INEQUALITY IN THE PUBLIC BASIC EDUCATION SYSTEM: THE ROLE OF THE SOUTH AFRICAN COURTS IN EFFECTING RADICAL TRANSFORMATION

by

Lorette Arendse

Student number: 04498314

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Supervisor: Professor Ann Skelton

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

University of Pretoria

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THESIS SUMMARY

The purpose of this thesis is to critically evaluate the South African courts' role in contributing to the radical transformation of public basic education which is mandated by the South African Constitution. The author observes that deeply rooted patterns of racial and class inequality, that developed over a span of four centuries of colonial and apartheid rule, are reproduced in the post-apartheid public basic education system. This disparity manifests as unequal access to quality basic education for the majority of black and poor learners in the post-1994 dispensation. It is contended that the substantive-based approach to the right to basic education by the High courts and Supreme Court of Appeal (SCA) has led to some transformative change in public education. However, this approach is only half the battle won because it does not address the engrained patterns of systemic inequality perpetuated by school governing bodies (SGBs) of former white/Model C schools. In this regard, it is argued that governing bodies of former Model C schools manipulate the autonomous legislative powers awarded to SGBs with the purpose of retaining their inherited privilege(s). Whenever the state has challenged these schools' utilisation of their policy-making autonomy, the school governing bodies have had recourse to the courts. As a result, a contentious relationship between SGBs of former white schools and provincial education departments has developed in the sphere of public schooling. Apart from contextualising the historical and contemporary inequality in basic education as well as analysing the transformative potential of the substantive-based approach of the High courts and SCA, this thesis focuses on the Constitutional Court's resolution of the acrimonious disputes between the government and former white schools. The author notes with concern the development of an approach by South Africa's apex Court rooted in the notion of "meaningful engagement". The application of meaningful engagement entails that the Court does not resolve the dispute before it, but requires of the SGBs and the state to engage with each other and settle the matter. The Court has classified meaningful engagement as the required procedure through which all education disputes must be resolved. In this regard, the author argues that the Constitutional Court's perfunctory application of meaningful engagement has hampered the Court's ability to deal effectively with the underlying "hard" issue of structural inequality which permeates the education system. Accordingly, the study concludes that the meaningful engagement approach threatens the radical transformation of the public basic education system.

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CHAPTER 1

INTRODUCING THE STUDY

> *[Twenty-six years] into democracy, the state has failed to effect the 'radical transformation' of public education as demanded by the [South African] Constitution.*[1] *Across the country, the quality of basic education provided to learners still largely depends on whether a child, and his or her parents are middle class or not, live in the city or in a rural area, are black or white, male or female, or are lucky enough to live close to a school not rendered catastrophically dysfunctional because of weak leadership.*[2]

1.1 BACKGROUND

More than a quarter of a century after the formal abolition of apartheid, the post-1994 public basic education system replicates distinctive patterns of inequality, predominantly on the grounds of race and class. In this study, it is demonstrated that primarily for black and poor learners, an overall pattern of disadvantage manifests itself in unequal access to quality education. The legacy of educational inequality created by the former colonial and apartheid administrations has thus persisted beyond the historic regime change of 1994.

It is trite that a bifurcated education system is in operation in South Africa's contemporary public school domain. This is particularly evident in the explicit divide between former Model C (former white) schools which are adequately resourced, and disadvantaged (former black) schools, many of which are still entrenched in abject poverty.[3] Besides a difference in resources, a marked disparity in academic outcomes also distinguishes these two systems. Learners at former Model C schools are on average outperforming their counterparts at disadvantaged schools.[4] The learners who are regularly branded as "being among the worst of the world"[5] in literacy and numeracy tests are mostly found at disadvantaged schools

1 Constitution of the Republic of South Africa, 1996 ("The South African Constitution"/ "The Constitution").

2 De Vos P "Basic education: Democratic South Africa has failed the children"(3 December 2015) https://www.dailymaverick.co.za/opinionista/2015-12-03-basic-education-democratic-south-africa-has-failed-the-children/ (accessed 8 May 2019).

3 Spaull N "Schooling in South Africa: How low quality education becomes a poverty trap" in De Lannoy A *et al* (eds) *South African Child Gauge* (2015) 37-38. I deliberately avoid the term "previously disadvantaged schools" as many of these schools are currently trapped in disadvantage. See also Jansen J and Spaull N (eds) *South African schooling: The enigma of inequality, A study of the present and future possibilities* (2019).

4 Bloch G *The toxic mix: What's wrong with South Africa's schools and how to fix it* (2009) 59; Spaull ibid. See generally, Amnesty International "Broken and Unequal: The State of Education in South Africa" (2020) available at https://www.amnesty.org/en/documents/afr53/1705/2020/en/ (accessed 20 April 2020).

5 Bloch ibid.

(predominantly township and rural schools) which have been described as "sinkholes" where "learners are warehoused and deprived of an education of any meaningful quality".[6]

The South African government should be applauded for the steps they have taken so far to address the historical imbalances inherited from the former colonial and apartheid regimes.[7] However, despite these efforts, the current public education system traps the majority of the country's youth in a cycle of poverty and restricts them from participating as equal citizens in society.[8] For instance, it is estimated that half of all South African learners do not obtain a Matric qualification of which black learners constitute the majority.[9] This, coupled with the substandard level of education received by the majority of black learners "…condemns them to the underclass of South African society where poverty and unemployment is the norm."[10] A recent World Bank Report confirms that a low level of quality education among primarily the black youth is one of the main drivers of inequality in South Africa which has been classified as one of the most unequal countries in the world in 2018.[11]

In response to the inequality in the public basic education system, the South African Constitutional Court, invoking the transformative mandate of the supreme Constitution[12] has called for the *radical transformation* of public education.[13] Two primary interpretations of

6 Ibid.

7 These include an increase in the education budget on an annual basis since 1994, the elimination of school fees in the poorest schools and the provision of nutrition for learners on a daily basis. See Brickhill J and Van Leeve Y "Transformative Constitutionalism: Guiding light or empty slogan?" in Bishop M and Price A (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 145; South African Human Rights Commission "Poverty Traps and Social Exclusion among Children in South Africa: Summary Report" (2014) 14. ("SAHRC Poverty Report (2014)").

8 A "poverty trap" is defined by the SAHRC as "any self-reinforcing mechanism which causes poverty to persist." Poor quality education is regarded as a poverty trap by the Commission. See SAHRC Poverty Report (2014) 6, 14.

9 Hartnack A "Background document and review of key South African and international literature on school dropout" (2017) 1-2. (Report prepared for DGMT Foundation). A "Matric" or National Senior Certificate (NSC) is obtained after learners successfully complete the national exams written at the end of Grade 12.

10 Spaull "Schooling in South Africa: How low quality education becomes a poverty trap" (2015) 37.

11 The International Bank for Reconstruction and Development / The World Bank "Overcoming Poverty and Inequality in South Africa: An assessment of Drivers, Constraints and Opportunities" (2018) xviii, 3, 39-41, 68, 78-86, 95 ("World Bank Inequality in South Africa Report (2018)". The report "is an analysis of South Africa's progress in reducing poverty and inequality since 1994, with 2006 to 2015 as a reference period." See Foreword to the Report.

12 Section 2 of the Constitution states: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." See *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at para 100: "Our Constitution provides a mandate… for the transformation of our society from its racist and unequal past to a society in which all can live with dignity."

13 *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* 2010 (2) SA 415 (CC) para 47. ("*Ermelo CC*"). Italics my emphasis.

transformative constitutionalism have taken shape over the years: some academic commentators view transformation as "…the achievement of certain tangible results or outcomes, [for example the transformation of public education] through adjudication"[14] whilst others regard it as "…the radical change of the institutions [such as school governing bodies, for example] and systems [such as the decentralised school governance system, for instance] that produce results themselves."[15] In this regard, it is contended that the High courts and the Supreme Court of Appeal (SCA), through their application of a substantive-based approach to the right to basic education, are achieving tangible, positive results in the lives of disadvantaged learners.[16] Although this approach has attracted some criticism,[17] it should be acknowledged and celebrated that the incremental "filling out" of the right has resulted in tangible outcomes for disadvantaged learners in the public school domain, such as the provision of teachers, textbooks, school furniture, scholar transport and school infrastructure.[18] However, in my view, the substantive-based approach in itself is not capable of effecting the *radical transformation* of public basic education.[19] In this regard, it is argued that the pattern(s) of disadvantage towards black and poor learners are, in part, perpetuated by school governing bodies (SGBs) from predominantly former white schools/former Model C schools.[20] Drawing on the second conceptualisation of transformation advanced above, it is my argument that the decentralised system of school governance empowers governing bodies from these schools to use their autonomy under the Schools Act to sustain their inherited privileges and thus perpetuate systemic inequality in the education system. I argue further that the Constitutional Court, in particular, has failed to effectively interrogate the role of the decentralised school governance system (and the governing bodies' manipulation of the system) in impeding radical transformation of the public basic education system.

14 Brand D "Courts, socio-economic rights and transformative politics" (2009) LLD thesis (Stellenbosch University) 4. ("Brand (2009) LLD thesis".)
15 Ibid.
16 See Chapter 6.
17 See, for example, Veriava F "The Limpopo textbook litigation: A case study into the possibilities of a transformative constitutionalism" (2016) 32(2) *SAJHR* 336-337, 342-343.
18 See Chapter 6.
19 Italics my emphasis.
20 See Chapters 4 and 7.

1.2 MAIN RESEARCH PROBLEM AND RESEARCH OBJECTIVES

Viewed against the background sketched above, the main research problem identified in this thesis deals with the efficacy of the South African courts' role in contributing to the radical transformation of the public basic education system. To this end, the research objectives of the study are:

- To trace the historical trajectory of the racial and class inequality in the South African public basic education system;
- To indicate how racial and class inequality manifest in the post-apartheid public basic education system;
- To demonstrate how the decentralised school governance system enables the perpetuation of systemic inequality in the education system;
- To define the term *radical transformation* and understand what it means in the context of the right to basic education;
- To establish a critical link between the first conceptualisation of "transformation" advanced above and the substantive-based approach to the right to basic education;
- To critically interrogate the Constitutional Court's approach of meaningful engagement within the context of the second interpretation of "transformation" advanced above.

1.3 DEMARCATION AND LIMITATIONS OF THE THESIS

The obligation to transform South African society rests on the judiciary, legislature, executive and all organs of state.[21] As indicated by its title, this thesis is specifically concerned with the role of the courts in achieving the radical transformation of the public basic education system as mandated by the Constitutional Court. The respective roles of the legislature, executive and SGBs (as state organs) in this regard, are explored to the extent that these institutions impact on the courts' mandate to achieve radical transformation of public education.

[21] See *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 (6) BCLR 728 (W) at para 51: "Our Constitution encompasses a transformative provision. As such, the State cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights." Section 7(2) of the Constitution provides: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." Section 8(1) of the Constitution states: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

Section 29(1)(a) of the South African Constitution entrenches the right to a basic education, including adult basic education whereas section 29(1)(b) provides for the right to further education which includes higher education.[22] Although the transformation of higher education is an important objective, this thesis is concerned with the transformation of the public basic education system. Higher education thus falls beyond the scope of the study.

The meaning of the term "basic education" is not settled in South African law or policy. Basic education has been equated with compulsory education which is applicable to learners from Grade 1 to 9 or upon reaching the age of fifteen years, whichever occurs first.[23] However, the National Department of Basic Education (NDBE) is responsible for the education of all learners in the public school domain, thus from Grade R to Grade 12. This thesis is limited to the basic education provided to learners from Grades R to 12. Adult basic education is only addressed in so far as it relates to children who fall beyond the compulsory schooling age.[24]

The concepts "basic education" and "primary education" are occasionally used as synonyms in international law discourse. In terms of article 5 of the World Declaration on Education for All, "[t]he main delivery system for the basic education of children outside the family is primary schooling."[25] Primary education can thus be regarded as the formal basic education given to children in primary schools.[26] A "basic education" has also been defined as "education that includes all age groups, and goes beyond conventional curricula and delivery systems, for example pre-school, adult literacy, non-formal skills training for the youth and compensatory post-primary programmes for school leavers."[27] Thus, basic education is not restricted to learners in the primary school phase, but can include informal approaches to education that are

[22] The Department of Higher Education and Training (DHET) is responsible for all post-school education and derives its mandate from section 29(1)(b) of the Constitution and the Higher Education Act which "provides for a unified and nationally planned system of higher education."
See http://www.dhet.gov.za/SitePages/AboutUsNew.aspx (accessed 15 April 2020).
[23] Section 3(1) of the South African Schools Act 84 of 1996 ("Schools Act").
[24] The South African Constitution defines a child as someone under the age of 18 years. See section 28(3) of the Constitution.
[25] Article 5 of World Declaration on Education for All: Meeting Basic Learning Needs (1990) available at https://unesdoc.unesco.org/search/N-EXPLORE-c02c0c8e-2dda-4d85-baee-c2b8ff8af0cc (accessed 14 April 2020).
[26] Sloth-Nielsen J and Mezmur B "Free Education is a Right for Me: A Report on Free and Compulsory Education" (2007) (Report commissioned by Save the Children, Sweden) 9. ("Sloth-Nielsen and Mezmur Report on Free and Compulsory Education (2007)") 10.
[27] Ibid.

relevant to children and adults. For the purposes of this thesis, the terms "basic education" and "primary education" are used interchangeably only in so far as it relates to the international law framework examined in Chapter 3. The conceptualisation of basic education in the South African context as explained above, is applicable throughout the remainder of the thesis.

In terms of section 40(1) of the Constitution, the "government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated." In terms of Schedule 4 of the Constitution, the national Parliament and the nine provincial legislatures share concurrent legislative competence over basic education. This means that basic education is "managed, overseen and implemented at both the national and provincial levels (or spheres) of government."[28] Unless specifically stated otherwise, reference to "the Department" or "Department of Basic Education" means a provincial education department in this thesis.

In terms of South African legislation, "black people" is a term that includes Africans, Coloureds and Indians.[29] In this thesis, the terms "blacks" and "Africans" are used interchangeably unless specifically stated otherwise.

1.4 THEORETICAL APPROACH AND METHODOLOGY

My understanding of "radical transformation" is influenced firstly by the notion of transformative constitutionalism. I support the idea that transformative constitutionalism is a political project aimed at achieving wide-ranging social change as well as a "legal interpretive enterprise" that finds expression in the term "transformative adjudication".[30] Secondly, I draw on the specific jurisprudence that has developed in response to the litigation instituted in the courts based on the right to basic education (and related rights). Two types of litigation are identified in the study: one spearheaded by civil society actors such as Section 27 and Equal Education that focuses primarily on securing the provision of physical resources to schools, for

[28] McLaren D "Funding basic education" in Veriava F *et al* (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 46.
[29] Section 1 of Employment Equity Act 55 of 1998. "Coloured people" refers to people of multi-racial descent in South Africa. See https://www.sahistory.org.za/article/race-and-ethnicity-south-africa (accessed 20 April 2020).
[30] Klare K "Legal culture and transformative constitutionalism" 1998 (14) *SAJHR* 150; Zitzke E "A new proposed constitutional methodology for effecting transformation in the South African Law of Delict" (2016) LLD Thesis (University of Pretoria) ("Zitzke (2016) LLD Thesis") 9; Moseneke D "The fourth Bram Fischer memorial lecture :Transformative adjudication" (2002) 18 *SAJHR* 318.

example textbooks and school furniture. The second form of litigation has been mainly instituted by SGBs from former white school governing bodies in an effort to safeguard their autonomy under the South African Schools Act. Thirdly, I resort to the work of academic commentators, such as Danie Brand to develop a theory/framework within which to assess the notion of "radical transformation".[31] This framework recognises that the achievement of transformative change through the provision of concrete entitlements is not enough to satisfy the demands of "radical transformation". What is also required, is that the systems/institutions that may impede transformation, must be significantly changed in order to achieve "radical transformation". Applying this framework to the realm of basic education, it is contended that the High courts and SCA have been successful in producing judgments that have led to transformative change in the lives of black and poor learners by ordering provincial education departments to provide tangible outcomes to schools, for example textbooks, teachers and school furniture. However, this alone does not lead to the radical transformation of public basic education. To this end, it is my argument that the decentralised school governance system itself is perpetuating historical inequalities in the education system. The role of the Constitutional Court in enabling these disparities is therefore interrogated in this study.

This thesis benefits from a range of approaches, including doctrinal legal research, socio-legal research, political theory, historical analysis and philosophy. In order to understand why I employ these approaches, it is prudent to explain how this thesis has been structured. Drawing on its title, namely "Inequality in the public basic education system: The role of the South African courts in effecting radical transformation", I have divided the thesis into two main parts consisting of the substantive chapters only. Part I, comprising Chapters 2, 3 and 4 contextualises the systemic inequality in the public basic education system. Part II, consisting of Chapters 5, 6 and 7 seeks to critically engage with the role that the courts play in the transformation of public basic education. The South African courts' contribution to the transformation of basic education can only be critically assessed if the depth of inequality in public education is fully grasped and if the courts' role in sustaining/disrupting such disparity is comprehended. In this regard, the courts' role is not isolated, but can only be understood through its relationship with other state organs, including the legislature, the executive and management systems such as school governing bodies. Therefore, I embark on a critical analysis of *inter alia*, case law, legislation and education policy which elucidates the role of

[31] Brand (2009) LLD thesis.

the courts, legislature, executive as well as school governing bodies in sustaining/disrupting patterns of systemic inequality in basic education. This is bolstered by the study of other disciplines, including history, sociology, education, politics and philosophy to depict the pervasive disparity in the education system and to critique the courts' contribution to the transformation of public education. Although I introduce the notion of "radical transformation" in Chapter 1, an extensive critical analysis of the concept is only provided in Chapter 5. The latter chapter is strategically positioned as the introductory chapter of Part II because Chapters 6 and 7 are viewed, to a large extent, through the lens of Chapter 5. To this end, in Chapter 5, I analyse, *inter alia*, the courts' judicial methods and legal reasoning as well as relevant academic commentary to develop a theoretical framework that is conductive to the radical transformation of the public basic education system. The rich body of case law that has developed from the substantive-based approach to the right to basic education by the High courts and SCA (examined in Chapter 6) is scrutinised in terms of this framework. Similarly, the Constitutional Court's education law jurisprudence in terms of the notion of meaningful engagement (analysed in Chapter 7) is examined through the framework of radical transformation. This thesis is based on desktop research comprising a range of sources, including case law, legislation, journal articles, books, theses and reports.

1.5 OUTLINE OF THE THESIS

A historical context of the public basic education system is provided in **Chapter 2,** which traces its colonial and apartheid roots. This chapter offers an overview of how racial and class inequality came to be engrained in our education system through Dutch and British colonisation and later through Union and apartheid rule. A historical analysis is crucial because the genesis for the entrenchment of systemic inequality in South Africa's current public basic education system has to be known in order to assess the effectiveness of the courts' role in bringing about transformation of public education.

Chapter 3 considers how systemic inequality is reproduced in the post-apartheid basic education system despite the implementation of a transformative-oriented legal dispensation permitting a system of judicial review in terms of which discriminatory laws can now be tested against a higher system of human rights principles or norms.[32] This chapter clearly

[32] Liebenberg S *Socio-economic rights*: *Adjudication under a transformative Constitution* (2010) 4.

demonstrates that a historical pattern of racial and class disadvantage has transferred seamlessly into the post-apartheid state. In this regard, Chapter 3 establishes that the majority of black and poor leaners are denied equal access to quality education in the post-1994 public schooling system. Chapter 3 diverges from the conventional understanding of "quality education" by evaluating the meaning of the concept within the framework of former Special Rapporteur on the Right to Education Kishore Singh's UN report "Normative action for quality education."[33] Singh adopts a holistic approach to "quality education" which he defines as follows:

> (i) a minimum level of student acquisition of knowledge, values, skills and competencies; (ii) adequate school infrastructure, facilities and environment; (iii) a well-qualified teaching force; (iv) a school that is open to the participation of all, particularly students, their parents and the community.[34]

A distinct pattern transpired in my examination of each indicator of quality: First, an analysis of local and international standardised assessments show that black and poor learners are not performing on par with their white and/or more socio-economically advanced black counterparts. Second, several historically underprivileged schools (mostly located in the former Bantustan territories) continue to suffer from inadequate infrastructure and facilities in the form of poor provision, or complete lack, of school buildings, school furniture, libraries, laboratories, textbooks and scholar transport. Third, the South African teaching profession faces various challenges. These include discrepancies in the quality of training imparted to teachers and a poor culture of teaching and learning in historically disadvantaged schools, stemming from these schools' deep-seated culture of opposition to the apartheid regime. Moreover, due to apartheid-era geography, former black schools are inevitably located in historically black communities where, in some instances, service delivery protests have resulted in the violation of the right to education of black learners. Furthermore, the morale of teachers at former black schools is detrimentally affected due to overcrowding in their classes, the grim physical environment in which some of them are compelled to teach, and the state's failure, in some instances, to remunerate these educators. In terms of Singh's final barometer

[33] Singh K "Report of the Special Rapporteur on the Right to Education: Normative Action for Quality Education"(2012)http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21_en.pdf (accessed 30 January 2020). ("Singh Report on Quality Education (2012)").
[34] Ibid 7.

of "quality education", this thesis finds that in some former black schools, factors such as illiteracy, poverty and lack of confidence may preclude black parents from participating in the local school governance process, thus leading to an infringement of the Schools Act and the principle of substantive participatory democracy.

The role of the decentralised school governance system in the perpetuation of systemic inequality in public schooling is examined in **Chapter 4.** This chapter focuses primarily on how governing bodies from predominantly former white schools apply their defined autonomous powers in terms of the Schools Act to preserve their privilege(s) inherited from the previous colonial and apartheid regimes. Drawing on influential education law rulings, including the *Ermelo* judgment, Chapter 4 reveals that many former Model C schools use the law defensively to protect their historical advantage(s). In addition, Chapter 4 demonstrates how the White, Western paradigm on which the majority of our schools have been founded, plays a crucial role in the agenda of predominantly former white schools to adopt exclusionary policies despite the Constitutional Court's progressive pronouncements on diversity in seminal case law such as *MEC for Education: Kwazulu-Natal and Others v Pillay*.[35]

Part II of the thesis begins with an analysis of the concept "radical transformation" in **Chapter 5.** As noted in section 1.4 above, I decided to strategically position the latter chapter at the start of Part II because Chapters 6 and 7 can only be understood through the framework advanced in Chapter 5. In Chapter 5, I draw on current principles of transformative constitutionalism, academic commentary and the courts' approach to transformation in the sphere of basic education to develop a theoretical framework in terms of which the radical transformation of the public basic education system can be examined. The chapter determines that "transformation" is conceptualised in two ways. First, it is understood as the fulfilment of tangible outcomes through the process of adjudication. To demonstrate this, I draw a link between the substantive-based approach of the High courts and the SCA and the first understanding of transformation. The second meaning of transformation is built on the notion that the structural inequality perpetuated by post-apartheid social/political/cultural/legal institutions or systems must be interrupted so as to enable the radical transformation of public basic education. In this regard, I make a connection between systemic inequality reinforced by

[35] 2008(1) SA 474 (CC) ("*Pillay CC*").

school governing bodies through the decentralised school governance system and the second conceptualisation of transformation.

In **Chapter 6,** I embark on a critical analysis of the link between the first conceptualisation of transformation and the substantive-based approach to section 29(1)(a) adopted by the High courts and SCA. Case law spanning a period of eight years from 2010 to 2018 is analysed to elucidate the content-based approach. Additionally, since Chapter 6 is concerned with the content of the right to basic education as it pertains to transformation, the chapter considers whether the compulsory period of education (the vehicle through which basic education is realised for the majority of learners in the public school domain) should be revised in order to meet the transformative imperatives of the South African Constitution.

Chapter 7, the final substantive chapter of this study primarily critiques the notion of meaningful engagement within the context of the second conceptualisation of transformation advanced in this thesis. Drawing on ground-breaking Constitutional Court rulings such as *Ermelo, Rivonia*[36], *Welkom*[37] and *FEDSAS*[38], Chapter 7 demonstrates that meaningful engagement/co-operation has become the Constitutional Court's principle method of solving disputes between the state and school governing bodies. Although meaningful engagement as a remedy honours fundamental principles of South Africa's constitutional democracy, such as participatory democracy, I conclude that the notion of co-operation has primarily had a regressive impact on the radical transformation of public basic education. I reach this conclusion based on an analysis of the following sub-topics: democracy in school governance, the broad systemic impact of meaningful engagement, the potential "chilling effect" of meaningful engagement on the courts' future engagement with education rights cases and the Constitutional Court's approach of "colour-blind racism" in respect of meaningful engagement.

[36] *Governing Body of Rivonia Primary School and Another v MEC for Education: Gauteng* 2012 (1) All SA 576 (GSJ) ("*Rivonia CC*").
[37] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2014 (2) SA 228 (CC) ("*Welkom CC*").
[38] *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (4) SA 546 (CC) ("*FEDSAS CC*").

Chapter 8 provides the Conclusion and the study's contribution to education law discourse. First, I commend the High courts and SCA for adopting a substantive-based approach to section 29(1)(a) which has resulted in concrete outcomes for disadvantaged learners in the public school domain. The content-based approach has undoubtedly contributed to the transformation of public schooling. Furthermore, I adopt the view that an objective test for determining the right to basic education is not warranted since a "fixed" understanding of the right does not cater for the changing context of South African society. I also criticise the Constitutional Court's preoccupation with the notion of meaningful engagement, which if not adequately addressed, may have a retrogressive impact on the radical transformation of public basic education. In this regard, meaningful engagement obstructs the application of substantive adjudication and may lead to a "chilling effect" on future education rights cases. Furthermore, the notion of meaningful engagement results in the Court displaying undue deference to school governing bodies which results in the following: First, it prohibits the apex Court from declaring patently discriminatory school policies unconstitutional, secondly, deference obscures the Court's "vision" to identify defects in the Schools Act which currently enable former white schools to use the decentralised school governance system to preserve their historical privilege(s) and thirdly, it hinders the Constitutional Court from acknowledging the white, Western paradigm in which our public schooling system is engrained which in itself contributes significantly to the perpetuation of systemic inequality.

PART I

CONTEXTUALISING INEQUALITY IN THE PUBLIC BASIC EDUCATION SYSTEM

CHAPTER 2

THE HISTORICAL CONTEXT

2.1 INTRODUCTION

The history of the South African education system has to be assessed in the context of the wider political, social and economic context of the country.[1] All too often, it is assumed that education is a neutral enterprise.[2] However, education is inherently political in nature[3] because it does not take place in a vacuum, but is inextricably tied to the particular society in which it is embedded. This chapter demonstrates how the former colonial and apartheid regimes employed education as one of their primary tools to impose the supremacy of one race over the other.

Chapter 2 traces the historical context of the South African education system by focusing on its colonial and apartheid underpinnings. The development of education during the 17th and 18th century in South Africa is scrutinised in section 2.2. The 17th century is chosen as a particular starting point because the opening of the first formal school in South Africa is recorded during this century of Dutch colonisation of South Africa.[4] In section 2.3, 19th century developments are examined. In this regard, particular emphasis is placed on missionary education which expanded significantly during the 19th century. Additionally, this section explores the link between the discovery of gold and diamonds during the late 19th century and the call for industrial education for blacks. Section 2.4 delves into the 20th century. The formation of the Union of South Africa in 1910 and the implementation of apartheid in 1948 led to significant developments in education. During the Union era, government officials promoted the ideology of the intellectual inferiority of blacks in comparison to whites, a theory which ultimately found favour with the apartheid ideologues in their implementation of the Bantu Education Act in 1953. In section 2.5, the conclusion is provided.

1 Kallaway P "An introduction to the study of education for blacks in South Africa" in Kallaway P (ed) *Apartheid and education: The education of black South Africans* (1984) 1.

2 Msila V "From apartheid education to the revised national curriculum statement: Pedagogy for identity formation and nation building in South Africa" (2007) 16 (2) *Nordic Journal of African Studies* 146.

3 Ibid 146-147.

4 The fact that this particular starting point in history is chosen, does not mean that I adopt the view that education in South Africa only commenced with Dutch occupation. Education in pre-colonial South Africa did exist, however an in-depth analysis of pre-colonial education falls outside the scope of this thesis. See footnote 25 for a brief discussion of pre-colonial education in South Africa and Africa.

2.2 EDUCATION DURING THE 17TH AND 18TH CENTURIES[5]

The first record of the establishment of a formal school in South Africa dates back to 17 April 1658.[6] The first school was introduced specifically for the slaves of the Dutch East India Company as a tool to indoctrinate them into their subjugated roles under Dutch occupation.[7] Slaves, irrespective of their ages, were taught to speak the language of their masters and trained in the virtues of obedience and respect for their colonial rulers.[8] In 1663, a second school was opened with the aim of providing predominantly for the educational needs of the colonists' children, although slaves and Khoikhoi children were allowed attendance of this school, albeit as a minority.[9] In 1682, the Dutch East India Company compelled all slave children younger than 12 to attend school whereas the older ones were required to receive "instruction" twice per week.[10] Soon thereafter, the school established in 1663 and which had been opened to all races, became the exclusive domain for children of the colonists and non-slaves.[11] The seeds of racial and class inequality in South African schools were therefore firmly planted in the 17th century by the Dutch colonists.

Schooling progressed at an extremely slow pace during the 17th and 18th centuries. Besides the few schools for slaves owned by the Dutch East India Company, only a small number of schools for the colonists' children were established in Cape Town and its surrounding areas during this era.[12]

5 The 17th century was the golden age of Dutch colonisation. The Dutch East India Company (VOC) had by this century accumulated a vast empire of colonies across Asia. The Cape was considered a safe midway harbour for the ships of the VOC on route to Asia. On 6 April 1652, Jan Van Riebeeck set foot on Cape shores and established a refreshment station for the VOC. Initially considered as only a temporary colony, the Cape became a permanent home for Dutch freeburgers (or citizens) after they were "given" land by the VOC. It was not long before employees from the VOC, including Dutch, French, Scandinavian and other Europeans retired permanently at the Cape. The Dutch occupied the Cape from 1652 until 1795 and then again from 1803 until 1806. The word "given" is placed in inverted commas here because the indigenous people of South Africa were dispossessed of their land through violence perpetrated by the colonisers as well as "[unjust] Dutch and [later] British landownership systems and laws…" Beck R *The history of South Africa* (2000) 25-27.
See also Bloch *The toxic mix* (2009) 30. For a general discussion on colonial land dispossession in South Africa, see Terreblanche S *A history of inequality in South Africa 1652-2002* (2002).

6 Molteno F "The historical foundations of the schooling of black South Africans" in Kallaway (ed) *Apartheid and education* (1984) 45.

7 Ibid.

8 Ibid.

9 Ibid 46.

10 Soudien C *Realising the dream: Unlearning the logic of race in the South African school* (2012) 100.

11 Molteno "The historical foundations of the schooling of black South Africans" (1984) 46.

12 Some household slaves and the children of ex-slaves were allowed to attend these schools. Ibid 48.

2.3 EDUCATION DURING THE 19TH CENTURY[13]

2.3.1 The development of missionary education

It is generally accepted that Christian mission schools had been the "backbone of African education" until the introduction of Bantu education in 1953.[14] The history of missionary education dates back to the 18th century when schools were initially established by the Moravian Church.[15] The Khoikhoi people were some of the early recipients of missionary education during the latter century.[16] However, it was only during the 19th century that missionary education gained impetus. Missionary education for Africans was forged early in the 19th century in the Eastern Cape.[17] By the middle of the 19th century, missionary education was so firmly entrenched that "Africans were becoming teachers in their own right and also responsible for the general stimulus towards education among themselves."[18] However, this does not mean that missionary education developed free from challenges. According to Saayman, missionaries regarded education as a prime tool in the evangelisation and

[13] The British colonised South Africa for the greatest part of the 19th century. Britain took over control of the Cape in 1795 from the Dutch. The Dutch regained occupation of the Cape for a brief period between 1803 and 1806. The British colonised the Cape for a second time from 1806, however the formal cession of the colony to Britain only took place in 1814. "Britain's direct colonial involvement in South Africa lasted from 1795 until 1910." See Terreblanche *A history of inequality in South Africa* (2002) 179.

[14] Saayman W "Who owns the schools will own Africa: Christian mission, education and culture in Africa" (1991) (4) *Journal for the Study of Religion* 29.
Although the majority of African schools were administered by English missions before 1953, other missions existed in South Africa as well. These included the German Lutheran missions who, as opposed to the English missions were embraced by the National Party. The Lutheran missionaries, similarly to the National Party, rejected English missionary education as "[being] quite superficial, making African pupils into caricatures of Western civilisation." Saayman writes: "For the Lutheran missionaries, the aim of mission was national christianisation ('Volkschristianisierung'). In order to achieve this aim, the national (racial) characteristics ('Volkstum') had to be maintained." The Lutheran philosophy on education was therefore closely aligned with the race-based Bantu education system favoured by the National Party to be introduced in 1953. See also Van der Merwe DW *Die Berlynse Sendinggenootskap en kerkstigting in Transvaal, 1904-1962* (1987) (Argiefjaarboek vir Suid-Afrikaanse Geskiedenis) translated as: Van Der Merwe DW *The Berlin missionary and church establishment in Transvaal, 1904-1962* (1987) (Archive yearbook of South African History).

[15] Lewis A "Perceptions of mission education in South Africa from a historical- educational perspective" (2007) (1/2) *Tydskrif vir Christelike Wetenskap* (translated as *Magazine for Christian Science*) 181-182.

[16] Molteno refers to the Moravian Missionary Society School for Khoikhoi set up for the Khoikhoi at Baviaanskloof (now Genadendal in the Western Cape Province) during the 18th century. See Molteno "The historical foundations of the schooling of black South Africans" (1984) 48.

[17] Zungu Y "The education for Africans in South Africa" (1977) 46 *The Journal of Negro Education* 203.
Following the Cape, Natal instituted education for Africans where the missionaries were mainly responsible for African education. The African population contributed to their education through the levying of taxes while the provincial government only provided limited financial assistance. In the Orange Free State and Transvaal, the development of education only took place at around the turn of the 19th century.

[18] Ibid.

westernisation of the African.[19] Molteno argues that the new educated force became immersed in the colonisers' outlook on life, converted to Christianity and were generally accepting of the new order.[20] In this way, education made a contribution to diminishing the indigenous people's resistance to colonisation and helped to cement the subordinated role of the colonised.[21] Msila shares a similar view that missionary education was utilised to create a docile and tame African population through the employment of Christian ideology.[22]

Since the missionaries regarded the need for education as urgent, they almost immediately set up schools wherever they settled.[23] In terms of the actual content of schooling, principles from European and American education systems were transplanted wholesale into African education for two main reasons.[24] Firstly, missionaries did not have a proper knowledge of African culture and since they did not recognise any familiar characteristics of Western education in these communities such as formal school buildings, they assumed that education systems did not exist in Africa.[25] Secondly, missionaries regarded Western society as superior to "primitive" Africa and therefore believed that a westernised education system could only be of benefit to Africans.[26] This negation of African values and principles led those who were

[19] Saayman (1991) 4 *Journal for the Study of Religion* 36.
[20] Molteno "The historical foundations of the schooling of black South Africans" (1984) 50.
[21] Ibid.
[22] Msila (2007) 16(2) *Nordic Journal of African Studies* 148.
[23] Saayman (1991) 4 *Journal for the Study of Religion* 37.
[24] Lewis LJ "Phelps-Stokes reports on education in Africa" (1962) as quoted in Saayman (1991) 4 *Journal for the Study of Religion* 37.
[25] Saayman (1991) 4 *Journal for the Study of Religion* 37. Although there were no formal schools (as we know it) in traditional societies, historical evidence points to the fact that learning and knowledge production did take place in these societies. For example, the rock paintings of the Cederberg Mountains in the Western Cape provide insight into the lives of the Khoisan. It shows that they had ways of learning their specific art and possessed knowledge about common symbols and technologies. The Khoisan's knowledge about traditional medicines are still being employed today. In traditional Nguni-speaking tribes, knowledge about medicines, agriculture and cosmology, to name but a few, flourished. Knowledge was mainly transferred from one generation to the next through oral tradition and song.
Julius Nyerere, the former president of Tanzania, writes powerfully: "The fact that pre-colonial Africa did not have 'schools'— except for short periods of initiation in some tribes—did not mean that the children were not educated. They learned by living and doing. In the homes and on the farms they were taught the skills of the society, and the behaviour expected of its members…. Education was thus 'informal'; every adult was a teacher to a greater or lesser degree. But this lack of formality did not mean that there was no education, nor did it affect its importance to the society. Indeed, it may have made the education more directly relevant to the society in which the child was growing up."
See Bloch *The toxic mix* (2009) 31-33; Ng'uni T "Bushman medicine a possible treatment for antibiotic resistant infection" (2016) https://sciencetoday.co.za/2016/11/14/bushman-medicine-a-possible-treatment-for-antibiotic-resistant-infection/ (accessed 11 July 2019). See also Nyerere J *Education for self-reliance* (1967) 2.
[26] Saayman (1991) 4 *Journal for the Study of Religion* 37.

educated in mission schools to loathe their own traditions and culture, or at the very least to become ambivalent about their own culture.[27] The educated elite minority promoted the legitimacy of colonialism by acting as mediators between the colonisers and the majority of the colonised population.[28] Kallaway reports that although governmental aid to missionary schools was intended to bring schooling within the reach of the "…mass of the laboring poor…", it soon became evident that an elite, educated minority was emerging amongst the indigenous populace.[29] The majority of the black child population was not receiving an education at all. The elite black minority in the missionary schools used education as a tool to escape the menial forms of labour which their unschooled counterparts were destined to perform in the colonial order.[30]

Although the criticism against missionary education as presented above has been rife, the positive contribution of missionary education towards the development of particularly black intellectuals has to be acknowledged. Jonathan Jansen, for example, refers to the famous Lovedale Institution which he calls "a case study in contradictions."[31] Lovedale developed into a seminary for the education of black learners and the children of missionaries in 1841.[32] Their curriculum consisted of three overlapping streams: "evangelical (the training of evangelists), industrial (practical) and academic (preparation for the School Higher and Matriculation examinations, which qualified students for the final school-leaving certificate.)"[33] By the year 1872, the academic curriculum at this institution had blossomed into an offering of "…history, natural philosophy, English literature, political economy, mathematics, botany, Greek and

[27] Kallaway "An introduction to the study of education for blacks in South Africa" (1984) 9. Kallaway refers to the making of a 'culture of silence' – "where the colonial element in schooling is its attempt to silence, to negate the history of the [indigenous]…and gain acceptance for structures which are oppressive." Reagan regards missionary education as "…racist, sexist, elitist and Eurocentric." Reilly claims that the missionary schools were the most important vehicle through which the process of deculturation was perpetrated. In brief, "deculturation" refers to the eradication of the original culture of an enslaved people who "are hired as unskilled labour for alien enterprises and are forced to learn the ways [of the coloniser]." "It was [at the missionary schools] that epistemic violence took place as the *modus operandi* of instruction, dismissing in jest and disgust the forms and histories of African peoples…"
See Reagan T "People's education in South Africa: Schooling for liberation" (1989) 24 *Journal of Thought* 6 and Reilly J *Teaching the 'native': Behind the architecture of an unequal education system* (2016) 85.

[28] Kallaway "An introduction to the study of education for blacks in South Africa" (1984) 9.

[29] Ibid.

[30] Molteno "The historical foundations of the schooling of black South Africans" (1984) 49-50.

[31] Jansen J "Curriculum as a political phenomenon: Historical reflections on black South African education" (1990) 59(2) *The Journal of Negro Education* 197.

[32] Ibid.

[33] Ibid 197-198.

Latin."[34] Lovedale incorporated both a professional and an industrial class. Higher level instruction courses were modified to satisfy university entry requirements, therefore making it possible for blacks to attain a tertiary education.[35] Prominent South African leaders were educated at missionary institutions, including former president Nelson Mandela who attended the Clarkebury Institute in Transkei and Healdtown, the Wesleyan College in Fort Beaufort.[36] Mandela would go on to obtain tertiary qualifications from the University of South Africa and co-founded the first black law practice in South Africa with former ANC president Oliver Tambo in 1952.[37]According to Nshamatiko Ndlovu, missionary education provided blacks with a formal education which enabled them to become gainfully employed and contribute to the development of their communities and the economy at large.[38] Furthermore, he points out that missionary education produced several leaders who played a significant role in effecting political and social change in South Africa (such as Nelson Mandela).[39] However, Ndlovu also highlights the adverse side of missionary education by arguing that the missionaries "succeeded in stamping out almost all Black peoples' traditional religious beliefs, as well as Black culture and inculcating Christian religious belief and the Western culture into them."[40] Similar to Ndlovu, Thembeka Ngcukaitobi captures the contradictions in the legacy of missionary education. In his recent seminal book, *The land is ours*, Ngcukaitobi , among other things, traces the lives of the first black lawyers in South Africa who played a significant role in the birth of constitutionalism in our country.[41] Most of these lawyers were educated at missionary institutions which, in Ngcukaitobi's view, were established to serve two major objectives of the British empire. [42] Firstly, black children at missionary schools were subject to agricultural and industrial training in order to become useful labourers in the "colonial economy."[43] Secondly, missionary education was utilised to ensure that blacks accept the "religion of the

[34] Ibid.
[35] Ibid 198. See Chapters 5 and 6 of Mandela's autobiography *Long walk to freedom* for an account of his experiences at these institutions. Mandela N *Long walk to freedom* (1994).
[36] Mandela ibid.
[37] http://www.mandela-children.org.uk/nelson-mandela/ (accessed 1 April 2020); http://www.derebus.org.za/late-president-mandelas-academic-life-legal-career/ (accessed 1 April 2020).
[38] Ndlovu N "A historical-educational investigation into missionary education in South Africa with special reference to mission schools in Bushbuckridge" (2002) Dissertation, Master of Education (UNISA) 176.("Ndlovu (2002) Masters Dissertation").
[39] Ibid 177.
[40] Ibid 176.
[41] Ngcukaitobi T *The land is ours: South Africa's first black lawyers and the birth of constitutionalism* (2018).
[42] Ibid 22, 39-207.
[43] Ibid 22.

West - monotheism as embodied in Christianity and its value system…"[44] This led to the "negation of African values, beliefs and ways of life."[45] However, as stated above, the curriculum at some missionary schools did not consist of only industrial and agricultural subjects.[46] Thus, for example, Ngcukaitobi refers to Healdtown which started out as a predominantly industrial school in 1857, but was mainly offering an academic curriculum by the late 1890s.[47] Richard Msimang, one of the lawyers featured in Ngcukaitobi's book, benefited from an academic education at Healdtown which enabled him to further his studies in the United Kingdom.[48] Msimang became the first black South African solicitor in England and Wales and upon his return to South Africa, played a major role in drafting the Constitution of the South African Native National Congress (later renamed to the ANC) and shone a light on the injustices resulting from the implementation of the Natives Land Act of 1913.[49]

In sum, the legacy of missionary schools is contested terrain. The missionary project was elitist, attempted to alienate blacks from their own culture and was conceived as a tool of colonial conquest, yet mission schools provided a good academic education to some learners who would later become firmly opposed to colonialism and contribute to effecting democratic change in South Africa.[50] The contradictory nature of the legacy of missionary education has been encapsulated as follows:

> There are two …viewpoints about missionaries in Southern Africa. Some think of them as agents of conquest, tools of imperialism, tools of a capitalist system, who fastened the yoke on a subject people and sapped their will to resist. Others see them as true servants of God, benefactors who brought the good news of the gospel to those who had not yet heard the Word. Benefactors who, in seeking to spread the Word, created literacy, schools and hospitals.[51]

[44] Ibid.
[45] Ibid.
[46] Jansen (1990) 59(2) *The Journal of Negro Education* 197-198.
[47] Ngcukaitobi *The land is ours* (2018) 122.
[48] Ibid 122-123.
[49] Ibid 128-154.
[50] Moloantoa D "The contested but pivotal legacy of missionary education in South Africa" (2016) http://www.theheritageportal.co.za/article/contested-pivotal-legacy-missionary-education-south-africa (accessed 11 July 2019).
[51] Ibid. See also Lewis (2007) (1/2) *Tydskrif vir Christelike Wetenskap* 181-198.

