviso may only be ignored if the school does not have a governing body, if the governing body delays making its recommendation by two months or longer, or if it is guilty of one or more of the transgressions mentioned in Sections 6(b) and (d), namely:

- Not following procedures collectively agreed upon or determined by the Minister
- Non-compliance of the candidate with any requirement collectively agreed upon or determined by the Minister
- Non-registration of the educator with the South African Council for Educators

- Evidence of undue influence being exerted on the school governing body or council of the further education institution to recommend said appointment, transfer or promotion
- Indications that the governing body or council did not pay due regard to the democratic values and principles referred to in Section 7(1) of the Act.

In terms of Section 7(1) of this Act due regard shall be paid to equality, equity and the other democratic values and principles which are contemplated in Section 195(1) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) in the 'making of any appointment or the filling of any post on any educator establishment under this Act'. This includes the ability of the candidate and the need to redress the imbalances of the past in order to achieve broad representation. In terms of the Act the provincial Head of Department may not, moreover, in any way negate or undermine the right of school governing bodies and councils of further education institutions to make recommendations for appointment, promotion and/or transfer of educators, even if there is evidence of procedural or other irregularities. Should the Head of Department decline said recommendations on any of the stipulated ground, s/he is obliged to afford these bodies a further opportunity to submit an alternate recommendation for his/her consideration (Section 6[3c]).

#### **3.4.7 The Education Laws Amendment Act**

First introduced in the National Assembly as a Section 76 Bill, and published in Government Gazette No. 27599 of 27 May 2005, the Education Laws Amendment Act of 2005 served as a means of amending some of the criteria and procedures for the selection and appointment of school educators as contained in the Employment of Educators Act (1998). The amendments affected by this Act have indeed impacted on the governing body's role in that: (1) previously SGBs were

required to submit only one name; (2) the HoD was virtually bound to appoint the candidate preferred by the SGB unless it could be proved that the recommendation was not made in good faith or the SGB had undue influence; (3) the matter of any declined candidate by the HoD would be referred back to the SGB to nominate a different candidate.

Of key importance is Section 7 which amends section 6(3)(c) (of this Act), in that: (1) it now requires SGBs to follow the prescribed interview and selection process, that is, convene an interview committee, shift and shortlist candidates, submit a condensed list of at least 3 or more candidates in order of preference, (2) the HoD to appoint the candidate recommended in line with stipulated criteria, that is, equality, equity and other democratic principles coupled with the need to redress past injustices, and that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators (SACE). However, despite the order of preference indicated in the recommendations made by the school governing body, the Head of Department may, in terms of the Education Laws Amendment Act, appoint any suitable candidate on the list unless the school governing body lodges an appeal within 14 days of the Head of Department's having taken this decision.

As regards the conversion of temporary appointments into permanent ones the Head of Department may in future effect such conversion without the recommendation of the school governing body. Also, any vacant post that was advertised before the commencement of this section must be filled in terms of the provisions of the Employment of Educators Act, 1998, as it existed immediately before the commencement of this section if interviews in respect of the vacant post were held before such commencement.

### **3.5 Public response to the perceived intent of the Education Laws Amendment Bill**

A comparison of the previously mentioned pieces of legislation relevant to my study indicates that all of the pieces of legislation discussed claim to have the transformation of South African society as primary purpose, with specific reference to the elimination of racial segregation and other forms of unfair discrimination. The strategies proposed for achieving this purpose are not, while similar, exactly the same, hence the specific intent of each Act is somewhat different.

- The National Education Policy Act focuses on the powers vested in the Minister of Education, giving him/her the right to override provincial legislation where it conflicts with national legislation [Section 3(3)]. In this regard it allows the Minister to take whatever measures necessary to address 'past discriminatory practices' [Section 3(4r)], to protect educators against 'unfair discrimination' [Section 4a(i)], and/or to redress past inequalities, including gender discrimination [Section 4c] in education provision.
- The South African Schools Act (Act 84 of 1996), while affirming the need for redress and the elimination of discrimination in educational provision, emphasizes 'construction' rather than 'deconstruction' in the eradication of past inequalities. The primary means of doing so, in terms of this Act, lies in the devolution of power to school governing bodies [Section 16(1)]
- The Labour Relations Act, focusing primarily on the advancement of 'economic development, social justice...and the democratisation of the workplace' [Section 1] encourages the protection of worker rights in the



workplace as the key means of ensuring the achievement of such advancement.

- The Employment Equity Act, the first piece of legislation that explicitly uses the terms ‘representivity’ and ‘diverse workforce’ [Section 13(1)] is based on the premise that legislation alone is not enough to effect transformation. Informed by this premise the Act proposes that measures should be taken to enforce affirmative action in the workplace. Its primary means would be to compel employers to create work environments that reflect the diversity of the South African population by forcing them to consider equity and representivity in their employment practices. To ensure employer adherence, the Act [Section 5], prohibits unfair discrimination in any employment policy or practice unless this is done in the interests of affirmative action [Section 6(2)].
- The Employment of Educators Act, taking its cue from the Schools Act, regards the devolution of power to provinces and schools as the primary means of effecting transformation. While taking cognisance of the Labour Relations Act and the Employment Equity Act, the Employment of Educators Act makes the provincial Heads of Department and school governing bodies jointly responsible for the transformation of the school environment, with specific reference to the composition of teaching staff.
- The original Education Laws Amendment Bill (2005) and, the eventual Education Laws Amendment Act (Act 24 of 2005) effectively gives the State – in the person of the Head of Department – permission to ignore the recommendations of the school governing body regarding the teacher/s most suitable for the advertised post and to unilaterally decide on subsequent action. It would seem, therefore, as if the Education Laws Amendment Act

subscribes to a key premise of the Employment Equity Act, namely that legislation in itself is not sufficient to effect transformation; that the State of necessity has to use other, more aggressive, measures to do so. The amendments to criteria and procedures for the selection and appointment of teachers in the Education Laws Amendment Act, according to a Memorandum accompanying the original Bill, are administrative and procedural in nature and are aimed at enhancing the efficacy of educator deployment. The relevant clause in the Employment of Educators Act [Section 6(3)(c)] required the Head of Department to refer the whole matter back to the school governing body should s/he decline its appointment recommendations. This, according to the Memorandum, is unnecessarily time-consuming. By according the HoD the right to either consider all the applications for the post concerned so as to make a temporary appointment or to re-advertise the post as proposed, would, according to this explanation, streamline the process.