2.3.2 Segregated but "undifferentiated" education

Missionary schools were indirectly forced to segregate children on the basis of race.[52] In terms of the Education Act of 1865, unsegregated schools were granted state funds which covered only the payment of teachers' salaries whereas other expenses were to be paid by the missions themselves.[53] To the contrary, segregated schools were guaranteed state funds which extended beyond teacher remuneration.[54] Even though schools were mostly racially segregated[55] during the 19th century, Hunt Davis Jr contends that the curriculum for blacks and whites were not "radically different" in content.[56] In fact, he reasons that it was not until 1953 that the syllabus for African students was "sharply differentiated from that of their white counterparts."[57] However, Jansen disagrees with Hunt Davis Jr in this regard.[58] He concedes that the secondary school curriculum remained the same for all races until 1953, but argues that the primary school curriculum was differentiated along racial lines under Union rule in 1922.[59]

2.3.3 The discovery of gold and diamonds: The call for industrial education and the creation of a black working class

Two historical events changed the education landscape in the late 19th century: the discovery of diamonds in Kimberley in 1867 and of gold on the Witwatersrand in 1886.[60] South Africa's new found status as a major economic force attracted entrepeneurs and capital from all over the world. London set out (and eventually succeeded) to dominate the market of these resources and consequently the global exchange system.[61] The British's quest to own and exploit South

[52] Molteno "The historical foundations of the schooling of black South Africans" (1984) 58,63. It should be noted that although missionary education constituted the primary education system for blacks during the 19th century, other schools outside missionary control existed during this era. For example, in 1865, legislation provided for governmental aid to three different types of schools, namely "public, missionary and native" schools.
[53] Ibid 63.
[54] Ibid.
[55] Some missionary schools were racially mixed. For example, in 1841 the Lovedale Institution in the Eastern Cape enrolled white, coloured and black students. Ndlovu (2002) Masters Dissertation 20.
[56] Hunt Davis R, Jr. "Bantu education and the education of Africans in South Africa" (1972) as cited in Zungu (1977) *The Journal of Negro Education* (46) 203.
[57] Hunt Davis Jr "The administration and financing of African education in South Africa 1910-1953" in Kallaway (ed) *Apartheid and education* (1984) 132.
[58] Jansen (1990) 59(2) *The Journal of Negro Education* 199.
[59] Ibid.
[60] Reilly *Teaching the 'native'* (2016) 75.
[61] Ibid.

Africa's mineral wealth led to the adoption of legislation which had a profound impact on education and labour in South Africa.[62] The infamous Glen Gray Act of 1894 imposed debilitating economic conditions on blacks which made it impossible for them to make a living through subsistence farming.[63] Troup recalls that the Act resulted in the formation of a '…landless class…with no option but to sell their labour.'[64] In order to assist the supply of a permanent African labour force to the mining companies, the British embarked on a mission to condemn undifferentiated missionary education and to advance state supervision of industrial education for Africans.[65] On 30 July 1894, Cecil John Rhodes, Prime Minister of the Cape, explained his motivation behind the proposed introduction of industrial education:

> I propose to use the labour tax for industrial schools and training…to be carried on under regulations to be framed by Government. Why? I have travelled through the Transkei, and have found some excellent establishments where the Natives are taught Latin and Greek. They are turning out Kaffir parsons, most excellent individuals but the thing is overdone. I find that these people can't find congregations for them.
>
> …
>
> They are turning out a dangerous class. They are excellent so long as the supply is limited, but the country is overstocked with them. The people will not go back and work, and that is why I say the regulations of these industrial schools should be framed by Government; otherwise these Kaffir parsons would develop into agitators against Government.[66]

The call for industrial education for Africans continued well into the beginning of the 20th century as will be discussed in more detail in the next section.

62 Ibid 75-81.

63 Ibid 81. "The Glen Gray Act of 1894 introduced individual land tenure that were followed by taxes on individual land tenure which few people could afford through subsistence farming alone. It specifically guaranteed that African farmers would never be able to accumulate any sort of wealth. Troupe argues as follows: 'There was simply not enough land for such a system…enough for a woman to cultivate by primitive methods, but not so much as not to force the men away to work. The rigid prohibitions on sales and transfers, intended to protect the holders but preventing a skillful and ambitious farmer from increasing his holding, made it unjust and uneconomic and impossible for a progressive agriculture to develop. A landless [black] class was soon formed with no option but to sell their labour, as Rhodes had intended.' Troupe F *South Africa: A historical introduction* (1975) as quoted in Reilly *Teaching the 'native'* (2016) 81.

64 Ibid.

65 Reilly *Teaching the 'native'* (2016) 80-81.

66 Vindex 1900, *Cecil John Rhodes: His political life and speeches* as cited in Reilly *Teaching the 'native'* (2016) 82.

2.4 EDUCATION DURING THE 20TH CENTURY

2.4.1 The beginning of the century: A fragmented education system

By the beginning of the 20th century[67], a fragmented education system had developed in South Africa.[68] In fact, a mix of education structures had developed with three of these, clearly distinguishable based on race and language.[69] The first system, discussed in detail above, had been developed by Christian missionaries and consisted of primary and secondary schools serving predominantly the non-white population.[70] The second system consisted of public schools that were mainly developed after 1902 by the British colonial state.[71] Teachers were imported from England and the curriculum and structure of these schools were devised so as to be in congruence with the English education system.[72] These schools were primarily established to educate whites and to advance the British culture.[73] A third structure of schools developed in response to the English system.[74] A group of whites which consisted mainly of Afrikaners did not want to be taught in English and rejected the curriculum advanced by the English schools.[75] Therefore, they developed a parallel system of schools based on the philosophy of Christian National Education.[76] These schools, mainly conceived in the former

[67] At the beginning of the 20th century, the territory of South Africa was embroiled in a war between the British and the independent Afrikaner Republics of the Orange Free State and the Zuid- Afrikaanse Republiek (also then known as Transvaal). The aim of the British was to bring the two Boer Republics under imperial control and to gain control of their mineral wealth while the Afrikaners were fighting for their independence. The war, known as the South African War formally ended in 1902 with the signing of the Treaty of Vereeniging. In terms of the treaty, the Afrikaner republics were forced to surrender their independence to the British in return for the promise of "eventual political autonomy, the right to maintain their language in schools and courts and massive economic assistance for post-war construction." By 1908, there were four separate, self-ruled colonies under British occupation in South Africa, namely the Cape of Good Hope, Natal, Orange Free State and the Transvaal. This state of affairs remained until the unification of South Africa in 1910. See Beck *The history of South Africa* (2000) 92-98.

[68] McKeever M "Educational inequality in apartheid South Africa" (2017) 61(1) *American Behavioral Scientist* 118.

[69] Ibid.

[70] Thompson L *A history of South Africa* (1996) as cited in McKeever (2017) 61(1) *American Behavioral Scientist* 118.

[71] Christie P *The right to learn: The struggle for education in South Africa* (1991) as cited in McKeever (2017) 61(1) *American Behavioral Scientist* 118.

[72] Mckeever (2017) 61(1) *American Behavioral Scientist* 118.

[73] Rakometsi M "The transformation of black school education in South Africa, 1950-1994: A historical perspective" (2008) Doctoral dissertation, University of the Free State as cited in Mckeever (2017) 61(1) *American Behavioral Scientist* 118.

[74] Mckeever (2017) 61(1) *American Behavioral Scientist* 118.

[75] Christie *The right to learn* (1991) as cited in Mckeever (2017) 61(1) *American Behavioral Scientist* 118.

[76] In terms of the Christian National Education philosophy, "…education must be adjusted to the life and world view of the Afrikaners: all school activities must reveal the Christian philosophy of life, Calvinistic beliefs, and promote the principle of nationalism in education, i.e. the national ideal, traditions, religion, language or culture

Afrikaner republics adopted Afrikaans as their medium of instruction and integrated into the territory of South Africa after the end of the South African War in 1902.[77]

2.4.2 The South African Native Affairs Commission Report: 1903-1905

In 1903 the South African Native Affairs Commission (SANAC) was launched, tasked with assessing "the status and condition of the Natives", including "their education".[78] The investigation culminated in the SANAC Report of 1905, a comprehensive historical document pertaining to the status of African affairs.[79] According to Reilly, the Report's probe into the education system bestowed "official blessings on restructuring the [black education] system" so as to "secure a static class of African manual labourers."[80] In this regard, the Report emphasised that "…the great demand of South Africa at present is for the unskilled or partially-skilled Native labourer."[81] The Commission also viewed "…industrial training and instruction in manual work… of particular advantage to the Native in fitting him for his position in life."[82] It is therefore clear that the Commission's particular view of industrial education was greatly influenced by the demand for black labour at that time.[83] Furthermore, the Report clearly

of each social group." Cross M "A historical review of education in South Africa: Towards an assessment" (1986) 22(3) *Comparative Education* 186.
Christian National Education significantly influenced education under apartheid as is discussed later in this chapter.

77 Omer-Cooper J *History of Southern Africa* (2nd ed) (1994) as cited in Mckeever (2017) 61(1) *American Behavioral Scientist* 118.

78 SANAC Report of the South African Native Affairs Commission (1905*)* A, section 1. The terms of reference of SANAC encompassed almost all conceivable activities of Africans and were as follows: "The status and condition of the Natives; the lines on which their natural advancement should proceed ; their education, industrial training ; and labour; The tenure of land by Natives and the obligations to the State which it entails; Native law and administration; The prohibition of the sale of liquor to Natives; Native marriages and the extent and effect of polygamy."

79 Ibid. Another significant report on black education during the first half of the 20th century is the "Interdepartmental Committee on Native Education Report" also known as the "Welsh Report". The Committee which reported its findings in 1936, had as its principal aim the determination whether the government should incur responsibility for the financing and administration of black education. The state subsequently did not adopt the recommendations of the Committee in this regard. See Christie P and Collins C "Bantu Education: Apartheid ideology and labour reproduction" (1982) 18 *Comparative Education* 59-75. For a discussion on this report as well as other reports focusing on black education before the introduction of Bantu Education in 1953, see Fleisch B "Social scientists as policy makers: E. G. Malherbe and the National Bureau for Educational and Social Research, 1929-1943" (1995) (21) *Journal of Southern African Studies* 349-372; Molteno "The historical foundations of the schooling of black South Africans" (1984) 45-107 and Jansen (1990) 59(2) *The Journal of Negro Education* 201.

80 Reilly *Teaching the 'native*' (2016) 106.

81 SANAC Report (1905) 73.

82 Ibid 72.

83 Reilly *Teaching the 'native'* (2016) 106.

conceptualised the African as a person of inherent inferiority who could only be educated in relation to that inferiority. For example, SANAC made the following observation:

> The consensus of opinion expressed before the Commission is to the effect that education, while in a certain number of cases it has had the effect of creating in the Natives an aggressive spirit, arising no doubt from an exaggerated sense of individual self-importance, which renders them less docile and less disposed to be contented with the position for which nature or circumstances have fitted them, has had generally a beneficial influence on the Natives themselves, and by raising the level of their intelligence, and by increasing their capacity as workers and their earning power, has been an advantage to the community.[84]

As will be discussed in the next section, this particular racist ideology found favour among the officials of the Union of South Africa.

2.4.3 The Union of South Africa: 1910- 1948[85]

In terms of the 1910 Union Constitution "education other than higher education" was designated a provincial responsibility.[86] Although the nature of administration for black children differed from province to province, the one constant feature was that schools for blacks were segregated from those for white learners.[87] The missionary institutions, primarily, remained in control of the administration of black schools[88] while the funding of schools fluctuated between central and provincial control.[89] Although the missionaries were mainly responsible for the administration of black schools, the Union government did exercise some indirect control by adopting "African educational policy" through the Union Native Affairs Commission.[90] One of these policies related to the adoption of different primary schools'

84 SANAC Report (1905) 67.
85 In September 1909, royal assent was provided to the South Africa Act which unified the four former British colonies (Cape of Good Hope, Natal, Orange Free State and Transvaal) into the Union of South Africa. The Act established a "strong central government with the four colonies reduced to provinces possessing local powers only." The date of the establishment of the Union was 31 May 1910 as declared by a Royal Proclamation of 2 December 1909. The unification resulted in a "British dominion, meaning that it had a large degree of self-government as far as domestic affairs were concerned. However, it could not yet be reckoned as a sovereign state." See Beck *The history of South Africa* (2000) 98-99; Venter A and Landsberg C (eds) *Government and politics in South Africa* (2011) 3. See also www.sahistory.org.za (accessed 11 July 2019).
86 Fleisch (1995) (21) *Journal of Southern African Studies* 351.
87 Hunt Davis Jr "The administration and financing of African education in South Africa 1910-1953" (1984) 130.
88 Ibid. The province of Natal was an exception. In 1918 government-run schools were established for Africans in Natal.
89 Zungu (1977) 46 *The Journal of Negro Education* 204-205.
90 Hunt Davis Jr "The administration and financing of African education in South Africa 1910-1953" (1984) 128.

curricula for black and white learners as will be discussed later in this section. Whereas education was free and compulsory for whites, for blacks it was not.[91] In fact, for a considerable amount of time under Union rule, the black population was taxed directly for the education of their children.[92] However, legislation passed in 1945[93] relieved the burden on the poorest section of society by reversing the latter tax laws imposed on the black populace.[94]

An important objective of the Union government was to fulfill the recommendations of the South African Native Affairs Commission Report referred to above.[95] The SANAC Report has been regarded as a blueprint for the creation of the white supremacist state that came to fruition in the Union of South Africa in 1910.[96] In the field of education, the Union secured the services of former Natal Chief Inspector of Native Education, Charles T Loram "…to best ensure implementation of a national education policy upon which a race-based labour aristocracy could be built and sustained."[97] Loram, who would go on to gain the status as South Africa's foremost expert on Native education,[98] has been described as an "inherent racist" who believed that "…whites had to decide what was best for Africans" because they were too "…immature in their stage of civilization".[99] These views found expression in Loram's 1917 doctoral thesis, *The Education of the South African Native*, a significant piece of work that would go on to influence the education of blacks for several decades.[100] Loram's philosophy on education was premised on the main idea that blacks would not be allowed to determine the substance and purpose of their education and that whites would therefore need to define the knowledge that

91 Zungu (1977) 46 *The Journal of Negro Education* 205.

92 Hunt Davis Jr "The administration and financing of African education in South Africa 1910-1953" (1984)128-135.

93 Act 29 of 1945.

94 Hunt Davis Jr "The administration and financing of African education in South Africa 1910-1953" (1984) 130. As will be discussed later in this chapter, the apartheid regime would after 1948 adopt laws that made the black population responsible for the funding of their own education.

95 Feinberg H and Horn A "South African territorial segregation: New data on African farm purchases, 1913 - 1936" (2009) 50 *Journal of African History* 42. See also Reilly *Teaching the 'native'* (2016) 146.

96 Feinstein and Horn make the point that various historians view the SANAC Report as providing the ideological basis of the notorious Natives Land Act of 1913 which prohibited Africans from purchasing land in 93% of South African territory. The latter Act, in turn inspired the creation of other racially motivated legislation which further entrenched racial segregation and white supremacy in various spheres of South African society. Feinberg and Horn (2009) 50 *Journal of African History* 42. See also Reilly *Teaching the 'native'* (2016) 146.

97 Reilly ibid.

98 Fleisch (1995) 21 *Journal of Southern African Studies* 351.

99 Hunt Davis Jr "Charles T Loram and the American model for African education in South Africa" in Kallaway (ed) *Apartheid and education* (1984)109.

100 Fleisch (1995) 21 *Journal of Southern African Studies* 352. See also Cross (1986) 22 *Comparative Education* 185-200.

blacks would acquire.[101] He attempted to justify this racist and paternalistic ideology by ascribing a specific psychology to blacks which seemingly explained their intellectual inferiority in comparison to whites.[102] In terms of his theory of "arrested development", black children might show intelligence during early childhood, but their "intellectual development" became arrested at adolescence.[103] Loram based these findings on the results from a collection of tests that he administered to students of all races from 1914 to 1916.[104] He reports in his doctoral research as follows:

> The fact that the Native child is from 30 to 100 percent slower than the European child in working arithmetical examples is very significant. The slowness of the South African native has become proverbial, and in their political, social and domestic dealings with the Natives the greatest mistakes made by the Europeans have been in neglecting to make allowances for the slowness of the Native people.[105]

Loram used these findings to criticise the education for Africans as being too academic and unrelated to the African's station in life.[106] He argued that the supposed inferiority of Africans warranted a separate curriculum adapted to their 'everyday needs' which he took upon himself to define as 'practical hygiene', 'elementary agriculture' and 'wise recreation.'[107] It is reported that he asked rhetorically: 'Which is really more important in the African villages today - practical hygiene or the ability to read? Elementary agriculture or geography? Wise recreation or arithmetic?'[108] Loram's support for a differentiated curriculum also clearly stems from the particular labour economy of the Union of South Africa. An academic curriculum, so he reasoned, generated white collar jobs which were the preserve of white workers. Africans, on the other hand, were meant for manual and agricultural labour. The education for Africans, so Loram argued, therefore had to be adapted accordingly in order to avoid racial conflict.[109] In his support of a "needs-based" curriculum for blacks, Loram endorsed the call for industrial

101 Reilly *Teaching the 'native'* (2016) 152-154.
102 Hunt Davis Jr "Charles T Loram and the American model for African education in South Africa" (1984)108 -121; Cross (1986) 22 *Comparative Education* 189 -190.
103 Ibid.
104 Reilly Teaching the 'native' (2016) 159.
105 Loram CT *The education of the South African native* (1917) 192.
106 Hunt Davis Jr "Charles T Loram and the American model for African education in South Africa" (1984) 113.
107 Ibid.
108 Ibid 113-114.
109 Loram *The education of the South African native* (1917) 125.

education for blacks formulated by the British colonial government in the late 19th century as referred to elsewhere in this chapter. As explained above, the Union government subsequently attempted to entrench the SANAC Recommendations relating to industrial education in formal education policy by commissioning the expertise of Charles T Loram. Loram's research would have far-reaching structural, pedagogical and psychological consequences for the South African educational landscape.[110] Loram's influence is clearly seen in the Union's decision to adopt differentiated curricula for black and white learners at primary school level in 1922.[111] This was the first time in the history of South African education that curricula were distinguished along racial lines.[112] The curriculum for black schools comprised two main elements. Firstly, "teaching of the vernacular" became compulsory and secondly, the syllabi greatly emphasised practical skills, including "hygiene, handwork, gardening, agriculture, housecraft, and needlework…"[113] At secondary school level, the curricula for black and white schools were more closely aligned.[114] Dube argues that the primary reason for the change in the curriculum was 'to handicap African children with the introduction of an inferior syllabus.'[115] Tabata agrees that the curriculum for black primary schools was substandard and formulated to guarantee that the majority of black people 'were fitted for menial jobs.'[116] Loram's doctoral research outlined a practical, organisational scheme of "bureaucratic structures" which provided the apartheid regime with an infrastructure on which they could model their racially based education system.[117] This scheme called for the centralisation of "Native education" under national government control and allowed for zero participation of Africans in their own education.[118] With the passing of the Bantu Education Act in 1953, Loram's proposal for central control of African education was finally realised.[119] Moreover,

110 Reilly *Teaching the 'native'* (2016) 160-167.
111 Jansen (1990) 59(2) *The Journal of Negro Education* 199. Loram was a member of the Union Native Affairs Commission which adopted "African educational policy" for black schools. See Hunt Davis Jr "The administration and financing of African education in South Africa 1910-1953" (1984)128.
112 Jansen (1990) 59(2) *The Journal of Negro Education* 199.
113 Ibid.
114 Horrell M *African education: Some origins and development until 1953* (1963) as cited in Jansen (1990) 59(2) *The Journal of Negro Education* 199.
115 Dube E "The relationship between racism and education in South Africa" (1985) 55 *Harvard Educational Review* as cited in Jansen (1990) 59(2) *The Journal of Negro Education* 199.
116 Tabata I (1960*) Education for barbarism in South Africa* as cited in Jansen (1990) 59(2) *The Journal of Negro Education* 199.
117 Reilly *Teaching the* 'native' (2016)164-165.
118 Ibid.
119 Ibid.

his theory of "arrested development" had a devastating impact on the mentality of generations of black learners. This blatantly generalised philosophy which had found favour in mainstream media,[120] eventually reached the classrooms where black learners were advised by their teachers not to try to aspire 'to go too far.'[121] More significantly, his ideology about the intellectual inferiority of blacks became one of the foundational principles of Bantu education which will be examined in the next part of this chapter.

2.4.4 Education under apartheid: 1948-1994[122]

2.4.4.1 Christian National Education

In the same year that the National Party rose to power, they adopted the policy of Christian National Education ("CNE").[123] Article 15 of the CNE policy provides:

> We believe that the calling and task of White South Africa with regard to the native is to Christianise him and help him on culturally, and that this calling and task has already found its nearer focusing in the principles of trusteeship, no equality and segregation. We believe besides

[120] For example, the *Times* (London) reported in 1917 that Loram's theory of "arrested development" was valid. See "Review of Loram's education of the South African Native" *Times Literary Supplement*, 27 September 1917.
[121] Matthews ZK *Freedom for my people* (1981) 46 as cited in Reilly *Teaching the 'native'* (2016) 163. Professor Matthews, one of the most celebrated members of the ANC and former Anthropology professor at Fort Hare, explained the impact of Loram's philosophy as follows: "What got through to us was the theory that Africans, because they were Africans, could only go so far and no further, so fast and no faster."
[122] In 1948, the National Party gained an electoral victory over the United Party and assumed control of South Africa. Their rule lasted for 46 years, from 1948 until 1994. In 1961, the Afrikaner's "passion of freedom from British dominium had been resolved" when South Africa became a sovereign republic. The National Party government was most notorious for the adoption of apartheid, a legislated system which extended to "most aspects of economic, social and political life." South Africans were classified into different race groups, including Blacks, Coloureds, Whites and Indians under the apartheid regime. Legislation was adopted that racially segregated public and private spaces, including schools and residential areas. Marriage and sexual relations across the colour line were proscribed. It is estimated that more than three million black people were forcibly removed from their homes and settled in so-called "group areas." A system of "Bantustans" was devised which by 1959 culminated in nine so-called "independent African states" taking up 13% of South Africa's territory. The remaining 87% of land would remain in the hands of the white population. Black people in urban areas were consigned to "townships with almost no economic base…and therefore underresourced and underdeveloped." In sum, "[t]o be white in [apartheid] South Africa was to be privileged and to be black was to be repressed and restricted." See Venter A and Landsberg C (eds) *Government and politics in South Africa* (2011) 5-7.
[123] Eshak Y "Authority in Christian National Education and fundamental pedagogics" (1987) Master of Education Dissertation (WITS University).
Christian National Education was developed by the Institute for Christian National Education under the auspices of the Federation of Afrikaans Cultural Associations (FAK). The FAK was part of a group of Afrikaner organisations established after the South African War in 1902. These organisations set out to mobilise Afrikaner power which culminated in the rise of the apartheid regime in 1948. Foremost among these organisations was the Broederbond which together with the FAK had a significant impact on the development of the South African education system post 1948. See Zungu (1977) 46 *The Journal of Negro Education* 207.

> that any system of teaching and education of natives must be based on the same principle. In accordance with these principles we believe that the teaching and education of the native must be grounded in the life and worldview of the Whites most especially those of the Boer nation as senior White trustee of the native...[124]

As the quote above illustrates, Christian National Education was not only a policy, but a philosophy rooted in the particular religious and political beliefs of the Afrikaner.[125] This worldview, according to Cross, means that "all school activities must reveal the Christian philosophy of life, Calvinistic beliefs, and promote the principle of nationalism in education…"[126] The Calvinist religion of the Afrikaners, to the extent that it was applied during apartheid, invoked the biblical notion of predestination.[127] This meant that whites were "the elect of God [thus superior] and blacks the hewers of wood and drawers of water [thus inferior, and the] school system of the Africans had to conform to this Christian orientation."[128] Although CNE was purportedly conceived as a policy for white Afrikaner children, it influenced the education of all South African children.[129] The CNE policy, in a racist and paternalistic fashion, proposed that black education should "not prepare blacks for equal participation in economic and social life" and "it must of necessity be organised and administered by whites."[130] Bantu education, discussed in greater detail later in this chapter, is regarded by some academics as merely one element of the broader CNE policy/doctrine.[131]

124 Msila (2007) 16 (2) *Nordic Journal of African Studies* 146.
125 Enslin P "The role of fundamental pedagogics in the formulation of educational policy in South Africa" in Kallaway (ed) *Apartheid and education* (1984) 140.
126 Cross (1986) 22 *Comparative Education* 186.
127 Zungu (1977) 46 *The Journal of Negro Education* 209.
128 Ibid.
129 Enslin "The role of fundamental pedagogics in the formulation of educational policy in South Africa" (1984) 140.
130 Ibid.
131 Reagan (1989) 24 *Journal of Thought* 7.

2.4.4.2 The Eiselen Commission

In 1949, the apartheid regime launched a Commission on Native Education under the supervision of Werner Eiselen.[132] The terms of reference of the Eiselen Commission were as follows:

> (1) The formulation of the principle and aims of education for Natives as an independent race, in which their past and present, their inherent racial qualities, their distinctive characteristics and aptitude, and their needs under the everchanging social conditions are taken into consideration.
> (2) The extent to which the existing primary, secondary and vocational education system for Natives and training of Native teachers should be modified in respect of the context and form of syllabuses, in order to conform to the proposed principles and aims, and to prepare Natives more effectively for their occupations.
> (3) The organization and administration of the various branches of Native education.
> (4) The basis on which such education should be financed.
> (5) Such other aspects of Native education as may be related to the preceding.[133]

The findings of the Eiselen Commission were made known in 1951 and suggested that black education should be integrated into a "carefully planned policy of segregated socio-economic development for black people"[134]. Specific recommendations included the following: Black education was to be targeted at 'black needs'; it was to be financed under the Minister of Native Affairs and centrally controlled ; the school syllabuses were to be revised to represent the 'black way of life' and the Native Affairs Department was to take over black schools from missionary bodies who were in control of the majority of black schools at that particular time.[135] According to Bloch, the recommendations of the Eiselen Commission provided the "intellectual and ideological" foundation for the apartheid government's "strategy in education".[136] Soudien

[132] Seroto J "A revisionist view of the contribution of Dr Eiselen to South African education: New perspectives" (2013) 9 *Yesterday &Today* 102.
[133] Eiselen W "Report of the Commission on Native Education 1949-1951" (1951) 7.
[134] Christie and Collins (1982) 18 *Comparative Education* 59.
[135] Ibid.
[136] Bloch *The toxic mix* (2009) 43.

agrees that the Commission set out the theoretical as well as the organisational basis of the Bantu Education Act[137] which is discussed in broader detail below.

2.4.4.3 The impact of apartheid on education

(a) Structural changes

The Bantu Education Act came into effect in 1953, providing extensive powers to the Minister of Native Affairs, H.F. Verwoerd, to implement the specific recommendations of the Eiselen Commission.[138] The administration of black schooling was removed from missionary control and placed under the central Native Affairs Department (NAD).[139] The Act required the registration of all black schools with the Department and empowered the Minister of the NAD to refuse registration.[140] Some registered missionary schools were permitted to carry on functioning, however were denied government subsidies after 1957.[141] Two years later, in 1959, almost all black schools were in the hands of the Native Affairs Department.[142]

Although most notorious, the Bantu Education Act was only one act within a range of legislation aimed at embedding segregation in the education system. A Commission on Coloured Education established in 1953 resulted in the Coloured Person's Education Act of 1963.[143] This act transferred educational control of people classified as "Coloured" from the provinces to an education branch within the Department of Coloured Affairs.[144] Likewise, the Indian Education Act of 1965 brought the education of people classified as "Indian" under the control of a Department of Indian Affairs.[145] The white Afrikaans and English public schools

137 Soudien C "Racial discourse in the Commission on Native Education (Eiselen Commission),1949-1951: The making of a 'Bantu' identity" (2006) 11(1) *Southern African Review of Education* 42.

138 Christie and Collins (1982) 18 *Comparative Education* 59.

139 Reagan (1989) 24 *Journal of Thought* 6; Christie and Collins (1982) 18 *Comparative Education* 62.

140 Ibid.

141 Ibid.

142 Christie and Collins (1982) 18 *Comparative Education* 60.
Some churches refused to hand over control of their schools to the apartheid regime and took the drastic decision to rather close down the schools. The Anglican Church explained the decision to close the doors of their schools as follows: "If the Minister of Bantu Education cannot entrust the training of African teachers to Christian missions, we, as a Christian mission will not entrust our land or our buildings to him or his Department for educational purposes. We are convinced that the true welfare of the African people is being denied by a political theory." See Reagan (1989) 24 *Journal of Thought* 8-9. For an in-depth discussion of the English church's response to the implementation of Bantu education, see Leleki M (1989) "A critical response of the English speaking churches to the introduction and implementation of the Bantu Education Act in South Africa" (1989), Doctor of Philosophy Thesis (University of Pretoria) Chapter 4.

143 Molteno "The historical foundations of the schooling of black South Africans" (1984) 88.

144 Ibid.

145 Ibid 88-89.

that existed under the Union of South Africa, were combined into one (white) education system under the apartheid regime.[146] In total, the apartheid regime created nineteen different education departments based on race and ethnicity.[147] Three "own affairs" systems were instituted for Coloureds, Indians and Whites "which were further organised into four semi-independent provincial departments."[148] African education was administered by eleven different departments: six self-governing territory departments, a central department for Africans living in "white South Africa"[149] and four departments in the so-called "Bantustans."[150] The setting of national norms and standards, policy decisions and budgetary allocations became the responsibility of the then National Department of Education.[151] A disproportionate share of resources was lavished on white schools whilst African, Coloured, Indian and Bantustan departments were severely underfunded.[152] For example, Fedderke and De Kadt report that "…white per pupil expenditure remained at least at seven times the level of that for Blacks, and almost twice that for Coloureds and Asians" between 1972 and 1992.[153]

(b) The entrenchment of racial inequality in the education system: 1953-1976

Apartheid was based on a "racially based system of inequality" wherein the majority of blacks was denied equal opportunities and outcomes in education.[154] A range of factors, when examined together, explains the former regime's reinforcement of racial inequality through

146 Mckeever (2017) *American Behavioral Scientist* 118.
147 Sayed Y "An overview of education policy change in post-apartheid South Africa" in Sayed Y *et al* (eds) *The search for quality education in post-apartheid South Africa: Interventions to improve learning and teaching* (2013) 1,7.
148 Ibid 7.
149 This term refers to the territory of the Republic of South Africa, excluding the so-called Bantustan homelands. See https://www.sahistory.org.za/article/homelands (accessed 11 July 2019).
150 The Promotion of Bantu Self-Government Act of 1959 launched the policy of grand apartheid. In terms of this Act, six territories known as the so-called "bantustans" or "homelands" were granted "independence" in 1968 and 1969. During the course of the following thirty years, Africans were gradually removed from "white South Africa" to the Bantustans. In terms of the Bantustan policy, black South Africans were classified according to their tribal heritage and forced to accept citizenship of the appropriately designated homelands. "Bantustans created all the trappings of states: they established development boards and parliaments, built capitals, inaugurated presidents, designed flags, composed national anthems and, above all, devised mechanisms of control and compulsion." See Sayed "An overview of education policy change in post-apartheid South Africa" (2013) 7; Chisholm L "Apartheid education legacies and new directions in post-apartheid South Africa" (2012) 8 *Storia del donne* 85.
151 Fedderke J *et al* "Uneducating South Africa: The failure to address the 1910-1993 legacy" (2000) 46 (3/4) *International Review of Education* 269-271.
152 Ibid.
153 Ibid.
154 Badat S and Sayed Y "Post-1994 South African education: The challenge of social justice' (March 2014) *The Annals of the American academy* 128.

Bantu education. These include the content of the curriculum, funding of black schooling and the poor qualifications of black teachers.[155] To begin with, the content of the curriculum for black (and white) learners was adapted to ensure alignment with the general state policy of racial discrimination towards black people and domination of the white elite.[156] Whereas white schools focused on a more academic curriculum, black schools set far lower academic requirements for their learners and rather lay emphasis on "practical subjects that prepared…pupils for blue-collar work futures."[157] The apartheid regime regarded the social, political and economic position of blacks as inferior and devised a curriculum that could serve "those predetermined ends".[158] The apartheid curriculum was predicated on the Verwoerdian notion that blacks were to be trained for their particular inferior position in society and that providing an "European education" to them would create "unhealthy white collar ideals" which were unattainable for the "native" in apartheid South Africa.[159] A practical example of the aforementioned curriculum adaptation is found in the research of Du Preez[160], who conducted a comprehensive study into the textbooks prescribed for black and white learners during this particular era of apartheid. He found the following twelve "master symbols" throughout the apartheid curricula:

(1) Legitimate authority is not questioned.
(2) Whites are superior. Blacks are inferior.
(3) The Afrikaner has a special relationship with God.
(4) South Africa rightly belongs to the Afrikaner.
(5) South Africa is an agricultural country; the Afrikaners are a farmer nation ("boerevolk").
(6) South Africa is an afflicted country.
(7) South Africa and the Afrikaner are isolated.
(8) The Afrikaner is militarily ingenious and strong.
(9) The Afrikaner is threatened.
(10) World opinion of South Africa is important.

155 Zungu (1977) 46 *The Journal of Negro Education* 202-218.
156 Reagan (1989) 24 *Journal of Thought* 15.
157 Fiske E and Ladd H *Elusive equity: Education reform in post-apartheid South Africa* (2004) as cited in McKeever (2017) 61(1) *American Behavioral Scientist* 119.
158 Jansen (1990) 59(2) *The Journal of Negro Education* 200.
159 Du Rand S "From mission school to Bantu education: A history of Adams College"(1990) Masters of Arts (University of Natal) 144.
160 Du Preez "Africana Afrikaner: Master symbols in South African school textbooks" (1983) as cited in Reagan (1989) 24 *Journal of Thought* 16.

(11) South Africa is the leader in Africa.

(12) The Afrikaner has a God-given task in Africa.[161]

Zungu argues that it is necessary to investigate the actual content of the curriculum in tandem with the shift that occurred in language policy. Before the introduction of the Bantu Education Act, black learners received education in their mother tongue during the lower primary phase (Grades 1-4).[162] From Grade 4, the medium of instruction, in most cases, would shift to English.[163] However, the Bantu Education Act introduced mother tongue instruction in the entire primary school phase (Grades 1-8).[164] Therefore, when students reached "…higher levels of education", they would encounter obstacles with their studies which by then would be conducted in English. According to Zungu, this shift to mother tongue instruction led to a restriction of knowledge by black learners.[165] The attainment of knowledge by black learners was further constrained by the apparent "freezing" of black education at the primary school level.[166] Upon closer scrutiny of enrolment figures for primary and secondary schools, it is discernable that most black learners left school soon after the completion of the lowery primary school level (at Standard 2/Grade 4).[167] The fact that education was not compulsory for blacks as opposed to whites also attributed to the high dropout rate at this level.[168] Further contributing to the restriction of knowledge was the introduction of the so-called "platoon-system" and

161 Ibid.
162 Zungu (1977) 46 *The Journal of Negro Education* 211.
163 Ibid.
164 Ibid.
165 Ibid. Another reason why the apartheid regime placed emphasis on mother-tongue education was "to create cleavages between Africans from different ethnic groups. It is well known that in multi-national or multi-ethnic societies, language becomes one of the symbols used as identity for in-group/out-group distinctions. By enforcing mother-tongue instruction, the government hoped for the fulfilment of their strategy, to divide the African people in order to rule them easily. This ties in neatly with Bantustan program whose basis [was] separate development of various African ethnic groups."
166 Christie and Collins (1982) 18 *Comparative Education* 70 ; Motshekga A "Bantu education? Over my dead body" (2012) available at https://www.sowetanlive.co.za/opinion/columnists/2012-04-03-bantu-education-over-my-dead-body/ (accessed 11 July 2019). Motshekga, the current Minister of Basic Education in South Africa, refers to the following statistics: In 1966, approximately 85% of blacks in the 7-14 years old age group were attending primary school. Of these, "just over half were likely to reach Standard Two (Grade 4), and only about a quarter Standard Six (Grade 8). Only one-tenth would progress to secondary [education]". Furthermore, "only 5.41% of children of the cohort of African children who had started school in 1949 completed [Matric] in 1959, only 5.21% completed in 1963 and only 8.66% in 1967."
167 Christie and Collins (1982) 18 *Comparative Education* 70; Zungu (1977) 46 *The Journal of Negro Education* 212.
168 Zungu (1977) 46 *The Journal of Negro Education* 214.

"double sessions" of schooling introduced in 1955.[169] In this case, the same teacher would teach two 3-hour sessions per day, one in the morning and one in the afternoon, to two different groups of learners.[170] In effect, this means that black learners were only awarded half of the normal teaching time applicable in (non-black) formal schools.[171] The overcrowding in black schools necessitated the introduction of the platoon system which was directly related to the inadequate funding of black schools.[172] For example, in 1975, the apartheid regime was spending 15 times more per capita for white education than for black education, which "dropped to 4 to 1 by 1989."[173] This has led to a considerable physical neglect and depreciation of black schools.[174] Decrepit buildings and a shortage of rudimentary resources "were [and still is to some extent] the norm in these schools."[175] The Bantu Education Act also had a detrimental impact on the qualifications of black teachers. Whereas white teachers benefited from being educated at post-secondary institutions, African teachers were being compelled to attend government approved teacher training colleges.[176] Zungu attributes this to the apartheid regime's objective to indoctrinate the African teacher,[177] ostensibly into the Bantu education ideology. Moreover, the introduction of Bantu Education resulted in a sharp decline in the qualification levels of teachers.[178] To this end, there was a marked increase in teachers *without* matriculation certificates or university degrees, as opposed to the period before 1953.[179] The combination of the aforementioned factors resulted in devastating consequences for black students specifically and for the black population at large. In Hendrik Verwoerd's own words:

> There is no place for him in the European community above the level of certain forms of labour…for that reason it is of no avail for him to receive a training which has as its aim absorption in the European community, where he cannot be absorbed. Until now he has been

169 Ibid.
170 Roux C "Post-graduate education students' oral history research: A review of retired teachers' experiences and perspectives of the former Bantu Education system" (2012) 8 *Yesterday & Today* 104.
171 Zungu (1977) 46 *The Journal of Negro Education* 215.
172 Roux (2012) 8 *Yesterday & Today* 104-105.
173 McKeever (2017) 61(1) *American Behavioral Scientist* 119.
174 Jansen (1990) 59(2) *The Journal of Negro Education* 200.
175 Ibid.
176 Chisholm (2012) 8 *Storia del donne* 86.
177 Zungu (1977) 46 *The Journal of Negro Education* 210.
178 Christie and Collins (1982) 18 *Comparative Education* 71-72.
179 A mere 25.5% of African teachers possessed university degrees in 1965. In 1968 "for every 100,000 in the population group concerned, 866 whites, 322 Indians, 74 coloureds and only 13 Africans reached the final year of schooling." Africans completed an average of four years of schooling with only one-tenth reaching secondary education in the 1960's. See Chisholm (2012) 8 *Storia del donne* (2012) 86. Italics my emphasis.

> subjected to a school system that drew him away from his own community and misled him by showing him the green pastures of European society in which he was not allowed to graze.[180]

Verwoerd's utterances confirmed the apartheid regime's total commitment to position the black youth outside the sphere in which the country's wealth was owned and controlled.[181] To this end, apartheid education was designed to equip black children with limited skills and the mental disposition to resign themselves to being exploited in the larger South African society.[182] The education system was therefore a crucial factor in the entrenchment of racial inequality and the preservation of white supremacy in apartheid South Africa.

(c) Period of Reform: 1970s until early 1990s

In 1975, the Minister of Bantu Education announced the introduction of Afrikaans as the medium of instruction in selected areas of Bantu Education.[183] This "ill-advised education policy" was merely one of many factors, including the crisis in black education and the general resistance against apartheid that accumulated to eventually precipitate the Soweto uprisings of 1976.[184] The Soweto uprisings became the catalyst for further school boycotts across the country and ultimately placed the issue of educational reform on the state's agenda.[185] Educational reform was part of the broader social reform program embarked upon by the apartheid regime in the 1970s.[186] The impetus for reform is found in an intricate set of problems

[180] Senate Speech as Minister of Native Affairs in 1954.
[181] Molteno "The historical foundations of the schooling of black South Africans" (1984) 92.
[182] Reagan (1989) 24 *Journal of Thought* 7.
[183] Ibid 10. The Minister issued a regulation instructing the tuition of half of all school subjects in Standard 5 (the equivalent of Grade 7 today) and Form 1 to be conducted in Afrikaans.
[184] Ibid 9-10. Soudien writes that "[o]n 16 June 1976 high school students in Soweto, Johannesburg, took to the streets to protest against a decision of the apartheid government to make the Afrikaans language compulsory as a medium of instruction. The protest set off a two-year long boycott of schools and came to be important in shifting the balance of forces in the struggle of oppressed people against the apartheid government."
Kallaway describes the crisis in black education that preceded the 1976 uprisings: "The attempt to enforce Afrikaans as a medium of instruction in the schools of Soweto proved to be the last straw in the ongoing crisis of the previous years. The inability of the Bantu Education Department to enforce its regulations on the issue, the intense resistance that resulted from that situation, with demands for educational reform being linked to wider political issues; the physical damage to schools and educational facilities; the rise of a vigorous student politics; the intensity of police activity and the victimisation of students and teachers, the mass resignation of teachers….endless problems about the payment of teachers' salaries, the leaks of examination papers, and extremely high examination failure rates, all added up to a situation in which black schools were simply not functioning." See Soudien *Realising the dream* (2012)174 and Kallaway "An introduction to the study of education for blacks in South Africa" (1984) 24-25.
[185] Davies J "Capital, state and educational reform in South Africa" in Kallaway (ed) *Apartheid and education* (1984) 342-346.
[186] Ibid.

with which the apartheid state was confronted in the 1970s, including an economic downturn and increasing anxiety about political instability in the country as a result of the protests in Soweto. The mass defiance against apartheid led to a global attack on apartheid, a sharp decrease in foreign investments and to a fresh call for economic sanctions against South Africa.[187] In the aftermath of the Soweto uprisings and the nationwide school boycotts, the state undertook to improve the education system for black learners.[188] Davies refers to three reasons behind the drive for this change in education policy. To start with, a crisis in skilled labour had developed in the country. Bantu education which had focused on delivering students with unskilled and semi-skilled abilities was reproached for constricting "…the flow of vitally needed skills and professional manpower, and thereby economic growth."[189] Next, the alienation of blacks through Bantu education had led to a militant black working class and an agitated unemployed black youth which the apartheid state saw fit to contain.[190] Thirdly, the regime was painfully aware that they had to do something in an educational sense to "…overcome the image of South Africa abroad as a society that could respond to genuine grievances only by indiscriminately killings its schoolchildren."[191]

In 1980, the state appointed the Human Sciences Research Council (HSRC) under the chairmanship of Professor JP De Lange with the surprisingly progressive mandate to deliver recommendations for "equality in education" for all race groups.[192] Another brief included the recommendation for an education system that could meet the required "manpower needs" in South Africa.[193] The De Lange Commission reported in 1981 and on the face of it, embraced values in direct contradiction to those of the apartheid education system. These included the principles of equal opportunities and standards in education; "free association in education";

[187] Ibid 342.
[188] Ibid 341.
[189] Hurwitz N "The economics of Bantu education in South Africa", SAIRR Report (1964) as quoted in Davies "Capital, state and educational reform in South Africa" (1984) 347.
[190] Davies ibid 348.
[191] Ibid 349.
[192] Chisholm L "Redefining skills: Black education in South Africa in the 1980s" in Kallaway (ed) *Apartheid and education* (1984) 388-389. The De Lange Commission was tasked with providing recommendations to the state with regards to: "(1) Principle guidelines for a practicable educational policy, so that (a) the optimum potential of all inhabitants be realised, (b) the economic growth of the country be promoted, (c) the quality of life of all inhabitants be improved; (2) The organisational and control structure, as well as the financing of education; (3) The consultative and decision-making mechanisms in education; (4) An infrastructure for education that would fulfil the manpower needs of the country and (5) A programme whereby equality in education for all population groups can be attained." Extract from Prime Minister's Speech in Parliament: 13 June 1980, SAIRR Archives, Brief 9,8 quoted in Davies "Capital, state and educational reform in South Africa" (1984) 355.
[193] Ibid.

and a rejection of racial differentiation.[194] It recommended the establishment of an academic and vocational stream operating within one education department as opposed to the various racially defined departments.[195] At the time that students reached high school, they would be channeled into either an academic or vocational secondary school.[196] The Commission reasoned that only a minority of learners required an academic education whilst "…50-80% of children in standards 5-8 receiving vocational education in future is in line with the manpower needs of South Africa."[197] The academic structure of the education system would include a pre-basic, basic and post-basic component.[198] It was suggested that basic education would be provided free of charge whilst parents would be required to shoulder the costs of post-basic education. Conversely, vocational training would be paid for by capital.[199] The initial excitement over the De Lange Report was short-lived.[200] An in-depth examination of the report revealed that most of the recommendations, which were subsequently implemented by the state, would have no real impact on the systemic racial inequality in the public education system.[201] According to Christa Van Zyl, even before the report was tabled in Parliament, government was backtracking on its initial progressive mandate.[202] She writes that:

> The 1981 report was formally received by the government, and tabled without any changes in parliament. It was, however, accompanied by a four-page "Interim Memorandum" in which the government indicated that it was in agreement with the principles and recommendations contained in the report, but only as far as they would fit into the existing political landscape.[203]

The Commission's understanding of a racially integrated education system was confined to private schools and universities.[204] The principle of "free association" would therefore become applicable to the latter institutions only and not to state schools which would continue to

194 Davies "Capital, state and educational reform in South Africa" (1984) 360.
195 Chisholm "Redefining skills: Black education in South Africa in the 1980s" (1984) 389.
196 Ibid.
197 Ibid.
198 Ibid.
199 Ibid.
200 Davies "Capital, state and educational reform in South Africa" (1984) 360.
201 Davies ibid 362- 363; Chisholm "Redefining skills: Black education in South Africa in the 1980s" (1984) 390.
202 http://www.hsrc.ac.za/en/review/hsrc-review-march-2019/hsrc-investigates-education-1908-1981 (accessed 14 April 2020).
203 Ibid.
204 Davies "Capital, state and educational reform in South Africa" (1984) 360.

segregate learners on the basis of race.[205] Furthermore, at the moment that students were to be transferred to either a vocational or academic school, the funding of education would become dependent on the economic status of parents. Financially sound black parents could therefore escape the Bantu education system and secure an academic education for their children at the costly multiracial private schools.[206] The majority of poor black students, however, was confronted with one of two choices once they completed the compulsory phase of schooling: Enroll at a vocational school for lack of being able to afford an academic education or drop out of school. In this way, the Commission fulfilled its state directive by ensuring that the labour needs of South Africa would be continually supplied by the "50-80% of [black] children" who it reasoned did not require an academic education. In sum, although the De Lange Commission was initially praised for its progressiveness, it essentially capitulated to the state's agenda of limited reform. By recommending the admission of black learners to private schools, it attempted to appease the defiant black community through the creation of a black educational elite. However, the *status quo* for the majority of black learners was left unaltered. The foundation of structural racial inequality in the state education system therefore remained intact. Chisholm puts it succinctly:

> Educational reform is crucial to the strategy of limited incorporation of a small number of blacks…Reforms which appear to be real concessions could defuse significant areas of opposition, at least in the short term. …These apparent reforms are not mere 'cosmetic' changes, but they are implemented in a manner that leaves the roots of inequality in South Africa untouched.[207]

Subsequent to the publication of the De Lange Report, educational groups belonging to the mass anti-apartheid movement, including the National Education Crisis Committee (NECC) and the Congress of South African Students (COSAS) continued with their efforts to draw attention to the rampant inequality in the education system.[208] The state's racially differentiated funding regime was one of the primary drivers of inequality during the 1980s. For example, in 1982, the apartheid regime spent approximately ten times more on the education of a white

[205] Ibid.
[206] Chisholm "Redefining skills: Black education in South Africa in the 1980s" (1984) 390.
[207] Ibid 388.
[208] Chisholm (2012) 8 *Storia del donne* 81-103.

child than on the education of a black learner.[209] Fedderke *et al* reports that real expenditure on white education far exceeded the absolute level of expenditure on any other race group until the mid-1980s.[210] Even though real expenditure on black education overtook funding on white education, the simultaneous surge in black enrolments had the effect that white schools remained considerably better resourced than black schools.[211] For this reason, the NECC and COSAS regarded the provision of physical resources such as books and furniture in black schools to be as important as the ultimate democratisation and deracialisation of the education system.[212]

The period of reform culminated in the early 1990s with the opening up of white schools to black learners.[213] In 1990, white public schools were given the option by the Minister of (White) Education to alter their status as from the start of 1991.[214] They were provided with three different school models: Selecting Model A would lead to the school becoming privatised; choosing Model B would mean that the school would retain its status as a state school, but would be allowed to allocate 49% of its total placements to black learners; a Model C school would become partially subsidised by the state and would therefore be responsible for balancing its budget through school fees and donations.[215] All three models had to comply with the following conditions:

- All white schools had to maintain a 51% white majority in their school population.
- The white cultural ethos of the school had to remain intact.
- The management councils of the schools did not necessarily promote the employment of black teachers on the staff of the schools.
- The financing of black pupils at these schools was the responsibility of the black parent.[216]

[209] 1993 Statistics for Living Standards and Development Household Survey as reported in Skelton A "Strategic Litigation Impacts: Equal Access to Quality Education" Report commissioned by Open Society Justice Initiative: Open Society Foundations Education Support Program (2017) 48 ("Skelton Equal Access Report (2017)").
[210] Fedderke *et al* (2000) 46 (3/4) *International Review of Education* 269.
[211] Ibid.
[212] Chisholm (2012) 8 *Storia del donne* 88.
[213] Tikly L and Mabogoane T "Marketisation as a strategy for desegregation and redress: The case of historically white schools in South Africa" (1997) 43 (2/3) *International Review of Education* 161.
[214] Pampallis J "The nature of educational decentralisation in South Africa" in Woolman S and Fleisch B *The Constitution in the classroom: Law and education in South Africa 1994-2008* (2009) 3-4.
[215] The different models were referred to as the so-called "Clase Models" named after the then Minister of White Eduation, Piet Clase. See Tikly and Mabogoane (1997) 43 (2/3) *International Review of Education* 161-162.
[216] Carrim N *et al* "The long shadow of apartheid ideology" in Bowser BP *Racism and anti-racism in world perspective* (1993) as cited in SAHRC "Report on Racism, 'Racial Integration' and Desegregation in South African Public Secondary Schools" (1999) 10. ("SAHRC Racism Report (1999)").

Although the majority of the 1 983 white state schools initially selected to retain their old status, the state, in 1993, made two announcements that resulted in 96% of all former white schools inadvertently becoming Model C schools.[217] Firstly, parents were informed that unless they voted with a two-thirds majority to retain the *status quo* or in favour of Model B schools, all previously white schools were to become Model C schools.[218] Secondly, the state decided to cut state subsidies to all school models.[219] Model C schools became state-aided schools managed by a principal and a management committee.[220] The state paid the salaries of a set number of teachers whilst the rest of the costs at these schools became the responsibility of the parents.[221] The management committee had the power to appoint teachers, determine admission policy and impose fees.[222] Although Model C schools officially allowed the admission of black students, in practice, the majority of black learners were denied access to these schools due to the imposition of, *inter* alia, particular selection criteria and high school fees which, in reality, masked overt racism.[223] However, the mere fact that the minority of well-off blacks could in principle access Model C schools meant that class inequality had now become intertwined with racial inequality in the public education system.

2.5 CONCLUSION

This chapter traced the historical context of the South African education system by focusing on its colonial and apartheid roots. A timeline was provided that captures the trajectory of education history from the 17th century until the early 1990s. Racial and class inequality in education was firmly entrenched by the Dutch settlers during the 17th and 18th centuries and later by the British colonial rulers with the establishment of missionary education in the 19th century. Missionary education has a contentious history in South Africa. On the one hand, it evokes fond memories of institutions of academic excellence where the country's struggle icons were educated. On the other hand, it is viewed by various academic commentators as having comprised racist, sexist, elitist institutions that rejected and maligned indigenous education systems by transplanting Western forms of education wholesale into African

217 Pampallis "The nature of educational decentralisation in South Africa" in Woolman and Fleisch *The Constitution in the classroom* (2009) 3-4.
218 Ibid.
219 Ibid.
220 SAHRC Report on Racism (1999) 10.
221 Ibid.
222 Ibid.
223 Ibid.

communities. Missionary education remained the dominant form of education for black learners until 1953 when the Bantu Education Act transferred control of missionary institutions to the apartheid regime.

Under British rule, education policy was significantly influenced by the imperialists' quest to own and exploit South Africa's mineral wealth (especially during the late 19th and early 20th century). Legislation and policy were primarily aimed at creating a class of unskilled or semi-skilled African labourers to serve the mining industry. Furthermore, British education officials spawned the ideology that blacks were intellectually inferior to whites. This racist philosophy would later become a foundational principle of the Bantu education system introduced by the apartheid regime. Before the National Party ascended to power in 1948, schools were already segregated along racial lines. However, the curriculum for black and white learners was generally the same until the Union's decision to adopt differentiated curricula for black and white learners at primary school level in 1922. However, the curriculum for all secondary school learners, irrespective of race, remained primarily the same until the apartheid regime's incumbency.

The introduction of apartheid in 1948 cemented racial inequality in South African education. The apartheid establishment created multiple education systems based on race and ethnicity, both within South Africa as well as in the former Bantustan territories. White education was flagrantly privileged to the detriment of other races. A disproportionate share of resources was lavished on white schools while African, Coloured, Indian and Bantustan departments were critically underfunded. The Bantu Education Act introduced in 1953 was the most notorious of apartheid-era education legislation, with its damaging consequences still reverberating in the post-1994 education system. The Act introduced a separate curriculum for black learners based on the Verwoerdian notion that blacks were to be trained for their particular inferior political, economic and social position in apartheid South Africa. Furthermore, the Act resulted in the structural disrepair, a lack of basic resources, overcrowding and underqualification of teachers at black schools. Most black learners left school after 4 years of primary school training under the Bantu education system. The combination of the abovementioned factors resulted in a lasting legacy of marginalisation and disadvantage for black learners specifically, and for the black population at large.

An era of reform, sparked by the Soweto uprisings in 1976, characterised the educational landscape from the mid-1970s until the early 1990s. The recommendations of the 1981 De Lange Commission resulted in some reforms to the extent that blacks were granted access to

private schools and universities. However, the reforms did not reach the public education system where segregation based on race remained unchanged until the early 1990s. In 1991, former white public schools opened their doors for black learners on a quota basis and initially charged high school fees, among other means, in an effort to curb black enrolment. Black learners with the required financial means could now escape impoverished black schools which, for the most part, had become dysfunctional under the Bantu education system. Seeing that the majority of black learners did not have the economic means to escape Bantu education, class inequality had now become interwoven with racial inequality in the public education system in the early 1990s.

CHAPTER 3
THE REPRODUCTION OF INEQUALITY IN THE POST-APARTHEID BASIC EDUCATION SYSTEM

3.1 INTRODUCTION

Following the demise of the apartheid regime, the first democratic administration was faced with the gargantuan task of addressing the inequality in the education system(s). The post-apartheid government abolished the racially based departments and replaced them with nine provincial education departments in coordination with one national department of education.[1] A progressive legal framework guaranteeing, *inter alia*, the constitutional rights to basic education and equality of all was adopted by the new regime. However, as will be demonstrated in this chapter, systemic inequality is reproduced in the current education system. In this regard, Chapter 3 examines how inequality manifests through the restriction of access to quality basic education for the majority of black and poor learners in post-apartheid South Africa. Chapter 3 is set out as follows: Section 3.2 examines the post-apartheid legal framework by providing an overview of the transformative character of the South African Constitution and the entrenchment of, *inter alia*, the rights to basic education and equality within this regime. Section 3.3 scrutinises the extent to which a pattern of unequal access to quality education for black and poor learners is perpetuated in post-apartheid South Africa. In this regard, the meaning of "quality education" is explored within the holistic conceptual framework developed by Kishore Singh, the former UN Special Rapporteur on the Right to Education. Section 3.4 provides the conclusion.

[1] Spaull N "Education quality in South Africa and Sub-saharan Africa: An economic approach" (2014) Doctor of Philosophy (Economics) (University of Stellenbosch) 21. ("Spaull (2014) Doctoral thesis").

3.2 THE POST-APARTHEID LEGAL FRAMEWORK

3.2.1 The transformative Constitution

The South African Constitution emerges from a specific context.[2] As noted in Chapter 2, the former colonial and apartheid regimes subjected the black population to systemic deprivation and discrimination through the adoption of policies that denied them access to basic services, such as health care, housing and education.[3] In the words of Danie Brand:

> Perhaps the most debilitating and tragic legacy of the 300 years of oppression, exclusion and discrimination along racial lines in South Africa that culminated in 43 years of apartheid rule in the 20th century is the devastating impoverishment and social and economic inequality left in its wake.[4]

The supreme 1996 Constitution was adopted to respond to this particular context and was therefore, "…explicitly conceived as a legal framework for the overcoming of the injustices of the past."[5] Largely hailed as a transformative document[6], the Constitution is aimed at transforming South Africa into the society envisioned in its Preamble. This provision states that the Constitution has been adopted so as to:

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

2 Moyo K "The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence" in Bohler-Muller N *et al* (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 78.
3 Ibid.
4 Brand D "The South African Constitutional Court and livelihood rights" in Vilhena O *et al* (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 414.
5 Brand "The South African Constitutional Court and livelihood rights" (2013) 414.
6 Brand writes that "the South African Constitution differs from a traditional liberal model in that it is *transformative*, as it does not simply place limits on the exercise of collective power (it does that also), but requires collective power to be used to advance ideals of freedom, equality, dignity and social justice." Furthermore, at a public lecture held at Wits University in 2009, former Constitutional Court judge, Kriegler J described the Constitution as "…indubitably a *transformative* document." See Brand D "Introduction to socio-economic rights in the South African Constitution" in Brand D and Heyns C (eds) *Socio- Economic Rights in South Africa* (2005) 1; Kriegler J "Can judicial independence survive transformation? – A public lecture delivered by Judge Johann Kriegler at the Wits School of Law on 18 August 2009" as cited in Moyo "The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence" (2018) 76 and Klare 1998 (14) *SAJHR* 146-188.

> Improve the quality of life of all citizens and free the potential of each person.

The vision of the society envisaged above, is not merely aspirational. The Bill of Rights demands the realisation of transformation through an explicit entrenchment of socio-economic rights, such as the right to basic education and an equality clause that endorses a substantive approach to equality.[7] Furthermore, all organs of state are obliged to fulfil the rights in the Bill of the rights.[8]

3.2.2 The right to basic education

Section 29(1) of the Constitution states the following:

> Everyone has the right-
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

In *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others*[9], the Constitutional Court, per Nkabinde J held:

> Unlike some of the other socio-economic rights, [the right to basic education] is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'.[10]

In order to fully grasp the importance of the distinction described above, an explanation of the Court's reasonableness approach applicable to the implementation of qualified socio-economic

[7] Section 9(2), (3) and (4) of the Constitution.
[8] Section 7(2) of the Constitution provides: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." Section 8(1) states: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."
[9] 2011 (8) BCLR 761 (CC) ("*Juma Musjid CC*").
[10] *Juma Musjid CC* para 37.

rights is warranted.[11] This approach involves a test of reasonableness that "focuses on the fairness or appropriateness of government action to give effect to socio-economic rights."[12] The reasonableness approach rejects an inquiry into the precise goods emanating from the right itself, but merely examines whether the state's conduct in implementing the right is reasonable or not.[13] The reasonableness approach was "foregrounded" in *Soobramoney v Minister of Health, Kwazulu-Natal*[14] and expansively developed by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*[15] which considered the scope and content of the right of access to housing in section 26 of the Constitution.[16] In *Grootboom*, the Court refused to interpret section 26(1) as giving rise to a minimum core content, comprising a "basket of goods and services" due to all rights holders.[17] Instead, the Court was resolute that section 26 (1) read with section 26(2), imposes positive duties on the state to adopt and execute reasonable policies within its available resources, ensuring progressive access to the right.[18] A similar approach has been adopted by the Court in respect of the other qualified socio-economic rights in the Constitution.[19] Cameron and Chris McConnachie explain the impact of the reasonableness approach on individual rights bearers:

> The implication is that individuals do not have a right to the provision of these socio-economic goods, but are merely entitled to have the state take reasonable steps to provide these goods progressively, within its available resources. In simple terms, the fact that a person is homeless,

[11] McConnachie Cameron and McConnachie Chris "Concretising the right to a basic education" (2012) 129 *SALJ* 561. The qualified socio-economic rights include sections 26 and 27 of the Constitution. In terms of section 26(1) "[e]veryone has the right to have access to adequate housing." Section 26(2) provides: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." Section 27(1) states: Everyone has the right to have access to-
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
In terms of section 27(2) "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'

[12] Dugard J and Wilson S "Constitutional jurisprudence: The first and second waves" in Langford M *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance*? (2014) 38.

[13] Ibid.

[14] 1998 (1) SA 765 (CC) ("*Soobramoney*").

[15] 2001 (1) SA 46 (CC) ("*Grootboom*").

[16] Dugard and Wilson "Constitutional jurisprudence: The first and second waves" (2014) 39-40.

[17] Ibid. See also *Grootboom* paras 34-36.

[18] Dugard and Wilson ibid. See also *Grootboom* paras 39-46.

[19] See, for example, *Treatment Action Campaign v Minister of Health (No2)* 2002 (5) SA 721 (CC).

> has insufficient food or water, has limited access to health care or social security is not sufficient to establish a limitation of her ss 26 and 27 rights. A limitation of these positive rights will have occurred only if the state's programmes to provide access to these goods are found to be unreasonable.[20]

Contrasting the reasonableness approach with the interpretation of the right to basic education in *Juma Musjid*, therefore puts into context the significance of Nkabinde J's pronouncement. Section 29(1)(a) confers the right to an actual public good, namely "basic education" and not merely to an entitlement that the state act reasonably in their adoption and implementation of the goods associated with the right.[21] The Constitution does not define the concept "basic education", nor does it explicitly entrench a right a right to "free" and "compulsory" basic education.[22] To this end, international law can serve as a useful guide in understanding these concepts.

3.2.2.1 International law

In interpreting the rights in the Bill of Rights, section 39(1)(b) of the Constitution requires of the courts to consider international law.[23] South Africa has ratified the most significant treaties entrenching the right to education, including the Convention on the Rights of the Child

[20] McConnachie and McConnachie (2012) 129 *SALJ* 562.

[21] Ibid 564.

[22] For an account on the debate involving the meaning of basic education in South Africa, see Van Der Merwe S "How 'basic' is basic education as enshrined in section 29 of the Constitution of South Africa?" (2012) 27 *SAPL* 365 -378; Skelton "How far will the courts go in ensuring the right to a basic education?" (2012) 27 *SAPL* 392-408; Murungi LN "Inclusive basic education in South Africa: Issues in its conceptualisation and implementation" (2015) 18(1) *PER* 3175-3178; Woolman S and Bishop M "Education" in Woolman *et al Constitutional Law of South Africa* Chapter 57.

[23] In terms of section 39(1)(b) of the Constitution, "[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law." Section 231(4) of the Constitution provides: "Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." South African courts invokes international law on a regular basis and mostly as an interpretive tool. The Constitutional Court has given a generous interpretation to the term "international law" which encompasses both binding treaties and non-binding international instruments. See *S v Makwanyane* 1995 (3) SA 391 (CC) para 35; Kweitel J *et al* "The role and impact of international and foreign law on adjudication in the apex courts of Brazil, India and South Africa" in Vilhena *et al* (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 192; Le Roux W "Descriptive overview of the South African Constitution and Constitutional Court" in Vilhena *et al* (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 173.

(CRC)[24], the International Covenant on Economic, Social and Cultural Rights (ICESCR)[25] and the UNESCO Convention against Discrimination in Education (CDE).[26] The CDE requires of state parties "to promote equality of opportunity and treatment in the matter of education and in particular [t]o make primary education compulsory and free." The latter Convention was the first international treaty to include an obligation on states parties to provide free and compulsory primary education.[27] The CRC, the principal international law instrument on children's rights, protects the right to education in article 28. Article 28(1)(a) specifically entrenches a right to free and compulsory primary education. Article 13(2)(a) of the ICESCR similarly obliges state parties to make primary education free and compulsory. Article 14 of the ICESCR requires of state parties to work out a detailed plan to realise primary education within a reasonable time.[28]

The ICESCR is undeniably the most important treaty which entrenches the right to education. General Comment No 13 published by the Committee on Economic, Social and Cultural Rights (CESCR) provides the most comprehensive description of the content of the right to basic education in international law.[29] This General Comment entrenches the so-called 4-A Scheme which concretises the right to education and has been widely employed as a foundation from which to interpret and define the right .[30] Other important General Comments for the purposes

[24] https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN (accessed 15 April 2020).

[25] https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN (accessed 13 April 2020).

[26] http://www.unesco.org/eri/la/convention.asp?KO=12949&language=E&order=alpha (accessed 13 April 2020).

[27] Beiter K *The Protection of the Right to Education by International Law* (2006) 90.

[28] Article 14 of the ICESCR provides: "Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in a plan, of the principle of compulsory education free of charge for all."

[29] The CESCR is responsible for monitoring the compliance by state parties of the rights in the ICESCR. The Committee publishes General Comments which guide the interpretation of the rights in the Covenant. See https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (accessed 15 April 2020).

[30] Veriava F "The contribution of the courts and of civil society to the development of a transformative constitutionalist narrative for the right to basic education" (2018) LLD Thesis (University of Pretoria) ("Veriava (2018) LLD Thesis") 17-18.

The 4A scheme, developed by Katarina Tomasevski, the former UN Special Rapporteur on the Right to Education is encapsulated in paragraph 6 of CESCR General Comment 13. Tomasevki's comprehensive framework has been cited with approval by leading academics on the right to education. It states the following:

"While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:

of this discussion includes General Comment No 3 which sheds light on the nature of the state parties' obligations in terms of ICESCR and General Comment No 11 which clarifies the interpretation of article 14.

Fons Coomans argues that the right to free, compulsory primary education under the ICESCR is the minimum core of the right to education.[31] Similarly, Julia Sloth-Nielsen and Benyam Mezmur contend that "article 28(1)(a) states the core minimum [of the right to education under the CRC]: 'free' and 'compulsory' education at the primary stage..."[32] The CESCR states that certain rights in the ICESCR "would seem to be capable of immediate application by judicial and other organs in many national legal systems."[33] The right to free, compulsory education in terms of article 13(2)(a) is listed as one of the latter rights.[34] In terms of the Maastricht

a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer laboratory and information technology.
(b) Accessibility - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:
Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds;
Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a 'distance learning' programme);
Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available 'free to all', States parties are required to progressively introduce free secondary and higher education;
(c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to educational objectives required by article 13(1) and such minimum educational standards as may be approved by the State.
(d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings."
See Skelton A "The role of the courts in ensuring the right to basic education in a democratic South Africa: A critical evaluation of recent education case law" (2013) 1 *De Jure* 1,3; Tomasevski K *Human rights obligations in education: The 4-A Scheme* (2006).

[31] Coomans F "Clarifying the core elements of the right to education" in Coomans F *et al* (eds) *The right to complain about economic, social and cultural rights* (1995) 7. Coomans regards the minimum core content as the "essence" of a right: "that essential element without which a right loses its substantive significance as a human right." The CESCR, during its 9th session in December 1993 emphasised that the minimum core is the floor beneath which the conduct of the State must not drop if there is to be compliance with the obligation. See UN Doc. E/C.12/1993/11, para 5.

[32] Sloth-Nielsen and Mezmur Report on Free and Compulsory Education (2007) 14.

[33] CESCR General Comment No 3, article 5.

[34] Ibid.

Guidelines, the ICESCR is violated where a state party fails to fulfil the minimum core of a right, including "the most basic forms of education."[35] The Guidelines further provide that the core obligations of a right must be fulfilled irrespective of the availability of resources in a state.[36] Although General Comment No 13 interprets the right to free, compulsory education as imposing an immediate obligation on all state parties[37], the CESCR will consider the resource constraints within a particular country in determining whether a state has discharged its minimum core obligations.[38] In order to grasp what is understood by the concepts of "free" and "compulsory" primary education, it is prudent to refer to CESCR General Comment No 11. In this regard, the meaning of "free of charge" is defined as follows by the CESCR:

> The nature of this requirement is unequivocal. The right [to primary education] is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs[39] constitute disincentives to the enjoyment of the right and may jeopardize its realisation. They are also often highly regressive in effect. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis.[40]

The element of "compulsory" is defined as follows by the Committee:

> The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access

[35] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Annex 5 to Office of the United Nations High Commissioner for Human Rights *Economic, social and cultural rights: Handbook for national human rights institutions* (2005) para 9 ("Maastricht Guidelines").
[36] Ibid para 10.
[37] CESCR General Comment No 13, para 51.
[38] Ibid, para 10.
[39] Direct costs are directly produced by the educational service, including teacher salaries, provision of schools and their maintenance, and the management of the education system. Other direct costs include costs without which education could not be delivered, namely text and other books, learning materials, basic school equipment (stationary such as pens, pencils, rulers, etc.), and fees for examination. Indirect costs are indirectly caused by the educational service. These include transport costs (costs incurred to get to school) and costs related to school meals, school uniforms, sporting equipment, and further educational equipment. See Sloth-Nielsen and Mezmur Report on Free and Compulsory Education (2007) 10.
[40] CESCR General Comment No 11, para 7.

> to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasized, however, that the education offered must be adequate in quality, relevant to the child and must promote the realisation of the child's other rights.[41]

At the time of ratifying the ICESCR in 2015, the South African government entered a reservation in respect of articles 13(2)(a) and 14 of the Covenant.[42] In this regard, the qualification provides that '[t]he Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2) (a) and Article 14, within the framework of its National Education Policy and available resources."[43] Whereas the ratification of the ICESCR was broadly welcomed in the country, disappointment was expressed at South Africa's decision to enter a declaration in respect of article 13(2)(a), especially in light of the decision of the Constitutional Court in *Juma Musjid* that the right to basic education is immediately realisable and not subject to the availability of state resources.[44] According to Equal Education, section 29(1)(a) of the South African Constitution refutes the reservation.[45] As stated above, the right to basic education is not subject to the internal qualifiers of progressive realisation, available resources and reasonable legislative measures. Furthermore, Equal Education points out that General Comment 13 provides that the right to primary education in terms of article 13(2)(a) of ICESCR imposes an immediate duty on all state parties to fulfil the right.[46] South Africa's reservation limits the immediate fulfilment of the right to basic education and thus violates the country's constitutional obligations as well as

41 Ibid, para 6. The concept of "compulsory education" within the context of the quality of education and the transformative imperatives of the South African Constitution is explored in section Chapter 3, section 3.3 and Chapter 6, section 6.3 of this thesis.

42 Joint Parallel Report by Equal Education and Equal Education Law Centre to the United Nations Committee on Economic, Social and Cultural Rights for its consideration of South Africa's initial State party report (64th Session (24 September - 12 October 2018) paras 5-6 available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fZAF%2f32259&Lang=en (accessed 24 July 2019). ("Equal Education and Equal Education law Centre Report to CESCR 64th Session (2018)"). Although South Africa signed the ICESCR in 1994, it only ratified the treaty on 18 January 2015. See https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr;https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec (accessed 14 July 2019);

43 Ibid.

44 https://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/ (accessed 14 April 2020); *Juma Musjid* para 37.

45 Equal Education and Equal Education Law Centre Report to CESCR 64th Session (2018) para 6.

46 Ibid.

its international obligation to prioritise primary education as set out in ICESCR.[47] Veriava interprets government's decision to enter the reservation as an obvious attempt to construe section 29(1)(a) as a progressively realisable right and to reduce the duties it has incurred in terms of the right to basic education.[48] The civil society organisation, Section 27 views the reservation as a clear violation of the South African Constitution.[49]

3.2.3 The right of equal access to quality basic education

As stated in Chapter 1, the Constitutional Court held that the particular (transformative) design of the Constitution is aimed at the "radical transformation of society as a whole and of public education in particular."[50] The Court refers to a "cluster of warranties" that are aimed at bringing about this transformation.[51] These include sections 29(1) and 9 of the Bill of Rights.[52] Section 9(1) of the Constitution states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". In terms of section 9(3), unfair discrimination against anyone is prohibited on a range of grounds, including "race, gender, sex, pregnancy, ethnic or social origin, colour, age, disability, religion, culture, language and birth." In terms of section 9(2), "legislative and other measures may be taken to protect or advance categories of persons disadvantaged by unfair discrimination" in order to promote the achievement of equality.[53] The South African Schools Act which gives effect to the constitutional right to education[54], honours the command in section 9(2) of the Constitution by unequivocally

47 Ibid.
48 Veriava (2018) LLD Thesis (University of Pretoria) 71-72.
49 http://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/ (accessed 15 April 2020).
50 *Ermelo CC* para 47.
51 Ibid.
52 Ibid.
53 Section 9 of the Constitution provides:
(1) "Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) 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.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."
54 *Ermelo CC* para 55.

requiring a "…system for schools which will redress past injustices in educational provision, provide an education of progressively *high quality* for all learners… [and] combat racism and sexism and all other forms of unfair discrimination and intolerance."[55] In addition, section 5(1)(a) of the Schools Act provides that "[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way." The South African Constitution, in conjunction with the Schools Act, therefore entrenches a right of equal access to quality basic education.

3.3 HOW DOES INEQUALITY MANIFEST IN THE POST-APARTHEID BASIC EDUCATION SYSTEM?

3.3.1 Unequal access to quality basic education for black and poor learners

The South African Constitution endorses a substantive notion of equality as the particular conception of equality that is required for the transformation of society[56] (and by implication the public education system.) In *Bato Star v Minister of Environmental Affairs*[57], former Chief Justice Ngcobo held that "[i]n this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities."[58] In *Minister of Finance v Van Heerden*, the Constitutional Court affirmed:

> The substantive approach [to equality] …roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved.[59]

However, race and gender are not the only characteristics on which systemic disadvantage is based. The Constitutional Court has acknowledged that " …disadvantage does not only follow the axis of race, but that racial cleavages are cross-cut with, among others, class.[60] Nowhere is the latter more true than in the public school domain. It is trite that a bifurcated public basic

55 Preamble to the Schools Act. Italics my emphasis.
56 *Minister of Finance v Van Heerden* 2004 (6) SA 21 (CC) para 142.
57 2004 (4)SA 490 (CC) ("*Bato Star*").
58 *Bato Star* para 74.
59 *Minister of Finance v Van Heerden* para 142.
60 *Minister of Finance v Van Heerden* para 27; De Vos P "The past is unpredictable: Race, redress and remembrance in the South African Constitution" (2012) 129 *SALJ* 86.

education system exists in South Africa today. This system is characterised by an explicit divide between former white schools and former black schools. In the words of Nic Spaull:

> The constituencies of these two school systems are vastly different with the historically Black schools still being racially homogenous (i.e. Black, despite the abolition of racial segregation) and largely poor; while the historically White and Indian schools serve a more racially diverse constituency, although almost all of these students are from middle and upper class backgrounds, irrespective of race.[61]

The post-apartheid education system therefore reproduces its own patterns of inequality, predominantly on the grounds of race and class. In order to achieve the equality objectives of the transformative Constitution, the patterns of disadvantage in the public education system have to be "faced up to and overcome" per the directive of the Constitutional Court in *Minister of Finance v Van Heerden*.[62] However, this objective is unattainable unless there is first an understanding of how these patterns manifest. In the rest of this chapter, I show that for the majority of black and poor learners, disadvantage manifests in unequal access to quality education.

3.3.2 What is "quality education"?

South African legal academic commentators have connected the concept of "quality education" to the meaning of "basic education" as set out in section 29(1)(a) of the Constitution. For example, Woolman and Fleisch contend that basic education can be understood in two possible ways: it can be conceived of as a "period of schooling" or "standard of education".[63] The former, in turn, is linked to the compulsory period of schooling in South Africa whilst the latter is connected to the concept of quality.[64] The Schools Act restricts compulsory education to the period from Grade 1 to 9 or until "a learner reaches the age of 15, whichever occurs first."[65] It

[61] Spaull "Schooling in South Africa: How low quality education becomes a poverty trap" (2015) 37-38.
[62] *Minister of Finance v Van Heerden* para 142.
[63] Woolman and Fleisch *Constitution in the Classroom* (2009) 127.
[64] Chapter 6, section 6.3 focuses more in depth on the interpretations of "compulsory education" and "basic education" in the wider context of radical transformation.
[65] Section 3(1) of the Schools Act provides: "Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first." However, in practice, the Department of Basic Education is accountable for education from Grade R to Grade 12, not merely from Grade 1 to Grade 9.

has been argued that the meaning of *basic* should not be derived from the number of years it takes to complete a qualification, but from the *quality* of education that has to be provided by the state.[66] However, there are no legal instruments that define quality education as such.[67] In general education literature, the understanding of the concept is also by no means clear-cut, whether this debate is in South Africa or elsewhere in the world.[68] Kishore Singh, the former United Nations Special Rapporteur on the Right to Education, contends that the quality of education is usually only assessed in terms of "…knowledge, skills and competencies."[69] Although the assessment of a learner's academic competence is important, it is not the only barometer of a quality education. For instance, Singh argues that while "[k]nowledge and skills in reading, mathematics and scientific literacy, predominant in quality appraisals" is significant, it should not be regarded as the only indicator for the quality of education.[70] Singh, therefore, calls for a broader and more holistic understanding of quality education.[71] Drawing

[66] Skelton Equal Access Report (2017) 47. Italics my emphasis.
[67] Skelton Equal Access Report (2017) 13.
[68] Carrim N "Approaches to education quality in South Africa" in Sayed *et al* (eds) *The search for quality education in post-apartheid South Africa* (2013) 39.
[69] Singh Report on Quality Education (2012) 5.
[70] Ibid 6. The conceptual basis for assessing quality in terms of the acquisition of knowledge and skills is found in the definition of "basic learning needs." The latter concept is defined in the World Declaration on Education for All of 1990 and was confirmed at the World Education Forum in 2000. Article 1(1) of the World Declaration states: "Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning."
[71] Singh ibid.

on the "international normative framework"[72], the "work of human rights treaty bodies"[73] and "international political commitments"[74], he has developed a conceptual framework that measures whether quality education is in place. Singh sums up his framework for quality education as:

> (i) a minimum level of student acquisition of knowledge, values, skills and competencies; (ii) adequate school infrastructure, facilities and environment; (iii) a well-qualified teaching force; (iv) a school that is open to the participation of all, particularly students, their parents and the community.[75]

Singh's framework seems to find favour in South African education policy. "Action plan to 2019: Towards the realisation of schooling 2030"[76] can be regarded as the Education Ministry's

[72] In terms of the Universal Declaration of Human Rights ("UDHR"), the ICESCR and the CRC, "education should be aimed at the full development of the human personality and the sense of its dignity." See specifically article 26 of the UDHR, article 13 of the ICESCR and article 29 of the CRC.
The Convention against Discrimination in Education (1960) explicitly refers "…to the obligation to ensure *quality* in education." In terms of article 1, paragraph 2 of the Convention, "the term 'education' refers to all types and levels of education, and includes access to education, the standard and *quality* of education, and the conditions under which it is given."
Article 10(b) of the Convention on the Elimination of All Forms of Discrimination against Women states that "[s]tate parties …have an obligation to ensure, on the basis of equality of men and women, access to education at all levels and in all its forms, including 'access to the same curricula, the same examinations, teaching staff with qualifications of the *same standard* and school premises and equipment of the *same quality*.'
Finally,"[t]he UNESCO-ILO Recommendation concerning the Status of Teachers (1966) provides a comprehensive normative framework on teachers' status, including their responsibilities, career advancement opportunities, security of tenure and conditions of service."
See Singh Report on Quality Education (2012) 7-8.
[73] The bodies referred to by Singh are the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child. Referring to the right to education in terms of article 13 of the ICESCR, the CESCR, states that "education offered must be adequate in *quality*, relevant to the child and must promote the realisation of the child's other rights." Both "treaty bodies have expressed concern about under-resourcing of schools, class sizes and teacher/pupil ratios, proportion of untrained teachers and their impact on the *quality* of education received." These bodies have also accepted …students' learning outcomes, such as low literacy rates, as indicative of limitations of the *quality* of education provided." See Singh Report on Quality Education (2012) 8.
[74] The commitments Singh refers to here stem from the World Declaration on Education for All adopted in Jomtien, Thailand in 1990, which has been followed up by "Dakar Framework for Action, adopted at the World Education Forum in Dakar, in April 2000." Both the Declaration and Framework acknowledge "…*quality* of education as a crucial component in the global movement to achieve Education for All. The Dakar Framework explicitly affirms that *quality* is at the heart of education." In terms of Goal 2 of the Framework, states should aim "…to provide primary education of good *quality*, while Goal 6 states that all aspects of education quality should be improved 'so that recognised and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.' See Singh Report on Quality Education (2012) 7-8.
[75] Singh ibid 7.
[76] NDBE "Action plan to 2019 :Towards the realisation of schooling 2030, Taking forward South Africa's National Development Plan 2030" (2015). ("Action Plan (2019)").

blueprint for public schooling. It sets out the various goals to be achieved by the year 2030 in order to achieve the vision of a "post-apartheid schooling system."[77] The core of this vision is the establishment of an education system committed to providing "*quality schooling*" to every young South African.[78] The Action Plan lists various features that are required to attain quality schooling, including access to schools and attendance of all learners, competent teachers, learning and teaching materials "in abundance" and of "high quality" and school buildings and facilities that are "spacious, functional, safe and well-maintained."[79] Kishore Singh's "Normative action for quality education" is adopted as a framework for understanding quality education in this thesis.

3.3.2.1 The link between quality education and inequality in terms of Singh's holistic framework

(a) Academic output

The first indicator of quality is "a minimum level of student acquisition of knowledge, values, skills and competencies".[80] Nic Spaull has done extensive research on learner performance in South Africa.[81] He has analysed students' results in national and international tests and has come to the following conclusions: Firstly, the overwhelming majority of primary school learners fall considerably below the standard literacy and numeracy requirements of the national curriculum.[82] Secondly, in international tests, South Africa consistently receives the lowest average score among developing countries and "when the sample is limited to only Sub-Saharan countries, performs worse than many other countries which are considerably poorer, such as Kenya, Swaziland and Tanzania."[83]

[77] Action Plan (2019) 9.
[78] Ibid. Italics my emphasis.
[79] Ibid 9-10.
[80] Singh Report on Quality Education (2012) 7.
[81] See for example Spaull N and Kotze J "Starting behind and staying behind in South Africa: The case of insurmountable learning deficits in mathematics" (2015) 41 *International Journal of Educational Development* 12-24; Spaull N and Taylor S "Measuring access to learning over a period of increased access to schooling: The case of Southern and Eastern Africa since 2000" (2015) 41 *International Journal of Educational Development* 47-59; Spaull N "Poverty & privilege: Primary school inequality in South Africa" (2013) 33 *International Journal of Educational Development* 436-447. See also SAHRC Poverty Report (2014) for which Spaull was a contributor.
[82] Spaul (2014) Doctoral thesis 23.
[83] In 2016, 50 countries, including South Africa, participated in the "Progress in International Reading Literacy Study" (PIRLS). This study, "conducted every five years, assesses the reading achievement of young students in their fourth year of schooling-an important transition point in their development as readers." South Africa's performance has been dismal, to say the least. South African Grade 4 learners have performed the worst out of all the countries participating in the study. An astounding 78% of our learners were unable to read for meaning.

However, upon closer analysis of these tests, a clear trend emerges: A minority of learners (amounting to approximately 25%) perform sufficiently well in these local and international assessments while the majority of students (more or less 75%) perform extremely poor.[84] The latter group of learners are primarily from historically black schools while the former group is mostly from historically advantaged schools.[85] In Spaull's own words:

> For whatever reason, historically disadvantaged schools remain dysfunctional and unable to produce student learning, while historically advantaged schools remain functional and able to impart cognitive skills; The constituencies of these two school systems are vastly different with the historically Black schools still being racially homogenous (i.e. Black, despite the abolition of racial segregation) and largely poor; while the historically White and Indian schools serve a

Russia and Singapore scored the highest in the assessment. Countries with a similar socio-economic background to South Africa, such as Brazil and India selected not to enroll their learners for the assessment. However, Chili, a middle-income country (and therefore comparable to South Africa, to some extent), outperformed South Africa by far with only 13% of its children unable to read for meaning.
See TIMSS & PIRLS International Study Center, Lynch School of Education, Boston College and International Association for the Evaluation of Educational Achievement (IEA), "PIRLS International Results in Reading" xi, 55 available at http://pirls2016.org/download-center/ (accessed 11 July 2019).
South African learners have participated in numerous national and international assessments focusing on literacy and numeracy. Besides PIRLS in 2016, 2011 and 2006, South African learners have also participated in the following international assessments: "Southern and Eastern African Consortium for Monitoring Educational Quality" (SACMEQ) in 2000 and 2007 for grade 6 and "Trends in International Mathematics and Science Study" (TIMSS) in 2003 and 2011 for grades 8 and 9. Locally, the most significant assessments have included the "Systemic Evaluations" in 2001 and 2007 for grade 3; the "National School Effectiveness Study" (NSES) from 2007 to 2009 for grades 3-5 and the "Annual National Assessments" (ANA) from 2011to 2014 for grades 1 to 6 and grade 9. The ANA's has since been replaced by the "National Integrated Assessment Framework" (NIAF). https://www.education.gov.za/Newsroom/MediaReleases/tabid/347/ctl/Details/mid/5986/ItemID/4387/Default.aspx (accessed 11 July 2019). See also Spaull (2014) Doctoral thesis 22-33.
For an up to date account of the academic performance of all South African learners, see Jansen and Spaull (eds) *South African schooling: The enigma of inequality* (2019).

[84] Fleisch B *Primary education in crisis: Why South African schoolchildren underachieve in reading and mathematics* (2008) as cited in Spaull (2014) Doctoral thesis 26. Spaull explains that in the "wealthiest quartile (25%) of students seem to attend vastly differing schools than the remaining three quartiles (75%). In top quartile schools ,students are far more likely to have their own textbook, receive homework frequently, experience less teacher absenteeism, repeat fewer grades, live in urban areas, speak English more frequently at home, and have more educated parents. All of these factors are likely to contribute to the better performance of this school sub-system….[T]he poorest three quartiles all have similar levels of grade repetition, teacher absenteeism, and textbook access."
For a very recent account of the difference in academic outcome between learners from former white as opposed to learners from former black schools, see Jansen and Spaull (eds) *South African schooling: The enigma of inequality* (2019).

[85] Spaull (2014) Doctoral thesis 26-28.

> more racially diverse constituency, although almost all of these students are from middle and upper class backgrounds, irrespective of race.[86]

Bloch does not agree entirely with Spaull's statistics. He argues that roughly 20% of South African learners perform well, of whom 10% are from former Model C schools and 10% from excellent historically disadvantaged schools.[87] However, this does not detract from the fact that a birfurcated education structure along the lines of race and class does exist in South Africa. As indicated above, although former Model C schools have now become racially mixed, the learners at these schools (irrespective of their racial background) are predominantly from the middle and upper backgrounds. However, former black schools have remained predominantly racially homogenous and mainly impoverished.

Yamauchi reasons that apartheid policies of spatial segregation have resulted in historically advantaged schools being geographically inaccessible to black learners.[88] However, even if the problem of physical accessibility can be solved, the larger challenge, in my view, is economic inaccessibility. The latter impediment is tied to the particular fee structure in operation in the South African education system. Before I examine the particular fee model applicable to South African basic education, it is imperative to explore the historical context which frames the school funding system. The first political period of the new post-apartheid government (1994-1999) reflected a shift from apartheid ideology characterised by "minority rule, balkanised, racially defined and resourced organisations, institutions and governance" to a new democratic era embodied by non-racialism [and a focus on equality].[89] During this initial period of democracy, the government focused on the creation of new institutions, organisations and governance as well as "new resourcing patterns."[90] This is reflected in the numerous policy documents, norms and standards, legislation and regulations developed during this time.[91]

86 Ibid.

87 Bloch *The toxic mix* (2009) 59. Bloch does not make it clear how he has reached this specific conclusion. In the foreword he indicates that the data in this book relies heavily on certain studies, including Bloch G *et al* (eds) *Investment choices for South African education* (Johannesburg: Wits University Press 2008). However, for a more recent, contextualised account of the distinction in academic outcome between learners from former white as opposed to learners from former black schools, see Jansen and Spaull (eds) *South African schooling: The enigma of inequality* (2019).

88 Yamauchi F "School quality, clustering and government subsidy in post-apartheid South Africa" (2011) 30 *Econ. Educ. Rev.* as cited in Spaull (2014) Doctoral thesis 28-29.

89 Rensburg I "Qualifications, Curriculum, Assessment and Quality Improvement: Laying the Foundations for Lifelong Learning" (Report on the National Policy Review Conference on Education and Training) (1998) 50.

90 Ibid.

91 Ibid.

White Paper 1,[92] released in 1995 and the government's maiden policy document on education, as well as White Paper 2,[93] adopted one year later in 1996, were conceived within the context described above.[94] In terms of White Paper 1, the government was ordered to "redress educational inequalities among those sections of our people who have suffered particular disadvantages" and uphold the principle of "equity" in order for all citizens to have "the same quality of opportunities."[95] White Paper 1 is regarded as the document that set out the fundamental policy framework within which the first post-apartheid public basic education system would be conceived and has become a primary reference point for the development of subsequent education policies and legislation.[96] White Paper 2 sets out policy on the organisation, governance and funding of schools.