This is not, however, the way in which stakeholders interpreted the amendment. Responding to the original Bill, they argued that, in the first place, the amendment made race rather than 'competence, quality or ability' the most important consideration in the appointment of teachers (News 24, 2005). In this sense the amendment could well be regarded as unfair discrimination. According to Abelman, Elmore, Kenyon and Marshall (1999), the State could, in forcing school governing bodies to appoint teachers on the basis of race, be undermining citizens' constitutional right to 'freedom of association'. Following this argument, education stakeholders, especially those representing formerly white (HoA) school communities, argued that, in forcing school governing bodies to prioritise race over ability the State was making a political rather than an educational statement (DoE, 2006). Moreover, by giving the Head of Department the right to ignore the recommendation of school governing bodies,

the State was undermining their authority and decision making power (Naidoo, 2004). In this sense, the right and the power to maintain control over decision-making in their schools given to them in terms of the Schools Act (Beckmann, 2002), was being removed.

In the second place, according to Zille (News 24, 2005), who at the time was the education spokesperson for the Democratic Alliance, the amendment would inevitably lead to a decline in the overall quality of education. Consequently it would be recorded in history as the democratic South African government's 'greatest failure'. Reiterating the Democratic Alliance's commitment to transformation of education on the one hand and urging all those with a stake in education to embark on mass action to stop the Bill being passed, Zille (News 24, 2005) argued that the amendment would not contribute to the kind of educational quality that the then Minister of Education, Naledi Pandor, claimed to be working towards.

*'On the contrary, it will achieve the opposite: it will destroy the remaining quality in the public education system, without doing anything at all to improve the pitiful quality of education in many disadvantaged schools. Instead of making race the criterion for teacher appointments, the government should encourage the best teachers to teach in the most disadvantaged schools through real incentives, particularly increased salary offers. Instead of encouraging and rewarding competence and quality, the Bill makes these attributes irrelevant in the filling of teaching posts'.*

In the third place, Zille, on behalf of the political party she represented, argued that if the Bill were to be passed and promulgated as an Act, it would increase the gap between the 'haves' and the 'have-nots' by using a funding formula that would continue to pour millions into those schools from which parents were

seeking to remove their children, while those schools facing increased demands for access, because they offered quality education, would actually lose money. Jansen (2005) and others (Martin, Ranson, McKeown & Nixon: 1996) concur with Zille on this point, arguing that, in targeting white schools, the South African government was not only trying to 'break what is fixed' - because they cannot 'fix what is broken' - but also to draw attention away from dysfunctional black schools.

While acknowledging that the underlying intent of the amendments as proposed in the original Bill was to redress past (racial) imbalances, the State denied that it was acting undemocratically or that it was undermining due process. In fact, so the State claimed, the fourteen-day window period granted to school governing bodies to appeal against the HoD's decision was evidence of the State's commitment to democracy, due process and devolution of power. School governing bodies responded to the State's seeming attempt to assure them that their powers were not being undermined by arguing that the proposed amendment created the impression that they were being disciplined/punished for not having toed the government line. The State's response to this claim confirmed this sense, explaining as it did, that the purpose of the amendment was to open the door for the State to re-examine the procedures followed by those school governing bodies that seemed to employ only certain categories of teachers at their schools (Surty, 2005). The amendment would, so the State argued, enable it to target, through specific interventions, schools that were previously either privileged or disadvantaged by virtue of race, ethnicity and language orientation. Such interventions could include the deployment of teachers to specific geographical areas where there were shortages and/or to schools that seemed to be faltering because they had difficulty attracting teaching staff (Grieves & Hanafin, 2005:20).

Bipath (2005:20), in support of the State's position, argues that redress of past racial imbalances was necessary given the history of racial discrimination, inequality of provision, resource imbalances, and inadequate black schooling during the apartheid period. It is because of such inequities, she argues, that there is a need to use legislation to restore balance to the system especially since history has shown that social change is seldom achieved without the force of the law. If our education system is to fulfil its promise of equal education for all, she argues, legislation should of necessity focus on the achievement of social justice. It should, therefore, not only define the responsibilities of school governing bodies but should also target schools that perpetuate inequality and segregation. Hargreaves (1994: 61-62) concurs with Bipath (2005) as regards the need for redress but does not regard legislation alone as a sufficient measure to effect change. According to Hargreaves (1994:61-62), the creation of structures that support the achievement of educational goals is useless unless it is accompanied by a commitment to align structure to practice.

Bipath's views are reminiscent of those expressed earlier by Moses (2002:3/4) and Kymlicka (1991:166), who point out that racially-informed policies are critical in fostering the ideal of self determination because they offer a standard of what 'ought' to be desirable. One could therefore argue that, in forcing school governing bodies to prioritise equity, redress and representivity in their selection procedures, the Education Laws Amendment Act of 2005 sets the standard. In raising this point one should perhaps take cognisance of Marable's (1995:186) observation that 'race becomes a social force only when individuals or groups behave towards each other in ways which either reflect or perpetuate the ideology of subordination and patterns of inequality in daily life'. Rather than favour some at the expense of others legislation should therefore seek to promote the autonomy of all citizens (Arnesen, 1998). Should it favour some at the expense of others without taking social context into consideration it would

automatically limit or advance some individuals' real choices (Moses, 2002:3). Howe and Howe (1984) caution that discussions focusing on racial issues tend to be passionate and complicated because they are informed by deeply entrenched views on racial equality and status is also relevant here, suggesting that it is best to base such discussions on philosophically defensible interpretations that have some chance of winning broad acceptance rather than on subjective opinions.