According to White Paper 1, the post-apartheid state initially committed itself to the provision of free, compulsory general education and parents were merely encouraged to make voluntary contributions to supplement governmental funding.[97] However, White Paper 2 proposed the introduction of partially state funded education in terms of which school funding would be borne by the state and those parents who could afford to pay school fees.[98] The second White Paper clearly represents a shift from the initial commitment to provide free education to the more restrained approach that permitted schools to raise additional funding through the charging of school fees.[99]

School funding is legislated in terms of a range of legislation[100], including the Schools Act which sets out "uniform norms and standards" for the "organisation, governance and funding

92 NDBE: "White Paper on Education and Training" (1995) (Notice 196).

93 NDBE: "White Paper 2: The organisation, governance and funding of schools" (1996) (Notice 130).

94 See Sayed Y "Education decentralisation in South Africa: Equity and participation in the governance of schools" (Background paper prepared for the Education for All Global Monitoring Report 2009 :*Overcoming Inequality: Why Governance Matters*) (2008) for a detailed account of the various education policy documents and legislation adopted during the first period of democracy in South Africa and beyond.

95 White Paper 1 (1995) Chapter 4, paras 7 and 8.

96 NDBE "Strategic Plan 2015-2020" 11. The Strategic Plan also states that White Paper 1 "adopted as its point of departure the 1994 education policy framework of the African National Congress."

97 White Paper 1(1995) Part 1, para 1, Chapter 13. See also Sayed "An overview of education policy change in post-apartheid South Africa" (2013) 13.

98 White Paper 2, section 5.1.

99 Sayed "An overview of education policy change in post-apartheid South Africa" (2013) 14.

100 Other legislation applicable to school funding include the National Education Policy Act 27 of 1996, Employment Educators Act 76 of 1998 and the Education Laws Amendment Act 24 of 2005.
See McLaren D "Funding basic education" (2017) 56 for an explanation of how these acts regulate school funding in South Africa.

of schools."[101] The Schools Act also regulates the role of school governing bodies in school funding and the rules pertaining to school fee policies.[102] The National Norms and Standards for School Funding[103], adopted in terms of the Schools Act[104], standardise the processes to be implemented by provincial education departments in "…determining resource allocations" to the schools in the respective provinces.[105] The Norms and Standards for School Funding regulate three categories of funding.[106] Firstly, the lion's share of funding is allocated to the salaries of teachers.[107] The second category of funding is spent on school infrastructure.[108] The final category is the non-personnel, non-capital expenditure (NPNC), otherwise known as "school allocation money."[109] This disbursement is aimed at the procuring of equipment and consumables required for teaching and assessment, including textbooks, stationary, furniture, computers, photocopiers, electricity, water, *et cetera*.[110] Schools pay for these expenses from their NPNC allocation and from money collected through the charging of school fees and the arranging of fund raising activities.[111]

In 2005, the Schools Act was amended to introduce a quintile system.[112] In terms of this system, schools are categorised into 5 categories, ranging from the poorest schools (quintile 1) to the least poor school (quintile 5). These poverty rankings are determined by the relative wealth of the community surrounding the school. Schools in quintiles 1-3 have been declared "no-fee"

101 Preamble to the Schools Act.
102 McLaren "Funding basic education" (2017) 56.
Chapter 4 of the Schools Act governs the role of school governing bodies within the public education system. Chapter 5 regulates the funding of public schools.
103 Government Gazette 19347, General Notice 2362 as amended by South African Schools Act: Amended National Norms and Standards for School Funding (Government Gazette 29179, General Notice 869) (31 August 2006) ("Norms and Standards for School Funding").
104 Section 35(1) of the Schools Act provides: "…[T]he Minister [of Basic Education] must determine national quintiles for public schools and national norms and standards for school funding after consultation with the Council of Education Ministers and the Minister of Finance."
105 McLaren "Funding basic education" (2017) 56.
106 Norms and Standards for School Funding 24.
107 Ibid.
108 Social Surveys and the Centre for Applied Legal Studies, University of the Witwatersrand "National survey on barriers of access to education in South Africa: Baseline review and conceptual framework document" (September 2006) 24.("Barriers Survey (2006)").
109 Ibid 25.
110 Ibid 25-26.
111 Barriers Survey (2006) 25. Section 39(1) of the Schools Act provides: "School fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the annual budget meeting of the school."
112 The Schools Act was amended in terms of the Education Laws Amendment Act 24 of 2005.

schools and are therefore not allowed to charge school fees.[113] The introduction of no-fee schools has seen a sharp increase in learners who do not pay schools fees. In 2006, the percentage of non-paying learners was a mere 3%. In 2014, a staggering 65% was exempted from paying school fees. In terms of provincial statistics, Limpopo had 92% of learners in no -fee schools, whilst the Western Cape had 41% of non-paying learners in the same year.[114] Schools in quintiles 4 and 5 are allowed to charge fees.[115] Section 39(1) and (2) of the Schools Act provides:

> …[S]chool fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the [annual budget meeting]. [This resolution] must provide for: (a) the amount of fees to be charged...

A discretion is therefore conferred on parents to determine whether school fees will be charged as well as the exact amount to be charged. Government explains the reasoning behind this as follows:

> The [Schools Act] imposes a responsibility on all public school governing bodies to do their utmost to improve the quality of education in their schools by raising additional resources to supplement those which the state provides from public funds (section 36). All parents, but particularly those who are less poor or who have good incomes, are thereby encouraged to increase their own direct financial and other contributions to the quality of their children's education in public schools. The Act does not interfere unreasonably with parents' discretion under the law as to how to spend their own resources on their children's education.[116]

The quintile system is not without problems. Alley and McLaren point out that a significant amount of learners nationally are accommodated in schools that are not receiving the minimum funding owed to them by government.[117] This is a serious concern since schools in quintiles 1, 2 and 3 are completely dependent on government for funding.[118] Although poor schools

[113] Norms and Standards for School Funding, para 109. Alley N and McLaren D "Fees are an issue at school too, not just university" (2016) https://www.groundup.org.za/article/fees-are-issue-school-too-not-just-university/ (accessed 26 November 2019). See also McLaren "Funding basic education"(2017) 63-73.
[114] Ibid.
[115] Norms and Standards for School Funding, para 156.
[116] Ibid, para 41.
[117] Alley and McLaren "Fees are an issue at school too, not just university" (2016) https://www.groundup.org.za/article/fees-are-issue-school-too-not-just-university/ (accessed 26 November 2019).
[118] Ibid.

receive a larger amount in school allocation money than advantaged schools, the parent communities serving the former schools are not financially able to increase the amount of fees charged if there is a shortfall in the state funding.[119] However, schools serving affluent communities are in a position to increase their budgets despite receiving a lesser allocation from government.[120] Given the discretion provided to parents in terms of the Schools Act, the amount of school fees to be charged depends on the economic status of the parent community the school serves.[121] Thus, the more affluent the parent community, the higher the school fees that will be charged, and *vice versa*.[122] A further concern with the quintile system is its classification process. The classification of schools into quintiles depends on the socio-economic conditions of the surrounding community.[123] In terms of the Norms and Standards for School Funding, the provincial education departments must assign to each school a poverty score that will enable them to sort schools from poorest to least poor. The determination of this score is based on the relative poverty of the community around the school, which in turn depends on the individual or household advantage or disadvantage with regard to income, wealth and/or level of education. The poverty score should be based on data collected from the national Census conducted by Statistics South Africa. Provincial departments are prohibited from relying on data provided by schools themselves.[124] Thus, the actual circumstances of the learners attending a school are not taken into account. This may lead to the incorrect categorisation of a school considering the fact that poor areas may be bordering wealthier areas.[125] The incorrect quintile ranking of a school may therefore have grave consequences for a school that is mostly inhabited by learners from a poor, disadvantaged background since these schools are unable to rely on parental contributions to supplement a deficient school budget.

119 Arendse L "The school funding system and its discriminatory impact on marginalised learners" (2011)15 *Law, Democracy and Development* 350-351.
120 Ibid.
121 Ibid.
122 Ibid.
123 Norms and Standards for School Funding, para 101.
124 Ibid.
125 Alley and McLaren https://projectrise.news24.com/fees-issue-school-not-just-university/ (accessed 11 July 2019).

(b) Education provisioning

Singh refers to "adequate school infrastructure, facilities and the school environment" as an indicator of quality education.[126] This description is rather broad and could therefore encompass "education provisioning" as a whole. Education provisioning refers to "provisioning for the various educational inputs…" that is required for the realisation of a quality education.[127] Provisioning is categorised as follows:

> (i)infrastructural provisioning, which includes the building of schools, classrooms and the provisioning of water, sanitation and services; (ii) personnel expenditure, which includes educator salaries; and (iii) non-personnel recurrent expenditure, which includes capital equipment and consumables used inside schools for schools to function properly, such as textbooks, stationery and computers.[128]

In addition, scholar transport is also an essential input that is necessary for the achievement of quality education.[129]

(i) Infrastructure

The inadequate state of infrastructure in former black schools was lamented by the Constitutional Court in *Juma Musjid:*

> The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation, even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.[130]

In *Mazdodzo and Others v Minister of Basic Education and Others*[131], the court held that the state's obligation to provide basic education encompasses more than the mere placement of

[126] Singh Report on Quality Education (2012) 7.
[127] Veriava F "Basic education provisioning" in Veriava *et al* (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 220.
[128] Ibid 227.
[129] Joseph S and Carpenter J "Scholar transport" in Veriava *et al* (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 274-291.
[130] *Juma Musjid CC* para 42.
[131] (2014) 2 All SA 339 (ECM) ("*Madzodzo*").

learners at schools.[132] It includes the provision of the necessary resources, including "schools, classrooms, teachers, teaching materials and appropriate facilities for learners."[133] Although progress in addressing infrastructural problems has been made by the state[134], there are still numerous schools in South Africa lacking basic facilities. The latest NEIMS report[135], for example, indicates that more than 80% of ordinary operational schools lack laboratories[136] and more than 70% of schools are without libraries.[137] On closer inspection, a clear pattern is revealed, namely that the worst problems related to infrastructure are recorded in the former Bantustans.[138] For instance, in Limpopo, almost 84% of schools lack libraries as opposed to 37% in the Western Cape.[139] The Eastern Cape is also home to the majority of mud schools in South Africa.[140] These schools are literally constructed from mud and have been at the centre of the so-called "mud schools case."[141] Ann Skelton explains the perniciousness of mud schools:

> Mud schools are, quite literally, schools in which the buildings are made of mud. They may consist of clusters of round mud huts, or in some cases are rectangular classrooms. While mud may not be the worst form of building material, the problem is that the mud schools are old and dilapidated. The roofs, often constructed from corrugated iron, have holes that have rusted through, causing children and classroom equipment to get wet when it rains. Books cannot be left in the classrooms, and when it rains, children simply cannot attend school. Mud schools also lack electricity, running water and sanitation, and most have old and insufficient classroom furniture.[142]

Litigation in the "mud schools case" was pursued after it became known that a significant portion of the provincial budget reserved for building schools was not being expended and all

132 *Madzodzo* para 20.
133 *Madzodzo* para 20.
134 NDBE "A 25 year Review of Progress in the Basic Education Sector: Executive Summary" (2019).
135 NDBE "National Education Infrastructure Management System Report (2019) ("NEIMS 2019 Report'")
136 Table 8 of NEIMS 2019 Report.
137 Ibid.
138 Draga L "Infrastructure and equipment" in Veriava *et al Basic education rights handbook: Education rights in South Africa* (2017) 238. See Chapter 2, footnote 150 for an explanation of the term "Bantustans".
139 Table 8 of NEIMS 2019 Report.
140 Skelton Equal Access Report (2017) 53.
141 *Centre for Child Law and 7 others v Government of the Eastern Cape Province and others*, Eastern Cape High Court, Bhisho, case no 504/10.
142 Skelton A "Leveraging funds for school infrastructure: The South African 'mud schools' case study" (2014) 39 *International Journal of Educational Development* 59-63.

programs to replace unsafe school structures had been discontinued.[143] The case was settled out of court in February 2011. The settlement agreement was a resounding success as the state agreed to provide "temporary and permanent infrastructure relief" to the affected schools in terms of stipulated time frames.[144] The state also made the significant commitment to eradicate roughly 445 unsuitable "school structures" within a three year period, coupled with an investment of R8 billion and "a plan of action."[145] The settlement has since morphed into a government program called the Accelerated Schools Infrastructure Delivery Initiative (ASIDI).[146] The National Department of Basic Education describes the objective of ASIDI as "[eradicating] the Basic Safety Norms backlog in schools without water, sanitation and electricity and to replace those schools constructed from inappropriate material (mud, planks, asbestos) to contribute towards levels of optimum learning and teaching."[147] According to the latest progress report provided by the NDBE, some strides have been made towards meeting the goals conceived in terms of the ASIDI programme.[148] However, a backlog in school infrastructure remains. In this regard, many schools built from inappropriate materials require replacement and significant numbers of schools still operate without basic resources such as water, electricity and sanitation.[149]

143 Ibid.
144 Ibid.
145 Skelton Equal Access Report (2017) 53.
146 Ibid.
147 https://www.education.gov.za/Programmes/ASIDI.aspx (accessed 10 May 2019).
148 In terms of Sub-programme 1 of ASIDI, 483 schools built from inappropriate materials initially required replacement. By the 2019/2020 financial year, 237 new schools have been built. In terms of Sub-programme 2, 939 schools that previously did not have access to sanitation must be supplied with at least a basic level of sanitation. By the 2019/2020 financial year, 861 schools have been provided with sanitation. In terms of Sub-programme 3, 932 schools that are not serviced must receive access to electrical energy supply. By the 2019/2020 financial year, only 372 schools have been supplied with electricity. In terms of Sub-programme 4, 1145 schools that did not have access to water must be provided with basic water supply. By the 2019/2020 financial year, 1002 schools have been supplied with water. See https://www.education.gov.za/Programmes/ASIDI.aspx (accessed 2 April 2020).
149 Based on the statistics provided in the footnote above, the following goals have to be met in order for the state to reach its targets in terms of ASIDI: 246 new schools still needs to be built; 78 schools requires sanitation; 560 schools still lack access to an electrical supply and 143 schools require a water supply. The state has to be commended for the good progress it has made in building new schools and providing sanitation. However, the significant numbers of schools without an electricity and water supply remain a great cause for concern. See https://www.education.gov.za/Programmes/ASIDI.aspx (accessed 2 April 2020).

(ii) Textbooks

The lack of textbooks is also another concern in the provision of quality education.[150] Spaull describes the importance of textbooks:

> Textbooks are a fundamental resource to both teachers and learners. Teachers can use textbooks for lesson-planning purposes, as a source of exercises and examples, and also as a measure of curriculum coverage. Learners can use textbooks to "read-ahead" if they have sufficiently mastered the current topic, preventing gifted learners from being held back. Textbooks can, to a certain extent, also mitigate the effect of a bad teacher since they facilitate independent learning.[151]

In *Minister of Basic Education and Others v Basic Education for All and Others*[152], the SCA confirmed that the right to education includes the right of every learner to a textbook in each learning area.[153] The court emphasised the significance of textbooks as not only ensuring that cognitive development of learners take place but also as guaranteeing "that constitutional values are instilled."[154] In *Tripartite Steering Committee v Minister of Basic Education*[155], the court held that the right to education "…is meaningless without ….textbooks from which to learn…"[156] Furthermore, the National Department of Basic Education has classified textbooks as "central to teaching the curriculum."[157] However, the post-apartheid education landscape has been plagued by a range of textbook related problems in disadvantaged schools. In *Minister of Basic Education and Others v Basic Education for All and Others* mentioned above, the

150 The NDBE categorises textbooks as part of the broader Learner Teacher Support Materials (LTSM). The "Draft National Policy for the Provision and Management of Learning and Teaching Support Material" distinguishes between core LTSM and supplementary LTSM. The core LTSM "refers to the category of LTSM that is central to teaching the entire curriculum of a subject for a Grade. Generally, this would comprise a textbook/learner book, workbook and teacher guide." Supplementary LTSM "refers to LTSM in addition to the Core LTSM [and] is generally used to enhance a specific part of the curriculum. Examples include a geography atlas, dictionaries, Science, Technology, Mathematics, Biology apparatus, electronic/technical equipment, etc." See NDBE "Draft National Policy for the Provision and Management of Learning and Teaching Support Material" (2014) 3. ("Draft LTSM Policy").

151 Spaull N "Equity & efficiency in South African primary schools :A preliminary analysis of SACMEQ III South Africa" (2012) Masters of Commerce thesis (Stellenbosch University) 66.("Spaull (2012) Masters of Commerce thesis").

152 2016 (4) SA 63 (SCA).

153 *Minister of Basic Education and Others v Basic Education for All and Others* para 50.

154 *Minister of Basic Education and Others v Basic Education for All and Others* para 2.

155 *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG).

156 *Tripartite Steering Committee and Another v Minister of Basic Education and Others* para 18.

157 Draft LTSM Policy (2014) 3.

affected parties were from "poor communities and…overwhelmingly, if not exclusively, black learners" who sought legal recourse for the state's failure to deliver textbooks to their schools.[158] A lack of textbooks creates multiple challenges in a school. Teachers are forced to borrow textbooks from neighboring schools and write content on a blackboard.[159] Logically, it is impossible to copy all the relevant content on a blackboard and this becomes an "unduly burdensome" task on teachers.[160] Some learners are also unable to see on a blackboard and are denied the benefit of reading the actual content in their own textbook.[161] Furthermore, learners are unable to take textbooks home which means they are unable to "complete their homework, prepare for lessons or consolidate what they learn in class."[162] Nikki Stein explains how school infrastructure is interconnected with learners' inability to enjoy their right to a textbook.[163] She maintains that textbook procurement, delivery and storage are all affected by school infrastructure.[164] Many schools in rural areas are not accessible because of the poor condition of roads leading to them, and as a result trucks may not be able to deliver textbooks.[165] Furthermore, schools lacking the necessary infrastructure often use makeshift structures to store textbooks.[166] In Limpopo, for example, a significant amount of textbooks stored in such structures was destroyed by floods in 2013.[167] Another factor to be taken into consideration is the method required by the NDBE for reporting shortages of textbooks which requires that schools call a hotline or fax or email forms to the department to indicate shortages.[168] Many historically disadvantaged schools in Limpopo, for example, lack these basic communication structures and are therefore unable to report shortages.[169]

158 *Minister of Basic Education and Others v Basic Education for All and Others* 2016 (4) SA 63 (SCA) at para 3. This case forms part of a cluster of cases concerning the state's failure to deliver textbooks to affected schools in Limpopo and will be discussed in broader detail in Chapter 6.
159 *Minister of Basic Education and Others v Basic Education for All and Others* para 19.
160 *Minister of Basic Education and Others v Basic Education for All and Others* para 19.
161 *Minister of Basic Education and Others v Basic Education for All and Others* para 19.
162 *Minister of Basic Education and Others v Basic Education for All and Others* para 19.
163 Stein N "Textbooks" in Veriava *et al Basic education rights handbook: Education rights in South Africa* (2017) 272.
164 Ibid.
165 Stein ibid. See also Metcalfe M (2012) "Verification of Textbook Deliveries in Limpopo" (Unpublished report presented to Section 27 and the Department of Basic Education).
166 Stein ibid.
167 Stein ibid. See also Chisholm, L "The textbook saga and corruption in education" (2013) 19(1) *South African Review of Education* 7-22.
168 Ibid.
169 Ibid. According the latest NEIMS Report, 24 schools in Limpopo, 73 schools in the Eastern Cape and 51 schools in Kwazulu-Natal are without communication systems. See Table 11of NEIMS 2019 Report.

(iii) Scholar Transport

Scholar transport is an important factor in assessing the provision of quality education. In *Juma Musjid* , the Constitutional Court held that access to school is an important component of the right to education.[170] In *Tripartite Steering Committee v Minister of Basic Education*, Plasket J held:

> The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, textbooks from which to learn, and *transport to and from school at State expense in appropriate cases.*[171]

However, millions of South African learners have no choice but to walk long distances to and from school each day.[172] Many of these learners are exposed to physical assault, rape, dangerous weather conditions and "long, tiring treks" to school, all of which may have a detrimental impact on their academic performance.[173] Recently, learners in the Western Cape town of Worcester protested against the lack of transport for rural learners.[174] Some of the learners stay as much as 40 km away from the nearest school and are forced to hitch-hike to attend school.[175] These learners are mostly the children of impoverished (black) farmworkers who are unable to afford private transport.[176] As a result, many learners eventually drop out of school because of the burdensome emotional, financial and physical toll that is placed on them to access school.[177] One of the roots of the scholar transport problem is found in apartheid spatial planning which had the effect of positioning black South Africans in remote areas where they had "the least access to resources".[178] Samaai puts it succinctly:

170 *Juma Musjid CC* para 43.
171 *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG) para 18. Italics my emphasis.
172 Joseph and Carpenter "Scholar transport"(2017) 276.
173 Ibid 276-279.
174Maregele B "Learners march in Worcester demanding scholar transport" (5 October 2018) https://www.groundup.org.za/article/children-farms-struggle-get-school/ (accessed 5 May 2019).
175 Ibid.
176 Ibid.
177 Ibid.
178 Samaai S "Constitutional Court farm eviction ruling reinforces apartheid spatial violence" (2017) https://www.dailymaverick.co.za/opinionista/2017-07-26-constitutional-court-farm-eviction-ruling-reinforces-apartheid-spatial-violence/#.WyEAasfBZ-U. (accessed 11 July 2019).

> The spatial organisation of the apartheid city was such that blacks, at the periphery of the city had the least access to resources, whilst White people, at the centre of the city not only had access to the city's resources, but also controlled them. As a result, blacks were far from job opportunities, schools and hospitals, and would often have to commute long distances in order to access these resources.[179]

Today, many learners still encounter enormous difficulty to access schools due to the long distances they have to travel to the classroom.[180] In 2015, the National Learner Transport Policy was promulgated.[181] In terms of the policy, the principal of a school, after consultation with the school governing body, has the duty to identify learners who will benefit from subsidised scholar transport services. The policy applies to learners from grades R to 12 and several conditions have to be met in order for learners to benefit from it. First, learners must be classified as "needy". Second, transport will only be subsidised to the "nearest appropriate school" and not to a parent's school of choice.[182] Third, learners with disabilities are prioritised, taking into account the "nature of the disability". Fourth, learners in primary school who are required to walk long distances to school, are prioritised. Finally, learner transport will not be available in areas where public transport services are in operation.[183] Joseph and Carpenter commend the state for prioritising learners with disabilities and primary school learners who have to walk long distances in terms of the Learner Transport Policy.[184] However, they do point to several shortcomings of the policy. Firstly, the criteria stipulate that beneficiaries must be "needy learners". However, "needy" is not defined in the policy.[185] Secondly, the policy makes it clear that learner transport will not be provided where public transport is available. This is shortsighted in view of the fact that learners may come from families for whom public transport is an unaffordable expense.[186] Thirdly, Equal Education reports that while many principals apply for scholar transport, the Department of Basic Education does not respond accordingly.

179 Ibid.
180 Rogan MJ "Dilemmas in Learner Transport: An Impact Evaluation of a School Transport Intervention in the Ilembe District, KwaZulu-Natal" (2006), Master of Development Studies Dissertation (University of KwaZulu-Natal) 50-84.
181 https://pmg.org.za/committee-meeting/25934/ (accessed 11 July 2019).
182 In terms of the Transport Policy, "parental choice means when parents prefer to enroll their child at a school other than the nearest suitable school."
183 National Department of Basic Education & Department of Transport "National Learner Transport Policy" (2015) 22-23.
184 Joseph and Carpenter "Scholar transport" (2017) 281.
185 Ibid 283.
186 Ibid.

In fact, the applications from these principals are sometimes not even acknowledged by the Department.[187]

(c) A well-qualified, motivated and well looked after teaching force

The third indicator of educational quality is a "well-qualified, motivated and well-looked after teaching force."[188]

(i) Teacher qualifications

The first democratic regime inherited an inequitable teaching system skewed along racial lines.[189] The lion's share of teachers (predominantly black educators) were trained at state-owned teacher colleges whereas the minority of teachers (predominantly white teachers) were educated at universities.[190] Wilmot and Schäfer write that the training of white and black teachers differed significantly in terms of its nature and quality to the extent that white teachers received an education which "emphasised a robust discipline knowledge base and academic skills" whereas training for black teachers was focused on the "development of professional skills and teaching practices".[191]

The post-apartheid state adopted various interventions to improve the quality of teacher qualifications and to transform the higher education sector as a whole.[192] The period between 1994 and 1999 was characterised by three programs aimed at securing properly qualified teachers.[193] The first initiative did not focus on the training of new teachers, but rather on the

[187] Ibid.

[188] Singh Report on Quality Education (2012) 6.

[189] Schäfer M and Wilmot S "Teacher education in post-apartheid South Africa: Navigating a way through competing state and global imperatives for change"(2012) 42 *Prospects* 41-46. Schäfer and Wilmot, on page 46 describe the racially fragmented system inherited by the post-apartheid government:
"When the new government took over in 1994, it faced an enormous task: dismantling an inequitable, structurally inefficient, and geographically and racially fragmented apartheid teacher education system which consisted of over 281 institutions providing various forms of teacher training. It included more than 100 colleges of education. Within South Africa, 18 of these were for Whites, 16 for Coloureds, 2 for Indians, and 13 for Blacks. A further 77 colleges were for Blacks residing in the nine 'homelands' or 'Bantustans' by the apartheid government. Alongside the various colleges of education, 36 universities also offered teacher training which was mostly discipline-based and post-graduate, focused on producing secondary school teachers; many also offered a four-year integrated undergraduate degree such as a Bachelor of Primary Education or Bachelor of Pedagogics. Whereas universities were mainly responsible for producing secondary school teachers, colleges of education were responsible for producing primary school teachers."

[190] Ibid 42.

[191] Ibid 46-47.

[192] Schäfer and Wilmot (2012) 42 *Prospects* 47.

[193] Chisholm (2012) *Storia dell donne* 93.

rationalisation, redeployment and redistribution of teachers in the system.[194] A significant number of qualified teachers, in particular, were not keen to be redeployed and chose to rather leave the teaching profession.[195]

The second initiative focused on teacher training. The government, taking into account international developments and the inadequate standard of training at teacher training colleges under apartheid, set in motion the process of incorporating the education of teachers under the auspices of higher education.[196] All teacher colleges were incorporated into the higher education sector which meant that "universities became the custodians and drivers of all teacher education in South Africa."[197] This resulted in the closing down of various teacher colleges around the country.[198] Although the cutback of higher education institutions (HEIs) was viewed as a prerequisite to streamline the system, various commentators argue that it led to a compromised status for education faculties in universities.[199] Teacher education was now viewed as the "step-child of higher education rather than a high priority academic field in its own right."[200]

The third program shifted the emphasis to the implementation of bursaries to make the teaching profession more attractive to new, young educators.[201] At present, the Fundsa Lushaka government bursary scheme is available to students, enabling them to obtain a qualification in teaching.[202] Holders of the bursary are obliged to teach at a public school for a number of years equal to that for which they were sponsored by the bursary scheme, and are unable to select a particular school of their choice.[203] Under the previous dispensation, the majority of teaching students could obtain a teacher qualification by completing a two or three year diploma, now students are required to complete a four year Bachelor of Education degree or "top up an appropriate bachelor's degree with a one-year Postgraduate Certificate in Education (PGCE)" in order to qualify as teachers.[204] Setting a bachelor's degree as a "minimum entry requirement"

194 Ibid.
195 Jansen J and Taylor N "Educational change in South Africa 1994-2003: Case studies in large-scale education reform" (2003) 2(1) *Country Studies, Education Reform and Management Publication Series* 29-35.
196 Chisholm (2012) *Storia dell donne* 93.
197 Schäfer and Wilmot (2012) *Prospects* 47.
198 Chisholm (2012) *Storia dell donne* 93.
199 Schäfer and Wilmot (2012) *Prospects* 47.
200 Council on Higher Education (CHE) (2010) "Report on the National Review of Academic and Professional Programmes in Education" 14.("CHE 2010 Report").
201 Chisholm (2012) *Storia dell donne* 93; Schäfer and Wilmot (2012) *Prospects* 47-48.
202 http://www.funzalushaka.doe.gov.za (accessed 7 May 2019).
203 Ibid.
204 Schäfer and Wilmot (2012) *Prospects* 48.

for the educator profession is meant to resolve qualitative concerns.[205] However, the poor quality of learner academic performance in standardised international and national tests[206] calls into question the "…subject and pedagogical content knowledge" of teachers.[207] A logical deduction from this observation is that the training of teachers poses some challenges. A review by the Council on Higher Education (CHE) on teacher qualifications has for instance found that there is a great difference in the quality of PGCE programmes across the several HEIs in the country. The PGCE programmes at predominantly all the historically advantaged universities received full accreditation after the review, however institutions that were served with either a notice of withdrawal or de-accreditation were mainly historically disadvantaged HEIs or universities of technology.[208] The CHE reports that "this variance in quality is largely a reflection of South Africa's history in the sense that inequalities of the apartheid era continue to be reproduced in teacher education programmes of the present."[209]

[205] Ibid.

[206] See section 3.3.2.1 (a) above.

[207] Chisholm (2012) *Storia dell donne* 93-94.

[208] However, some historically disadvantaged universities such as the University of the Western Cape, received full accreditation. See CHE 2010 Report 51-67.

[209] CHE 2010 Report 65.

The Report also found challenges with the BEd programme, including an "uneveness of quality of BEd programmes' across the country and [t]he graduate output of BEd programmes, in terms of phase and subject specialisation, language competence, and the supply of teachers for all sectors of the school system with its diverse range of social and educational contexts, is haphazard and conditioned more by institutional histories than by employer needs."

Mention should also be made of the ACE (Advanced Certificate in Education) Programmes. By the late 1990s, approximately 67 000 teachers were still underqualified. In an effort to address this, the Department launched ACE which provides teachers with the opportunity "to upgrade and convert their three-year qualification into the required four-year qualification." Schäfer and Wilmot describe the challenges with the ACE programme as follows:

"First, the Norms and Standards policy [for Educators, 2000] did not provide sufficient guidelines on what the areas of specialisation for the ACE programme should be; this opened the door to a proliferation of ACE qualifications across the country. When the ACE programme was reviewed in 2006-2008, there were 69 different ACEs in the country and over 290 specialisations being offered. Second, the review found that universities were struggling to meet the conceptual demands of the ACE programme and that few institutions had found an appropriate balance between developing teachers' pedagogic skills on the one hand, and their discipline knowledge skills on the other." See CHE 2010 Report 102-103; Schäfer and Wilmot (2012) *Prospects* 49.

(ii) An inappropriate culture of teaching and learning.

Jansen and Spaull suggest that an appropriate culture of teaching and learning is absent in many former black schools.[210] Spaull refers to "ongoing informal institutions of disorder, distrust, rebellion, and lack of cooperation" that have, for the most part, remained intact in former black schools.[211] According to Jansen, this stems from the political resistance against colonial and apartheid education.[212] The struggle commenced in the late 1970s, maintained its momentum in the 1980s, and is still manifesting itself today.[213] In particular, the 1976 revolt against state education was a turning point in the relationship between the government and public schools.[214] At that time, school inspectors were driven out of schools by teachers who distrusted these inspectors who they perceived as "…extensions of the surveillance systems brought to bear on activist students and educators [by the former regime]."[215] Teachers detested the inspection of their work by these agents of the apartheid state.[216] This relationship of distrust and culture of opposition to state interference transferred seamlessly to the post-apartheid state.[217] The belief that teachers in former black schools would allow the new legitimate democratic state back into their classrooms to conduct educator evaluation was completely wrong because the "culture of resistance" was too deeply rooted.[218] An important role player in sustaining this adversarial relationship between the state and historically disadvantaged schools, has been the South African Democratic Teachers Union (SADTU).[219] The Union has been very successful in retaining and mobilising the ingrained adversarial cultures emanating from the anti-apartheid

[210] Spaull (2014) Doctoral thesis 21; Jansen J "Personal reflections on policy and school quality in South Africa: When the politics of disgust meet the politics of distrust' in Sayed *et al* (eds) *The search for quality education in post-apartheid South Africa* (2013) 81-95.

[211] Spaull ibid. The ANC, in 1994 observed as follows: "Apartheid education and its aftermath of resistance has destroyed the culture of learning within large sections of our communities, leading in the worst-affected areas to a virtual breakdown of schooling and conditions of anarchy in relations between students, teachers, principals, and the education authorities." See ANC *A Policy Framework for Education and training* (1994).

[212] Jansen "Personal reflections on policy and school quality in South Africa: When the politics of disgust meet the politics of distrust" (2013) 86.

[213] Ibid.

[214] Ibid.

[215] Ibid. See also Biputh B and McKenna S "Tensions in the quality assurance processes in post-apartheid South African schools" (2010) 40(3) *Compare: A Journal of Contemporary and International Education* 279-299 for an analysis of the current quality assurance processes in public schools that were developed in response to the autocratic apartheid era school inspection system.

[216] Jansen "Personal reflections on policy and school quality in South Africa: When the politics of disgust meet the politics of distrust" (2013) 87.

[217] Ibid.

[218] Ibid.

[219] Ibid 87-88.

struggle.[220] Each time the state attempted to introduce new policies on teacher appraisal or the development of schools, SADTU would contest them.[221] Where policies were endorsed and finally implemented, another challenge would emerge.[222] Some schools and districts would physically stop government officials at the school gate with the purpose of preventing the intended evaluation.[223] Over the years, SADTU has evolved from a teachers' union into a "major political role player" that becomes involved in issues beyond teaching and education.[224] For instance, SADTU, as a member of COSATU, urged its members to leave the classroom and join the nationwide COSATU protests against rising food, electricity and fuel prices in 2008.[225] Demonstrations about "service delivery" have resulted in regular disruptions in schools located in historically disadvantaged communities, as was the case in Vuwani, Limpopo, in 2016.[226] The South African Human Rights Commission, after launching an investigation into the impact of protest action on the right to basic education, found that protests mostly arise from grounds that are not related to the delivery of basic education.[227] Causes of protest action may range from a lack of access to water in Zeerust (North West) to the state's

220 Ibid.

221 Ibid. See also Paddy S and Jarbandhan DS "Perceptions of the role of teacher unions in education in two secondary schools in Soweto" (2014) 22(3) *Administratio Publica* 148-166.

222 Jansen "Personal reflections on policy and school quality in South Africa: When the politics of disgust meet the politics of distrust" (2013) 87-88.

223 Ibid. Marius Roodt refers to SADTU as a "militant trade union" that "instead of protecting the rights of teachers, infringed the rights of learners in the country." In his report for the South African Institute for Race Relations, Roodt writes that even the Minister of Basic Education, Angie Motshekga "has criticised SADTU, saying that the union (which is an ally of the ANC through its membership of the Congress of South African Trade Unions) caused more problems than it solved in some parts of the country. She also bemoaned the union's opposition to measures to improve education, its antagonistic approach, illegal strikes, and its use of policy matters as 'bargaining chips' to get its way." (footnotes omitted). See Roodt M "The South African Education Crisis: Giving the Power back to Parents" South African Institute for Race Relations (May 2018) 7.

224 Jansen "Personal reflections on policy and school quality in South Africa: When the politics of disgust meet the politics of distrust" (2013) 87-88.

225 https://mg.co.za/article/2008-08-05-cosatu-to-mobilise-millions-for-price-protest (accessed 12 July 2019).

226 South African Human Rights Commission "National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa" (2017) 1-3. ("SAHRC Report on Protest Action (2017)").

See also Skelton A and Nsibirwa M "#Schools on Fire: Criminal justice responses to protests that impede the right to basic education" (2017) 63 *SA Crime Quarterly* 39-50.

On 29 April 2016, the Limpopo High Court delivered a ruling that confirmed the "community-contested demarcation by the Municipal Demarcation Board, that incorporated Vuwani District into the Malamulele Municipality." The residents were not satisfied with this decision and embarked on protest action which led to "29 schools in the area being set on fire, allegedly by protestors." In terms of information provided by the NDBE, "the burning of 29 schools in Vuwani disadvantaged an estimated 10 233 learners ,but the total number of schools disrupted was 102 with 52 827 learners unable to attend school."

227 SAHRC Report on Protest Action (2017) 30-36.

failure to tar roads in the John Taolo Gaetsewe District in the Northern Cape[228]. The protests in Limpopo resulted in various detrimental consequences for learners, including being barred physical access to school, being denied access to the school nutrition programme, and being prohibited to write final year exams.[229] The SAHRC Report reveals that schools are targeted for various reasons, including the fact that they are viewed as governmental property and not as an essential component of the community structure.[230] There is therefore no sense of ownership by the community in relation to the schools in their areas.[231] Also, and more devastatingly, "[a] sense of apathy and despair" exists in these communities where "parents, often frustrated, unemployed and caught in a vicious cycle of poverty, fail to see how education can guarantee a brighter future for their children."[232] Thus, it is clear that historically disadvantaged schools are plagued by an internal problematic culture of teaching and learning as indicated above, as well as an external culture of protest, driven in part by the poverty and inequality of the community surrounding the school. The former culture has led to scant policy reform in former black schools which were "unwilling and/or unable" to reap the benefits from teacher and school evaluations as well as "monitoring interventions".[233] In contrast, former white schools have been able to implement state policies without causing any harm to existing practices of "teaching, learning and managing schools".[234] Furthermore, the external culture of

228 Ibid 2-3.
229 Ibid.
230 Ibid 31.
231 Ibid.
232 Ibid. The SAHRC recommends that section 3(6) of the Schools Act be used as a source of prosecution against those alleged offenders who threaten or intimidate learners or teachers from accessing schools during times of protest. In terms of this subsection "…parents who fail to ensure that their children attend school are guilty of an offence, and further, that any other person who, without just cause, prevents a learner from attending school, is guilty of an offence." Section 3(6) states further that "[i]n both cases, the person is liable on conviction to a fine or imprisonment not exceeding six months." In response to the SAHRC Report, the National Department of Basic Education has proposed an amendment of section 3(6) by the Education Law Amendment Bill of 2017. Clause 2 of the Bill proposes to amend section 3(6) by increasing "…the penalty provision from six months to six years in the case where the parent of a learner, or any other person, prevents a learner who is subject to compulsory school attendance from attending school."
Skelton and Nsibirwa argue that the proposed amendment, particularly as it relates to parents, is problematic. They contend that parents should not be prosecuted for keeping their children from school if their decision for doing so, is rooted in the fear that they, or their children will be harmed during "..protest-related violence." Rather, only parents, who are genuine protesters, and "…who are 'using' interference with their children's schooling as a means to pressure authorities to accede to their demands should be targeted for prosecution." See Skelton and Nsibirwa (2017) 63 *SA Crime Quarterly* 45-46.
233 Jansen "Personal reflections on policy and school quality in South Africa: When the politics of disgust meet the politics of distrust" (2013) 87-88.
234 Ibid.

protest, so prevalent in many South African black communities today, contributes to a further deterioration of quality education for black and poor learners.

(iii) Post provisioning

"Post provisioning" is a reference to the procedure regulating the assignment of educators to South African schools.[235] Although the courts have confirmed that teaching and non-teaching posts are core entitlements of the right to basic education[236], several schools in South Africa, especially in the Eastern Cape are suffering from teacher shortages.[237] The provisioning of teacher posts is governed by a range of legislation and policies, including the Employment Educators Act (EEA) [238], Schools Act and Labour Relations Act (LRA)[239] as well as the "Post Distribution Model for the Allocation of Educator Posts to Schools"[240]. The latter policy sets out a formula that are supposed to guide the Head of Department (HOD) of a provincial education department in the allocation of posts to specific schools after the MEC has determined the post establishment for the province.[241] This formula determines that the post distribution must be proportional to the actual needs of the school and takes into account the "maximum ideal class size applicable to a specific learning area or phase", the "period load" of teachers, the "need to promote a learning area", the "number of grades", whether there is "more than one medium of instruction" , the "disabilities of learners", "access to the curriculum", "poverty (more teachers are supposed to be placed at poor schools)" and level of funding from the department.[242] Although the formula is needs-based, Sephton argues that it actually favours the wealthier schools.[243] Such schools, for example, have the means to detect "learners with special needs" and they are in a position to present "more subjects" because the SGB is able to remunerate additional teachers.[244] Conversely, disadvantaged schools are only

[235] Sephton S "Post provisioning" in Veriava *et al* (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 249.
[236] See for example *Centre for Child Law v Minister of Basic Education* (2012) 4 All SA 35 (ECG) and *Linkside v Minister of Basic* (unreported case number 3844/2013) (2015]) ZAECGHC 36 (26 January 2015).
[237] Sephton "Post provisioning" (2017) 249.
[238] 76 of 1998.
[239] 66 of 1995.
[240] Hereafter known as the "Post Distribution Model".
[241] Section 5(1) (b) of the EEA provides: "Notwithstanding anything to the contrary contained in any law but subject to the norms prescribed for the provisioning of posts, the educator establishment of a provincial department of education shall consist of the posts created by the Member of the Executive Council."
[242] Section 3 of Post Distribution Model. See also Sephton "Post provisioning" (2017) 251.
[243] Sephton ibid.
[244] Ibid.

able to present "core" subjects because of dwindling "learner numbers" and a "shortage of teachers funded by the provincial education department".[245] The application of the Post Distribution Model therefore results in a skewed learner-to-teacher ratio across schools. In some schools, teachers are able to comfortably teach classes numbering less than the preferred departmental learner-to-teacher ratio,[246] whereas in other (mostly historically black) schools, teachers are confronted with class sizes far greater than the recommended learner-to-educator proportion.[247] Overcrowding leads to a host of challenges experienced by both learner and teacher in the classroom.[248] For instance, teachers are unable to pay attention to all learners[249] and are instead forced to spend the majority of their teaching time maintaining discipline.[250] Teachers therefore "lose valuable lesson time" while attempting to manage large classes that are more prone to noise, "pushing", and "hitting".[251] The conclusion can therefore be drawn that overcrowding in classrooms detrimentally impacts on the morale of teachers.[252] Learners that are exposed to overcrowding tend to perform poorer academically than their counterparts in classrooms with lower teacher-to-learner ratios.[253] Overcrowded classrooms amount to "unsupportive learning environments" which detrimentally impact on the quality of teaching and learning.[254] The morale of teachers is further affected by the fact that a department may make an appointment, but fail to pay teachers.[255] The failure to remunerate teachers has been particularly prevalent in the Eastern Cape.[256] The Centre for Child Law and the Legal

245 Ibid.
246 Ibid. The National Department of Basic Education recommends a learner-educator ration of 40:1 for primary schools and 35:1 for secondary schools. See https://www.education.gov.za. (accessed 1 September 2018).
247 Marais P "We can't believe what we see : Overcrowded classrooms through the eyes of student teachers" (2016) 36(2) *South African Journal of Education* 2. Marais reports that some schools in the Eastern Cape have up to 130 learners crammed into one classroom.
248 Ibid.
249 Imtiaz S "Exploring strategies for English language teaching of Pakistani students in public sector colleges" (2014) 2(2) *Research Journal of English Language and Literature* as cited in Marais (2016) 36(2) *South African Journal of Education* 2-4.
250 Mustafa H M *et al* "Comparative approach of overcrowded effects in classrooms versus solving 'cocktail party problem' (neural networks approach)" (2014) 3(2) *International Journal of Engineering Science and Innovative Technology* 178 as cited in Marais (2016) 36(2) *South African Journal of Education* 2-4.
251 Mustafa *et al* (2014) as cited in Marais (2016) ibid.
252 Marais 36(2) *South African Journal of Education* (2016) at 3.
253 Ibid.
254 Khumalo B & Mji A "Exploring educators' perceptions of the impact of poor infrastructure on learning and teaching in rural South African schools" (2014) 5(20) *Mediterranean Journal of Social Sciences* as cited in Marais (2016) 36(2) *South African Journal of Education* 3.
255 Sephton "Post provisioning" (2017) 260.
256 Ibid.

Resources Centre have been at the forefront in using strategic litigation to ensure the filling of vacant posts and the payment of teachers in the province.[257]

(d) Participatory democracy

The fourth barometer of quality in terms of Singh's framework emphasises the importance of participatory democracy in school governance.[258]

(i) School governing bodies: A state organ within a statutory partnership

South Africa has a decentralised school governance system. In the context of public schooling, the term "decentralisation" refers to the devolution of decision-making authority from the state to the local school level.[259] White Paper 1 was the post-apartheid regime's first policy declaration that supported the establishment of school governing bodies in the public schooling system.[260] However, it was the second White Paper on Education that was much more explicit in its recommendation of a decentralised form of school governance. For example, it called for a "*radical decentralisation* of management and governance responsibilities to local schools and communities."[261] The first democratically elected government's decision to settle on a decentralised school governance system is explored in greater detail in Chapter 4.

White Paper 2 culminated in the adoption of the Schools Act in 1996. The Act establishes a uniform system for the governance, funding and organisation of schools.[262] The current legislative framework creates a multiple approach to school governance. The nature of this statutory partnership is summarised concisely in *Ermelo* by the Constitutional Court:

> An overarching design of the [Schools Act] is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises

[257] Ibid 256-257. These cases include *Centre for Child Law v Minister of Basic Education* and *Linkside and Others v Minister of Basic Education and Others*.
[258] Singh Report on Quality Education (2012) 6-7.
[259] Dibete K "The role of the school governing bodies in managing finances in no-fee schools in the Maraba circuit of Limpopo province" (2015) Master of Education Dissertation (UNISA) 9.("Dibete (2015) Master of Education Dissertation").
[260] White Paper 1 (1995), Chapter 12.
[261] White Paper 2 (1996), para 4.2. Italics my emphasis.
[262] Preamble to the Schools Act.

> executive control over public schools through principals. *Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school*.[263] (Footnotes omitted.)

The Schools Act provides that the governance of every public school is vested in its governing body.[264] SGBs are organs of state tasked with the overarching obligation to ensure the provision of the right to education to learners at a school.[265] In *Welkom*, Khampepe J described a school governing body as "akin to a legislative authority …responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education."[266] The governing body stands in a position of trust towards the school[267] which entails that "[it] is expected to act in good faith, to carry out its duties and functions on behalf of the school and to be accountable for its actions."[268] The primary function of the governing body is to look after the interest of the school and its learners.[269] However, this does not mean that SGBs operate in isolation, divested from the larger community in which a particular school is located. In *Ermelo,* the Constitutional Court held that :

> The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution.[270]

263 *Ermelo CC* para 56. Italics my emphasis.
264 Section 16(1) Schools Act.
265 *Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2009 (10) BCLR 1040 (CC) para 3. In this case, the Constitutional Court specifically stated that "SGBs are part of the state apparatus designed to secure the provision of the right to education under the Bill of Rights."
266 *Welkom CC* para 63.
267 Section 16 (2) Schools Act.
268 Mestry R "The functions of school governing bodies in managing school finances" (2006) 26(1) *South African Journal of Education* 26 as cited in Dibete (2015) Master of Education Dissertation 17.
269Section 20(1) (a) of the Schools Act states that "…the governing body of a public school must promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school." See also *Ermelo CC* para 57.
270 *Ermelo CC* para 80

(ii) Structure and powers of SGBs

In terms of the Schools Act, the school governing body consists of elected members, co-opted members and the principal of a school.[271] The elected members comprise parent representatives (who constitutes the majority), teachers, non-teaching personnel and in the case of secondary schools, the learners.[272] School governing bodies have a wide ambit of powers. Some of the pivotal functions include the development and adoption of a constitution and mission statement for a school, the adoption of a code conduct for learners, the establishment of *inter alia,* admission policies[273] and language polices[274], the development of a school budget, the levying of school fees[275] and recommending to the Head of the provincial department who to appoint as teachers.[276] SGBs may also apply to the Head of Department to be awarded additional

[271] Section 23(1) Schools Act.
[272] Section 23(2) Schools Act.
[273] Section 5(5) Schools Act.
[274] Section 6(2) Schools Act.
[275] Section 39 Schools Act.
[276] Section 20(1) of the Schools Act provides: "…[T]he governing body of a public school must-
(a) promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school;
(b) adopt a constitution;
(c) develop the mission statement of the school;
(d) adopt a code of conduct for learners at the school;
(e) support the principal, educators and other staff of the school in the performance of their professional functions;
(eA) adhere to any actions taken by the Head of Department in terms of section 16 of the Employment of Educators Act, 1998 (Act No. 76 of 1998), to address the incapacity of a principal or educator to carry out his or her duties effectively;
(f) determine times of the school day consistent with any applicable conditions of employment of staff at the school;
(g) administer and control the school's property, and buildings and grounds occupied by the school, including school hostels, but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy;
(h) encourage parents, learners, educators and other staff at the school to render voluntary services to the school;
(i) recommend to the Head of Department the appointment of educators at the school….
(j) recommend to the Head of Department the appointment of non-educator staff at the school…
(jA) make the recommendation contemplated in paragraph (j) within the time frames contemplated in section 6(3)(l) of the Employment of Educators Act, 1998 (Act No. 76 of 1998).
(k) at the request of the Head of Department, allow the reasonable use under fair conditions determined by the Head of Department of the facilities of the school for educational programmes not conducted by the school;
(l) discharge all other functions imposed upon the governing body by or under this Act; and
(m) discharge other functions consistent with this Act as determined by the Minister by notice in the Government Gazette, or by the Member of the Executive Council by notice in the Provincial Gazette."

functions. Some of these functions include the power to select subject options, buy textbooks and determine the extra-curricular program for the school.[277]

Although SGBs enjoy a high degree of autonomy, it does not mean that they have unlimited power. The Constitutional Court has confirmed that the powers of SGBs are subject to the Constitution, the Schools Act and to applicable provincial legislation.[278] The Constitutional Court held that "any powers of the governing body must also be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress."[279] In that same case, the Court confirmed that school governing bodies are entrusted with a public resource which must be governed in accordance with the values of the Constitution.[280]

(iii) Democracy in school governance

Democracy is one of the fundamental values of the South African Constitution.[281] The Constitution itself was adopted to establish a society based on *democratic values*, social justice and fundamental human rights.[282] The Schools Act describes the *democratic* transformation of society as one of the primary objectives of the post-apartheid schooling system.[283] School governance is part of the country's system of "democratic governance."[284] Therefore, schools are supposed to be run according to the same principles of representative/participatory democracy that are espoused in the South African Constitution.[285] In *Doctors for Life*

[277] Section 21(1) of the Schools Act provides: "…[A] governing body may apply to the Head of Department in writing to be allocated any of the following functions:
(a) To maintain and improve the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;
(b) to determine the extra-mural curriculum of the school and the choice of subject options in terms of provincial curriculum policy;
(c) to purchase textbooks, educational materials or equipment for the school;
(d) to pay for services to the school;
(dA) to provide an adult basic education and training class or centre subject to any applicable law;
(e) other functions consistent with this Act and any applicable provincial law."
[278] *Ermelo CC* para 61. See also *Rivonia CC* para 41.
[279] *Ermelo CC* para 61.
[280] *Ermelo CC* para 80.
[281] Preamble to the Constitution.
[282] Ibid. Italics my emphasis.
[283] Preamble to the Schools Act. Italics my emphasis.
[284] White Paper 2, para 3.17.
[285] Brand D "Judicial deference and democracy in socio-economic rights cases in South Africa" in Liebenberg S and Quinot G (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 180.

International v Speaker of the National Assembly[286], the Constitutional Court held that the representative and participatory elements of democracy are not in tension, but are mutually supportive.[287] The Court found that:

> General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people.[288]

In *Welkom*, the Constitutional Court expanded on the notion of participatory democracy by declaring that the Constitution demands the "substantive involvement and engagement of people in decisions that may affect their lives."[289] The Court, in this regard, seems to echo Brand's understanding of democracy which entails that democracy is not only about process, but also about content.[290] In other words, the delivery of the structures through which democracy operates (for example elections) does not secure democracy.[291] What is needed, is a culture of democracy or the substantive practice of democracy within these structures.[292] School governing bodies as organs of state, in theory at least, operate according to democratic principles. In *Ermelo*, the Court held that SGBs are democratically constituted[293] and are

[286] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC)("*Doctors for Life"*).
[287] *Doctors for Life* para 115.
[288] *Doctors for Life* para 115. See also *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1)* 2006 (5) BCLR 622 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)* 2007 (1) BCLR 47 (CC) ;*Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2013 (1) BCLR 14 (CC).
[289] *Welkom CC* para 139.
[290] Brand "Judicial deference and democracy in socio-economic rights cases in South Africa" (2012) 181-182.
[291] Ibid.
[292] Ibid.
[293] See section 23(1) and (2) of the Schools Act. Section 28 of the Schools Act provides: "Election of members of governing body. Subject to this Act and any applicable provincial law, the Member of the Executive Council must, by notice in the Provincial Gazette, determine-
(a)the term of office of members and office-bearers of a governing body;

supposed to function democratically.[294] Moseneke DCJ (as he was then) stated: "[A school governing body] is meant to be a beacon of grassroots democracy in the local affairs of the school."[295]

An implication of democratic school governance is that all the role players on the SGB have a voice in the decision-making process.[296] In terms of White Paper 2, the "governance policy

(b)the designation of an officer to conduct the process for the nomination and election of members of the governing body;
(c) the procedure for the disqualification or removal of a member of the governing body or the dissolution of a governing body, for sufficient reason in each case;
(d)the procedure for the filling of a vacancy on the governing body;
(e)guidelines for the achievement of the highest practicable level of representivaty of members of the governing body;
(f)a formula or formulae for the calculation of the number of members of the governing body to be elected in each of the categories referred to in section 23 (2), but such formula or formulae must provide reasonable representation for each category and must be capable of application to the different sizes and circumstances of public schools; and
(g)any other matters necessary for the election, appointment or assumption of office of members of the governing body."

294 *Ermelo CC* para 57. Section 18 of the Schools Act provides:
"(1) The governing body of a public school must function in terms of a constitution which complies with minimum requirements determined by the Member of the Executive Council by notice in the Provincial Gazette.
(2) A constitution contemplated in subsection (1) must provide for –
(a) meetings of the governing body at least once every school term;
(b) meetings of the governing body with parents, learners, educators and other staff at the school, respectively, at least once a year;
(c) recording and keeping of minutes of governing body meetings;
(d) making available such minutes for inspection by the Head of Department; and
(e) rendering a report on its activities to parents, learners, educators and other staff of the school at least once a year."
Section 18A of the Schools Act provides:
"(1)…The Member of the Executive Council must, by notice in the Provincial Gazette, determine a code of conduct for the members of the governing body of a public school after consultation with associations of governing bodies in that province, if applicable.
(2) The code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment dedicated to the improvement and maintenance of a quality governance structure at a public school. (3) All members of a governing body must adhere to the code of conduct. (4) The code of conduct must contain provisions of due process, safeguarding the interests of the members of the governing body in disciplinary proceedings.
(5) The Head of Department may suspend or terminate the membership of a governing body member for a breach of the code of conduct after due process.
(6) A member of the governing body may appeal to the Member of the Executive Council against a decision of a Head of Department regarding the suspension or termination of his or her membership as a governing body member."

295 *Ermelo CC* para 57.

296 Mncube V "The perceptions of parents of their role in the democratic governance of schools in South Africa: Are they on board?" (2009) 29(1) *South African Journal of Education* 2-3 as cited in Dibete (2015) Master of Education Dissertation 19.

for public schools is based on the core values of democracy" which are identified as "representation of all stakeholder groups, participation, tolerance, rational discussion and collective decision-making."[297] Although all role players have a say in school governance, parents, in theory, have a much more powerful role in decision-making by virtue of their majority stake in SGBs.[298] According to Van Wyk, parents must at all times have a majority by means of a "50% plus one member representation."[299] This means that "there must always be one more parent on the governing body than the combined total of the other members with voting rights."[300] The reasoning behind this preferential position for parents is explained by government as the fact that "[p]arents have most at stake in the education of their children, and this should be reflected in the composition of the governing body, where this is practically possible."[301] However, the decentralisation of power to school governing bodies is not a guarantee of school democracy. To put it differently: The mere fact that school governing bodies, especially parents have the power to participate in decision-making, does not mean that there is substantive democracy (to borrow Brand's term) in operation at schools. Yana van Leeve reveals evidence that points to a lack of substantive participatory democracy in schools in townships and rural areas occupied predominantly by learners from poor, working class black families.[302] She argues that school governance in these schools are weakened by a range of factors, including the low level of education among parents with limited knowledge on the functioning of SGBs.[303] In these circumstances, the principal of the school tends to take over the running of the SGBs and alienates less informed and experienced parents.[304] Xaba, who has done an in-depth study on the governance challenges facing historically black schools, asserts that most principals see their main roles on the SGB as educating parents and acting as mediator between parents and educators.[305] The teachers blame the low level of education

297 White Paper 2 (1996) 16.
298 Section 23(1) and (2) Schools Act.
299 Van Wyk N "The rights and roles of parents in school governing bodies in South Africa" (2007) 1 *International Journal about parents in education* 133 as cited in Dibete (2015) Master of Education Dissertation 19.
300 Naidu A *et al Education management and leadership: A South African perspective* (2008) 150 as cited in Dibete (2015) Master of Education Dissertation 19.
301 White Paper 1(1995) 70.
302 Van Leeve Y "Executive heavy handedness and the right to basic education: A reply to Sandra Fredman" (2016) 10 *Constitutional Court Review* 202.
303 Ibid 202-203.
304 Ibid.
305 Xaba M "The possible cause of school governance challenges in South Africa" (2011) 31 *South African Journal of Education* 205.

among the parent community as the reason for their inability to make decisions on SGBs.[306] Although workshops are available to train parents in understanding the school governance system, many parents do not attend these out of fear that their illiteracy or limited literacy will be exposed.[307] There is therefore a tense relationship between educators and parents: educators see parents as illiterate and parents feel sidelined and undermined by educators.[308] What happens inevitably, is that the principal and the educators take the lead role in decision-making on various issues, including "policy formulation, development and implementation."[309] The parents merely "rubber stamp" the process.[310] This is in contradiction to the roles that the Schools Act sets out for the different role players on school governing bodies. The Act clearly vests the governance of schools in the school governing body and the "professional management" of schools in the principal, who exercises her role under the authority of the Head of Department.[311] In *Welkom*, the Constitutional Court contrasted the term "governance" with "professional management" and attempted to explain the difference between the two concepts.[312] The Court held that the "professional management of a public school consists largely of the running of the daily affairs of a school by directing teachers, support staff and the use of learning materials, as well as the implementation of relevant programmes, policies and laws."[313] The governing body, on the other hand, is "…responsible for the formulation of certain policies and regulations."[314] The Court went further by adding that "a principal's authority is more executive and administrative in nature, being responsible for the implementation of applicable policies… and the running of the school on a day-to-day basis."[315] At this juncture, it is also important to note that the principal is an employee of the Head of Department of a specific provincial education department. Section 16(3) of the Schools Act requires the principal to undertake "the professional management of a public school . . . *under the authority of the Head of Department*"[316]. Section 16A(1)(a) states that "[t]he

306 Ibid 205-206.
307 Ibid.
308 Ibid.
309 Ibid.
310 Ibid.
311 Section 16(1) and (3) Schools Act. The principal's functions are set out in section 16A of the Act.
312 *Welkom CC* paras 61-63.
313 *Welkom CC* para 62.
314 *Welkom CC* para 63.
315 *Welkom CC* para 63.
316 Italics my emphasis.

principal of a public school *represents the Head of Department* in the governing body..."[317] In the minority judgment of *Welkom*, Zondo J concisely demarcated the role of the principal in the affairs of a school governing body:

> On the one hand, [section 16A(3) of the Schools Act] obliges him or her to 'assist the governing body in the performance of its functions and responsibilities', but, on the other, it makes it clear that such assistance or participation in any responsibilities or functions of the governing body 'may not be in conflict with instructions of the Head of Department', 'legislation or policy' or 'an obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister'.[318]

The role of the principal is therefore to assist and inform the governing body, but never to take decisions for it.[319] Furthermore, the principal as an employee of the state, when taking decisions for the school governing body, acts beyond the powers conferred upon her by the Schools Act. However, the violation of the Schools Act is but one aspect of the story. The relegating of parental power in former black schools also leads to an infringement of substantive democracy.

(iv) The violation of substantive democracy in former black schools[320]

One of the main goals of decentralisation is "greater democracy" in schools.[321] Grant Lewis and Motala imply that this objective is easier met in "resource rich contexts" such as former Model C schools as opposed to former black schools.[322] As indicated above, poor and illiterate parents from predominantly former black schools may be barred from engagement in the decision-making processes of the school governing bodies that they represent. Therefore, it is logical to reason that former Model C schools, shored up by an "educated and skilled parent force" have an improved level and quality of participation in school governing bodies.[323]

317 Italics my emphasis.
318 *Welkom CC* para 199.
319 See for example section 16A of the Schools Act: "The principal must – (f) inform the governing body about policy and legislation and (h) assist the governing body with the management of the school's funds…"
320 The violation of substantive democracy may happen in former white schools as well. However, this claim falls outside of the scope of my thesis and will not be addressed here.
321 Grant Lewis S and Motala S "Educational de/centralisation and the quest for equity, democracy and quality" in Chisholm L (ed) *Changing class: Education and social change in post-apartheid South Africa* (2004) 123-126.
322 Ibid.
323 Van Leeve (2016) 10 *Constitutional Court Review* 203.

Whether this amounts to "greater democracy" in these schools, depends on how you define democracy. At the least, though, it does mean that the process of decision-making is more robust in these schools than in former black schools, where decisions tend to be taken by the principal and rubber-stamped by the parent constituency. As I have shown above, the socio-economic status and illiteracy of certain black parents may prevent them from participating in the SGB decision-making processes. The current practice of "democratic" governance in former black schools therefore leads to the "othering"[324] and exclusion of the black parent's voice. However, in terms of a substantive conception of democracy, these qualifiers for participation ,namely literacy and socio-economic status, would not be a bar to participation. Instead, participation and engagement would be enabled *despite* these factors.[325] In sum, parents, irrespective of their race, socio-economic class or literacy, have been awarded majority representation status on school governing bodies by the state. It has been stated elsewhere in this thesis that parents enjoy this position because they have the most at stake when it comes to the education of their children. The power parents hold on SGBs, entitles them to take part in decisions that ultimately have an impact on the quality of education provided to their children. These decisions can range from the adoption of a beneficial school policy to the choice of holding the principal and teachers to account for the delivery of a good standard of education. However, this can only occur if a substantive culture of democracy is fostered at a school. Therefore, an environment which enables such a form of democracy ultimately contributes to the realisation of quality education. Since the latter environment is absent in primarily disadvantaged schools, access to quality basic education is restricted for the majority of black and poor learners in the South African public school domain.

3.4 CONCLUSION

Despite the adoption of a progressive rights framework, buttressed by a Constitution aimed at radically transforming the education system, Chapter 3 has found that patterns of inequality along the lines of race and class persist in the current public basic education system. One of these patterns is the protraction of unequal access to quality education for the majority of black and poor learners. In order to show how this pattern manifests, the framework titled "Normative action for quality education", developed by former UN Special Rapporteur on Education,

[324] Grant Lewis and Motala ''Educational de/centralisation and the quest for equity, democracy and quality" (2004)121.
[325] Italics my emphasis.

Kishore Singh was invoked. Singh rejects the norm that academic outcome should be used as the only indicator of educational quality. Instead, he calls for a holistic approach to quality which entails that a particular framework be in place to assess the existence of a quality education. The framework is summed up as follows:

> (i) a minimum level of student acquisition of knowledge, values, skills and competencies; (ii) adequate school infrastructure, facilities and environment (or 'education provisioning') (iii) a well-qualified teaching force; (iv) a school that is open to the participation of all, particularly students, their parents and the community ('participatory democracy').[326]

The chapter then proceeded to engage with each one of these different barometers/indicators of quality. Drawing on the work of Spaull, Fleisch and Bloch, among others, it was established that, in terms of the first indicator, there is a vast discrepancy in academic performance between former white and former black schools. It is mostly learners at historically black schools that are significantly below the standard literacy and numeracy requirements of the national curriculum. The poor performance of black learners reveal that the remnants of inferior Bantu education still lingers in the post -apartheid education system.

The next marker focused on education provisioning, a category which includes infrastructure, textbooks and scholar transport. Although the courts have established that the right to basic education encompasses the provision of infrastructure, including classroom desks and chairs, as well as the right of each learner to a textbook for each learning area and to scholar transport where appropriate, the reality on the ground remains dire. The latest statistics reveal that infrastructural disrepair is rife in many former black schools, especially those located in the former Bantustan territories. These schools are forced to operate without the most rudimentary educational facilities, including libraries and laboratories and in some cases, learners are being taught in so-called "mud schools" exposing them to a harsh physical and psychological environment which undeniably has a detrimental impact on the provision of quality education. The chapter revealed further that the post-apartheid education landscape has been afflicted by a range of textbook related problems in historically disadvantaged schools. The case law indicates that it is predominantly, if not exclusively, black learners who sought legal recourse for the state's failure to deliver textbooks to their schools. The absence of textbooks creates multiple problems, including the fact that learners are unable to complete their homework,

[326] Singh Report on Quality Education (2012) 7.

prepare for lessons or consolidate what they have learned in class for a particular day. In addition, Stein reveals how the infrastructural disrepair and the remote location of some former black schools have a detrimental impact on the delivery and storage of textbooks. Added to the challenges above, many black and poor learners suffer the consequences of a lack of transport at state expense. The chapter disclosed that learners walk extremely long distances to school every day and are exposed to, among other things, bodily endangerment and physical exhaustion which negatively affect their performance at school. Although the National Learner Transport Policy has been promulgated to provide transport to learners at state expense in appropriate cases, the chapter has exposed various shortcomings with the policy. For instance, a significant deficiency with the policy is that scholar transport is not provided in areas where public transport is available and as a result, poor learners who are unable to afford public transport, are automatically excluded from benefiting from this policy.

Singh's next indicator of educational quality is a "well-qualified, motivated and well looked after teaching force."[327] In this regard, Chapter 3 delved into teacher qualifications, the lack of a culture of teaching and learning in former black schools and post-provisioning. The post-apartheid state is still struggling with an unequal teaching system skewed along racial lines. A detailed CHE Report on teacher qualifications has revealed that despite a robust effort by the post-apartheid administration to improve the qualifications of black teachers, there remains a variance in quality of teacher programmes across Higher Education Institutions, with former black institutions not performing on a par with their former white counterparts. The CHE affirms that inequalities of the apartheid era continue to be reproduced in teacher education programmes of the present. A further concern in former black schools is a poor culture of teaching and learning, emanating from the resistance against apartheid and colonial education and which had transferred seamlessly into the post-apartheid order. Related to the latter issue, is the fact that former black schools are embedded in communities where there is a growing, festering resistance against the devastating consequences of apartheid, including large scale unemployment and poverty. This despair finds expression in service delivery protests where schools are many times the target of frustrated protestors. Teaching is also affected by the post-provisioning system which refers to the process of assigning teachers to schools across the country. Although the courts have declared teaching posts a core element of the right to basic education, this chapter has revealed that several historically disadvantaged schools are

[327] Ibid 6.

experiencing teacher shortages. This results in a host of problems, including overcrowding which most studies have proven to impact poorly on learner performance. Although the Post Provisioning Model is a policy that is touted as "needs-based", Sephton's examination of the policy actually shows it that it does not favour historically disadvantaged schools, but rather (unintentionally) privileges former white schools who are not in need of more teachers. In addition to these challenges faced by predominantly black teachers, this chapter has also laid bare that the state may appoint teachers, but in some instances, fail to pay them which, in turn, has a crushing impact on the morale of teachers. Therefore, in light of the above, Singh's notion of a well-qualified, motivated and well-looked after teaching force is not a reality in many historically disadvantaged schools.

The fourth indicator of educational quality referred to in Chapter 3, is that of a culture of substantive participatory democracy in school governance. The chapter found that the South African Constitution and the relative legislative framework require the practice of substantive participatory democracy by all state organs, including school governing bodies. The latter form of democracy entails the active participation and engagement of all stakeholders in school policy, including parents, educators, the principal and in the case of secondary schools, the learners. According to the state, parents as the majority constituency on school governing bodies have the most at stake in the education of their children. However, Chapter 3 has examined the extent to which there is actually a lack of participatory democracy in former black schools. The research has revealed that the role of parents is routinely undermined in school governing bodies of historically disadvantaged schools and that the principal and educators, in reality take the lead and make decisions. Parents merely serve to rubber- stamp policy.

In conclusion, Chapter 3 has established that a pattern of unequal access to quality education for the majority of black and poor learners is perpetuated in the post-apartheid public basic education system. The courts' role in addressing this inequality within the broader context of the transformation of public basic education is primarily addressed in Part II of the thesis and to a lesser extent in the next chapter[328] . The level of success that the courts have achieved in this regard is mixed, as will be demonstrated in the analysis provided in the chapters to follow.

[328] Chapter 4, section 4.2.2.

CHAPTER 4
THE DECENTRALISED SCHOOL GOVERNANCE SYSTEM AS ENABLER OF SYSTEMIC INEQUALITY

4.1 INTRODUCTION

As noted in the last part of Chapter 3, a decentralised form of school governance is applicable in the South African public school domain. In terms of decentralisation, school governing bodies exercise defined autonomy over a wide range of issues, including the adoption of admission policies, language policies and the determination of school fees.[1] In this chapter, the claim is made that SGBs from predominantly former white schools use their decentralised powers to protect and preserve their inherited privilege(s). Thus, it is contended that the decentralised school governance system acts as an enabler of systemic inequality in the public education system. In an effort to comprehensively understand how this system manages to perpetuate systemic inequality, Chapter 4 not only draws on the law (in the form of legislation, case law, *et cetera)* and the views of legal academic commentators, but also borrows from the conceptual views of educationists and sociologists, such as Jonathan Jansen and Crain Soudien. In this regard, it is important to provide such a comprehensive analysis of the inequality propagated by the decentralised school governance system in order to fully contextualise the courts' response to this disparity.

The chapter is set out as follows: Section 4.2.1 traces the historical trajectory of decentralisation in school governance. In the next part, the focus shifts to the contemporary context by examining how SGBs from mainly former white schools employ their decentralised powers under the Schools Act to sustain and perpetuate their historical privilege(s). In section 4.2.3, I analyse why these SGBs consistently have recourse to the courts to protect their discriminatory policies despite the existence of a strong anti-discriminatory legal framework in South African law. Section 4.3 provides the conclusion.

[1] See Chapter 3, section 3.3.2.1 (d) .

4.2 TRACING THE TRAJECTORY OF THE DECENTRALISED SYSTEM OF SCHOOL GOVERNANCE

4.2.1 Historical context of decentralisation

Why did the first democratic South African government settle on a decentralised model of school governance? Various academic commentators argue that the current school governance system is part and parcel of a compromise that was reached between the ANC and the former apartheid regime during the negotiations which led to the adoption of our current constitutional dispensation.[2] Based on the following arguments, it is clear that both the ANC and the former administration supported a decentralised system, albeit for different reasons. Woolman and Fleisch contend that the ANC's backing of decentralisation was rooted in its democratic allegiance to "grassroots politics".[3] They argue that:

> Many of the ANC government's early educational initiatives were predicated on the assumption that sustained school improvements must develop organically out of community participation and that community participation is contingent upon stronger (read autonomous) school governance structures.[4]

Sayed explains the context in which this support for the participation of grassroots communities in education was formed:

> The notion of grassroots community participation was constituted in the context of a state which was oppressive and where the state itself was the primary apparatus of oppression. Thus, grassroots community control was the antithesis of state control. Power to the people as opposed to that of the state reflected a strong commitment to participatory democracy and the decentralisation of control.[5]

[2] Soudien *Realising the dream* (2012) 168-169. See also Ramaphosa R "Negotiating a new nation: Reflections on the development of South Africa's Constitution" in Andrews P & Ellmann S (eds) *Post-apartheid constitutions: Perspectives on South Africa's basic law* (2001) 71-84 ; Meiring J "The genesis of South Africa's Constitution" in Meiring J (ed) *South Africa's Constitution at twenty-one* (2017) 3-21.

[3] Woolman and Fleisch *The Constitution in the classroom* (2009) 4-5.

[4] Ibid.

[5] Sayed Y "Discourses of the policy of educational decentralisation in South Africa since 1994: An examination of the South African Schools Act" (1999) 29 *Compare* : *A Journal of Comparative and International Education* 141-152.

Therefore, the ANC's commitment to grassroots politics took root during a time when it was a liberation movement in the throes of fighting a repressive regime. The endorsement of decentralisation reflected the ANC's desire to empower grassroots communities who at that particular time in history were suppressed by the apartheid regime.[6] Furthermore, the policy initiatives of the ANC during apartheid showed strong support for decentralisation in education. As former black schools became increasingly dissatisfied with the apartheid education system during the late 1980s, the ANC's National Education Crisis Committee (NECC) made an appeal for the creation of Parent Teacher Student Associations (PTSAs) in these schools.[7] PTSAs were to be broadly represented by teachers, parents and learners and were viewed as alternatives to the education governance structures of the time which were widely regarded as pawns of the apartheid state.[8] Subsequently, the NECC compiled the "National Education Policy Investigation Report" in which its vision for post-apartheid schooling remained loyal to the idea of local involvement in the governance of schools.[9]

The former apartheid regime also started leaning heavily towards decentralisation during the early 1990s. In its Education Renewal Strategy (ERS) of 1991, the former administration touted the idea of school management councils in the former white education system, in terms of which parents were to enjoy more power than educators.[10] This materialised in the establishment of Model C schools which were granted substantial autonomy and became legally empowered to adopt policies on a range of issues, including the language of instruction at a school, admission requirements and school fees.[11] As noted in Chapter 2, although Model C schools, in theory, allowed for the admission of black learners since 1991, the school management ensured that the "white cultural ethos" of the school remained intact through the introduction of various measures, such as selection tests and the charging of high school fees,

6 This suggests that the ANC is not necessarily committed to a decentralised form of school governance indefinitely. The context in which the ANC approved of decentralisation has changed since the transition period. The governing party is not a liberation movement anymore and its contested relationship with school governing bodies in primarily former Model C schools may have spurred the ruling party to revise the current system of school governance. The content of the draft Basic Education Law Amendment Bill, for example, seems to point to a curtailment of the powers of school governing bodies. See Department of Basic Education, Invitation to Comment on the Draft Basic Education Law Amendment Bill (13 October 2017); Van Leeve (2016) 10 *Constitutional Court Review* 202.

7 Grant Lewis and Motala "Educational de/centralisation and the quest for equity, democracy and quality" (2004) 117.

8 Karlsson J "The role of democratic governing bodies in South African schools" (2002) 38(3) *Comparative Education* 327-328.

9 Grant Lewis and Motala "Educational de/centralisation and the quest for equity, democracy and quality" (2004) 117.

10 Ibid.

11 Ibid 117-118.

to keep the majority of black learners from accessing these schools.[12] According to Pampallis, Model C schools were created to ensure that white communities could remain in control of "their schools rather than allowing them to fall into the hands of a democratically-elected government, which was (rightly) seen as imminent"[13] In other words, the former regime embarked on a mission to insulate former white schools from state control under a new ANC-led government. Further, by transferring these schools to parentally controlled management councils, the apartheid government attempted to maintain white privilege (at least in schools) in a future post-apartheid state.[14] The "Model C school model of governance", for lack of a better term, has seemingly been transferred to the post-1994 dispensation, in my view. To support my claim, the following observations are made: The management councils of former Model C schools are tantamount to the current school governing bodies. Similar to the management structures of former Model C schools, parents on school governing bodies exercise majority control. Furthermore, like their counterparts during the apartheid era, SGBs are empowered with the legislative authority to adopt school policies on various issues, including admission requirements, the levying of school fees and the medium of instruction at a school. According to Soudien, this autonomy does provide SGBs in former white schools with the power to adopt exclusionary policies which may result in the perpetuation of historical privileges.[15] Soudien's view lends credence to the argument that the first democratic government attempted to assuage the white community by agreeing to a decentralised model of school governance.[16] However, the apparent appeasement of this group has to be understood in context. Chisholm argues that the period leading up to the adoption of the Schools Act in 1996, was characterised by an environment of severe financial restraint.[17] The ANC-led government set out to reform the vastly unequal education system which they inherited from the apartheid regime, within these particular circumstances. According to Chisholm, the government decided on leveraging private money from middle-class (mostly white) parents in order to supplement existing public funds. These parents, therefore, had to be prevented from removing their children from the public school system and enrolling them in private schools.[18]

[12] Chapter 2, section 2.4.4.3.(a).
[13] Pampallis J "The nature of educational decentralisation in South Africa" *Decentralisation and Education Conference (Johannesburg 2002)* as cited in Woolman and Fleisch *The Constitution in the classroom* (2009) 3-4.
[14] Soudien *Realising the dream* (2012) 115.
[15] Ibid 117-118.
[16] Woolman and Fleisch *The Constitution in the classroom* (2009) 4-5.
[17] Chisholm "Apartheid education legacies and new directions in post-apartheid South Africa" (2012) 90.
[18] Karlsson (2002) 38(3) *Comparative Education* 328.

One way of ensuring the latter, was to provide parents and SGBs with decentralised powers on issues such as the charging of school fees.[19] By allowing parents and SGBs the freedom to decide on the amount of school fees they wished to expend and the quality of education they wished to acquire for their children, the state could focus their resources on the redress of historically disadvantaged schools.[20] Therefore, Jansen argues that the government "consciously attempted to reconcile white and middle-class elements of post-apartheid society with government reform."[21] According to Jansen, the government's decision to assuage the white constituency reflects the politics of reconciliation that governed South Africa during the first term of the new democratic government under the leadership of deceased President Nelson Mandela.[22] Badat and Sayed agree that President Mandela's emphasis on reconciliation meant that the state was hampered in its efforts to embark on effective redress of the education system.[23] In this regard, the authors claim that the state's reparation of the (inherited) unequal education system was impeded by, among others, "strong governing bodies in previously white-only schools."[24] By adopting this view, Badat and Sayed seem to agree with Soudien

19 Woolman & Fleisch *The Constitution in the classroom* (2009) 24.
20 Ibid.
21 Jansen (2002) 17(2) *Journal of Education Policy* 199-215.
22 Ibid. The "politics of reconciliation" that Jansen refers to here is also referred to as "rainbow nation politics" noted by Badat and Sayed in footnote 24 below. Elirea Bornman writes that the concept "Rainbow Nation" was "first coined by Archbishop Desmond Tutu − which became the dominant rhetoric in the first years of the democratic state" and that the "ANC has invoked the metaphor of the Rainbow Nation in which different ethnic and racial groups – symbolised by the different colours of the rainbow − are perceived to be united in a harmonious whole." For a more detailed explanation of 'Rainbowism" and a critique of the concept see Bornman E "The Rainbow Nation versus the colours of the rainbow: Nation-building and group identification in the post-apartheid South Africa" (2014) https://www.semanticscholar.org/paper/The-rainbow-nation-versus-the-colours-of-the-%3A-in-Bornman/129fbf35160c0fbdadc5804fa18b0d9973d304e0 (accessed 1 February 2020).
23 Badat and Sayed (2014) *The Annals of the American Academy* 130.
24 Ibid.
Woolman and Fleisch argue that the appeasement of the white community was only a minor part of the ANC's decision to settle on a decentralised school governance system. However, their argument is disputed by Saleem Badat and Yusuf Sayed. In this regard, they argue that the "reconciliation/rainbow nation politics" of the transition period played an important role in the ANC-led government's decision to appease the white constituency. Badat and Sayed write: "The ability of the new government to address the apartheid legacy was conditioned by the changes that occurred between 1990 and 1994. On the one hand, the ruling National Party began the process of transferring control of schools previously reserved for whites to school governing bodies, effectively privatising them. On the other hand, the post-1994 state was, as an outcome of the pre-1994 negotiations, a Government of National Unity (GNU) in which the majority party (African National Congress), in a coalition led by President Nelson Mandela, emphasised reconciliation. The GNU was reluctant to act decisively to transform the educational system. This result was partly a consequence of the negotiated settlement itself, which created a federalist state and established powerful provincial interest groups that shared concurrent responsibilities for schooling. Implementing redress as a national strategy was thus constrained by relatively autonomous provinces coupled

that the significant powers of autonomy provided to school governing bodies have enabled SGBs in former white schools to entrench past patterns of inequality in the basic education system. I expand on this argument below.

4.2.2 The perpetuation of historical privilege(s) through decentralised school governance

The Schools Act boldly declares that the "achievement of democracy in South Africa has *consigned to history* the past system of education which was based on racial inequality…"[25] Soudien disagrees by contending that the decentralised form of school governance, regulated by the Schools Act, actually empowers former white schools to maintain and in some instances, to modify privileges from the past.[26] According to the author, school governing bodies from these schools employ their autonomy to adopt policies that may lead to the exclusion of learners on the basis of various grounds, including race, language, culture and socio-economic class.[27] The legislative powers granted to SGBs to set school fees and determine their own language policies respectively, serve as classic examples of Soudien's argument as is explained below. It should be noted that the next section will feature some case law that best illustrate Soudien's contention and is not meant to provide an exhaustive list and examination of cases relevant to his argument. However, cases not referred to in this part of the thesis and which may also be applicable here, will be analysed in depth in Chapter 7.

4.2.2.1 School fees

In terms of section 39(1) of the Schools Act, "school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents." The Act states further that "a governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school."[28] As explained in Chapter 3, former Model C schools predominantly supplement state resources through the charging of school fees because they are categorised as fee-charging schools in terms of the

with strong governing bodies in previously white-only schools…" See Badat and Sayed 2014) *The Annals of the American Academy* 130; Woolman and Fleisch *The Constitution in the classroom* (2009) Chapter 1.

25 Preamble to the Schools Act. Italics my emphasis.

26 Soudien *Realising the dream* (2012) 116-118, 168-171. See Chapter 2 for a detailed account on how the discriminatory policies of the colonial and apartheid regimes led to a bifurcated post-apartheid public basic education system along the lines of race and class.

27 Soudien *Realising the dream* (2012) 168-170.

28 Section 36(1) of Schools Act.

quintile system.[29] Conversely, almost all former black schools have been classified as schools with a no-fee status. These schools are completely reliant on the government for financial support and therefore receive a larger portion from the state fiscus than former Model C schools. Poor schools may receive a larger amount of funding than advantaged schools, but are unable to rely on school fees and/or the contributions of a rich parent community if there is a shortfall in the state funding.[30] However, former white schools, already privileged by past preferential treatment from the apartheid regime, are able to remain well-resourced in the post-apartheid state because they are mostly supported by middle-class to affluent parent communities.[31] Parents are capable of contributing handsomely to the school budget through the charging of school fees, the amount of which are in their discretion.[32] According to van Leeve, these parents are "willing and able to double or triple the state's resources [in order for] quality to flourish."[33] This inevitably leads to the perpetuation of inequality in the basic education system. As Fiske and Ladd notes "[f]ees have reinforced the advantages enjoyed by the formerly white schools without at the same time increasing the resources available to schools serving historically disadvantaged students."[34] The finding of Fiske and Ladd is confirmed by the research in Chapter 3 which has established that a pattern of unequal access to quality education for the majority of black and poor learners is perpetuated in the post-apartheid basic education system.

4.2.2.2 Language policy

The case of *High School Ermelo and Another v Head of Department Mpumalanga Department of Education and Others*[35] serves as a further example that the decentralised form of school governance reinforces inherited privileges. The case was launched in the South Gauteng High Court but was ultimately decided by the Constitutional Court on appeal from the Supreme Court of Appeal. The Constitutional Court case will not be analysed in this section, but will be examined in depth in Chapter 7. For the purpose of understanding how inequality is perpetuated

[29] See Chapter 3, section 3.3.2.1.
[30] Arendse (2011)15 *Law, Democracy and Development* 350-351.
[31] Ibid.
[32] Section 39(1) Schools Act.
[33] Van Leeve (2016) 10 *Constitutional Court Review* 203.
[34] Fiske E and Ladd H "Balancing public and private resources for basic education: School fees in post-apartheid South Africa" in Chisholm (ed) *Changing class:Education and social change in post-apartheid South Africa* (2004) 57.
[35] [2007] ZAGPHC 232 ("*Ermelo HC*").

through decentralised school governance, I will only refer to the High Court judgment in this section of the study.

Section 6(2) of the Schools Act provides: "The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law." Before I proceed further, it should be noted that the purpose of this part of my thesis is not to engage with the interpretation of section 6(2), but to show how the school in this case used this particular power to maintain their historical privilege(s). The interpretation of section 6(2) will be analysed in detail in Chapter 7 as part of the discussion of the Constitutional Court case.

Hoërskool Ermelo[36], a historically privileged school in Ermelo, Mpumalanga[37] had until 2007 always employed Afrikaans as the exclusive medium of instruction.[38] The school, built to accommodate 1200 learners, experienced increasing dwindling enrolment numbers over the years.[39] As a result, its learner- to-classroom ratio of 23:1 was well below the national average of 35 learners per class in 2006/2007.[40] The school's low learner-to-classroom ratio in comparison to that of its historically black counterparts in the nearby area, which amounted to 69 learners per classroom in some schools, placed into sharp focus the continuing disparity between former white and former black schools in South Africa.[41] Due to the severe shortage of classroom space at English medium schools in the town of Ermelo, Hoërskool Ermelo, the only school in the circuit area not filled to capacity, was approached by the Mpumalanga Education Department to enrol an amount of black, English speaking learners in early 2006.[42] The school refused, citing their exclusive Afrikaans medium policy as justification, and suggested to the Department that the learners could be accommodated at two vacant buildings in Ermelo, which in the Department's assessment were unsuitable for schooling to take place in.[43] The learners were eventually housed in a converted laundry of an English medium school.[44] In August 2006, the Department, cognisant of the shortage of classroom spaces for

[36] "Hoërskool" is the Afrikaans term for "High School".
[37] Ermelo is a town located in the province of Mpumalanga.
[38] *Ermelo CC* para 6.
[39] *Ermelo CC* para 9.
[40] *Ermelo CC* paras 11-15.
[41] *Ermelo CC* paras 2, 11.
[42] *Ermelo CC* para 12.
[43] *Ermelo CC* para 12.
[44] "The Department provided and paid three educators who gave instruction in English [in the converted laundry]. The laundry space provided to the learners was not to the liking of the Department. It later lodged a complaint with the South African Human Rights Commission that the school treated these learners as second-class citizens.

the upcoming school year, consulted all principals in the town of Ermelo on how English speaking learners could be accommodated in 2007.[45] The principal of Hoërskool Ermelo responded that the Department could establish a new English medium school at the "Convent", a vacant and seemingly available building which in the Department's view was however not conducive to teaching and learning.[46] As the school year commenced in 2007, approximately 113 English speaking learners could not be accommodated at the English schools in Ermelo, which had all reached maximum capacity.[47] Instead of accommodating the learners, the Ermelo SGB suggested that Afrikaans learners from neighbouring schools could be transferred to their school so as to provide space at the former schools to accommodate the stranded learners.[48] After a persistent to and fro between the school and the Department, the Head of Department intervened.[49] The HOD, purporting to act in terms of the Schools Act, withdrew the school governing body's function to determine the language policy of the school and bestowed this power on an interim committee, which immediately changed the Afrikaans medium policy to "parallel medium" as a means of accommodating the affected learners.[50] Although the interim committee defined the "new" language policy as "parallel medium", Afrikaans retained its dominant status at the school. According to the amended policy, the medium of "teaching and learning" at the school would remain Afrikaans, however English would be taught for selected learners at the "entry grade" only.[51]

The South Gauteng High court rejected the school's argument that it had insufficient space to accommodate the learners as a smokescreen and found that, in actual fact, Hoërskool Ermelo was doing everything in its power to remain an exclusive Afrikaans medium institution.[52] In this regard, it was held that the school adopted a "strategy" to bar access to the stranded English learners.[53] The school governing body contended that the rights of Afrikaans learners would be prejudiced by the enrolment of learners who prefer to be taught in English.[54] Although the

The school then and now still denies the accusations that it ill-treated and unfairly discriminated against the learners." *Ermelo CC* para 13.