### 3.6 Relevant Court Cases

It is not only school governing bodies and political leaders who interpret legislation in different ways. Courts do too. This is evident from the Snayer Case, in which the governing body of a rural black school in Mpumalanga recommended a *son of the soil*<sup>4</sup>, who was not the best candidate, for appointment as the new principal of the school (Mpande, 2005). The HoD of the province rejected the recommendation on the grounds that the governing body had acted 'un-procedurally' (Esbend, 2005). The governing body of the school lost the case.

Yet another case illustrating the possibility that the same law could be differently interpreted is the 2003 court case between Kimberley Girls' High School and another versus the Northern Cape Head of Department of Education. In this case the HoD rejected the recommendation of the governing body regarding the appointment of a Post level 1 English educator in 2002 on the grounds that it had not adhered to a process collectively agreed upon, namely to give preference to candidates disadvantaged by the injustices of the past. As justification the HoD argued that suitably qualified candidates from previously disadvantaged backgrounds were overlooked and not even short listed for interviews. They

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<sup>4</sup> Person who was born and schooled in that area

were therefore not afforded an equal opportunity to demonstrate their proficiency in English and their competency as educators.

According to the HoD, the governing body of Kimberley Girls' High School had violated the administrative process that should be followed in the selection and recommendation of teachers for appointment to public schools, the Employment Equity Act (Act 55 of 1998), the Schools Act (Act 84 of 1996), the Employment of Educators Act (Act 76 of 1998) and the Constitution (1996). In doing so, the HoD argued, the governing body of this school showed a disregard for the democratic values and principles that underpin the Constitution and should, therefore, underpin their selection processes. The governing body argued that it had followed the prescribed statutory procedures and that its recommendation should therefore be accepted. The governing body's application was dismissed with costs.

A third case, heard in the Constitutional Court of South Africa, was the 2003 case between the HoD of the Limpopo Department of Education and governing body of Settlers Agricultural High School. Following the HoD's rejection of the SGB recommendation, the court ruled against the HoD because the SGB had followed the correct procedure and the Act. At that stage, that is, prior to January 2006, the HoD was obliged to accept the recommendation of the governing body provided that it was made in good faith and without undue influence.

In lodging an appeal against the High Court decision, the HoD, in referring to the afore-mentioned Northern Cape case, contested the SGB's interpretation of Sections 6 and 7 (1) of the Employment of Educators Act (Act 76 of 1998) and the provisions of Section 195(1) of the Constitution 1996 (Act 108 of 1996), both of which refer to the ability of the candidate and the need to redress the imbalances of the past in order to achieve broad representation. The Constitutional Court



refused the HoD's application for leave to appeal with costs because it was lodged nine months after the High Court had made its decision and the HoD had ignored the order for costs made against him in the High Court case. According to the Constitutional Court, overturning the appointment at that stage would not have been in the interest of justice.

A fourth example involves a case between the Head of Department of the Western Cape Education Department and the governing body of Point High School (Case number 584/07 of 31 March 2008). In this instance the governing body of the school applied to the Cape High Court regarding the legitimacy of two administrative decisions made by the HoD. The governing body argued that the HoD had fallen foul of the provisions of Section 6(2) of the Promotion of Administrative Justice Act (Act 3 of 2000). The HoD insisted that a local person who acted in the post should be employed, a clause which was not communicated before the interview and selection process was done.

In terms of the Promotion of Administrative Justice Act (Act 3 of 2000) the court has the power to review an administrative action if a mandatory procedure prescribed by an employer was not complied with and if relevant considerations were not considered. The school governing body had followed the procedure prescribed in detail by the Department. The short-listing and interview processes had been supervised by the Department's local representative, the Circuit Manager. The court overturned the HoD's decision, dismissing the case with costs. This case is very important to this study because it deals with section 6 of the Employment of Educator's Act amended by the Education Laws Amendment Act 24 of 2005.

A similar yet slightly different case involved the rejection of a district director's recommendation regarding the appointment of two black candidates as principals of formerly white (HoA) schools in the Eastern Cape. According to Mpande (2005), the recommendation of the District Director regarding both teachers was rejected by the Department of Education on the grounds that the District Director, while adhering to equity and redress principles, had acted un-procedurally. The South African Democratic Teachers' Union (SADTU) contested the Department's rejection, arguing that learner enrolment at these two formerly white schools was more than 90 percent black (Carrels, 2006) but the SGB of the school countered that the authority to appoint those people they preferred and needed had been devolved to them, not to the District Director. Once again, the SGB won the case because it had followed stipulated procedure.

The examples cited above clearly indicate that the same legislation and/or principles informing such legislation could be open to different interpretations. School governing bodies and the DoE sometimes apply different criteria in the selection and recommendation of teachers for appointment at the schools for which they are responsible (Wong, 2000; Jansen, 2005). The outcomes of these cases indicate that the interpretation of legislation is socially and legally complex, especially when such legislation touches on the intricate interrelationship between the rights of governing bodies to make decisions and the need for transformation aimed at restoring racial and gender imbalances in education.

### **3.7 Summative conclusion**

In this chapter I discussed various theoretical positions on school governance in general, relating these to the effects that the devolution of certain powers to school governing bodies has had on the transformation of the staff composition of public schools. I also describe the context – social and legislative – within

which changes to legislation are effected, focusing specifically on the reaction of different stakeholders to changes in the Employment of Educators Act promulgated in the Education Laws Amendment Act, of 2005, suggesting that these responses had historical roots. I argued that there seems to be sufficient evidence that legislation aimed at equity, redress and representivity in the workplace has not contributed as much to the transformation of education as was expected and that legislation on education seems to be interpreted differently by different stakeholders. I provided evidence that these differences could result in legal battles, suggesting that regardless of the merit or not of measures taken to speed up processes aimed at racial integration, great care needs to be taken to safeguard the integrity of the process.

In the next chapter I focus on the intent behind the changes to legislation, i.e. the State's commitment to promote equity and representivity in the staff composition of South African schools, using SGB teacher selection process as a redress measure. In doing so, I argue that a number of countries have used legislation as a means of enforcing racial integration in schools and that the relative successes they achieved may well have been the motive behind the South African government's adoption of this strategy for education transformation in South Africa.

## CHAPTER FOUR

### EQUITY, REDRESS AND REPRESENTIVITY

#### 4.1 Introduction and Purpose

As indicated in Chapter Three, the Education Laws Amendment Act of 2005 and other Acts dealing with the employment of educators has equity, redress and representivity as purpose. Informed by the apartheid practices of the past, which separated learners and teachers along racial/colour lines, these pieces of legislation are aimed at redressing past inequalities by promoting racial integration at school level. The premise on which these Acts rest seems to be that, if the learner population of public schools is integrated, so should the staff composition be.

As already mentioned in Chapters One and Three, while the learner population of former (white) House of Assembly schools is becoming increasingly multi-racial, the same cannot be said of former (black) Department of Education and Training schools. Also, while the learner population of former House of Assembly schools is becoming increasingly black their staff compositions and the composition of their school governing bodies have remained largely white. This, I argued in Chapter Three, is seen as one of the reasons for the changes effected to the Employment of Educators Act (Act 76 of 1998) as regards the selection and appointment of school educators as promulgated in the Education Laws Amendment Act of 2005.

Following the discussion of legislation on teacher selection and appointment in Chapter Three, this chapter serves a dual purpose. In the first instance it is aimed

at clarifying the meaning of the concepts, 'equity', 'redress' and 'representivity'. In the second instance it is aimed at determining why the South African government is so adamant that the selection and appointment of teachers should promote equity, redress and representivity. In exploring these issues I shall be arguing that, given the fragmentation of South African society during the apartheid years, the promotion of equity and representivity in the selection and appointment of teachers at public schools is crucial to the transformation of the education system but that the way in which this is done has to be sensitive to the history and dispositions of those whom it will most directly affect, namely schools teachers and learners.

In presenting my argument I first share insights I gained from reading academic literature and a range of other documents as regards the meanings attached to the concepts equity, redress and representivity. Following the concept clarification, I consider the rationale for and effectiveness of State initiatives to promote equity in its public schools. I then describe some of the strategies used by other countries in their attempts to racially integrate schools as a means of redressing past inequalities and ensuring future equity in education. Finally, using these strategies as benchmarks I identify strengths and weaknesses in the initiatives that the South African government has taken to date as regards the promotion of equity in the public schools for which it is ultimately responsible.

## 4.2 Concept Clarification

Key to the discussion of equity through the promotion of racial integration, which is the focus of this chapter are a number of closely associated concepts. Naturally 'equity' is one of these concepts. I would, however, argue that any discussion of equity would, by implication, include a discussion of segregation, integration, diversity, representivity and redress. These are exactly the issues that were the foci of the changes to legislation on teacher selection and appointment promulgated in the Education Laws Amendment Act (Act 24 of 2005). Before embarking on a discussion of the fairness of government initiatives aimed at the promotion of equity and representivity in the staff composition of schools it is, therefore, necessary to first clarify and/or define all these concepts.

### 1.1.1 Equity

The Concise Oxford Dictionary (1961) defines equity as 'fairness'; 'recourse to principles of justice to correct or supplement law'; system of law coexisting with and superseding common and statute law'. In the sense that equity is 'part of a set of legal principles entrenched in legislation and applied strictly so as to achieve natural justice' ([http://en.wikipedia.org/wiki/Equity\\_\(law\)](http://en.wikipedia.org/wiki/Equity_(law))) it is meant to direct or prevent someone from executing a particular action or actions. What is important in this regard is that equity measures are meant to promote social justice. If such measures are stipulated in legislation they carry with them the power and authority of the enactor – Parliament in the case of the State - and the associated penalties for failure or refusal to obey (<http://www.investorwords.com/1726/equity.html>).

Applied to actions taken by the State it would mean that the State should ensure that all its citizens, irrespective of race, culture, language, or other differences have access to all its institutions, services and programs, and are allowed to participate in all public activities. In short, the State should ensure that *equal opportunity* is available to all its citizens. Applied to actions that the State should *not take* it means that it should in no way discriminate against any of its citizens in any way or on any grounds. By implication legislation passed by a State that wishes to promote equity should protect individual and group rights and punish wrongs. Such laws would be in line with the universally accepted principles of essential justness coupled with the sovereign power of Parliament to enact them (<http://www.investorwords.com/1726/equity.html>).

While most legal systems in the world strive to uphold the ideal of equal opportunity – equity - through fair and proper administration of the laws of the country concerned, unjust laws have on occasion been passed. The South African Constitution (1996), resting as it does, on values such as equality, non-discrimination and social justice, by implication commits the country to the promotion of equity. However, the Bill of Rights in the Constitution allows for ‘fair discrimination’, that is discrimination aimed at restoring previous ‘unfair’ discrimination practices. In terms of this stipulation, the South African government and those who benefit from it regard affirmative action as an equity measure that is aimed at redressing past injustices, especially in the areas of race and gender. To those who feel that they are being disadvantaged by these measures affirmative action is, however, no more than blatant discrimination.