45 *Ermelo CC* para 14.
46 *Ermelo CC* para 14.
47 *Ermelo CC* para 16.
48 *Ermelo HC* para 27.
49 *Ermelo HC* para 27.
50 *Ermelo HC* para 29.
51 *Ermelo HC* para 39.
52 *Ermelo HC* paras 55-56. See also Woolman and Fleisch *The Constitution in the classroom* (2009) 70-72.
53 *Ermelo HC* para 56.
54 *Ermelo HC* para 61.

court did not reach a definite ruling on the "prejudice issue" because the school failed to submit convincing evidence to support its claim, the court nevertheless remarked *obiter* about the issue.[55] In this regard, the school relied on *Governing Body, Mikro Primary School, and Another v Minister of Education, Western Cape, and Others*[56] where Thring J dealt with a similar claim of prejudice against Afrikaans learners.[57] Similar to the Ermelo governing body, the SGB of Mikro Primary School adopted an Afrikaans medium language policy, however, the school started operating *de facto* as a parallel medium institution after it received instruction from the HOD of the Western Cape Education Department to admit English speaking learners in 2005.[58] Although the Afrikaans learners at Mikro Primary school would continue to receive their tuition in Afrikaans, Thring J held that these learners would indeed be prejudiced by the introduction of English to the school. He pronounced:

> It is contended by the first and second respondents that the applicants will suffer no prejudice because pupils at the school who have chosen to be taught in Afrikaans may continue to receive their tuition in that language. I disagree. Where the governing body of a school has elected to have a single language as its medium of instruction, the introduction of a second language of tuition must inevitably have a profound influence on the *modus vivendi*, the customs, traditions and almost every aspect of the atmosphere which pervades the school.[59]

Msaule argues that the enrolment of "new" students who prefer to be educated in a language different from a school's exclusive language of instruction, does not mean that the initial medium of instruction is terminated.[60] For instance, the right of the Afrikaans Ermelo learners to be taught in Afrikaans was never threatened. As noted above, the amended language policy introduced English at the entry level grade only. The introduction of English would simply have meant that the Afrikaans learners would continue to receive instruction in Afrikaans while the English learners would have been accommodated in English. Therefore, the SGB's contention that the Afrikaans learners would have been prejudiced was not really based on the

55 *Ermelo HC* paras 57-58.
56 2005(3) SA 504 (CPD). See also Bray E "Macro issues of Mikro Primary School" (2007) 1 *PER* 1-20; Bargueño D "The politics of language in education: The *Mikro* case in South Africa" (2012) 11(1) *Journal of Language, Identity & Education* 1-15.
57 *Ermelo HC* para 58.
58 *Governing Body, Mikro Primary School, and Another v Minister of Education, Western Cape, and Others* 25.
59 *Governing Body, Mikro Primary School, and Another v Minister of Education, Western Cape, and Others* 25.
60 Msaule P "The right to receive education in one's language of choice: A fundamental, but contentious right" (2010) 21 *Stell LR* 250-251.

supposition that their language rights would have been infringed. The fact that counsel for the school relied on Thring's approach in *Mikro*, suggests that the real motivation behind the prejudice argument was to preserve the Afrikaans/Afrikaner culture of the school.[61] However, as far back as 1996, Spoelstra J, in *Matukane v Laerskool Potgietersrus*[62] rejected the "culture argument" by stating that the contention that the "Afrikaans culture and ethos" of Primary School Potgietersrus, in that particular case, would be destroyed by the admission of learners from an English (read: black) background is "so far-fetched as to border on the ridiculous."[63] Although the *Ermelo* High court did not explicitly refer to "culture" as the reason behind the school's persistent refusal to accommodate the English learners, it emphasised that the school was doing everything possible to keep the English learners away.[64] The court also unreservedly rejected Thring J's approach, thereby indirectly acknowledging that Hoërskool Ermelo's attempts at excluding the English learners were aimed at the preservation of the Afrikaans culture at their school and that the Afrikaans learners were indeed never prejudiced.[65] The South Gauteng High court castigated the school for its persistent refusal to accommodate the stranded learners. In the words of the court:

> It is clear that the attitude of the applicants is to consign learners wanting to be taught in English to any conditions anywhere, as long as they do not set foot at their school. This is a callous attitude towards the educational interests of learners from other sections of the communities. It is reminiscent of the pre-democratic era, when the educational rights of white learners were better catered for than those of learners of a different colour. Under the present constitution, all learners have equal rights to state facilities irrespective of language or colour.[66]

Dissecting the quote above, it is telling that the court does not refer to the race of the English learners, and hence, does not explicitly claim that Hoërskool Ermelo used its exclusive medium policy to bar access to the black learners based on the ground of race. However, the court's use of specific phrases confirms that it implicitly acknowledges that the English learners were

[61] See Woolman and Fleisch for a lucid, historical account on the link between the establishment of Afrikaans schools and the preservation of the Afrikaner culture. Woolman and Fleisch The *Constitution in the classroom* (2009) 45-50.
[62] 1996 (3) SA 223 (T).
[63] *Matukane v Laerskool Potgietersrus* 475.
[64] *Ermelo HC* para 56.
[65] *Ermelo HC* para 59.
[66] *Ermelo HC* para 66.

indeed denied access to the school based on their race. First, the court describes the school's attitude as "callous" towards students from "other" communities. Since Hoërskool Ermelo is a former white school, the court's mentioning of learners from "other" communities is therefore clearly a reference to black learners. Secondly, the court emphasises that the school's approach towards the English learners is "reminiscent" of the apartheid period during which learners from a white background were privileged at the expense of students of a "different colour". Chapter 2 of this thesis provided a detailed account on the apartheid regime's ideology of white privilege and its racially based discrimination policies against non-white learners. There is therefore no doubt that the court's reference to learners of a "different colour" is code for black learners. Finally, the court unequivocally makes the statement that every learner in South Africa, irrespective of *colour* or language, enjoys the right of equal access to state resources.[67] This is a clear indication, in my opinion, of the court's view that Hoërskool Ermelo used its Afrikaans language medium policy as a cover to exclude the affected learners on the basis of race. Moreover, it is important to emphasise that despite the explicit legislative prohibition that no form of racial discrimination may be practiced in the implementation of a language policy[68], the Ermelo SGB decided to approach the courts to have their section 6(2) power protected, instead of accommodating the black learners, who were in desperate need of finding a school. This decision, in my view, was clearly driven by racism and a need to preserve white dominance at the school. Thus, the *Ermelo* High court judgment typifies how school governing bodies from predominantly former white schools employ the decentralised policy of school governance to protect their inherited privilege(s).

More recently, another contested Afrikaans language policy was at the centre of a dispute in *Governing Body, Hoërskool Overvaal and Another v Head of Department of Education: Gauteng Province and Others*.[69] On 5 December 2017, the District Director of the Gauteng Education Department issued an instruction to the principal of Hoërskool Overvaal, an Afrikaans medium school, to admit 55 English speaking Grade 8 learners.[70] The school refused and sought urgent relief from the Pretoria High court to review and set aside this instruction.[71]

[67] Italics my emphasis.
[68] Section 6(3) of the Schools Act states: "No form of racial discrimination may be practised in implementing [a language policy for public schools.]"
[69] 86367/2017 (Unreported) ("*Overvaal judgment*").
[70] *Overvaal judgment* 2.
[71] Ibid.

The facts in this matter are highly contentious. Although the learner-to-teacher ratio of 1:36 at Overvaal was below the recommended national norm of 1:40[72], the governing body argued that the school did not have the capacity to accommodate the learners.[73] Furthermore, the SGB claimed that the English schools in the vicinity had excess capacity to admit the learners.[74] The principals of the neighbouring English schools initially deposed that their schools possessed the extra space, but later withdrew those depositions.[75] However, the court, per Prinsloo J rejected the principals' withdrawn statements and found that the English schools did in fact have the requisite capacity to house the affected learners.[76] Prinsloo J's emphasis on the neighbouring English schools makes sense in the context of his decision to accept the Overvaal SGB's version that it did not have the capacity to accommodate the learners.[77] The court belaboured the point that the Department failed to interpret the capacity at Hoërskool Overvaal in relation to the capacity of other schools in the district.[78] To this end, the court held that to place English learners in an Afrikaans school while there was "ample room" in neighbouring English schools contravened the "Norms and Standards for Language Policy".[79] This policy states that a school must admit a learner whose language of preference is the same as the particular medium of instruction of that school.[80] The court held that a school is under no obligation to admit a learner whose language of choice differs from the school's medium of teaching and learning.[81] Thus, for Prinsloo J, Afrikaans schools are exempt from providing access to English speaking learners where other neighbouring English schools have the capacity to accommodate them. Furthermore, the court held that the Gauteng Education Act

72 The National Department of Basic Education recommends a learner-educator ratio of 40:1 for primary schools and 35:1 for secondary schools. See Sephton "Post provisioning" (2017) 251.
73 *Overvaal judgment* 8. In fact, the SGB claimed that the school was operating beyond its capacity because "expert consultants" had verified that the ratio of 36 learners per class exceeded safety requirements.
74 *Overvaal judgment* 8-9.
75 *Overvaal judgment* 8-12.
76 *Overvaal judgment* 38-48.
77 *Overvaal judgment* 36.
78 *Overvaal judgment* 15. Here, the court specifically referred to Regulation 5(10) of the Gauteng Admission Regulations which provides that: "In placing a learner at a particular school, the District Director and Head of Department respectively shall have regard to; (a) the proximity of the school to the learner's place of residence or his/her parent's place of work; (b) the capacity of that school to accommodate that learner relative to the capacity of other schools in the district."
79 *Overvaal judgment* 15. The Norms and Standards for Language Policy was promulgated in 1997 in terms of section 6(1) of the Schools Act.
80 *Overvaal judgment* 31-32.
81 *Overvaal judgment* 31-32.

does not empower the District Director to unilaterally override a school's language policy.[82] For these reasons, the Department's conduct was held to be in violation of the principle of legality.[83] As a result, the Department's instruction to Hoërskool Overvaal to admit the 55 English learners was set aside.[84]

The *Overvaal* judgment is analysed further in Chapter 7. However, of specific importance for this part of the thesis, is the question whether the Overvaal SGB relied on its Afrikaans language policy as an excuse to deny access to the 55 learners on the grounds of race? In this regard, the Department claimed that Hoërskool Overvaal, a school with a 95% white learner population at the time, has been failing to transform.[85] The parents of the 55 learners also insisted that their children were denied access to the school because they were black.[86] Prinsloo J addressed the Department's concerns by pointing out that the school had admitted 9 black learners out of a total of 142 learners for the 2018 school year.[87] Alley and Brenner have since criticised the Overvaal governing body and the High Court for maintaining that "a sprinkling of black Afrikaans-speaking learners demonstrates sufficient commitment to transformation."[88] The authors contend further that the approach displayed by the governing body and the court is not considerate of the "need for redress" in the public basic education system.[89] I agree with Alley and Brenner, but am cognisant of the fact that it is very difficult to prove that the SGB had a racist intent when they refused to admit the English learners. In this regard, it is prudent to compare the facts in the *Ermelo* judgment to that of the *Overvaal* case. In *Ermelo*, all the schools, including the English schools in the area, except for Hoërskool Ermelo was filled to capacity.[90] Despite this fact, the Ermelo governing body unreasonably persisted in their refusal to accommodate the English-speaking black learners.[91] As pointed out by the South Gauteng High court, the Ermelo SGB did everything in its power to prevent those learners from setting foot at their school.[92] In this regard, a reasonable inference could therefore

82 *Overvaal judgment* 35.
83 *Overvaal judgment* 35.
84 *Overvaal judgment* 50-51.
85 *Overvaal judgment* 33-34.
86 https://www.timeslive.co.za/news/south-africa/2018-01-09-war-over-access-to-school-ends-up-in-court/ (accessed 28 November 2019).
87 Ibid.
88 https://www.dailymaverick.co.za/article/2018-08-14-race-and-language-concourt-misses-chance-to-guide-transformation-of-the-education-system/ (accessed 28 November 2019).
89 Ibid.
90 See *Ermelo CC* paras 12-16.
91 Ibid.
92 *Ermelo HC* para 66.

be drawn that the learners were excluded because they were black. However, in the *Overvaal* judgment, the evidence, although disputed, seemed to have supported the contention that the English speaking schools in the area had the capacity to accommodate the affected learners.[93] The Overvaal governing body also mentioned that "in a situation where an Afrikaans school has enough capacity and neighbouring schools have none, an attitude of cooperation for the greater good may be called for."[94] This implies that the school may have been willing to accommodate the affected learners if the facts were different, in other words if the English schools were filled to capacity and Overvaal was the only school in the vicinity with the necessary space. It is therefore submitted that the facts in this particular case conspired in favour of Hoërskool Overvaal and made it difficult to assess whether the governing body employed the exclusive Afrikaans policy as a ploy to remain an overwhelmingly white school. This means that the school may indeed have used the language policy as a means to keep black learners out. In my view, the mere fact that the school had a 95% white population at the time, despite the diverse demographics surrounding the school[95], attests to the probability that the intention of the governing body may have been racially motivated.

Another matter that evoked concerns about a historically white school's alleged use of its decentralised legislative powers as a tool of racial exclusion, is *Governing Body of Hoërskool Fochville v Centre for Child Law; In Re: Governing Body of Hoërskool Fochville v MEC Education Gauteng*. [96] The facts of this case strongly resonate with those set out in the *Ermelo* and *Overvaal* matters noted above. The main issue in *Fochville SCA* involved a dispute between the governing body of Hoërskool Fochville and the Gauteng Education Department concerning the admission powers of the school.[97] The SGB had launched an urgent application in which it sought to prevent the Department from providing admission to a group of learners "in excess of the capacity determination of the school's admission policy."[98] The school also alleged that the admission of these learners would result in "severe overcrowding and

[93] *Overvaal judgment* 38-48.
[94] *Overvaal judgment* 34.
[95] https://www.dailymaverick.co.za/article/2018-08-14-race-and-language-concourt-misses-chance-to-guide-transformation-of-the-education-system/ (accessed 28 November 2019).
[96] ("*Fochville HC*").
[97] *Centre for Child Law v The Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA) para 1. ("*Fochville SCA*").
[98] *Fochville SCA* para 1. See also Veriava (2018) LLD Thesis fn 122.

materially prejudice all of the learners at the School, including the additional learners."[99] The latter group of learners consisted exclusively of English speaking black children.[100] The application did not succeed and the learners were enrolled as the first group of Grade 8 English learners in January 2012 at Hoërskool Fochville which had been an exclusive Afrikaans institution up until that time.[101] The Department instituted a counter-application in which it sought to amend the Afrikaans medium policy to that of dual medium.[102] The Centre for Child Law (CCL) also became involved in the main dispute as a third party in an effort to represent the interests of the group of English learners admitted to the school.[103] In this regard, the CCL presented an affidavit which set out allegations of *inter alia*, racial discrimination against the school.[104] These allegations were based on interviews and questionnaires that the Centre had conducted with the affected learners.[105] In response, Hoërskool Fochville launched an interlocutory application to force CCL to produce the questionnaires.[106] The Centre did not comply on the grounds that the information provided in the questionnaires were privileged.[107] When the High court ordered CCL to produce the questionnaires for inspection to the school, the Centre appealed this decision to the SCA.[108] However before the appeal on the interlocutory matter could be heard, the main dispute in this case had been settled.[109] To this end, the settlement agreement encompassed that the Department start constructing a new English medium school in the town of Fochville by the start of 2015.[110] Furthermore, the settlement also stipulated that except for one learner, all the admitted Grade 8 English learners would be permitted to complete their education at Hoërskool Fochville.[111] Despite the settlement agreement, the SCA nonetheless heard the interlocutory appeal and held that the content of the questionnaires was privileged information and that children have the right to participate in all issues concerning them.[112]

99 *Fochville SCA* para 2.
100 Veriava (2018) LLD Thesis fn 122.
101 *Fochville SCA* para 3.
102 *Fochville SCA* para 3.
103 *Fochville SCA* para 3.
104 *Fochville SCA* para 6.
105 *Fochville SCA* paras 3-8.
106 *Fochville* para 5.
107 Veriava (2018) LLD Thesis fn 122.
108 *Fochville SCA* para 4. Veriava ibid.
109 *Fochville SCA* para 8.
110 *Fochville SCA* para 8.
111 *Fochville SCA* para 8.
112 Veriava (2018) LLD Thesis fn 122.

For the purposes of this part of the thesis, my focus is not on a general analysis of the law pertaining to the issues of confidentiality, disclosure and privileged information in respect of children.[113] I am concerned with the question whether the school initially launched the legal proceedings in the main matter to exclude the learners because they are black? In other words, did the school attempt to use its decentralised admission powers as a means of excluding the affected learners on the basis of their race and not because the governing body was concerned about "overcrowding" if these learners were admitted?[114] Both the High ccourt and the SCA's views on the main dispute were never heard because the matter had been settled. However, the CCL's intervention into the matter made it possible to shed some light on the school's real motivation to exclude the affected learners. In this regard, the Centre's affidavit provides some indication that the school's decision to initially deny admission to the learners were racially motivated. The affidavit clearly sets out statements by the learners to the effect that they had experienced racial discrimination at the school.[115] Should this indeed have been the case, then Hoërskool Fochville, in addition to Hoërskool Overvaal and Hoërskool Ermelo, are not exceptions to the notion that former white schools use their decentralised legislative autonomy as a tool of racial discrimination.[116] For instance, the Federation of Governing Bodies for South African schools (FEDSAS)[117] has admitted that "there are apparently instances where [Afrikaans-medium] schools have used their language policies as a mechanism for screening applications in a manner that suggests that the screening occurs with racist intent".[118] In sum,

113 For a discussion on the issue of "disclosure" in the *Fochville* judgments, see Tsele M "Disclosure in Centre for Child Law v the Governing Body of Hoërskool Fochville" (2017) 20 *PER* 1.

114 *Fochville SCA* para 2.

115 *Fochville SCA* paras 6 and 7.

116 *Fochville SCA* paras 6 and 7.

117 On its website, FEDSAS describes itself as "the national representative organization for governing bodies, which informs, organises, mobilises and develops its members to achieve and uphold the highest recognised international educational standards." See https://www.fedsas.org.za/Home/ (accessed 1 February 2020).
It is submitted that FEDSAS's claim above that it is the "*national* representative organisation of governing bodies" seems to suggest that it is an organisation that represents *all* SGBs in the country. However, this is not accurate since FEDSAS is a partner of Afriforum, a "civil rights organisation that mobilises Afrikaners, Afrikaans-speaking people and other minority groups in South Africa and protects their rights." In the Vision and Mission statement of Afriforum , the following is stated: "AfriForum *specifically focuses on the rights of Afrikaners* as a community living on the southern tip of the continent." (Italics my emphasis).
See https://www.fedsas.org.za/Home/ (accessed 1 February 2020); https://www.fedsas.org.za/Links/Partners/ (accessed 1 February 2020) and https://www.afriforum.co.za/en/about-us/ (accessed 1 February 2020).

118 https://www.dailymaverick.co.za/article/2018-08-14-race-and-language-concourt-misses-chance-to-guide-transformation-of-the-education-system/ (accessed 28 November 2019).

Ermelo, *Overvaal* and *Fochville* are classic examples of several cases in recent years where school governing bodies from primarily former white schools have become involved in a tug of war with the state in an effort to protect their decentralised legislative powers under the Schools Act. Whenever these schools are confronted by the government who accuse them of exercising their autonomy in an exclusionary manner, the governing bodies have recourse to the courts.[119] In this regard, van Leeve contends that the SGBs essentially aim to take control of public schools with the purpose of benefitting a group of children that are already privileged.[120] One way in which former white schools secure this privilege, is through instituting court proceedings against the state whenever their terrain is encroached upon by public authorities.[121] They are able to mount these court actions because they can draw on their established "resources, networks and expertise".[122] Thus, former white schools use the law defensively to protect their inherited privilege(s).[123]

4.2.3 Why do school governing bodies adopt discriminatory policies?

What exactly influences a school governing body from schools identified by FEDSAS above to interpret a school policy in an exclusionary manner, despite the existence of explicit prohibitions on discrimination in the South African legal framework and the injunction of the Constitutional Court in *Ermelo* not to do so. I argue below that SGBs and the schools they represent are institutions rooted in an institutional culture which dictates that some schools adopt policies that operate to the exclusion of learners on various grounds, including race, socio-economic class, language and culture.

4.2.3.1 Understanding "curriculum" as an institution

The institutional culture of a school is intrinsically related to its curriculum. The ordinary, literal meaning ascribed to the term "curriculum" is "the subjects comprising a course of study in a school or college."[124] Jansen proposes that we understand curriculum not only as a particular course syllabus, but as an institution.[125] He defines the concept as follows:

119 Soudien *Realising the dream* (2012) 170.
120 Ibid.
121 van Leeve (2016) 10 *Constitutional Court Review* 203.
122 Ibid.
123 Soudien *Realising the dream* (2012) 170.
124 Oxford English Dictionary for Students (2006) Oxford University Press.
125 Jansen J *Knowledge in the blood: Confronting race and the apartheid past* (2009) 172.

> [Curriculum] is not only the text inscribed in the course syllabus for a particular qualification but an understanding of knowledge encoded in the dominant beliefs, values, and behaviors deeply embedded in all aspects of institutional life.[126]

The sum total of the subjects presented at an institution therefore does not equal a curriculum, but is merely one feature thereof, albeit an essential one. Based on Jansen's expansive definition above, a curriculum also encompasses the institutional culture of a school. There is not one specific definition of the term "institutional culture".[127] In its "Institutional Culture Plan", Wits University describes "institutional culture" as follows:

> Institutional culture should be understood to encompass the policies and practices (tangible and intangible) that mark the daily and long-term academic, social, cultural and personal experiences of those who share and pass through the university's everyday practices and spaces.[128]

Although this definition was formed in the context of higher education, it can be applied to schools as well. As is explained in broader detail below, schools, similar to universities, have institutional cultures which are reflected in their "policies and practices." In the South African context, racism is often a driver of institutional culture. For instance, it has been argued that racism is often "overtly and covertly imbedded in [an] institution's culture, systemic policies and practices."[129] Spears define "institutional racism" as follows:

> It is in its most profound instances covert, resulting from acts of indifference, omission and refusal to challenge the status quo. Thus, an individual need never have wilfully done anything that directly and clearly oppresses minorities; she/he need only have gone about business as usual without attempting to change procedures and structures in order to be an accomplice in racism, since business as usual has been systematised to maintain blacks and other minorities in an oppressed state.[130]

126 Ibid.
127 SAHRC "Transformation at Public Universities in South Africa" (2016) 22. ("SAHRC Report on Transformation at Universities (2016)").
128 Ibid.
129 Ibid 23.
130 Spears A "Institutionalised racism and the education of blacks" (1978) 9 (2) *Anthropology and Education Quarterly* as quoted in SAHRC Racism Report (1999) 3.

Ntuli argues that matters of culture almost always morph into matters of racism, which often stems from an institution's lack of comprehension regarding the distinct cultures in our country.[131] As explained in Chapter 2 of this thesis, the principles of European and American education systems were transplanted wholesale into South African education by the former colonists who entertained the belief that Western civilisation is superior.[132] As a result, the cultures of black people were maligned in the curricula of the colonial and apartheid education systems.[133] In present-day South Africa, the Schools Act declares that the post-apartheid education system is based, in part, on the advancement of "diverse cultures".[134] In *Pillay* the Constitutional Court affirmed the Constitution's commitment to diversity.[135] Langa CJ (as he was known then) held that this commitment "is totally in accord with this nation's decisive break from its history of intolerance and exclusion."[136] However, despite this affirmation of the apex Court and a legislative and policy framework that protects cultural and religious diversity,[137] in reality, the cultural foundation of our education system remains predominantly Western in nature.[138] In this regard, the National Department of Basic Education confirms that the curriculum in South African public schools is mainly based on a Eurocentric model and

131 SAHRC Report on Transformation at Universities (2016) 23.
132 Chapter 2, section 2.3.1.
133 Ibid.
134 The Preamble of the Schools Act declares, *inter alia*, that… "this country requires a new national system for schools which will …protect and advance our diverse cultures and languages…" See also Fish Hodgson T "Religion and culture in public education in South Africa" in Veriava *et al* (eds) *Basic Education Rights Handbook* (2017) 185-203 for an overview of the legislative and policy framework as well as case law pertaining to culture and religion in public schools.
135 *Pillay CC* para 65.
136 *Pillay CC* para 65.
See also *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) where the Constitutional Court held at para 60:

> "The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation."(Footnotes omitted.)

137 See Fish Hodgson "Religion and culture in public education in South Africa" (2017) 185-203.
138 Mail and Guardian "Baby steps to decolonise schools" (24 to 30 March 2017) 11 https://mg.co.za/article/2017-03-24-00-baby-steps-to-decolonise-schools/ (accessed 1 February 2020).

supports the notion that public schools must be decolonised.[139] It is submitted that Western culture therefore undergirds the post-apartheid South African curriculum. Drawing on Jansen's expansive understanding of "curriculum" explained above, it is contended that it is not only the national syllabi that continue to be grounded in Western principles, but also the institutional cultures of our schools. This is reflected in the codes of conduct of many South African schools. Thus, for example, in 2016, the Code of Conduct of Pretoria Girls' High stated that "all hair must be brushed" and that "all styles should be conservative, neat and in keeping with the school uniform."[140] Some of the learners contended that the school interpreted the Code to mean that black learners were prohibited from wearing their hair in an Afro because it was too "exotic."[141] The school was also accused of forcing black girls to chemically straighten their hair for the sake of "neatness".[142]

Johnson and Bankhead argue that for black women and girls, hair is not merely about appearance, but an expression of identity and culture, among other things.[143] The natural hair of black women has been deemed undesirable in terms of mainstream Western standards for centuries.[144] In this regard, it has been written that:

> For black women in society, what is considered desirable and undesirable hair is based on one's hair texture. What is deemed desirable is measured against white standards of beauty, which include long and straight hair, that is, hair that is not kinky or nappy. Consequently, black women's hair, in general, fits outside of what is considered desirable in mainstream [Western] society.[145]

Therefore, when a black woman decides to wear her hair in its natural state, it may be in defiant response to this notion that black hair is not considered "acceptable" in the (white) Western society. Thus, the wearing of a hairstyle, such as the Afro, is often symbolic of reclaiming

[139] Ibid. See also NDBE "Report of the History Ministerial Task Team" (2018) for an exposition of government's future plans to decolonise the History Curriculum in our public schools.
[140] Mansfield-Barry S and Stwayi L "School governance" in Veriava *et al* (eds) *Basic Education Rights Handbook* (2017) 85.
[141] Ibid.
[142] https://www.theguardian.com/world/2016/aug/29/south-africa-pretoria-high-school-for-girls-afros (accessed 1 February 2020).
[143] Johnson T and Bankhead T "Hair it is: Examining the experiences of black women with natural hair" 2014(2) *Open Journal of Social Sciences* 86.
[144] Ibid 87-91.
[145] Ibid.

identity and having pride in African culture.[146] The belief that natural black hair is "undesirable" points to a clear marker of institutional racism since black women are forced to comply with white beauty standards in order to be accepted into certain institutions, such as was the case at Pretoria Girls High.[147] Although the school's Code of Conduct was couched in racially neutral language, the interpretation thereof had a racially discriminatory impact on black female learners.[148] The Code therefore reflected a typical example of how a policy may covertly imbed institutional racism.[149] Furthermore, the school's relegation of forms of black culture and its insistence that black learners conform to white standards of beauty by expecting of them to straighten their hair, suggests that the institutional culture of Pretoria Girls High was (and may still be) predominantly rooted in a Western institutional paradigm. It should be stated though that the school had indicated that it would change its hair policy due to the courageous activism of learners such as Zuleika Patel and sustained criticism from various sectors in society.[150] However, the Pretoria Girls High incident is merely one of many instances where racism and other prejudices are entrenched in schools' codes of conduct across South African schools.[151] For example, learners have been denied access to schools because the wearing of Islamic headgear or the sporting of dreadlocks (in accordance with the Rastafarian religion) have been interpreted to be offensive by school governance bodies.[152] Ironically, it is not only former white schools, but also former black schools that have turned learners away based on religious or cultural intolerance, which in my view, indicates the pervasiveness and superiority of the mainstream white, Western paradigm in the institutional cultures of our schools.[153] Despite a strong anti-discrimination legal framework and an array of government policies aimed at guiding schools on developing inclusive codes of conduct, SGBs continue to adopt

146 Peane P "Our Hairitage: The link between black women's identity and their hair" (28 September 2017) https://city-press.news24.com/Voices/our-hairitage-the-link-between-black-womens-identity-and-their-hair-20170927 (accessed 1 February 2020)

147 See Crain Soudien's insightful analysis on how black learners, in particular, are forced to negate their own culture in order to assimilate into the dominant white, Western culture of predominantly former white schools. Soudien *Realising the dream* (2012) 136-147.

148 Mansfield-Barry S and Stwayi L "School governance" (2017) 85.

149 SAHRC Report on Transformation at Universities (2016) 22-23.

150 https://www.iol.co.za/news/south-africa/pretoria-high-school-for-girls-to-change-discriminatory-policies-7118105 (accessed 1 February 2020).

151 https://equaleducation.org.za/2016/09/02/we-demand-an-end-to-prejudicial-school-codes-of-conduct/ (accessed 19 October 2019).

152 Fish Hodgson "Religion and culture in public education in South Africa" (2017) 196-197.

153 For example, a learner at Joe Slovo Engineering High School in Khayelitsha, Cape Town was suspended "because his dreadlocks violated the school rules on hairstyles, which required boys' hair to be short and unbraided." See Fish Hodgson "Religion and culture in public education in South Africa" (2017) 196.

school policies imbedded in racism and other prejudices. In my opinion, this state of affairs will endure because the institutional culture of South African schools are grounded predominantly in a Western paradigm which negates the cultures of non-white learners as explained above. In this way, the school governance system which provides SGBs with the autonomy to develop their own policies enables the reproduction of systemic inequality in public basic education.

4.3 CONCLUSION

Chapter 4 has found that the decentralised school governance system serves as a primary enabler of systemic inequality in the public basic education system. Starting with a historical account of decentralisation in South African schooling, this chapter has established that both the ANC and the former National Party government preferred a decentralised school governance system in a post-apartheid dispensation, albeit for different reasons. In this regard, the ANC attempted to stay loyal to its grassroots politics commitments while also being cognisant of the environment of severe financial restraint within which it, as the first post-apartheid government would have to restructure the vastly unequal basic education system inherited from the apartheid regime. A decentralised system allowed the first democratic government to leverage private money from the white middle-class constituency at former Model C schools in an effort to supplement governmental funds for redress in disadvantaged schools. This was made possible because the decentralised powers to local schools enabled parents in former white schools to decide on the amount of school fees they preferred to spend as well as the quality of education they wanted to procure for their children. The National Party, on the other hand, negotiated for decentralisation in post-apartheid South African schools with a different agenda in mind. The former regime advocated for a wide range of powers to be transferred to public schools, including the autonomy to decide on admission policies, language policies and school fees in order to preserve white privilege at former Model C schools.

Chapter 4 proceeded to examine the contemporary context by focusing on the manner in which primarily former white schools use their legislative autonomy to maintain their inherited privilege(s). Drawing primarily on the work of Soudien and an analysis of seminal case law, including *Ermelo*, *Overvaal*, and *Fochville*, this chapter has determined that school governing bodies from predominantly former Model C schools utilise decentralised powers to exclude certain groups of learners on various grounds, including race, socio-economic class, language and culture.

The next part of Chapter 4 found that despite a strong anti-discrimination legal framework aimed at guiding schools on developing inclusive codes of conduct, SGBs continue to adopt school policies ingrained in racism and other prejudices. Drawing on Jansen's expansive definition of "curriculum", and the interpretation of codes of conduct by various governing bodies, this chapter established that the Western paradigm in which the colonial and apartheid governments imbedded former curricula, has transferred into the post-apartheid context. In this regard, SGBs continue to adopt policies that relegate the culture of predominantly black learners because of the white, Western foundation of the institutional cultures in most of our public schools.

Finally, Chapter 4 concludes Part I which has provided a historical and contemporary analysis of systemic inequality in the public basic education system. In Part II, the focus shifts to an in-depth examination of the role of the courts in addressing this disparity within the broader context of the radical transformation of public basic education.

PART II

THE ROLE OF THE COURTS IN EFFECTING RADICAL TRANSFORMATION OF BASIC EDUCATION

CHAPTER 5
RADICAL TRANSFORMATIVE ADJUDICATION: A THEORETICAL FRAMEWORK

5.1 INTRODUCTION

Chapter 3 has set out in detail how distinctive patterns of unequal access to quality education for the majority of black and poor learners are reinforced in the post-apartheid public basic education system. Furthermore, Chapter 4 has found that the decentralised school governance system serves as an enabler of systemic inequality in the public school domain. In response to this disparity, the South African Constitutional Court has not only called for the transformation of public education, but for the *radical transformation* thereof.[1] What does *radical transformation* mean?[2] Furthermore, what is the role of the courts in effecting transformation in public education? Chapter 5 attempts to answer these questions by providing a theoretical framework through which the courts' contribution towards the radical transformation of the public basic education system can be assessed. This chapter is strategically positioned as the opening chapter of Part II because the role of the courts in effecting transformation in basic education constitutes the bulk of the second part of this thesis. Furthermore, Chapters 6 and 7 can only be understood through the theoretical framework provided in Chapter 5.

5.2 TRANSFORMATIVE CONSTITUTIONALISM

The South African Constitution, although containing features of classic liberal constitutions, such as the separation of powers doctrine and the notion of the rule of law, embraces certain elements which causes Karl Klare to characterise it as "post-liberal."[3] One of these elements is the transformative character of the Constitution. In Klare's own words:

> [T]he South African Constitution, in sharp contrast to the classical liberal documents, is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and *transformative* role and mission.[4]

1 *Ermelo CC* para 47. Italics my emphasis.
2 Italics my emphasis.
3 Klare 1998 (14) *SAJHR* 151-156.
4 Ibid 153. Italics my emphasis.

Klare first described South Africa's project of constitutionalism as "transformative constitutionalism" in his seminal article published in 1998.[5] Since the publication of that article, the term "transformative constitutionalism" has been repeated so often in academic articles that it has been described by Sanele Sibanda as having obtained "near hallowed status as a descriptor of the current South African project of constitutionalism."[6] The concept has also been criticised as an "empty slogan which can mean anything, and therefore means nothing."[7] I disagree with this particular critique. Even if Klare had not coined the term, [8] the fact remains that the Constitution itself demands the fulfilment of the transformative vision laid out in its "institutional and normative framework".[9]

5.2.1 The transformative mandate of the Constitution

Brickhill and van Leeve correctly point out that the term "transformative constitutionalism" is not explicitly referred to in the text of the South African Constitution.[10] However, the transformative nature of the Constitution can be construed from certain constitutional provisions. To start with, the Preamble encapsulates a specific vision for South African society. This vision encompasses, among other things, that the country is "healed from the divisions of the past" and transformed into a society based on "democratic values, social justice and fundamental human rights" in which the "quality of life of all citizens" can be improved and

5 Klare 1998 (14) *SAJHR* 146-188.

6 Sibanda S "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism, and the struggle to eradicate poverty" in Liebenberg and Quinot (eds) *Law and poverty:Perspectives from South Africa and beyond* (2012) 45.
The amount of literature on the notion of "transformative constitutionalism" is vast. In addition to the articles, chapters and books already cited in the study so far, see also Albertyn C and Goldblatt B "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" (1998) 14 *SAJHR* 248; Roux T "Transformative Constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?" (2009) 20 *Stell LR* 258; Liebenberg S "Needs, rights and transformation: Adjudicating social rights" (2006) 17 *Stell LR* 5; Van Marle K "Transformative constitutionalism as/and critique" (2009) 20 *Stell LR* 286; Langa P "Transformative constitutionalism" (2006) 17 *Stell LR* 351; Moseneke (2002) 18 *SAJHR* 309.

7 Brickhill and van Leeve "Transformative constitutionalism-Guiding light or empty slogan?" (2015)141.

8 Judge Laurie Ackermann has expressed his preference for the concept "substantive constitutional revolution" instead of "transformative constitutionalism". See Klaaren J "The constitutionalist concept of Justice L Ackermann: Evolution by revolution" in Bohler-Muller *et al* (eds) *Making the road by walking it* (2018) 35; Brickhill and van Leeve "Transformative constitutionalism-Guiding light or empty slogan?" (2015) 147.

9 Liebenberg *Socio-economic rights* (2010) 34. Bohler-Muller *et al* write that "[t]he Constitution creates a framework, a launching pad if you like, for the achievement of the society described in the Bill of Rights." Bohler-Muller *et al* "Introduction" in Bohler-Muller *et al* (eds) *Making the road by walking it* (2018) 13. See also Brickhill and van Leeve "Transformative constitutionalism-Guiding light or empty slogan?"(2015) 146-147.

10 Brickhill and van Leeve "Transformative constitutionalism-Guiding light or empty slogan?" (2015) 146.

the "potential of each person" can be freed.[11] However, the vision of the society envisaged in the Constitution is not merely aspirational. As already noted in Chapter 3 and reaffirmed here for the purposes of this discussion, the Constitution demands positive conduct from all state actors, including the courts to work towards achieving transformation.[12] The Constitution does so through imposing a positive obligation on all state organs to fulfil the rights in the Bill of Rights, including socio-economic entitlements and by mandating the achievement of substantive equality.[13] For Penelope Andrews, "[i]t is through a combination of equality and access to socio-economic rights" that South Africa's colonial and apartheid legacy may be dealt with in a comprehensive and aggressive manner so as to effect the transformation of South African society.[14] Langa has argued that the realisation of socio-economic rights, coupled with a substantive conception of equality are central to the achievement of transformation in South Africa.[15] In *Ermelo,* the Constitutional Court refers to the legacy of apartheid education:

> Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. *Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception.* While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.[16]

In response to the systemic inequality created by the former regime's severe marginalisation of former black schools as opposed to the preferential treatment of former white schools, the Court states that "[i]n an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a *radical transformation of society as a whole and of public education in particular*."[17] The Court then refers to a "cluster of warranties" aimed at bringing

[11] Preamble to the Constitution.
[12] Section 7(2) of the Constitution provides: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." Section 8(1) states: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."
[13] Ibid.
[14] Andrews P "Race, inclusiveness and transformation of legal education in South Africa" in Dixon R and Roux T (eds) *Constitutional triumphs, constitutional disappointments* (2018) 228.
[15] Langa (2006) 17 *Stell LR* 351-354. Langa was formerly the Chief Justice of the South African Constitutional Court. Here he is writing extra-curially.
[16] *Ermelo CC* para 45. Italics my emphasis. See Chapter 2 of this study for a detailed exposition on the legacy of colonial and apartheid education.
[17] *Ermelo CC* para 47. Italics my emphasis.

about this transformation.[18] These include section 29(1)(a) and section 9 of the Bill of Rights.[19] In *Juma Musjid*, the Constitutional Court held that section 29(1)(a) (together with the Schools Act) "…signify the importance of the right to basic education for the transformation of our society".[20] In *Section 27 v Minister of Education*[21], Kollapen J held that education is "an indispensable tool" in the larger transformation project.[22]

5.2.2 The meaning of *radical transformation*[23]

Klare defines transformative constitutionalism as:

> [A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.[24]

According to the late Andre Van Der Walt, Klare's oft-quoted definition can be interpreted as follows:

> In the transformative context of the new South African democracy, constitutional supremacy was implemented against the background of a history characterised by inequality and injustice and the Constitution must be seen as an explicit attempt to transform legal and social institutions and power relationships towards greater equality and justice.[25]

Brand argues that two primary interpretations of transformative constitutionalism have taken shape over the years. In terms of the first understanding, transformation is conceived as "…the achievement of certain tangible results or outcomes through adjudication."[26] For example, the scholarship of legal scholars, such as Liebenberg and Pieterse, examines the extent to which

18 *Ermelo CC* para 47.
19 *Ermelo CC* para 47.
20 *Juma Musjid* para 38.
21 2012 (3) All SA 579 (GNP).
22 *Section 27 v Minister of Education* para 5.
23 Italics my emphasis.
24 Klare 1998 (14) *SAJHR* 150.
25 Van Der Walt A, University of Pretoria RHP course notes on "Transformative Constitutionalism and Legal Research" (2014).
26 Brand (2009) LLD Thesis 4.

the courts' approach in socio-economic rights cases have resulted in transformative change in the lives of indigent people through the provision of access to socio-economic entitlements such as water and housing.[27] The research of these commentators examines, *inter alia*, the transformative impact of seminal Constitutional Court judgments such as *Grootboom* and *Mazibuko v City of Johannesburg*[28] on the lives of underprivileged communities. For instance, in *Grootboom*, the issue of the right of access to housing for a Cape Town based indigent group was argued before the Court whereas *Mazibuko* dealt with the right of access to water of poor Johannesburg residents. In the context of basic education, the "transformative outcome through adjudication method", as I will term it, is particularly evident as the High courts and SCA have adopted an approach in terms of which the right to basic education is substantively defined on an incremental basis.[29] In this regard, the gradual "filling out" of the right has resulted in tangible outcomes for disadvantaged learners in the public school domain, such as the provision of teachers, textbooks, school furniture, scholar transport and school infrastructure.[30] The substantive-based approach to section 29(1)(a) will be explored fully in the next chapter.

The second interpretation of transformation means "…the radical change of the institutions and systems that produce results themselves."[31] Drucilla Cornell refers to transformation as the radical restructuring of political, legal or social institutions.[32] In this regard, Brand argues that present-day South African institutions and systems impede transformative change because they are structured in a way which inhibits transformation.[33] He contends further that in order for meaningful transformation to occur, these institutions and systems must be transformed in a radical manner.[34] The Constitutional Court judgment of *Van Rooyen v S* [35] serves as an example of Brand's contention. Before 1996 (the year in which the Constitution formally came into effect), the Magistrates Commission, the institution responsible for the appointment of magistrates to South Africa's Magistrates courts, was severely underrepresented in terms of its

[27] See for example Liebenberg S "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" (2000) 6 *Law, Democracy and Development* 159 and Pieterse M "Resuscitating socio-economic rights: Constitutional entitlements to health care services" (2006) 22 *SAJHR* 473.
[28] 2010 (4) SA 1 (CC).
[29] See Chapter 6 of this thesis.
[30] Ibid.
[31] Brand (2009) LLD Thesis 4.
[32] Cornell D *Transformations: Recollective imagination and sexual difference* (1993) 1.
[33] Brand (2009) LLD Thesis 5.
[34] Ibid.
[35] 2002 (8) BCLR 810 (CC) ("*Van Rooyen*")

race and gender composition.[36] The adoption of the Constitution and the Magistrate's Courts Act of 1996 resulted in the Commission becoming more representative in terms of its racial and gender profile.[37] In *Van Rooyen*, the Constitutional Court held that the changes effected to the Commission were necessary to ensure the transformation required by South Africa's foundational law.[38] The Court found that "transformation involves not only changes in the legal order, but also changes in the composition of the *institutions* of society, which prior to 1994 were largely under the control of whites and, in particular, white men."[39] Thus, drawing on Brand's second interpretation of the term "transformation", the Magistrate's Commission prior to 1996 was structured in such a way that it impeded transformation. Furthermore, the structure of this institution had to be changed in order to effect radical transformation. Solange Rosa contends that "full transformation" can only occur if the social and economic impact of apartheid laws and policies are addressed and if the legal-political structures that sustained apartheid society, are reconfigured.[40] (In my view, Rosa's reference to "full transformation" can be equated to Cornell and Brand's understanding of "radical transformation.") Similarly, Liebenberg asserts that the "underlying arrangements which generate various forms of political, economic, social and cultural injustice" have to be deeply restructured in order to work towards the transformative society envisioned in the Constitution's Preamble.[41]

In sum, the second conceptualisation of transformation recognises that the stubborn patterns of inequality entrenched during colonialism and apartheid, are being replicated by post-apartheid political/social/economic/legal/cultural institutions and systems, and that the underlying foundations of these systems must be altered in order for meaningful/full/radical transformation to occur. This particular understanding of transformation explains Albertyn's argument that inequality is systemic by nature and engrained in the institutions (or systems) of our country.[42] This also resonates with Klare's view that transformative constitutionalism involves the transformation of South Africa "political and social institutions and power relationships" as cited above.[43] In the realm of public basic education, it is submitted that

[36] *Van Rooyen* para 49.
[37] *Van Rooyen* paras 50-61.
[38] *Van Rooyen* paras 50-61.
[39] *Van Rooyen* para 50. Italics my emphasis.
[40] Rosa S "Transformative constitutionalism in a democratic developmental state" in Liebenberg S and Quinot G (eds) *Law and poverty* (2012) 103.
[41] Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 27.
[42] Albertyn (2007) 23 *SAJHR* 254.
[43] Klare 1998 (14) *SAJHR* 150.

systemic inequality is reinforced and perpetuated through the decentralised school governance system. To this end, it has been established in Chapter 4 that this system has, in particular, provided school governing bodies from former white schools with the tools to maintain, and in some instances, modify their inherited privilege(s).[44] The decentralised legislative autonomy conferred upon SGBs has in some cases, led to the adoption of policies that are exclusionary to learners on various grounds, including race, language, culture and socio-economic class.[45] The previous chapter has also concluded that the white, Western institutional culture in which the majority of our schools are embedded, plays a significant role in the motivation of SGBs to adopt policies that are rooted in racial and other prejudices. In terms of the second understanding of "transformation", the structure/composition/operation of the school governance system itself has to be challenged in order to effect radical transformation of the public basic education system.

5.3 THE ROLE OF THE COURTS IN EFFECTING RADICAL TRANSFORMATION

For Klare, transformative constitutionalism envisages the realisation of a political project through the law.[46] Similarly, Marius Pieterse views the South African constitutional project of transformation as "unashamedly" political.[47] However, according to Emile Zitzke transformative constitutionalism is not merely a political project but can be conceived of as a "legal-interpretive" enterprise.[48] As noted above, the Constitution imposes a positive obligation on the courts to contribute towards transformation in South Africa.[49] According to Brand, this means that the courts must "in both the outcomes they generate in their judgments and the manner in which they reach their judgments (their reasoning and judicial 'method')..work toward the achievement of [transformation]".[50] Brand's assessment requires closer scrutiny into the South African legal culture.

5.3.1 The impact of liberal legalism on South African legal culture

For the purposes of this thesis, I embrace Klare's understanding of "legal culture":

[44] Chapter 4, section 4.2.2.
[45] Ibid.
[46] Klare 1998 (14) *SAJHR* 150.
[47] Pieterse M "What do we mean when we talk about Transformative Constitutionalism" 2005 (20) *SAPL* 165. Pieterse contends that the transformative Constitution boldly commands a "political vision".
[48] Zitzke (2016) LLD Thesis 9.
[49] See section 5.2.1 above.
[50] Brand "Judicial deference and democracy in socio-economic rights cases in South Africa" (2012)180.