I would argue that it is in these different attitudes towards affirmative action and, by implication, towards attempts to restore historical imbalances, that one of the reasons for the resistance to the changes regarding teacher selection and

appointment promulgated in the Education Laws Amendment Act (2005) can be found. Resting on the same premises as the Employment Equity Act, (Act No 55 of 1998), the Education Laws Amendment Act (2005) ensures that, in future, school governing bodies that do not explicitly consider equity, redress and representivity in their teacher selection processes could be prosecuted in terms of the Employment of Educators Act – the Act to which changes were effected as a result of the promulgation of the Education Laws Amendment Act (Act 24 of 2005).

### **1.1.2 Representivity**

Representivity simply refers to the fact that all those who should be included in whatever activity, situation, or event are visibly there, whether they represent themselves, a constituency or a community (<http://dictionary.reference.com/search?q=Representative>). In terms of race, gender and, at times, even language, this could mean that all races, both genders and all acknowledged/official language groups should be represented. In any employment situation where equity is a principle representivity would therefore imply that the composition of the workforce, including those in management positions, should be representative of the composition of the population at large. This could mean that the workforce should include people from all races, both genders, different language groups and, if possible, people with disabilities at all levels of the organisation or industry concerned. In this sense representivity therefore serves as a benchmark against which the success of equity measures could be assessed. The more diverse the workforce, the more successful it would be in terms of equity criteria; the more homogeneous the workforce, the greater its failure as assessed against the same criteria.



In apartheid South Africa neither racial nor gender equity was considered in the selection and employment of educators. Because the education system was fragmented, with separate schools for people belonging to different racial and language (in most instances) groupings, as well as for those with specific disabilities and, in some cases those of different gender, schools were primarily mono-racial and monolingual. Also, as far as gender was concerned, management positions were typically reserved for males, with females making up the bulk of the 'workers'.

It follows that, in post-apartheid South Africa, representivity would be an important indicator of the State's success in creating a truly united nation where all people have an equal chance to be employed (at any level of the system and in any job) and/or to be productive and prosperous. In terms of education it would mean that the staff and learner composition of all public schools – i.e. those schools that are the responsibility of the State – should be representative of the composition of the South African population at large. If not, the State would have failed in its mission to establish equity.

### **1.1.3 Redress**

Redress is not, strictly speaking, a principle but a strategy or measure that could be used to ensure equity, representivity, integration, et cetera, so as to 'make amends or bring relief to unjust or oppressive treatment' (<http://www.thefreedictionary.com/redress>). Through redress, imbalances can be corrected, retribution from past injuries can be awarded and protection from future harm assured (<http://www.thefreedictionary.com/redress>).

One of the redress measures often used by governments that are committed to the achievement of equity in the workplace is affirmative action. According to Kemp (1992:12), affirmative action is primarily aimed at the eradication of discriminatory practices on the one hand and the promotion of skills development on the other. Fuhr (1994:9), adding to Kemp's definition, emphasizes that affirmative action is also aimed at the creation of a diverse workforce which, at all levels, reflects the society in which it operates. Affirmative action is not and should not be a 'vengeful turning of the tables of oppression', former President Nelson Mandela said.

In South Africa redress would refer to measures that the State would have to take to restore the racial and gender balance in the workplace, to ensure that those who have in the past been disadvantaged are given preferential treatment, creating opportunities for those with disabilities to be productively employed and to ensure that no person or group of persons will in future be excluded from any opportunity to advance him/herself simply because s/he is 'different'. In terms of education this would mean that specific steps – such as the aforementioned changes to the Employment of Educators Act (Act 76 of 1998) - would have to be taken to ensure that no person should, on the basis of his/her race, gender, language or disability be refused the opportunity of being employed at any school under the jurisdiction of the State provided that s/he satisfies the requisite criteria for the position concerned.

To date the South African government has primarily used two strategies to restore balance and to ensure equity in school education (DoE, 2004:1). The role played by legislation in this regard is discussed in Chapter 3. As regards affirmative action a number of mechanisms have since 1994 been put in place to ensure that 'suitably qualified people from designated groups have equal

employment opportunities and are equitably represented in all occupational categories and levels of the workforce of a designated employer' (Employment Equity Act No 55 of 1998). One of these, to which the governing bodies of public schools have now become accustomed, is the checking procedure followed by the Department to ensure that SGB recommendations for appointment are procedurally sound. If they are not, the recommendation is rejected and the selection process has to start from scratch. The most recent mechanism, promulgated in the Education Laws Amendment Act (Act 24 of 2005) is the stipulation that SGBs must in future provide the HoD with the names of three candidates, instead of the previous one candidate. Allied to this stipulation is the right given to the HoD to decide which, if any, of the three candidates s/he wants to appoint without having to consult the SGB concerned in this regard (see Chapter 3 for detail in this regard).

#### **1.1.4 Segregation**

Even though many societies throughout history have practiced racial segregation, it was by no means universal, and some multiracial societies such as the Roman Empire were notable for their rejection of this practice. Few modern societies officially practice racial segregation, and most of them officially frown upon racial discrimination. However, anxieties about racial, religious and cultural differences still find expression in many social and political spheres, either as an official pretext for culturally accepted discrimination, or as a socially acceptable way of discussing cultural, religious and economic friction that results from racial discrimination. Controversies in this regard often mask concerns about the culture or racial composition of specific groups. Racial issues also feature in seemingly race-neutral disputes, in the discussion of topics such as

poverty, healthcare, taxation, religion, enforcement of a particular set of cultural norms, and even fashion.