> By *legal culture*, I mean professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies deployed by participants in a given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other discursive contexts (e.g., in political philosophy), are deemed outside the professional discourse of lawyers? What enduring political and ethical commitments influence professional discourse? What understandings of and assumptions about politics, social life and justice? What inarticulate premises, [are] culturally and historically ingrained' in the professional discourse and outlook?[51]

South African legal culture has been been strongly influenced by features of liberal legalism, such as a formalism.[52] One of the characteristics of a formalist or positivist approach to the law is the insistence on a rigid distinction between law and morality (or politics).[53] Therefore, a formalist interpreter will be cautious of an interpretation of the law that could result in a "non-legal outcome", for example the achievement of a political (or social/economic/moral) goal.[54] For a strictly positivist judge, a norm or rule qualifies as law because "of the way it was enacted", and not whether it is moral or not.[55] Therefore, as soon as it is established that a rule or decision comes from a legitimate authority such as Parliament, or from another court whose decision is binding, the rule becomes compulsory to be followed, and no substantive reasoning is permitted.[56] The fact that the rule may not accord with fairness or may not have a just outcome, is thus disregarded in a formalist approach to adjudication. In this regard, Klare notes that liberal legalism endorses a "commitment to a formal or procedural rather than substantive conception of justice."[57]

The formalist approach to the law may be applied in different ways. For example, it may involve interpreting a text by having regard only to the ordinary or literal meaning of a text[58] or it may entail deferring the decision to an authority deemed to be more competent to deal

51 Klare 1998 (14) *SAJHR* 166-167.
52 Liebenberg *Socio-economic rights*(2010) 43.
53 Zitske (2016) LLD Thesis 9.
54 Johnson *et al Jurisprudence: A South African perspective* (2001) 63-76.
55 Bilchitz *et al Jurisprudence in an African context* (2017) 24.
56 Froneman J "Legal reasoning and legal culture: Our vision of law" (2005) 16 *Stell LR* 6.
57 Klare K "Law-making as praxis" (1979) 40 *Telos* 132.
58 Froneman (2005) 16 *Stell LR* 6.

with the decision.[59] Deference from the courts to other state organs is therefore a strong indicator of formalism.

Formalism does have its advantages, such as "legal certainty."[60] In addition, as Langa has observed, "there is much to be said for sticking to the rules when they are clear and good."[61] However, he cautioned that "it is …when the upholding of a law obscures or ignores that law exists to try, however difficult, to ensure justice, that formalism becomes dangerous."[62] This danger was clearly demonstrated under the apartheid regime. For example, John Dugard contends that a formalist approach to adjudication was instrumental in sustaining the system of apartheid.[63] Under the previous regime, judges operated under a system of parliamentary sovereignty that required of them to obey the intention of the apartheid legislature.[64] Moseneke elaborates:

> Until 1994, the South African legal culture….. was informed by inflexible legal positivism predicated upon parliamentary sovereignty. Adjudication was rule based. Law drew its legitimacy from the very fact that it was state sanctioned. The material context or the social aftermath of the application of the rule was deemed irrelevant. In that scenario, judges were deemed to have no duty to dispense justice in any sense other than permitted by the law.[65]

The former South African legal system did not permit a system of judicial review in terms of which discriminatory laws could be tested against a higher system of human rights principles or norms.[66] Since the Legislature was supreme, the courts were compelled to adhere to the laws adopted by Parliament.[67] Although some progressively-minded judges found creative ways to "use the law against apartheid"[68], the system of parliamentary sovereignty, bolstered by a

59 Currie I "Judicious avoidance" (1999) 15 *SAJHR* 145.
60 Froneman (2005) 16 *Stell LR* 7.
61 Langa (2006) 17 *Stell LR* 357.
62 Ibid.
63 Dugard J "Judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181, 183.
64 Moseneke (2002) 18 *SAJHR* 316.
65 Ibid.
66 Liebenberg *Socio-economic rights* (2010) 4.
67 Venter A and Landsberg C *Government and politics in South Africa* (2011) 4. Parliamentary sovereignty, in and of itself, is not necessarily responsible for the maintenance of an unjust system. If the legislature is democratically elected and committed to performing the will of the people justly, it will not use the system of parliamentary sovereignty for its own nefarious ends. In South Africa, the apartheid legislature was undemocratically elected and abused its supreme legislative powers to sustain an unjust system.
68 Cameron E *Justice: A personal account* (2014) 41. See specifically Chapter 1 of this book for an account by Judge Edwin Cameron on how progressively minded judges under the previous regime used the law to subvert

formalist approach to adjudication, enabled the pre-1994 judiciary to uphold the laws of apartheid.

Finally, it is a common misconception that formalism is an interpretive method that is devoid of politics and morality. In other words, the mere fact that some judges regard a formalist interpretation of the law as neutral and non-political, does not make it so. In this regard, Zitzke argues that the 'blind application' of law exercised by a formalist interpreter advances the "politics inherent in the laws themselves."[69] He explains further that the politics intrinsic to laws may also be associated with the preservation of "hierarchies of power."[70] In the sphere of basic education, the following example illustrates Zitzke's point: Section 39 of the Schools Act provides parents with the autonomy to determine the amount of school fees to be charged for a particular school year.[71] As explained in Chapters 3 and 4, the school fee system reinforces the historical privileges of former white schools "without at the same time increasing the resources available to schools serving historically disadvantaged students [who are predominantly black]."[72] Therefore, a judge who interprets section 39 in a formalist manner, does not engage in a politically neutral exercise because the provision maintains the historical imbalance of power between former white and former black schools.

5.3.2 The adoption of the supreme Constitution: A paradigm shift in legal culture

The adoption of the supreme Constitution fundamentally changed the South African legal system.[73] Parliamentary sovereignty gave way to a system of constitutional supremacy in which a justiciable Bill of Rights is embedded.[74] The late Etienne Mureinik argued that the actual change from apartheid to post-apartheid South Africa is illustrated by a shift from "a culture of authority" to a "culture of justification."[75] Freda Githuru explains that the culture of authority represents the apartheid era during which the former government reigned as an

the apartheid legal system. See also Bohler-Muller N *et al* (eds) *Making the road by walking it: The evolution of the South African constitution* (2018) 61-62.

69 Zitzke (2016) LLD Thesis 11.

70 Ibid.

71 Section 39(1) Schools Act.

72 Fiske E and Ladd H "Balancing public and private resources for basic education: School fees in post-apartheid South Africa" (2004) 57.

73 Liebenberg *Socio-economic rights* (2010) 1-2.

74 Ibid.

75 Mureinik E "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *SAJHR* 32.

oppressive and authoritarian regime.[76] On the other hand, the culture of justification is representative of the constitutional era which stands in direct contrast to the former era.[77] The post-apartheid state is now held accountable for its conduct and "every exercise of power is expected to be justified" in terms of the law, in particular the Constitution.[78] Alfred Cockrell describes the transition to constitutional democracy as "paradigm shift" which necessitated the adoption of a "new style of adjudication".[79] Moseneke, writing extra-curially, echoes Cockrell's argument:

> The Constitution has reconfigured the way judges should do their work [and] invites us into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with its transformative roles.[80]

5.3.2.1 Transformative adjudication[81]

What then does this "new style of adjudication", ushered in by the paradigm shift to constitutional democracy entail? Cockrell contends that the courts are no longer bound by a "formal vision of the law" as dictated by the apartheid legal system.[82] That vision has been replaced by a "substantive vision of the law" brought about by the supreme Constitution.[83] According to Langa, an allegiance to "substantive reasoning" is at the crux of the transformative Constitution.[84] For Cockrell, such reasoning involves a grappling with the substantive rightness of a decision and requires that the courts justify their decisions with reference to "moral, economic, political, institutional or other considerations."[85] Drawing on Brand above, transformative adjudication does not only require a certain form of reasoning to be employed by judges, but also the application of certain judicial methods.[86] The Constitution itself prescribes a method of interpretation conducive to achieving the transformative

76 Githiru F "Transformative constitutionalism, legal culture and the judiciary under the 2010 Constitution of Kenya (2015) LLD thesis (University of Pretoria) 93 -94. ("Githiru (2015) LLD Thesis").
77 Ibid.
78 Zitzke (2016) LLD Thesis 8.
79 Cockrell A "Rainbow jurisprudence" (1996) 12 *SAJHR* 1,10.
80 Moseneke (2002) 18 *SAJHR* 318.
81 Moseneke coined the term "transformative adjudication" at the influential Fourth Bram Fischer Memorial Lecture, delivered in Johannesburg on 25 April 2002. See Moseneke ibid.
82 Cockrell (1996) 12 *SAJHR* 1,10.
83 Ibid.
84 Langa (2006) 17 *Stell LR* 357.
85 Cockrell (1996) 12 *SAJHR* 1,10.
86 Brand "Judicial deference and democracy in socio-economic rights cases in South Africa" (2012)180.

imperatives of the Constitution in the form of section 39 by instructing the courts on how to interpret the law. Section 39 of the Constitution provides:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum—
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.
> …
> (2)When interpreting any legislation,…, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Jacques De Ville points out that section 39(1)(a) deals with the interpretation of the rights in the Bill of Rights whereas section 39(2) deals with the interpretation of statutes.[87] However, he reasons that the distinction between the former and the latter should not be "stretched too far" as both constitutional and statutory interpretation require a similar approach to interpretation.[88] In this regard, Froneman J held:

> The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular piece of legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution. Constitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with a search to find the literal meaning of statutes.[89]

Ultimately, both constitutional and statutory interpretation are aimed at achieving the same objective. According to Sachs "section 39 of the Constitution requires that the law be interpreted in a progressive, purposive and transformative manner".[90] Lourens Du Plessis points out that section 39(2), in particular, has actually established a new method of statutory interpretation, namely that legislation must be interpreted in such a manner so as to give effect

87 De Ville JR *Constitutional and statutory interpretation* (2001) 59.
88 Ibid 59-60.
89 *Matiso v Commanding Officer, Port Elizabeth Prison* 597.
90 Sachs A "Oliver Tambo Centenary Series, Part 2: Does the Constitution stand in the way of radical land reform?" https://www.dailymaverick.co.za/article/2017-05-05-oliver-tambo-centenary-series-part-3-does-the-constitution-stand-in-the-way-of-radical-land-reform/ (accessed 3 June 2019).

to the "spirit, purport and objects of the Bill of Rights."[91] In *Phumelela Gaming and Leisure Ltd v Grundlingh and Others*, the Constitutional Court held that the courts have *no discretion* in complying with the obligation under section 39(2).[92] In *Governing Body of Rivonia Primary School and Another v MEC for Education: Gauteng*, Mbah J held that this interpretive duty must be performed by the courts even if a litigant has not directly invoked section 39(2) of the Constitution.[93] Du Plessis states:

> [Section 39(2)] cannot be overridden by 'legislative intent' couched in (allegedly) 'clear and unambiguous language'. The 'intention of the legislature, in all its possible significations, will always be subject (and second) to the Constitution, and not only when a statute is (allegedly) inconsistent with a provision or provisions of the Constitution.[94]

The value-laden prism through which constitutional and statutory interpretation is required to take place, finds application in a contextual approach to interpretation endorsed by the Constitutional Court.[95] De Vos, for example, contends that "[t]he Constitutional Court has implicitly embraced the transformative vision of the Constitution, most notably in its acceptance of a contextual approach to interpretation."[96] In the words of Moseneke:

> [T]ransformative jurisprudence needs to contextualise violations within actual, live conditions. Decisions on violations of constitutional rights must be seen in the context of socio- economic conditions of the groups concerned in the light of social patterns, power relations and other systematic forms of deprivation, which may be relevant. Also the historical context of the case must be heard.[97]

[91] Du Plessis L "Theoretical (dis-) position and strategic leitmotivs in constitutional interpretation in South Africa" (2015) 18(5) *PER* 1337.
[92] *Phumelela Gaming and Leisure Ltd v Grundlingh and Others* 2007 (6) SA 350 (CC) paras 26-27. Italics my emphasis.
[93] *Governing Body of Rivonia Primary School and Another v MEC for Education: Gauteng* 2012 (1) All SA 576 (GSJ) para 20.
[94] Du Plessis (2015) 18(5) *PER* 1338. (References to footnotes omitted).
[95] De Vos P "Grootboom, The right of access to housing and substantive equality as contextual fairness" (2001) *SAJHR* 261-262; Moseneke (2002) 18 *SAJHR* 318; De Ville *Constitutional and statutory interpretation* (2001) Chapter 4.
[96] De Vos ibid. I am not claiming that other approaches may not lead to a transformative outcome. However, I am arguing that a contextual approach to adjudication provides the courts with some guiding principles on how to achieve a transformative outcome through adjudication.
[97] Moseneke (2002) 18 *SAJHR* 318.

Therefore, transformative adjudication entails an approach to interpretation that is focused on remedying the historical inequality in South African society (and by implication in the public basic education system).[98] According to De Ville, this involves "ameliorating the impact and effect of entrenched patterns of oppressions and exclusion on certain groups."[99] However, drawing on Brand's understanding of transformation above, it is submitted that the amelioration of exclusionary and oppressive patterns on some groups is not enough to effect radical transformation. To this end, the courts must also be willing to interrogate the foundations of systems/institutions that obstruct transformation as was the case in *Van Rooyen v S*.

5.3.2.2 A critique of Transformative adjudication

By now, it is trite that Klare, in his influential 1998 article, lamented the conservatism of the South African legal culture which he perceived as a threat to the transformative objectives of the Constitution.[100] He rooted his understanding of conservatism not in the political belief systems of our lawyers, but in their restrained "traditions of analysis."[101] He contended that a "highly structured, technicist, literal and rule-bound" form of legal interpretation seems to be more prevalent in South Africa than in the United States of America.[102] Pieterse, on the other hand, does not only point out the traditional formalist approach of our judiciary, but also their preference for "classic liberalism…and accordingly of condoning the inequalities occasioned, reinforced and sustained by the unfettered operation of classical liberal economic and social structures."[103] For Sibanda, the political views of our judges play a significant role in the ability of transformative constitutionalism to deliver on its "large scale promises."[104] He argues that if the interpreters of our law share a political and social understanding of transformation (what he terms "the sharing of a transformative consciousness"), then "the possibilities of establishing a truly transformed society would be, within the bounds of reason and the constitutional text, virtually limitless."[105] However, if judges' understanding of transformation

98 Ibid.
99 De Ville *Constitutional and statutory interpretation* (2001) 60.
100 Klare (1998)14 *SAJHR* 170.
101 Ibid 169.
102 Ibid 168.
103 Pieterse 2005 (20) *SAPL* 164.
104 Sibanda "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism, and the struggle to eradicate poverty" (2012) 57.
105 Ibid 50.

is rooted in different political ideologies, then the objectives of transformative constitutionalism will always be in jeopardy.[106] For example, a judge who is faithful to the liberal notion that the acquisition of property is only as a result of hard work and talent and that the state should have minimal state interference in individual rights[107], will possibly take a negative view of the expropriation of land for the purpose of achieving transformation in our society. Furthermore, such a judge would likely be influenced by her own personal context (i.e. to protect her own property and interests). Therefore, it is not surprising that Sibanda contends that transformative constitutionalism runs the risk of not delivering "…true transformation… because it promises that which those charged with delivering it are not committed to, owing to its potential to undo already entrenched elite or middle class interests."[108]

Drawing on the above, it is clear that Sibanda is exposing two issues to be concerned about. First, he points to the pitfalls of the liberal paradigm in which the South African Constitution is entrenched (and hence the classic liberal notions that may have an negative impact on transformation). For instance, he questions the ability of transformative constitutionalism to deliver on its promises given its entrenchment in a liberal, democratic, constitutional paradigm.[109] Secondly, by arguing that a "shared transformative consciousness" by legal interpreters is needed to best effect transformation, Sibanda suggests that he is distrustful of the South African courts' commitment to transformation.

The late former Chief Justice Langa, writing extra-curially, pointed out that transformative adjudication does not mean that judges have free reign in their interpretation of the law.[110] He stated that the Constitution envisages distinct roles for each branch of government and places limits on the law-making ability of the judiciary through classic liberal notions, such as separation of powers and the rule of law.[111] In this regard, he warned that the Constitution does not envisage that judges take over the legislative domain by creating law but are rather required to interpret the law.[112] Nevertheless, Langa acknowledged that the transformative objectives of the Constitution actually do impose some law-making function on the courts in the sense that they are required to change the law so as to bring it in conformity with constitutional rights and

106 Ibid 51.
107 Heywood A *Political ideologies: An introduction* (2007) (4th ed) 78.
108 Sibanda "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism, and the struggle to eradicate poverty" (2012) 51.
109 Ibid 57.
110 Langa (2006) 17 *Stell LR* 357.
111 Ibid.
112 Ibid.

values.[113] The tension in transformative adjudication that Langa evinces, is illustrative of the conflict between "freedom and constraint" in constitutional adjudication.[114] In this regard, the Constitution specifically contains broad open-ended language which imposes obligations on judges to fulfil the transformative mission of South Africa's foundational law. However, the same text features classic liberal notions such as the separation of powers and the rule of law which places a restraint on how far judges can go as pointed out by Langa above. To this end, in *S v Zuma*[115], Kentridge AJ held that "the Constitution does not mean whatever we might wish it to mean".[116] However, does the post-liberal characterisation of the South African Constitution change the way in which classic liberal notions should be interpreted? For instance, Klare while acknowledging that judges should not be unrestrained in their interpretation of the law, argues that a more politicised conception of the rule of law (and logically other classic liberal notions) and adjudication is required to give effect to the transformative mandate of the Constitution.[117] I agree that there is a limit as to how far judges can go in their interpretive duties. However, it is submitted that classic liberal concepts should be interpreted in a manner that are at least not obstructive to the transformative imperatives of the Constitution. This follows from the mere fact that the South African Constitution is after all not a purely liberal Constitution, but a "post-liberal" document which, in the words of Moseneke, commands the judiciary to "observe with unfailing fidelity the transformation mission of the Constitution."[118] This observation of Moseneke infuses me with more optimism than Sibanda because I believe that judges, irrespective of their political inclinations have no choice but to be led by the transformative objectives of the Constitution. If not, they are breaching their professional duty to serve the Constitution to which they are legally bound.[119] Furthermore, in response to Sibanda's second concern pointed out above, the next chapter will show that our courts, in particular the High courts and SCA have started to adopt a transformative approach in their adjudication of the right to basic education.

[113] Ibid.
[114] Klare (1998)14 *SAJHR* 149.
[115] 1995 (4) BCLR 401 (CC).
[116] At para 17.
[117] Klare (1998)14 *SAJHR* 150.
[118] Moseneke (2002) 18 *SAJHR* 319.
[119] See sections 7(2) and 8(1) of the Constitution.

5.4 CONCLUSION

Chapter 5 has aimed to conceptualise a theoretical framework in terms of which the radical transformation of public education as demanded by the Constitution can be assessed. In this regard, it has been established that a twofold meaning of transformation has taken shape over the years. In terms of the first understanding, transformation is perceived as the realisation of concrete outcomes through adjudication. The second meaning recognises that the systemic inequality reinforced by social/political/cultural/legal institutions or systems must be disrupted in order for radical transformation to occur. Furthermore, Chapter 5 has endeavoured to distill the judicial methods of interpretation and reasoning as well as general principles that are conducive to a transformative approach to adjudication.

In the final substantive chapters to follow, both conceptualisations of transformation as expressed in the sphere of public basic education, will be explored in greater depth. To this end, Chapter 6 will determine that the content-based approach in respect of section 29(1)(a) does result in transformative change in the lives of disadvantaged learners. However, this is only half the battle won. The substantive-based approach is not capable of adequately disrupting the systemic inequality that are reinforced and perpetuated through the school governance system. Thus, in Chapter 7, the meaningful engagement approach of the Constitutional Court is examined critically through the lens of the second conceptualisation of transformation.

CHAPTER 6
TRANSFORMATION DEMONSTRATED THROUGH TANGIBLE OUTCOMES: THE SUBSTANTIVE-BASED APPROACH TO SECTION 29(1)(a)

6.1 INTRODUCTION

Chapter 5 has established that two distinct interpretations of "transformation" have developed over the years. In terms of the first understanding, transformation is understood as the realisation of tangible outcomes or results through adjudication.[1] The second meaning of transformation is concerned with the fundamental restructuring of the systems/institutions that produce results or outcomes.[2] Chapter 6 focuses on the first conceptualisation of transformation as expressed in the substantive-based approach of the High courts and the SCA. This chapter specifically examines the jurisprudence that has evolved out of the Constitutional Court's interpretation of the right to basic education in *Juma Musjid* which, to date, is one of the most influential judgments in education law jurisprudence. The case was appealed to the Constitutional Court in 2010 from the Kwazulu Natal High court (Pietermaritzburg) which sanctioned the eviction of a public school, operated on private property owned by the Juma Musjid Trust.[3] Although the application to prevent the eviction was unsuccessful as the Constitutional Court ultimately granted the eviction order[4], the judgment is essentially revered for the powerful pronouncements made by Nkabinde J on the meaning of the right to basic education. In this regard, the Court distinguished section 29(1)(a) from the qualified socio-economic rights in the Constitution by declaring that the former right is not subject to the same internal qualifiers applicable to the latter rights.[5] Furthermore, the Constitutional Court held that the right to basic education is significant for the transformation of South African society.[6] *Juma Musjid* seems to have emboldened the South African High courts and the SCA to adopt a progressive stance by giving substantive content to the right to basic education.[7]

1 Chapter 5, section 5.2.2.
2 Ibid.
3 *Juma Musjid CC* para 1. Section 14(1) of the Schools Act allows for the establishment of a public school on private property "only in terms of an agreement between the Member of the Executive Council (MEC) and the owner of the private property." In this case, the MEC's failure to complete an agreement, stipulating the terms and conditions of the tenancy, gave rise to a deadlock with the Juma Musjid Trust. This, in turn, led to successful eviction proceedings being instituted by the Trust in the High Court. A bid to appeal the judgment to the Supreme Court of Appeal was unsuccessful.
4 See *Juma Musjid CC* paras 63-64 for an explanation of the Constitutional Court's finding that the eviction order sought by the Juma Musjid Trust was reasonable.
5 *Juma Musjid CC* para 37.
6 *Juma Musjid CC* para 38.
7 See section 6.2.1 below.

Chapter 6 is set out as follows: In section 6.2 , the incremental, yet progressive approach of the High courts and SCA, in giving explicit content to the right to basic education is scrutinised through the lense of the first understanding of transformation noted above. In section 6.3, after having had established the content of section 29(1) (a) through the courts' "filling out" of the right, the question is posed: "What do we mean by the term 'basic education'?" In this regard, *Juma Musjid* has instigated two debates for the purposes of this thesis. Firstly, the Constitutional Court's pronouncements on the transformative potential of basic education is examined to explore a meaning of basic education that is aimed at contributing to the transformation of South African society. Secondly, the Court's interpretation on the link between basic education and the compulsory schooling period has prompted an analysis into whether the current compulsory education period should be amended. Section 6.4 provides the conclusion.

6.2. "FILLING OUT" THE CONTENT OF THE RIGHT TO BASIC EDUCATION: THE INCREMENTAL APPROACH BY THE HIGH COURTS AND SCA

As already noted in Chapter 3, the *Juma Musjid* Court held that the absence of qualifiers in the textual formulation of the right to basic education means that section 29(1)(a) is immediately realisable, not subject to the availability of state resources and that the right may only be limited in terms of the Constitution's general limitation clause.[8] Furthermore, the Constitutional Court confirmed that the state bears the primary onus to provide a basic education.[9] However, what is the exact content of the state's duties in respect of section 29(1)(a)? This question was not before the Court. However, Nkabinde J provided some broad parameters in understanding the content of the right to basic education. Firstly, she held that access "is a necessary condition

[8] *Juma Musjid CC* para 37.

[9] The Court found that the state incurred a positive obligation in terms of sections 7(2) and 8(1) of the Constitution to provide a basic education. Section 7(2) of the Constitution provides: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." Section 8(1) states: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." The Court held that the primary obligation to provide a basic education rests on the state, and that the Trust's duty was merely "secondary". According to the Court, private entities such as the Juma Musjid Trust incur mere "negative obligations not to impair learners' right to a basic education [in terms of section 8(2) of the Constitution]." *Juma Musjid CC* paras 45-62.
In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), the Constitutional Court held that "[the right to basic education in terms of section 32 of the Interim Constitution] creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education." See also Seleoane M "The right to education: Lessons from *Grootboom*" (2003) *Law, Democracy and Development* 141-143.

for the achievement of this right"[10] and that the state has a duty to ensure the availability of schools.[11] Whereas the *Juma Musjid* judgment provided some broad principles in guiding the content of the right to basic education, the High courts and the SCA have been more specific in providing exact content to the right, albeit on an incremental basis. According to Skelton, these courts "…have begun to spell out, in case after case, what makes up the right to education."[12] According to Veriava, the High courts and SCA have been engaged in developing a "rich jurisprudence" based on the principles established in *Juma Musjid*.[13]

6.2.1 A chronology of cases: 2010-2018

6.2.1.1 The "Mud schools" case

The so-called "Mud schools" case was one of the first noteworthy cases to focus on school infrastructure.[14] As noted in Chapter 3 of this thesis, this case, launched in 2010 by the LRC, on behalf of the Centre for Child Law and several schools in the Eastern Cape, resulted in a settlement agreement with the state which eventually developed into the Accelerated Schools Infrastructure Development Initiative (ASIDI).[15] Since a settlement was reached in this case, the court did not explicitly find that infrastructure constitutes an element of the right to basic education. However, in my view, the government's commitment to provide appropriate infrastructure in schools as per the terms of the program, indicated an admission on their part that school infrastructure is a key element of the content of section 29(1)(a). The analysis of the subsequent cases will show that the courts have now confirmed that infrastructure is indeed a core component of the right to basic education.

6.2.1.2 Centre for Child Law and Others v Minister of Basic Education and Others

The next important judgement dealt with teaching and non-teaching staff as key elements of section 29(1)(a). In *Centre for Child Law and Others v Minister of Basic Education and Others*[16], the court held that teaching and non-teaching staff are core components of the right

[10] The Court held that "…access to school [is] an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution…" *Juma Musjid CC* para 43.
[11] Sections 7(2) and 8(1) of the Constitution read with section 12 of the Schools Act imposes a duty on the state "to provide public schools for the education of learners." *Juma Musjid CC* para 45.
[12] Skelton Equal Access Report (2017) 66.
[13] Veriava (2018) LLD Thesis 14.
[14] Skelton Equal Access Report (2017 52.
[15] Ibid 52-53.
[16] (2012) 4 All SA 35 (ECG).

to basic education.[17] Plasket J, in particular focused on the damaging impact of a deficient non-educator staff on learners as well as teachers.[18] He reasoned:

> If the administration and support functions of a school… cannot perform properly because of staff shortages, not only does this have a knock-on effect on the right to basic education but it also has the potential to threaten other fundamental rights. Where hostels are understaffed, for instance, or security is lacking, the rights to dignity and to security of the person, as well as children's rights in terms of s 28 of the Constitution, may be implicated. When administrative capacity in a complex institution like a school is non-existent, administration either breaks down or has to be performed by teachers who have to deviate from their core functions to perform tasks that they are not trained or expected to perform.[19]

This dictum confirms the approach by the Constitutional Court that socio-economic rights are not to be construed in isolation, but in relation to other rights.[20] All the rights in the Bill of Rights are interconnected.[21] Therefore, a denial of certain core elements of section 29(1)(a), such as teachers and non-teaching staff, does not only constitute a violation of the right to basic education, but detrimentally impacts other rights, such as the right to dignity. Furthermore, Plasket J inadvertently alludes to the infringement of quality education[22] by highlighting the undue burden that is placed on teachers when there is a shortage of support staff at a particular

17 At paras paras 33-34. See para 32 of the judgment for a summary of the process governing non-teacher post allocations. Sephton, in her chapter, "Post provisioning" (2017) 247-261 explains in detail the legislative and policy framework governing the allocation of teaching posts in South Africa.

18 *Centre for Child Law and Others v Minister of Basic Education and Others* paras 16-21.

19 *Centre for Child Law and Others v Minister of Basic Education and Others* para 21.

20 In *Grootboom* at paras 22-23, the Constitutional Court explained the interrelated nature of rights in the Bill of Rights: "…[R]ights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2."
The textual interpretation of socio-economic rights described here is part of the broader contextual approach to interpretation employed by the Constitutional Court. This approach requires a consideration of the text as well as the social and historical context of the right. This requires that "rights must be interpreted with a historically conscious transformative vision in mind." In practical terms, this means that the interpretation of the right to basic education "…must be geared towards redressing this historical disparity[in the education system caused by the discriminatory education policies of the colonial and apartheid regimes]." See De Vos (2001) 17 *SAJHR* 258. See also Chapter 5, section 5.3.

21 *Grootboom* paras 22-23.

22 In Chapter 3, section 3.2.3 of this thesis, I make the argument that section 29(1)(a) of the Constitution read with the Schools Act guarantees a right of equal access to *quality* basic education. Italics my emphasis.

school. Being compelled to carry the workload of non-teaching staff may force educators to cut classes and to be inadequately prepared for their lessons. This in turn leads to a low morale among educators and a drawback in the quality of education provided to learners.

6.2.1.3 Madzodzo and Others v Minister of Basic Education and Others

Quality was also implicated in *Madzodzo and Others v Minister of Basic Education and Others*[23] in which the Mthatha High court pronounced on the failure of the Eastern Cape Education Department to provide school furniture (in the form of desks and chairs) to destitute public schools in the province.[24] The court described in detail the harmful effect that a scarcity or complete lack of furniture has on learners and teachers. The court emphasised that learners are either "…forced to sit on the floor…", "…compelled to stand throughout lessons with no writing service" or "…squashed into desks like animals."[25] This results in a multitude of problems. Learners become entangled in fights over the limited furniture available, which in turn leads to a struggle on the part of the teacher to maintain discipline in class. Furthermore, due to the limited writing space, teachers are not able to provide learners with writing exercises. Inevitably, the deplorable physical environment, "not at all conducive to teaching and learning" results in learners not being able to concentrate on the work before them.[26] It therefore comes as no surprise that Goosen J described this poor state of affairs as an impairment of the dignity of the affected learners.[27] The court subsequently found that an absence of desks and chairs "profoundly undermines the right of access to basic education."[28] Similar to *Centre for Child Law v Minister of Basic Education*, the court affirmed the interrelated nature of the rights in the Bill of Rights by considering the impact of a lack of appropriate furniture on the dignity of the learners.[29] Goosen J further alluded to an assault on the quality of education, brought on by the deplorable physical environment in which the learners were educated. The court interpreted the provision of school furniture as part of the state's obligation to provide "educational resources" which includes "schools, classrooms, teachers, teaching materials and appropriate facilities for learners."[30] *Madzodzo* is therefore significant to the extent that the court went

[23] (2014) 2 All SA 339 (ECM) ("*Madzodzo*").
[24] At para 1.
[25] *Madzodzo* para 20.
[26] *Madzodzo* para 20. For a summary of the case, see Veriava "Basic education provisioning" (2017) 232-233.
[27] *Madzodzo* para 20.
[28] Ibid. See also Veriava F and Skelton A "The right to basic education: a comparative study of the United States, India and Brazil" (2019) 35(1) *SAJHR* 3-4.
[29] *Madzodzo* para 20.
[30] *Madzodzo* para 20.

further than merely declaring that the state is liable to provide desks and chairs to learners. The court expanded the content of the right by interpreting section 29(1)(a) as a right to school infrastructure and the various educational resources referred to above. Furthermore, *Madzodzo* interpreted the right to basic education as an entitlement to a physical environment that takes account of a learner's right to dignity.

6.2.1.4 The "Textbook judgments"

Next, textbooks as a core component of section 29(1)(a), became the main issue in a trio of judgments. In the first of these judgments, *Section 27 and Others v Minister of Education and Another*[31] ("*Textbook 1 judgment*"), the North Gauteng High court considered the question whether the state's failure to provide textbooks to public schools in the Limpopo province signified an infringement of the rights to basic education, equality and dignity.[32] The court, in the end, did not make any pronouncements on the rights to equality and dignity. However, it zoomed in on the question whether the right to basic education includes an obligation on the state to provide textbooks. Kollapen J answered in the affirmative by having recourse to a range of state policy statements and documents. For example, the court emphasised former President Zuma's declaration in the "2011 State of the Nation Address" that "[t]he Administration must ensure that every child has a textbook on time."[33] Furthermore, the court referred to the "Limpopo Education Department's Annual Performance Plan for 2011- 2012" which indicated as one of its objectives "[t]o ensure that every learner has access to a minimum set of textbooks

[31] Case 24565/12, 4 October 2012.

[32] *Textbook 1 judgment* para 21. This particular case was instituted by Section 27 as a direct result of the so-called "Limpopo textbook crisis". The root of this crisis was found in government's decision to implement a new curriculum, called "Curriculum and Assessment Policy Statements" (CAPS) in 2012. As a result of the change, new textbooks were required to implement the curriculum. The National Department of Basic Education made the decision to introduce CAPS on a grade by grade basis: grades 1 to 3 and 10 in 2012, grades 4 to 6 and 11 in 2013 and grades 7 to 9 and 12 in 2014. Due to resource constraints, the NDBE decided to prioritise the procurement of textbooks for the grades in which CAPS would be implemented in 2012. The NDBE subsequently ran out of money which led to some schools not receiving textbooks. Limpopo was particularly affected by the non-delivery of textbooks due to "the general fraud, maladministration, corruption and incompetence in the provincial government." In January 2012, the national executive exercised its section 100 constitutional mandate to intervene in the Limpopo government by taking over the obligations of the province. See Veriava (2016) 32(2) *SAJHR* 321-323.
Section 100(1)(a) of the Constitution provides: "When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations."

[33] *Textbook 1 judgment* para 23.1.

and workbooks required according to National Policy."[34] Finally, Kollapen J highlighted the "Limpopo Education Department's Curriculum Strategy" which states that effective teaching and learning is impossible without "learning support materials."[35] On the court's reasoning, the government has taken "an unambiguous stance…that textbooks are an essential and vital component in delivering quality learning and teaching."[36] Drawing on the above, Kollapen J came to a firm conclusion:

> [T]he provision of learner support material in the form of textbooks, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of text books.[37]

The *Textbook 1 judgment* is not only valuable because of its contribution to "filling out" the content of the right to basic education. The judgment also provides clear guidance as to when the judiciary is willing to give content to socio-economic rights. Kollapen J relied on state policy statements and documents to reach the conclusion that the right to basic education includes the right to textbooks. Dugard and Wilson argue that the courts are disposed to providing content to socio-economic rights when it requires "…the state to take steps provided for in, or consistent with, its own policy, or when expanding on the content given to the right by applicable legislation…"[38] In other words, the courts are more likely to give content to socio-economic rights where legislation or policy giving effect to the applicable right already exists.[39] As will be discussed later in this chapter, the SCA adopted a similar approach as Kollapen J in relying on policy statements to give content to section 29(1)(a).

[34] *Textbook 1 judgment* para 23.2. Linda Chisholm provides the broader political and economic context within which the "Limpopo textbook crisis" developed. See, for example, Chisholm L "Understanding the Limpopo textbook saga" available at http://www.hsrc.ac.za/en/review/hsrc-review-september-2013/understanding-the-limpopo-textbook-saga (accessed 13 July 2019).

[35] *Textbook 1 judgment* para 23.3. The NDBE categorises textbooks as part of the broader Learner Teacher Support Materials (LTSM). See NDBE "Draft National Policy for the Provision and Management of Learning and Teaching Support Material" (2014) 3.

[36] *Textbook 1 judgment* para 23.3.

[37] *Textbook 1 judgment* para 25.

[38] Dugard and Wilson "Constitutional jurisprudence: The first and second waves" (2014) 59.

[39] Danie Brand explains why the courts are more inclined to define the content of socio-economic rights where legislation giving effect to the right already exists: "Statutory entitlements are likely to be more detailed and concrete in nature than the vaguely and generally phrased constitutional rights forming their background, and are consequently more direct in the access to resources that they enable people to leverage. In addition, courts are

Subsequent to the order in the *Textbook 1 judgment*, the state failed to effect complete delivery of textbooks to all the affected schools in Limpopo. As a result, two more settlement agreements in terms of which the state undertook to deliver the textbooks by specified dates, were reached.[40] When the state failed to comply with these timeframes, another case in the continuous textbook litigation saga was instituted, namely *Basic Education for All and Others v Minister of Basic Education and Others* ("*Textbook 2 judgment*").[41] At the time when the application was launched, the NDBE had made significant strides in delivering textbooks to schools in Limpopo.[42] On the state's version, it had already delivered approximately 97% of textbooks in the province at the time when litigation was instituted.[43] The NDBE argued that their failure to provide textbooks to the remaining schools did not amount to a violation of section 29(1)(a) because most of the textbooks had been delivered at the stage when litigation had commenced.[44] Thus, the court was faced with the question whether a violation of the right to basic education occurred in respect of the minority of learners who had not received their

likely to enforce statutory entitlements more robustly than they would constitutional rights, because they are enforcing a right, duty or commitment defined by the legislature itself, rather than a broadly phrased constitutional right to which they have to give content. As such they are not to the same extent confronted with the concerns of separation of powers, institutional legitimacy and technical competence that have so directly shaped and limited their constitutional socio- economic rights jurisprudence." See Brand D "Introduction to socio-economic rights in the South African Constitution" (2005)14.

40 Paterson K "Constitutional adjudication on the right to basic education: Are we asking the state to do the impossible?" (2018) 34 (1) *SAJHR* 113-114.

41 Kollapen J's initial order required of the state to deliver textbooks for grades R,1,2,3 and 10 by no later than 15 June 2012. Failure by the state to meet the latter deadline resulted in a settlement agreement that extended the deadline with two weeks to 27 June 2012. The settlement also included an undertaking by the state to agree to an independent audit and to a "catch-up" plan for Grade 10 learners at least. The settlement also required that monthly reports be served, detailing progress on the plan. When the state still did not meet the 27 June 2012 deadline, the case was again placed before Kollapen J by the initial applicants. On 4 October 2012, a fresh order was issued by the North Gauteng High court, requiring completion of delivery by 12 October 2012. According to Basic Education for All (BEFA), although textbook delivery improved in 2013, it was still not completed. The NDBE, on the other hand, admitted that although "there were shortfall in deliveries in 2013…these were rectified." However, by January 2014, Section 27 informed the NDBE of a number of "textbook shortages" in Limpopo. Several schools also indicated that they "had not received their full quotas of books in 2012 and 2013." By 20 March 2014, two months into the new school year, Section 27, in a formal letter to the Minister of Basic Education, detailed a growing number of schools in the province without textbooks. The letter also indicated that Section 27 would institute an urgent application if learner support material, including textbooks were not delivered to the affected schools by 7 April 2014. The lack of a "substantive response" to the letter by the Minister resulted in a new application being launched by BEFA and 29 school governing bodies in Limpopo on 27 March 2014. This application resulted in the judgment delivered by Tuchten J on 5 May 2014. See Veriava (2016) 32(2) *SAJHR* 321-343 and *Textbook 2 judgment* paras 2-31.

42 *Textbook 2 judgment* para 44.

43 *Textbook 2 judgment* para 44. See also Stein "Textbooks" (2017) 173-263.

44 *Textbook 2 judgment* para 44.

quota of textbooks.[45] Tuchten J confirmed the finding in *Textbook 1* that textbooks are an essential component of the right to basic education.[46] He rejected the state's argument that delivering textbooks to the majority of schools in the Limpopo province meant that they had complied with their section 29(1)(a) obligations. The court held:

> The delivery of textbooks to certain learners but not others cannot constitute fulfilment of the right. Section 29(1)(a) confers the right to a basic education to *everyone*. If there is one learner who is not timeously provided with her textbooks, her right has been infringed. It is of no moment at this level of the enquiry that all the other learners had been given their books.[47]

The state subsequently appealed the *Textbook 2 judgment* to the SCA and argued, *inter alia*, that the requirement of a 100% delivery record is a "standard of perfection" that they were not able to meet.[48] In other words, they "insisted that the right to a basic education did not mean that *each learner* in a class has the right to his or her own textbook."[49] The SCA per Navsa JA, rejected this argument and made the following pronouncement in *Minister of Basic Education and Others v Basic Education for All* ("*Textbook 3 judgment*"):

> …[T]he DBE did not only set itself a 'lofty' ideal but .. its policy and actions, as set out in the affidavits filed on its behalf, all indicate that it had committed to providing a textbook for each learner across all grades. *The content of the s 29(1)(a) right is also determined in the DBE's 'Action Plan to 2014 – Towards the Realisation of Schooling in 2025*'[50]. That certainly is what it achieved in pursuit of its own policy in respect of the other eight provinces and on its version of events for almost 98 per cent of learners in Limpopo.[51]

[45] *Textbook 2 judgment* para 44. The applicants averred that 39 schools in Limpopo had not received textbooks at the time when the application was launched in this particular case. See para 4 of the judgment.
[46] *Textbook 2 judgment* para 51.
[47] *Textbook 2 judgment* para 52.
[48] *Minister of Basic Education and Others v Basic Education for All* (2016) 4 SA 63 (SCA) para 33 ("*Textbook 3 judgment*").
[49] *Textbook 3 judgment* para 41. Italics my emphasis.
[50] The "2014 Action Plan" referred to here by the court has actually been replaced by a new policy, called "Action Plan to 2019 :Towards the Realisation of Schooling 2030 ("Action Plan 2019")". The latter plan can be regarded as the Education Ministry's blueprint for public schooling. It sets out the various goals in education to be achieved by the year 2030 and how to achieve them. The Ministry lists various features that need to be in place to satisfy the "…vision of a post-apartheid schooling system…" by the year 2030. These include access to schools and attendance of all learners, competent teachers, learning and teaching materials "in abundance" and of "high quality" and school buildings and facilities that are "spacious, functional, safe and well-maintained." See Action Plan 2019 8-15.
[51] *Textbook 3 judgment* para 42.

Navsa JA clearly endorsed Kollapen J's interpretive approach by deriving the content of section 29(1)(a) from policy statements. The SCA also went further than merely confirming the now uncontroversial stance that the right to basic education includes a right to a textbook.[52] The Court proceeded to launch an inquiry into the learners' right to equality by applying the constitutionally mandated "*Harksen* test".[53] This test involves a two stage enquiry to determine whether differentiation amounts to unfair discrimination in terms of section 9(3) of the Constitution and has been framed by the Constitutional Court as follows:

> Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground [in terms of section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.[54]

According to Albertyn and Fredman, "dignity is generally recognised as the core value and standard of [the unfair discrimination enquiry under] section 9(3)."[55] For example, in *President of the Republic of South Africa and Another v Hugo*,[56] the Constitutional Court held:

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human

[52] *Textbook 3 judgment* para 41.
[53] The "*Harksen* test" was established in *Harksen v Lane* 1998 (1) SA 300 (CC). Although this case was decided under the Interim Constitution 200 of 1993, the equality provisions under the 1996 Constitution are similar to those of the Interim Constitution. Therefore, the *Harksen* test remains valid for a determination of unfair discrimination under the current Constitution. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) and De Ville *Constitutional and statutory interpretation* (2000) 234.
[54] *Harksen v Lane* para 53.
[55] Albertyn and Fredman "Equality beyond dignity: Multi-dimensional equality and Judge Langa's judgments" (2015) *Acta Juridica* 435.
[56] 1997 (4) SA 1 (CC) ("*Hugo*").