Segregation might seem benign when referring to divisions by colour, but in South Africa's case it created notions of racial inferiority and/or superiority. Schools were not only separated in terms of colour - all-black or all-white schools - but learners and teachers were legally separated by differences in the allocation of academic and financial resources. This segregation, sanctioned by the law, resulted in black teachers teaching at black (DET) schools and white teachers teaching at (white) HoA schools. It also led to black schools being allocated fewer resources and fewer opportunities for advancement than their white counterparts. Segregation therefore not only promoted inequality, but also upset the balance of the entire education system.

### **1.1.5 Integration**

Integration, according to the Oxford Dictionary (1961), is a process whereby the parts of some or other entity are assembled to form a whole. Applied to people, it could mean that the members of a particular group (cultural, linguistic, social, racial, gender) are combined into a whole. It could also refer to a process whereby people from different groups combine to form a new group or where people who have previously been separated are now reunited. In the sense that integration is a process by means of which people of different races who had previously been separated from one another are reunited, racial integration is the opposite of segregation.

Racial integration could essentially take place in one of two ways – spontaneously or systematically. A systematic process of racial integration, typically referred to as desegregation, would include the formulation of specific goals and strategies aimed at ensuring that people from different races will respect and mingle with one another at social and systemic levels. By implication such a process would include the creation of equal opportunities for, amongst others, employment and promotion, also in public schools, which are the focus of my study. The term, ‘desegregation’, is normally associated with the legal/legislative domain and its primary purpose is to ‘drive diversity, and create harmony and order, not only in schools but also in society’ (Organ, 1997). In this sense, desegregation is the legal remedy to segregation. While usually effective in the long run, systematic integration processes are fraught with difficulties and could lead to inter-racial and other forms of conflict because it typically ignores feelings of bitterness, arrogance, inadequacy and victimization experienced by those who are at the receiving end of such actions.

While systematic integration – desegregation – is largely a legal process, spontaneous integration is largely a social one. Spontaneous integration involves much more than merely imposing equity and representivity indicators/benchmarks to ensure that those representing a racial minority would be integrated into a majority group or vice versa. Rather, spontaneous integration implies the creation of an entirely new group, with a new culture that draws on the strengths inherent in the diversity of all its members and the cultural and other assets that they bring with them. What counts is not physical contact but what happens when this contact occurs - how people interact and positively relate to each other (Soudien, 2004:95).

Even when circumstances are ideal racial integration remains a challenge because people have to circumvent inevitable chaos by creating a new order. It requires the expansion of existing value structures to equally accommodate all people, irrespective of particular differences. In an evolutionary process such as this, people of different races, genders, languages and abilities gradually establish social links across barriers, simultaneously bridging and binding people across the spectrum (<http://studentweb.tulane.edu/~mcardin/integrationproject-0.html>). This process, according to Naidoo (1996a: 11), is not a single event or a one-time shift in school conditions: it involves a series of activities and events, and change will only occur over a long period of time. It requires the interaction of people in multiracial settings where everyone has equal status and equal opportunities, that is, the members of the different cultures and races must acknowledge their equality and claim their right to equal opportunity if real integration is to take place.

### **4.3 Equity and education in South African schools**

Referring to a range of studies conducted by different institutions and individuals after 1994, Soudien (2004:89) claims that the only impact education legislation has had on integration is that black children migrated to white schools, with little and mostly no movement the other way. While these black learners might now be experiencing 'equal educational opportunities' their peers who have remained in township schools are still marginalized. Their schools are still overpopulated, remain under resourced, and operate on shoestring budgets and in environmentally poor conditions. By implication, they are being denied the right to equality, non-discrimination and equal opportunity (Bird, 2003; Bird, 2002; & Mangan, 1997:1).

Other studies conducted on racial integration amongst learners indicate that, while assimilation, rather than integration, is taking place in schools, institutionalised racism is still pervasive. Manifestations of assimilation at the classroom level include negative stereotyping of black students, selective empathy, discriminatory seating arrangements, devolution of authority to students on racial grounds, and an aversion to African languages. Evidence of racist undercurrents that explode every now and again, even in so-called 'integrated schools, are often reported in the South African media. Think, for example of the incident in which a black learner stabbed a white learner with a pair of scissors; the incident in which black learners were prohibited from wearing the school's uniform and were separated from white learners for teaching/learning purposes, and the many incidents in which black learners were refused permission to enrol in the school of their choice (Naidoo, 1997:3).

Bird (2003) and Bird (2002), investigating racism and equality, found widespread evidence that many decisions taken by school managers and/or governing bodies reflected resistance to government efforts to ensure equity, equality and quality education for all South Africans. The incidents of racism mentioned in the previous paragraph could also, according to Naidoo (2004:20) signify resistance to racial equality and/or a single-minded determination on the part of a school community to preserve the character and culture of its school under the guise of implementing and utilising the directives of the Schools Act. The Human Sciences Research Council (HSRC), having collected eye-witness accounts of the day-to-day interactions of white and black South Africans in educational contexts came to the same conclusion (McKinney, 2005; Nkomo, McKinney, & Chisholm, 2004; Sekete et al., 2001).

A number of researchers (Adams & Waghid, 2005:25; Apple, 2001; Baker, et al., 2004:2; Boyd & Miretzky, 2003; Fullan, 2001; Gilmour, 2001; Rees & Rodley, 1995; Wallace & Pocklington, 2002), while agreeing that racial integration in South African schools is limited, do not necessarily agree with these reasons. Boyd and Miretzky (2003) ascribe it to the 'hierarchical relationship' between the State and people at schools. Apple (2001) and other researchers (Baker, et al., 2004: 2; Boyd & Miretzky, 2003; Rees & Rodley, 1995; Wallace & Pocklington, 2002) blame the lack of integration on the fact that the State depends primarily on legislation as a redress measure. Grieves and Hanafin (2005: 21-22), building on this argument, point out that the fault is not with legislation but with the way in which people interpret it, something that, according to Thody (1998) is influenced by whether or not people understands the law. Gilmour (2001) as well as Adams and Waghid (2005: 25), taking up this point, suggest that some people's limited understanding of the law is the result of social inequalities while Baker, et al. (2004: 2) argue that it is the result of confusion caused by the plethora of new laws and amendments to laws that have been passed in South Africa since 1994 and the tempo at which this has taken place.

It might well be that, in the light of the afore-mentioned research findings, the South African government realized that it would have to approach racial integration from another angle. As indicated in Chapter Three the government regarded the Schools Act as its primary tool to create a new, national, education system that would not only redress past injustices in educational provision but would also give school communities the opportunity to take responsibility for the governance of their schools. Informing the devolution of governance responsibilities to local school governing bodies was the assumption that it would promote equitable educational opportunities while simultaneously improving teaching and learning (Bird, 2003; Bird, 2002; and Brehony, 1994). Implied in this assumption was the expectation that governing bodies



understood their new roles and responsibilities and would take appropriate action to live up to these expectations (Wohlsetter & Mohrman, & Robertson 1996). According to Naledi Pandor, the Minister of Education at the time the Education Laws Amendment Act (Act 24 of 2005) was passed, school governing bodies had not lived up to these expectations, especially as regards the selection and recommendation of teachers for appointment at their schools. Consequently racial inequalities in the staffing composition of public schools have not as yet been erased (Nieto, 2005; Smith, 1996) and, so the argument goes, the State had no other choice than to take corrective action.

It is clear from this argument that the South African government believes that a diverse, representative teaching staff is crucial to learners' academic performance on the one hand and to the transformation of public schools on the other (DoE: 2005). Finn (2002), Stringfield, Datnow, Ross and Snively (1998) disagree with the assumption on which the Minister bases her argument. According to them, appointing teachers whose culture is incompatible with that of the school might be detrimental to both the school and the person concerned. Adding to this argument, McCarthy and Crichlow (1993) point out that appointing a small number of teachers of other races at a single school may lead to their concentrating on not being offensive or using the wrong language for fear of being marginalized. Abelman, Elmore, Kenyon & Marshall (1999), on the other hand, claim that the imposed inclusion of someone with whom people do not 'freely want to associate' may also be seen as a contravention of the Constitution.

#### **4.4 International Equity Initiatives**

Notwithstanding the many problems associated with imposed integration in schools, there is evidence in literature that there are cases where it has been

relatively successful. While international publications do not have much to say on teacher appointment as a means of creating equity and diversity in the staff composition of schools (Frankenberg, 2006), much has been written on the racial integration of learners and, since the reasons for such integration – equity, representivity and redress – are much the same as those for the integration of teaching staff, I include here brief discussions of some international efforts at racial integration at schools. I would argue that, although they focus on the integration of learners rather than teachers, they contain valuable lessons for the South African situation.

One of the reasons given for the lack of racial integration in schools is social stratification, a factor that is as applicable to the integration of teachers as it is to the integration of learners. In this regard Baker et al. (2004:276/7) argue that families, schools and the State inadvertently reproduce class stratification and that such stratification inhibits equal educational opportunities. This adds to Baker's (1999) argument, that schools play a major role in the promotion of social equity and fairness. Based on their findings that schools broaden or narrow educational opportunities a number of international researchers (Buchmann & Hannum, 2001; Lareau, 2002; Lucas & Berends, 2002; Shavit & Blossfeld, 1993) urge governments to actively reduce not only the school's stratifying effect but also that of other stratifying mechanisms.

Research on policy implementation (Ayalon, 1994; Baker, 1999; DiMaggio, 1982; Fuller & Robinson, 1992; Grant & Motala, 1984; Hallinan, 2000; Lareau & Horvat, 1999; Meyer, Rubinson, Ramirez & Boli-Bennet, 1977) emphasizes the school's capacity to exert cultural dominance and influence institutional growth or decline, diversification and bureaucratisation. In this sense, according to Werum (2003), school culture could well undermine legislation and/or policies that are

aimed at enhancing the quality of education and/or the promotion of equal access to quality education, thereby exacerbating existing inequalities.

For the purposes of my study I focus on racial integration initiatives launched in three countries - the United States of America (USA), Israel and Northern Ireland. These countries are included because they were all at some time characterized by discrimination on the basis of colour, ethnicity, and socio-economic status. Also, in their attempts to establish racially integrated schools, obstacles similar to those faced in South Africa hampered their efforts. Valuable lessons for the racial integration of schools in South Africa could be learnt from the identification of what these countries did right and what went wrong.

#### **4.4.1 Racial integration in USA schools**

In the United States of America integration did not take just take place instantaneously, probably because not all Americans are convinced that racial integration is the way to improve academic performance at school level. While the proponents of racial integration argue that segregation has a negative impact on learners' academic achievement, its opponents regard government initiatives aimed at the integration of races at schools as a violation of the Constitution's guarantee of equal protection under the law (Kahlenberg, 2008). From the vantage point of America's dominant (westernised white) culture school desegregation is a singular and inevitable event emanating from legislation and principles of democracy. From the vantage point of African American teachers, school desegregation is fraught with complexities and conflicts in which race, social class standing, gender, and personal relationships all play a role (Dingus, 2003; Dixson, 2005).

Eventual school integration in the USA was the direct result of a court ruling, that of a case that appeared in the Supreme Court in 1954. In this case the court ruled that the principle of 'separate but equal' was no longer valid (Orfield, 2004: 95), and that children of all ethnic backgrounds were to be educated together in the same age-appropriate schools (early-civil rights/Emmett/html). Initially processes like bussing black schoolchildren to white schools outside their areas of residence, heightened racial tensions, resulting in resistance, increased violence and disparity in the performance of students. White parents in Arkansas even dispatched the National Guard to prevent black learners from attending the white schools where their children were. ([http://www.watson.org/"lisa/blackhistory/school-integration/lilrock/index.html](http://www.watson.org/)).

Ironically, many years later, the same court rejected a school integration plans in which learners from two schools would be classified by race with a view to enforcing racial quotas as a means of achieving integration. The Court ruled that such quotas would violate the equal-protection clause of the 14th Amendment to the Constitution. As a consequence of this ruling American schools and/or colleges, while still considering race no longer use it as their primary criterion for learner enrolment (Schmidt, 2007). An opinion poll on the matter indicated, however, that the population as a whole still believed that race should be a prime consideration in this regard (Orfield, 2004).

#### **4.4.2 Racial integration in Irish schools**

In Northern Ireland schools were segregated in terms of historical religious divisions of religion with Catholics and Protestants attending separate schools (Dunn & Smith, 1988: 3). In 1974 this segregation culminated in violence that left 220 people killed (Cowden, 1999) and resulted in the formation of a movement called ACT (All Children Together), which started a peace initiative aimed at the integration of schools. Pressure exerted by this movement forced the British government to develop an integrated education system (McGlynn, Niens, Cairns, & Hewstone, 2004:151) which, as illustrated in the case from the Legan College - the first integrated educational institution in Belfast (Cowden, 1999) – not only brought together pupils from Protestant and Catholic traditions but also from other cultures and, in addition, appointed teachers and governors from mixed backgrounds (Alvarez, 2004).

#### **4.4.3 Racial integration in Israeli schools**

In the case of Israel, school segregation was the result of differences in nationality and religion. Palestinian Arab children were taught in Arabic, with Hebrew taught as a second language. Jewish children were taught in Hebrew only (Human Rights Watch, 2001). All learners followed the same curriculum, fell under the same Ministry of Education and attended similar but not identical educational institutions (Hertz-Lazarowitz, 2003:2). The Israeli government financed and regulated the education of almost all children in Israel and the law also did not prohibit Palestine Arab parents from enrolling their children in Jewish schools. However, in practice, very few Arab parents sent their children

to Jewish schools, hindering the progress of integration in Israeli schools (Human Rights Watch, 2001).

#### **4.5 Lessons for South Africa**

It would seem as if, as was the case in the USA, the challenge to integrate schools across racial lines in South Africa, is also a moral imperative. Responding to this imperative, Webster (1992) points out, implies adapting to a new political and social environment, a new way of life, obedience to new laws, which are changed or amended all the time, and a new schooling system. Moreover, in terms of this imperative, education legislation and its implementation should promote social justice.

Insights gained from literature as well as from studying equity initiatives in other parts of the world have convinced me that, while little will change without the force of the law, legislation alone is not enough to effect real integration. Informing my claim is the realization that racial integration is a multi-dimensional complex process that is affected by a multitude of factors. These include differences in the organizational structure, culture and ethos of schools, minimal opportunities for teachers of different races to interact with one another at personal, social and professional levels and fears of having to sacrifice what works and is valued for something unknown. These are the 'soft' or subjective factors. The 'hard' ones include different understandings and, therefore, different interpretations of, responses to and implementation of legislation on education.

Indications from literature are that coercive measures, while perhaps able to change the 'face' of schools do not really change a school's 'soul' or spirit.

According to Caldas and Bankston (2007) coercive desegregation weakens bonds and hurts not only learners and schools, but also entire communities. They cite examples from various parts of the United States to show how parents undermine desegregation plans by seeking better educational alternatives for their children rather than supporting the public schools to which their children were assigned.

Literature seems to suggest that there are other ways to promote racial integration – of learners and teachers alike. One of these is for the State to change its integration strategy from a systematic to a spontaneous one. The latter, while more gradual, seems to be more effective in the long run. Given that very little progress has to date been recorded with respect to social integration among teachers from different backgrounds the Department of Education should perhaps utilize teacher training workshops and conferences as opportunities for cross-racial exposure and interaction. The more people get to know and understand one another the less fearful and intolerant they might become. Workshops that allow teachers from different racial groups to work through their racial stereotypes might also play a role in this regard.

Literature also suggests, however, that the integration of teachers should be carefully considered in terms of its effect on learners' academic performance. Although the South African government might be convinced that racial integration is pedagogically sound literature suggests that learning might be negatively affected if the teacher's language usage and style of instruction is of benefit mainly to those students belonging to his/her own cultural background (DoE, 2005). On the other hand, the addition of a person of a different culture might actually enrich cultural understanding (Fineman, 2008) since it creates

opportunities for individuals and schools to interact effectively across cultures and to enhance awareness of people's expressed values.

Another option is to accept, as Stringfield, Datnow and Ross (1998) argue, the reality of systemic variation, and the fact that 'real schools have distinctive organisational characteristics and problems, unique student populations and diverse communities and institutional histories'. Instead, therefore, of expecting school governors to sacrifice what they regard as valuable, the State should acknowledge these (Apple, 2001; Fullan, 2001; Rees & Rodley, 1995; Wallace & Pocklington, 2002), as strengths using them as basis for ongoing debates about the way forward.

#### **4.6 Summative conclusion**

As indicated in the Introduction to this chapter, its primary purpose was to interrogate the notion of equity with specific reference to State initiative aimed at the racial integration of teachers at public schools. In exploring this notion I referred to a range of literature on the topic, first to clarify equity and other related concepts and then discussing some of the reasons for and effects of State initiatives in South Africa and elsewhere to promote racial integration at school level. In doing so I argued that the government might be more successful in these attempts if it considered evolutionary rather than systemic approaches to racial integration since these were not only less threatening but also more effective.

In the next chapter I present the findings of my empirical investigation in the understanding, interpretation and implementation of legislation on teacher



selection and recommendation in selected public schools in the Tshwane North District of Gauteng, South Africa. In doing so I use insights gained from my literature review to describe, analyse and explain my findings.