> beings will be accorded *equal dignity a*nd respect regardless of their membership of particular groups.[57]

Applying *Harksen v Lane* to the facts of the *Textbook 3 judgment*, the SCA held that the differentiation between those learners who had received textbooks and those who did not, amounted to discrimination.[58] The Court justified a finding of unfair discrimination as follows:

> Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the *indignity* of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against.[59]

Navsa JA, therefore, clearly considered the dignity of the affected learners as the benchmark for his finding of unfair discrimination. Moreover, by employing an equality analysis, the SCA underscored the fact that equal access to education is a vital component of section 29(1)(a). Important to note, also, is that the SCA did not explicitly base its finding of unfair discrimination on a listed ground in section 9 (3) , or on a comparable ground. However, as I will argue next, the court did so implicitly. Navsa JA argued that "the approximately three per cent of the learners who did not receive textbooks were treated differentially,…were being discriminated against [and that there] is no justification for such discrimination" without ever mentioning the distinguishing ground(s) for differentiation.[60] However, at the beginning of the judgment, the court noted that "it is common cause that the affected learners are from poor communities and are mostly, if not exclusively, located in rural areas. They are also overwhelmingly, if not exclusively, *black learners*."[61] Furthermore, it is indisputable that the affected learners were all from no-fee schools which are predominantly historically black

[57] *Hugo* para 41. Italics my emphasis.
[58] *Textbook 3 judgment* para 48. To this end, the SCA drew a distinction between the 97% of learners in the country who had received textbooks and the 3% of learners in Limpopo, who had not. The court held that there was no reasonable basis for this differentiation.
[59] *Textbook 3 judgment* para 49. Italics my emphasis. See also Veriava (2016) 32(2) *SAJHR* 331-334.
[60] *Textbook 3 judgment* para 48.
[61] *Textbook 3 judgment* para 3. Italics my emphasis. See also Kamga S "The right to a basic education" in Boezaart T (ed) *Child Law in South Africa* (2nd ed) (2017) 527-529.

schools.[62] White learners in the public education system were therefore never affected by the textbook crisis. An argument can therefore be made that the state's failure to deliver textbooks to those affected schools, amounted to unfair discrimination against black learners on the basis of race. Navsa JA, also implicitly made a ruling of unfair discrimination on the comparable ground of socio-economic status. In this regard, he stated that "[w]e must guard against failing those who are most vulnerable. In this case we are dealing with the *rural poor* and with children. They are deserving of constitutional protection."[63] He also acknowledged that all the affected learners were from "*poor communities*."[64] As established above, the children affected by the textbook crisis were all located in no-fee schools. Schools are allocated no-fee status based on the median household earnings, unemployment percentage and the standard of education of the community in which the school is located.[65] According to Paterson, "[i]t is therefore presumed that parents [or guardians] in these communities cannot afford to purchase textbooks. If the state does not provide textbooks, the learners must learn without them."[66] The socio-economic status of these learners therefore differentiates them from those learners in fee-charging schools whose parents or guardians are assumed to be able to afford textbooks. Thus, although the SCA did not explicitly refer to socio-economic status as a differentiating ground on which it based its finding of unfair discrimination, the court's emphasis on the poor and vulnerable as deserving of constitutional protection, implies that unfair discrimination on the basis of socio-economic status was indeed implied.

In sum, *Textbook 3* is a significant judgment in the courts' approach to the interpretation of the right to basic education and the broader constitutional imperative of transformation. To start with, the SCA confirmed that section 29(1)(a) entitles every learner in the public school domain to be provided with all the required textbooks for a specific grade.[67] According to Kamga, the SCA ruling underscores the importance of textbooks as integral to the availability of section 29(1)(a).[68] In Stein's view, the judgment clarifies that the state is in violation of the right to basic education if it fails to comply with its obligation to provide textbooks to learners in public

[62] *Textbook 3 judgment* para 3.
[63] *Textbook 3 judgment* para 50. Italics my emphasis.
[64] *Textbook 3 judgment* para 3. Italics my emphasis.
[65] Regulation 101 of National Norms and Standards for School Funding as cited in Paterson (2018) 34(1) *SAJHR* 113.
[66] Paterson ibid.
[67] *Textbook 3 judgment* para 53.
[68] Kamga "The right to a basic education" (2017) 528.

schooling.[69] For Veriava, *Textbook 3* reinforces the High courts' notion that education provisioning is immediately realisable.[70] She also contends that the SCA's decision to interpret textbooks as an integral element of the right to basic education, confirms the court's substantive approach to the interpretation of section 29(1)(a).[71] Furthermore, the SCA found that equal access to textbooks (and impliedly to education as a whole) is a clear component of the right to basic education. Kamga argues that the court has clearly shown that the provision of textbooks are "extrinsically" connected to the achievement of the rights to equality and dignity.[72] Lastly, the SCA affirmed the pattern of disadvantage disproportionally skewed towards black, impoverished learners in the public school domain and delivered a judgment aimed at addressing this historical inequality.[73] In this regard, the court implicitly found that the state's failure to provide textbooks to the affected learners, amounted to unfair discrimination on the basis of race and socio-economic status.[74] To this end, the court's finding of unfair discrimination against black and poor learners on the basis of race and socio-economic status, confirms my analysis in Chapter 3 that black and poor learners do not enjoy equal access to quality education in post-apartheid South Africa. Taken all together, the SCA's approach in *Textbook 3*, displays an approach to judicial interpretation that is vital for the broader transformative purpose of the public basic education system. Veriava correctly describes this method as a "transformative constitutionalist narrative" which is crucial to transforming the public basic education system.[75]

6.2.1.5 Tripartite Steering Committee v Minister of Basic Education

The judiciary's "filling out" of the content of the right to basic education continued in *Tripartite Steering Committee v Minister of Basic Education*.[76] The court was tasked with the question whether scholar transport, at state expense, should be provided to indigent learners who live a

[69] Stein "Textbooks" (2017) 270.
[70] Veriava (2016) 32(2) *SAJHR* 331.
[71] Ibid.
[72] Kamga "The right to basic education" (2017) 528.
[73] At para 48 of *Textbook 3*, Navsa JA writes: "The State is prohibited from unfairly discriminating against any person whether on listed grounds or not. SASA and NEPA envisage equality of opportunity for learners. SASA's preamble recognises that historically, our education system was based on racial inequality and segregation and *those past injustices have to be remedied.*"
[74] *Textbook 3 judgment* para 49. See also Stein "Textbooks" (2017) 270.
[75] Veriava (2016) 32(2) *SAJHR* 334.
[76] (2015) 5 SA107 (ECG) ("*Tripartite Steering*").

particular distance from school.[77] In assessing whether the right to basic education includes a right to transport, the court per Plasket J adopted a contextual approach to interpretation. Firstly, the court highlighted the perils associated with the long distances that learners have to walk to and from school every day. Although the impact of these long treks on learners have been discussed in Chapter 3 of this thesis, it warrants repetition for the purposes of discussing this particular case. At paragraph 14 of the judgment, Plasket J states:

> …[A] great burden, both physical and psychological, is placed on scholars who are required to walk long distances to school. They are often required to wake extremely early, and only get home late, especially if they engage in extramural activities at school, with the result that less time than would be desirable is available for study, homework and leisure. That, in turn, has a knock-on effect on performance at school, attendance at school, particularly during periods of bad weather, and it increases the dropout rate.

The quote above places into context the negative impact of a lack of transport on access and quality of education. To this end, the court implies that learners without transport may not be able to access school on days affected by foul weather. Furthermore, the long walking journeys learners are forced to undertake to and from school, physically and psychologically take a toll, thereby detrimentally influencing their academic output. Moreover, the court emphasised the positive obligation on the state to fulfil basic education before relying on the reasoning in *Juma Musjid* that access to school is an essential component of the right to basic education.[78] The calso had recourse to previous High court judgments where the content of the right to basic education has been defined. In particular, Plasket J held that section 29(1)(a) is insignificant without *inter alia*, "infrastructure, school security, the provision of meals, educators, administrative staff, school furniture, textbooks and *learner transport*".[79] However, the court was quick to point out that the provision of transport by the state is not unconditional, but dependent on two factors: First, accessibility to school must be obstructed by distance and second, learners must be financially incapable to procure transport to and from school.[80] The judgment by Plasket J has been praised by Joseph and Carpenter for correctly identifying the challenges that learners have to endure as a result of a lack of transport.[81] The authors point out

[77] *Tripartite Steering* para 2.
[78] *Tripartite Steering* paras 15-16. See also *Juma Musjid CC* paras 43-46.
[79] See, for example, the *Textbook 1 judgment* para 25, *Tripartite Steering* para 18. Italics my emphasis.
[80] *Tripartite Steering* paras 18-19; Joseph and Carpenter "Scholar Transport" (2017) 274-291.
[81] Joseph and Carpenter ibid 289.

further that the judgment was apposite in accentuating the state's failure to effectively tackle the problem of scholar transport in the country.[82]

6.2.1.6 Equal Education and Another v Minister of Basic Education and Others

One of the most recent judgments dealing with the courts' incremental approach to define section 29(1)(a) is *Equal Education and Another v Minister of Basic Education and Others*.[83] Equal Education (the applicant) disputed the validity of various provisions of the Norms and Standards for School Infrastructure, promulgated in 2013.[84] These regulations indicate various standards related to infrastructure that must be in place at public schools and stipulate deadlines as to when the state must provide schools with the required infrastructure.[85] In order to make sense of the judgement, it is imperative to discuss the history related to the promulgation of the Norms and Standards for School Infrastructure.

(a) Historical context of the Norms and Standards for School Infrastructure

In 2007, Parliament amended the South African Schools Act by introducing section 5A into the Act.[86] In terms of this section, "the Minister may,…by regulation prescribe minimum uniform norms and standards for school infrastructure."[87] At the same time, Parliament inserted section 58C into the Act "which imposes mechanisms to ensure that the provinces comply with the norms required under Section 5A by requiring MECs to annually report to the Minister on provincial progress."[88] By 2011, the Minister had still not prescribed the regulations as envisioned by section 5A.[89] At that point in time, the Minister argued that she had a discretion to promulgate the regulations and was therefore under no obligation to do so.[90] In response to the Minister's recalcitrance, Equal Education embarked on a campaign of "sustained activism" to force the Minister to publish the desired regulations.[91]After unsuccessful attempts to

82 Ibid. See also Motala S "Educational access in South Africa" (2011) 1 *Journal of Educational Studies* 84.
83 (2018) ZAECBHC 6.
84 NDBE "Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure" 2013. See *Equal Education v Minister of Basic Education* paras 35-45.
85 *Equal Education v Minister of Basic Education* paras 35-45.
86 As amended by section 5 of Education Laws Amendment Act 31 of 2007.
87 Section 5A of Schools Act.
88 As amended by section 11 of Education Laws Amendment Act 31 of 2007.
See also http://old.equaleducation.org.za/campaigns/minimum-norms-and-standards (accessed 15 November 2018).
89 *Equal Education v Minister of Basic Education* para 41.
90 *Equal Education v Minister of Basic Education* para 41.
91 Draga "Infrastructure and equipment" (2017) 239.

persuade the Minister otherwise, Equal Education launched court proceedings in 2012, compelling the Minister to publish the Norms and Standards.[92] This application launched a protracted journey of court orders and settlements before the Minister finally promulgated the Norms and Standards on 29 November 2013.[93] The publication of these regulations is significant because "these legally-binding standards set a standard for provincial education departments to work towards, and against which to be held accountable."[94] Although Equal Education has rightly celebrated the promulgation of the Norms and Standards in 2013, it has consistently expressed its reservations in respect of certain regulations which form the basis of their dispute in the 2018 judgment, *Equal Education and Another v Minister of Basic Education and Others*. The disputed regulations are discussed below.

(b) Arguments before the court

The first disputed regulation stated that "the implementation of the norms and standards …is subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general and making available of such infrastructure."[95] Equal Education argued that this regulation subjected the implementation of the Norms and Standards to the co-operation and resources of other government agencies and therefore, in effect, provided the Minister with a mechanism to escape her obligation to provide school infrastructure.[96] It was further contended by the applicant that the regulation compromises the right to basic education because section 29(1)(a) includes the obligation to provide infrastructure at schools.[97] In response, the Minister claimed that although, on the face of it, section 29(1)(a) is not subject to internal qualifiers, it is important to understand that the right can be limited by enabling

The Equal Education website reports: "EE members have marched and picketed, petitioned, written countless letters to the Minister, gone door-to-door in communities to garner support for the campaign and have even gone so far as to spend nights fasting and sleeping outside of Parliament. EE lobbied Parliament and politicians, and on Human Rights Day in March 2011, it led 20 000 learners and supporters in a march to Parliament to demand that the Minister and the DBE keep their promise and adopt Minimum Norms and Standards that will lay down the blueprint for ensuring that all learners in South Africa, regardless of race or wealth, are able to learn in schools with adequate infrastructure."
See http://old.equaleducation.org.za/campaigns/minimum-norms-and-standards (accessed 15 November 2018).

92 Ibid.

93 *Equal Education v Minister of Basic Education* para 43.

94 http://old.equaleducation.org.za/campaigns/minimum-norms-and-standards (accessed 15 November 2018).

95 Subregulation 4(5)(a) of Norms and Standards for School Infrastructure. See para 59 of *Equal Education v Minister of Basic Education.*

96 *Equal Education v Minister of Basic Education* para 61.

97 *Equal Education v Minister of Basic Education* para 67.

legislation such as the Norms and Standards for Infrastructure.[98] The Minister's argument from this point on became utterly perplexing and incongruous: She contended that the abovementioned enabling legislation points to the fact that the right to basic education, like other rights in the Bill of Rights, is subject to progressive realisation.[99] The Minister invoked the Constitutional Court's dictum in the *Ermelo* judgment where Moseneke J held that the determination of language policy (in terms of section 29(2) of the Constitution) must be understood "within the broader constitutional scheme to make education progressively available and accessible to everyone."[100] Subsequent to constructing the argument that section 29(1(a) is a qualified right, she changed course and admitted that the right to basic education is indeed unqualified and therefore not subject to progressive realisation.[101] However, despite this admission, the Minister proposed that in this particular case, the court make an exception and adopt an approach that allows the state to realise the "positive dimension of the right", which includes the provision of school infrastructure, progressively.[102] Her insistence on this exception stemmed from the argument that she "simply does not have unlimited resources" and is dependent on the Department of Finance and the Treasury to provide the necessary finances to discharge the obligations related to school infrastructure.[103] To this end, the

98 At para 68. Section 36(1) of the Constitution provides that any right in the Bill of Rights may be limited in terms of a law of general application. De Vos and Freedman identifies three features that characterises a law of general application. First, the law must be capable of being applied generally, second, the law must be "accessible" and third, it must comply with the requirement of "clarity". See De Vos P and Freedman W (eds) *South African Constitutional Law in context* (2014) 362. For a detailed exposition on each of these factors, see *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR (CC) para 47 and *Hugo* para 96.

99 *Equal Education v Minister of Basic Education* para 68.

100 *Ermelo CC* para 61.

101 *Equal Education v Minister of Basic Education* para 72.

102 *Equal Education v Minister of Basic Education* para 72. By arguing that the positive duties stemming from section 29(1)(a) should be subjected to progressive realisation, the Minister is relying on the notion that human rights impose different levels of obligations on the state. These include the duty "to respect, protect and fulfil". The obligation to respect means that the state must refrain from measures that will thwart the "enjoyment" of the right. The obligation to protect entails that the state must adopt "measures that prevent third parties from interfering with the enjoyment of the right." The duty to fulfil requires that the state is obliged to take positive steps to ensure the fulfilment of the right. Danie Brand agrees with Sandra Liebenberg that the distinction between negative and positive obligations of rights has become primarily "debunked" in socio-economic rights jurisprudence.
See CESCR General Comment No 13: The right to education: article 13 (1999) paras 46-47; Brand D "The right to food" in Brand and Heyns (eds) *Socio-Economic Rights In South Africa* (2005) 159; Brand "The South African Constitutional Court and livelihood rights'(2013) 416 and Liebenberg S "*Grootboom* and the seduction of the negative/positive duties dichotomy" (2011) 26 *SAPL* 37.

103 *Equal Education v Minister of Basic Education* para 115.

Minister's excuse that the state is financially unable to comply with its obligations to provide school infrastructure seemed to echo the South African government's decision to make a reservation in respect of article 13(2)(a) of ICESCR as examined in Chapter 3 of this thesis.[104] Equal Education also challenged Regulation 4(3)(a) which expressed that schools completely constructed from materials such as "wood, metal, asbestos and mud" require "prioritisation".[105] The applicant contended that this regulation does not make it clear what "prioritisation" of schools that are wholly constructed from these materials actually convey.[106] In other words, did the regulation imply that schools built partially from these materials were excluded from the Department's list of prioritisation? A similar argument was made in respect of Regulation 4(3)(b) which provided that schools with no access to electricity, water and sanitary services must receive "prioritisation."[107] Again, did the regulation imply that schools with limited access to power, water or sanitation would not be prioritised? The Minister unsurprisingly claimed that she has the discretion to publish the regulations in the form that she chooses and therefore, that she can prioritise certain schools over others.[108] This preference, in her view, is dependent on "budgetary constraints."[109] Furthermore, she claimed that the provision of water, sanitation and electricity fall "outside her scope of services."[110]

(c) Judgment by Mzizi AJ

The court stressed the cardinal importance of infrastructure for the delivery of basic education.[111] Mzizi AJ rejected the Minister's argument that the implementation of the Norms and Standards can be subject to budgetary constraints and to the cooperation of other state entities.[112] Such a claim, in the court's reasoning, flies in the face of the immediate nature of section 29(1)(a).[113] Furthermore, the court held that the Minister's claim that she was hamstrung to allocate resources for infrastructure, should have been justified in terms of section

104 See Chapter 3, section 3.2.2.
105 *Equal Education v Minister of Basic Education* para 118.
106 *Equal Education v Minister of Basic Education* para 119.
107 *Equal Education v Minister of Basic Education* para 136.
108 *Equal Education v Minister of Basic Education* para 132.
109 *Equal Education v Minister of Basic Education* para 132. There are various role players involved in the budget process as it pertains to the sphere of public basic education. See, for example, McLaren "Funding basic education" (2017) 37-73.
110 *Equal Education v Minister of Basic Education* para 140.
111 *Equal Education v Minister of Basic Education* para 170.
112 *Equal Education v Minister of Basic Education* paras 180-185.
113 *Equal Education v Minister of Basic Education* para 185.

36 or section 172(1)(a) of the Constitution, which she failed to do.[114] In this regard, Mzizi AJ followed the *Juma Musjid* ruling which held that section 29(1)(a) can only be limited in terms of the limitation clause. The court did not elaborate on how section 172(1)(a) was applicable. I suspect, however, that the court actually meant to refer to section 172(1)(b) of the Constitution which provides that "[w]hen deciding a constitutional matter within its power, …a court may make any order that is just and equitable". To that end, the Minister could have then argued that an order requiring her to comply with the obligations of section 29(1)(a) in full, would not have been "just and equitable".[115] Furthermore, the court rebuffed the Minister's contention that it was within her discretion to decide which schools are prioritised, and held that schools that are partially built from inappropriate materials presented the same dangers as schools built entirely from such materials.[116] The court did not mince its words pertaining to this issue:

> The crude and naked facts staring [at] us, are that each day the parents of these children send them to school as they are compelled to, they expose these children to danger which could lead to certain death. This is [a] fate that also stares the educators and other caregivers in the schools in the face.[117]

The court subsequently amended Regulation 4(3)(a) to the effect that it now prioritises the replacement of all classrooms built entirely or substantially from mud, wood, asbestos or metal through reading in the desired changes to the Norms and Standards.[118] A similar remedy was effected in respect of Regulation 4(3)(b) which now requires that "all schools that do not have access to *any form* of power supply, water supply or sanitation" must be provided such access.[119] Additionally, the judgment upheld the constitutional value of accountability by declaring the Regulations unconstitutional to the extent that they did not provide for the plans and reports specifying government's progress in implementing the Norms and Standards. The

[114] *Equal Education v Minister of Basic Education* para 185.
[115] The *amicus curiae* in this case, Basic Education for All (BEFA), argued that "…to the extent that the respondent is unable to discharge the right to basic education in full and immediately, it must justify such failure through the mechanism of section 36 of the Constitution. Also it could argue that an order compelling it to discharge the right in full and immediately would not be just and equitable". See *Equal Education v Minister of Basic Education* at para 89.
[116] *Equal Education v Minister of Basic Education* paras 180-193.
[117] *Equal Education v Minister of Basic Education* para 194.
[118] *Equal Education v Minister of Basic Education* para 209.
[119] *Equal Education v Minister of Basic Education* para 209. Italics my emphasis.

court directed the Minister to amend the Regulations so as to provide for an accountability mechanism in this regard.[120]

At this juncture, it is important to examine the importance of this judgment with regard to the "filling out" of the particular content of the right to basic education. Firstly, the court stressed the cardinal importance of infrastructure for the delivery of basic education,[121] thereby confirming that infrastructure is a core component of the right to basic education. The order of the judgment, in my view, is also particularly useful. To the extent that Mzizi AJ's order led to an amendment of the Regulations as I explain above, the court broadened the right to apply to a wider range of learners that otherwise would not have benefited had the Regulations not been revised.

6.2.2. Debating the transformative impact of the substantive-based approach

As noted in Chapter 5, one of the primary interpretations of "transformation" is conceived as "…the achievement of certain tangible results or outcomes through adjudication."[122] In this regard, the role of strategic litigation in providing content to section 29(1)(a) has to be highlighted. Veriava and Skelton indicate that various civil city organisations have instituted a range of cases seemingly spurred on by the principle established in *Juma Musjid* that the right to basic education is immediately realisable and therefore directly enforceable.[123] Moreover, these organisations have argued in each separate case that a particular component such as infrastructure is indispensable to the realisation of section 29(1)(a), thus calling for a substantive-based understanding of the right to basic education.[124] As explained in detail above, these cases have resulted in the courts ordering the state to provide tangible outcomes in the form of textbooks or teachers to disadvantaged learners. By adopting a substantive approach to section 29(1)(a), the High courts and SCA have steered in the opposite direction of the Constitutional Court which has remained steadfast in a "normative emptiness" approach of socio-economic rights.[125] The content-based approach has been vehemently criticised by academic commentators as having an anti-transformative impact on the implementation of

120 *Equal Education v Minister of Basic Education* para 209.
121 *Equal Education v Minister of Basic Education* para 170.
122 Chapter 5, section 5.2.2.
123 Veriava and Skelton (2019) 35(1) *SAJHR* 3.
124 Ibid.
125 Veriava (2016) 32(2) *SAJHR* 332.

socio-economic rights.[126] Although the substantive-based approach has undoubtedly been welcomed, it is not without its criticism. Firstly, it has been contended that while court orders set out the specific section 29(1)(a) entitlement(s) to be realised, the state often does not meet these requirements within the stipulated timeframes.[127] This means that civil society organisations have to repeatedly engage the court to ensure that the state complies with its obligations in respect of the right to basic education.[128] Furthermore, Veriava argues that despite the substantive-based approach of the courts to section 29(1)(a), there is no objective test laid down by the courts to determine all the entitlements that would constitute the content of the right to basic education.[129] In this regard, she refers specifically to the *Textbook 3 judgment* noted above.[130] Although the SCA in this case endorsed a substantive-based approach to the adjudication of the right to basic education, it did not develop a test which could objectively establish which elements constitute the right to basic education.[131] The SCA suggested that it is within the discretion of government to define all the essential elements of the right through its policy frameworks.[132] In response to the SCA's latter stance and commenting on the courts' failure to develop an objective test, Veriava notes the following:

> [T]he absence of an objective test could impact on future education provisioning cases, particularly where there is a lack of clarity from the government as to its policy and provisioning. Indeed, by making government policy the sole determinant of the content of the right, government will be disincentivised from providing policy certainty in respect of education provisioning.[133]

Liebenberg takes an opposing view to Veriava by arguing that the normative content of socio-economic rights should never reach a stage of completion, but allow "space" for rights to evolve so as to respond to "changing contexts and forms of injustice."[134] Moreover, in *Doctors*

126 See for example Dugard and Wilson "Constitutional jurisprudence: The first and second waves" (2014) 37-42; Bilchitz D "Giving socio-economic rights teeth: The minimum core and its importance" (2002) 119 *SALJ* 484.
127 Veriava and Skelton (2019) 35(1) *SAJHR* 4.
128 Ibid.
129 Veriava (2016) 32(2) *SAJHR* 336.
130 Ibid.
131 Ibid 336-337.
132 Ibid.
133 Ibid 337.
134 Liebenberg *Socio-economic rights* (2010) xix.

for Life, the Constitutional Court explained that rights will degenerate if they remain fixed.[135] The Court held further that the meaning of rights should change to keep abreast with the continual shifts in the notion of justice and the evolving circumstances of society.[136]

In light of the above, I agree with Liebenberg that the content of socio-economic rights should not have an "end point". It should be developed continuously, particularly in an intolerant society such as South Africa with a history of marginalisation of people based on, *inter alia*, race, sex and gender. Although it is acknowledged that the absence of an objective test is very cumbersome for civil strategic litigators because they have to keep going back to the courts to order the implementation of a specific component of section 29(1)(a), this strategy enables the courts to continuously expand on the content of the right. Such an approach ensures that a space is always left open to contest potential violations of the right to basic education (and other rights) in respect of groups that may need to have their rights litigated and enforced in future. Thus, it is submitted that the right to basic education should not remain static, but is to be constantly developed so as to ensure that more and more learners continue to benefit from the ambit of the right. Such an approach is also in keeping with Langa's view on the notion of transformation:

> [T]ransformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.[137]

135 *Doctors for Life* para 97.

136 Ibid. As an example of the Court's observation in *Doctors for Life* and Liebenberg's argument, in the last few years, "nonbinary identity has been slowly seeping into societal consciousness." In this regard, a person who adopts the label of "gender non-binary" does not identify as male or female and thus does not conform to any gender stereotype. The "coming out" of non-binary individuals is quite new in society and these persons as a groups tend to be discriminated against. See https://www.nytimes.com/2019/06/04/magazine/gender-nonbinary.html (accessed 23 January 2020); Vijlbrief A *et al* "Transcending the gender binary: Gender non-binary young adults in Amsterdam" (2020) 17(1) *Journal of LGBT Youth* 89-90.

137 Langa (2006) 3 *Stell LR* 354.

6.3 DEFINING "BASIC EDUCATION" POST-*JUMA MUSJID*

A discussion on the content-based approach pertaining to section 29(1)(a) is incomplete without an evaluation of the meaning of the term "basic education" and its relevance for the transformation of South African society.

6.3.1 The link between basic education and compulsory education

Section 29(1) of the Constitution distinguishes between two levels of education: a basic education (including adult basic education) and further education. This provision declares that:

> Everyone has the right -
> (a) to a basic education, including adult basic education; and
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Section 3(1) of the Schools Act sets out the compulsory schooling provision:

> …[E]very parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.[138]

The Constitutional Court remarked on the link between basic education and compulsory education in *Juma Musjid*:

> Section 3(1) of the [Schools] Act, *following the constitutional distinction between basic and further education*, makes school attendance compulsory for learners from the age of seven years until the age of 15 years or until the learner reach the ninth grade, whichever occurs first.[139]

This pronouncement implies that the Constitutional Court supports the notion that basic education is capped at a Grade 9 education and are limited to learners younger than 16. As will be discussed later in this chapter, the Court's narrow association of basic education with

[138] In terms of section 2 of the Education Laws Amendment Act, a learner may be admitted to Grade R (pre-school) from the age of four, "turning five by 30 June in the year of admission." Furthermore, a learner may be admitted to Grade 1 by the age of five, "turning six by 30 June in the year of admission."
[139] *Juma Musjid CC* para 38. Italics my emphasis.

compulsory schooling has drawn some criticism.[140] The High court has been more explicit in its position on the link between basic education and compulsory education. In *Philips v Manser*, the applicant was a 17 year old, Grade 11 learner who had been suspended by the SGB of the public school he was enrolled in.[141] The applicant contended, among other things, that the conduct of the SGB infringed his right to a basic education.[142] The court held that a violation of section 29(1)(a) did not occur since "in terms of the Constitution, basic education means schooling up to the age of 15 years or Grade 9."[143] As a 17 year old, Grade 11 learner, the applicant therefore did not meet the requirements to claim the right to basic education in terms of this judgment. This narrow interpretation of basic education is echoed in certain state policy, such as White Paper 1[144] and the Green Paper on Further Education and Training.[145] White Paper 1 states that "appropriately designed education programmes to the level of the proposed General Education Certificate (GEC)… would adequately define basic education."[146] The White Paper describes the GEC as being awarded after completion of the compulsory education period.[147] The Green Paper on Further Education defines "further education and training" (FET) as "[consisting] of all learning and training programmes from …Grades 10 to 12 in the school system.."[148] The Green Paper also states that "[l]earners enter FET after the completion of the compulsory phase of education at Grade 9…".[149] Therefore, in accordance with the latter policies, a basic education is limited to a Grade 9 education. Since the adoption of White Paper 1 in 1995 and the Green Paper on Further Education in 1998, a gradual shift seems to have taken place in respect of government's initial stance on the meaning of "basic education." This shift was set in motion in 2009, the year in which the National Department of Education split into two separate departments, namely the National Department of Basic Education and the

140 See, for example, Skelton (2012) 27 *SAPL* 403.
141 *Philips v Manser* (1999) 1 All SA 198 (SE) 200.
142 *Philips v Manser* 217.
143 *Philips v Manser* 217. The Constitution does not define the term "basic education". Therefore, the court erred by exclusively relying on the Constitution for the finding that basic education is restricted to compulsory education.
144 Although the White Paper was published in 1995, and is therefore very early state policy, it is still considered as a "fundamental reference for [education] policy and legislative development" for the state. See the NDBE "Strategic Plan 2015-2020" 11.
145 Department of Education: Green Paper on Further Education and Training (15 April 1998) ("Green Paper on Further Education").
146 White Paper 1,Chapter 7, para 15.
147 White Paper 1,Chapter 5, para 14.
148 Green Paper on Further Education, Chapter 1, para 3.1.
149 Ibid.

Department of Higher Education and Training.[150] In practice, the National Department of Basic Education regulates the education of learners from Grade R to 12, not merely from Grade 1 to 9.[151] In certain official state publications, such as the latest South Africa Yearbook[152], the Department of *Basic* Education is recognised by the national government as the department that assumes responsibility for providing quality *basic* education to learners from Grade R to Grade 12.[153] This denotes a clear departure from White Paper 1 which confines basic education to a Grade 9 education.[154] In light of the contradictory approach of the state in defining basic education, it is therefore important to delve deeper into the actual meaning of the concept as will be attempted below.

6.3.2 Understanding "basic education" in terms of a qualitative approach

Daria Roithmayr argues that the wording of section 29 of the Constitution, in so far as "adult basic education" is concerned, is in conflict with an interpretation that suggests that basic education is restricted to compulsory education.[155] Section 29(1)(a) states explicitly that "[e]veryone has a right to basic education, including adult basic education." According to Roithmayr, adult basic education becomes "nonsensical" if basic education is confined to compulsory education only.[156] The Green Paper on Adult Education[157] adopts an approach to adult education which recognises that learning takes on various forms and occurs all through an individual's life.[158] In this regard, adult education includes the provision of learning programmes across a broad spectrum, and goes beyond a formal approach to education.[159] For instance, at state-owned public adult learning centres (so-called PALCs, also known as ABET

150 https://www.education.gov.za/AboutUs/AboutDBE.aspx (accessed 30 December 2019).
151 Skelton Equal Access Report (2017) 47.
152 The South Africa Yearbook is the "official authoritative reference work on the Republic of South Africa and is updated annually." See https://www.gcis.gov.za/content/resourcecentre/sa-info/south-africa-yearbook-201718 (accessed 26 September 2019).
153 The 2017/2018 South Africa Yearbook available at https://www.gcis.gov.za/content/resourcecentre/sa-info/south-africa-yearbook-201718 (accessed 26 September 2019). Italics my emphasis.
154 White Paper 1,Chapter 7, para 15.
155 Roithmayr D "Access, adequacy and equality: The constitutionality of school fee financing in public education" (2003) 19(3) *SAJHR* 393.
156 Ibid.
157 NDBE "Ministerial Committee on Adult Education Report" (July 2008).
158 Ibid 12.
159 Ibid 5.

centres[160]), programmes ranging from basic literacy to Grade 12 are on offer.[161] Having outlined the government's approach to adult education, a reading of section 29(1)(a) in its entirety (therefore inclusive of the phrase "adult basic education"), makes it obvious that basic education is a very broad concept. In the South African context, basic education can be delivered in a conventional school or not, applies to children and adults alike and extends beyond conventional school curricula. A distinction can therefore be drawn between a formal and non-formal approach to basic education. A formal approach refers to basic education that is administered in the context of the conventional school system, whereas a non-formal approach denotes basic education that is administered outside the traditional schooling system. What does a basic education mean in the context of the formal schooling system? For several years, an academic debate has focused on the question whether basic education refers to a period of schooling (so-called "time-based approach") or standard or quality of education.[162] A time-based approach carries an inherent danger to the extent that basic education may merely become a "…formal goal that any [learner] marking time and any school pushing students through could satisfy."[163] Such an approach is particularly problematic in the South African context because of widespread allegations against the state that it has lowered the passing criteria of subjects in order to inflate the percentage of students who obtain a Matric certificate at the end of Grade 12.[164] Should these allegations indeed be true, the government is acting in violation of the domestic legal framework which endorses a qualitative approach to basic education. Starting with the Constitution, the transformation of South African society lies at the heart of our constitutional order.[165] The Preamble to the Constitution sets out the vision of

160 ABET is the acronym for Adult Basic Education and Training. Ibid 2.

161 Department of Higher Education and Training :White Paper for Post school Education and Training (2013) 21. ("White Paper on Post-school Education").

162 Woolman and Fleisch have suggested that there are at least two plausible interpretations of a "basic education": it could refer to a "period of schooling" or it could refer to a "standard of schooling". See Woolman & Fleisch *The Constitution in the classroom* (2009) Chapter 5. See also Van Der Merwe S "How 'basic' is basic education as enshrined in section 29 of the Constitution of South Africa?" (2012) 27 *SAPL* 365 ; Skelton (2012) 27 *SAPL* 402-405 and McConnachie, Skelton and McConnachie "The constitution and the right to a basic education" (2017) 23-25. Italics my emphasis.

163 Woolman and Fleisch *The Constitution in the classroom* (2009) 128-129.

164 https://businesstech.co.za/news/lifestyle/148933/matric-exams-are-easy-and-mean-very-little-jansen/ (accessed 2 February 2019) Professor Jonathan Jansen, a distinguished professor at the Faculty of Education of the University of Stellenbosch claimed that it is not difficult to pass Grade 12 in South Africa and that the requirements to obtain Matric are substandard. Furthermore, he asserted that the National Department of Basic Education adjusts scores upwards for the majority of subjects.

165 *Soobramoney* para 8.

the society that we are aiming to transform into.[166] It dictates that the supreme law was adopted, *inter alia*, to "heal the divisions of the past, establish a society based on democratic values, social justice and fundamental human rights …[and] improve the quality of life of all citizens and free the potential of each person."[167] Besides emphatically declaring that the right to basic education is significant for the transformation of our society, the Constitutional Court, in *Juma Musjid*, also links the objectives of basic education to the transformative goals of the Preamble.[168] The Court held that education is significant for the development of individual persons as well as our broader democratic society, especially in view of apartheid's legacy.[169] In the same case, the Court emphasises the importance of basic education as a "…socio-economic right directed at …promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential [as well as providing] a foundation for a child's lifetime learning and work opportunities."[170] The Court also stresses the importance of basic education as an empowerment right which is "… the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."[171] According to McConnachie and McConnachie, the purposive approach favoured by the Court suggests that basic education is an education with a substantive content that must be aimed at achieving the "individual and societal development" required in terms of the transformative Constitution.[172] Although the Court initially seemed to adopt a narrow interpretation of basic education as being restricted to the compulsory schooling period, Nkabinde J's purposive approach suggests that the Court conceive of "basic education" as a much broader concept that cannot be confined to time spent in school. Rather, it is a concept that must be informed by the transformative goals

166 Pieterse (2005) 20 *SAPL* 158.
167 Preamble to the Constitution.
168 *Juma Musjid CC* paras 38-42. The Court relied directly on provisions from the international law and regional law framework to describe the objectives of basic education. These include article 17 of the African Charter on Human and Peoples' Rights; article 11(2) and (3) of the OAU African Charter on the Rights and Welfare of the Child; article 26 of the Universal Declaration of Human Rights; articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights and article 28(1) of the Convention on the Rights of the Child. The regional instruments are available from www.achpr.org. The international law instruments can be accessed at https://www.ohchr.org. Section 39(1)(b) of the Constitution provides: "When interpreting the Bill of Rights, a court…must consider international law."
169 *Juma Musjid CC* para 42.
170 *Juma Musjid CC* para 43.
171 *Juma Musjid CC* para 41. See also CESCR General Comment No 13: The right to education: article 13 (1999) para 4.
172 McConnachie and McConnachie (2012) 129 *SALJ* 566.

entrenched in the Constitution. It is very difficult to conceive that learners who are merely "pushed" through school in terms of a formalist approach to education, will be sufficiently equipped to realise these transformative objectives. A quality-based approach to basic education is therefore mandated by South Africa's supreme law. In addition, key education legislation and policy also point to the endorsement of such an approach. In this regard, the Schools Act, giving effect to the right to basic education[173], requires the provision of a school system that is committed to providing an education of "high *quality*" to learners across the country.[174] Furthermore, Action Plan 2019, widely regarded as the Education Ministry's blueprint policy for public schooling, unequivocally states that "*quality* schooling" must be achieved by the year 2030.[175] Conceptualising basic education as a standard of education and not merely as a time period spent in school, also ties in with Singh's framework to quality education which I adopted in Chapter 3 of this thesis to describe how the majority of black and poor learners are denied quality basic education in South Africa.[176]

6.3.3 The importance of compulsory schooling

"Compulsory education" and "basic education", while not synonymous, are related concepts. In this regard, compulsory schooling provides the state with a measure to ensure that basic education is delivered to learners in the public school system.[177] In the current South African context, compulsory education is restricted to a Grade 9 education, provided to children from the age of 7 to 15.[178] Although children can receive an education without attending a school, children's rights analysts argue that the Convention on the Rights of the Child endorses the notion that schools, generally provide children with the best opportunity to acquire an education.[179] In this regard, section 28(1)(e) of the CRC imposes a duty on all state parties, including South Africa, to increase school attendance.[180] As noted above, one way in which the government ensures that learners attend school and thus receive a basic education, is

173 *Ermelo CC* para 55.
174 Preamble to the Schools Act. Italics my emphasis
175 Action Plan (2019) 9.
176 See Chapter 3, section 3.3.
177 Simbo C "Defining the term basic education in the South African Constitution: An international law approach" (2012) 16 *PER* 173.
178 Section 3(1) of the Schools Act.
179 Sloth-Nielsen and Mezmur Report on Free and Compulsory Education (2007) 9.
180 Ibid.

through the imposition of compulsory schooling.[181] Beiter contends that the term "compulsory" means "a protection of the rights of the child, who may claim certain rights that nobody, neither the State nor even the parents, may deny".[182] For example, a parent may decide that a girl-child is not worthy of education and this necessitates the state to be able to override that choice through the adoption of compulsory schooling.[183] It is therefore very important that the state imposes a compulsory form of education so as to ensure that all children, irrespective of their gender, race or other barriers, have an equal opportunity to access basic education. However, making basic education compulsory is not *only* about protecting the rights of the child through the guarantee that she can access a basic education.[184] As noted above, basic education is vital to the transformation of South African society. Thus, the provision of basic education ensures that the interests of society, as a whole, are advanced. Bearing in mind the importance of compulsory schooling in ensuring the delivery of basic education, the question, in my view, should now shift to whether compulsory education as currently conceptualised is capable of achieving the transformative aims of the Constitution. In other words, does a Grade 9 education, inclusive of its standard/quality meet the objectives of the transformative Constitution? In Chapter 3 of this study, the following conclusions were reached: First, mostly black learners do not meet the standard literacy and numeracy requirements of the national curriculum; second, it is predominantly historically disadvantaged schools that lack the basic infrastructure and facilities, such as functional school buildings, textbooks, school furniture and transport; third, it is overwhelmingly former black schools that are steeped in a culture of poor teaching and learning; and finally, a lack of substantive participatory democracy are mostly detectable in these schools.[185] It is therefore indisputable: The state is failing to provide a quality basic education to the majority of its learners in the public school domain. Without negating the importance of all the barometers of a "quality education" as analysed in Chapter 3, I want to focus on the first gauge, namely "a minimum level of student acquisition of knowledge, values, skills and competencies" for the purpose of the discussion to follow.[186] The

[181] Simbo (2012) 16 *PER* 173.
[182] Beiter *The protection of the right to education by international law* (2006) 31.
[183] Ibid.
[184] Italics my emphasis.
[185] Chapter 3, section 3.3.
[186] The indicators of quality education" in terms of Singh's framework are: "(i) a minimum level of student acquisition of knowledge, values, skills and competencies; (ii) adequate school infrastructure, facilities and environment ; (iii) a well-qualified teaching force; (iv) a school that is open to the participation of all, particularly students, their parents and the community." See Singh Report on Quality Education (2012) 7.

research reveals that it is the majority of learners in the compulsory schooling period, the Grade 1-9 cohort, that are unable to read for meaning.[187] This has prompted some commentators to argue for a definition of basic education that includes schooling up to Grade 12, in effect suggesting that the compulsory period of schooling should be extended to Matric. They have argued that a Grade 9 education does not sufficiently equip learners "…with knowledge and skills that will enable them to develop their full potential, to live and work in dignity, and to improve the quality of their lives"[188], in effect contending that the current compulsory level is incapable of meeting the transformative objectives of the Constitution. Khoza specifically emphasises the link between the compulsory level of education and the procurement of a job in South Africa, a country marred by a high unemployment rate.[189] He contends that it is more probable that learners with a Matric or higher qualification will gain employment as opposed to learners who have only attained a grade 9 qualification.[190] Khoza's view is endorsed by the recent findings of the 2018 World Bank report on poverty and inequality in South Africa. The report found that employment increases with a higher education level.[191] However, it is not only the level of education that has the latter impact, but also the *quality* of education.[192] To this end, the report indicates that a "*low quality of education*, [among other things] compromise efforts to reduce [the problems of] unemployment, poverty and inequality."[193] Sampie Terreblanche refers to these three problems collectively as the "legacy of apartheid" that was bequeathed to the ANC government in 1994.[194] Terreblanche argues that since the transition to democracy, "[t]he interaction between poverty, unemployment and inequality has not only entrenched and aggravated the black majority's predicament, but it has also intensified the burden of their deprivation."[195] These three factors, are therefore interrelated as can also be gleaned from the World Bank report which observes that "[h]igh unemployment is increasingly

[187] Chapter 3, section 3.3.2.1.
[188] Khoza S *Socio-economic rights in South Africa* (2007) 420; Churr C "Realisation of a child's right to a basic education in the South African school system: Some lessons from Germany" 2015 (18) 7 *PER* 2411.
[189] Khoza ibid. According to the latest statistics released by Stats SA (Department of Statistics), the general unemployment rate in the fourth quarter of 2019 was 29.1%. It is estimated that 40.1% of young people (aged 15 to 34) are unemployed.
http://www.statssa.gov.za/?p=12948 (accessed 15 April 2020); https://www.iol.co.za/capeargus/news/south-africas-youth-unemployment-rate-rises-above-40-42597029 (accessed 15 April 2020).
[190] Khoza ibid.
[191] World Bank Inequality in South Africa Report (2018) 81.
[192] Italics my emphasis.
[193] World Bank Inequality in South Africa Report (2018) 3.
[194] Terreblanche S *Lost in transformation: South Africa's search for a new future since 1986* (2012) ix.
[195] Ibid.

putting pressure on South Africa's social contract, as a job is the main way out of poverty and towards a more prosperous life."[196] Therefore, a low level and a poor quality of education restrict access to the job market, which in turn prevents an individual from escaping poverty, bettering her life and ultimately contributing to the reduction of inequality in the country. The reduction of inequality, unemployment and poverty, in turn, is pivotal to achieving the transformative objectives of the Constitution. It is thus submitted that the current Grade 9 education provided to the majority of learners in South Africa, are not capable of effectively addressing the legacy of apartheid as described by Terreblanche. As a result, a Grade 9 education is simply not conducive to the achievement of transformation. Therefore, it is my submission that the current compulsory level of education should be increased from Grade 9 to Grade 12. I agree with Khoza that a Matric qualification will at least place learners in a better position to gain employment or access higher education. However, merely increasing the compulsory level of schooling without a concerted effort to tackle the poor quality of education that the majority of black and poor learners are subjected to in the country, is short-sighted.[197] The World Bank Report warns that "skilled labour can be difficult to find in most skilled and professional segments largely due to *the poor state of the public education system*."[198] The inference to be made from this finding is, that out of two people with the same level of qualification, the person who has received a better quality of education, will more likely be employed. In this regard, it should be borne in mind that the bifurcated public basic education system, explained in detail in Chapter 3, produces vastly different results in respect of the quality of education. In this regard, learners educated at former white schools receive a better standard of education as opposed to learners from historically black schools, subject to exceptions of course. Hence, the former cohort of students do stand a greater chance of gaining access to higher education and/or securing employment. Thus, should the state not address the issue of quality effectively, the inequality in the basic education system will be perpetuated indefinitely. The consequent risk is that transformation will merely remain an aspiration, and not become an attainable objective.

196 World Bank Inequality in South Africa Report (2018) 3.
197 Chapter 3, section 3.3.
198 World Bank Inequality in South Africa Report (2018) xiv. Italics my emphasis.

6.3.4 Revising the compulsory schooling provision : The case of the "lost" learners older than 15 and beyond Grade 9

At this juncture, it is apposite that I repeat the Constitutional Court's utterances on the link between basic education and the compulsory schooling period. In *Juma Musjid*, Nkabinde J held:

> Section 3(1) of the [Schools] Act, *following the constitutional distinction between basic and further education*, makes school attendance compulsory for learners from the age of seven years until the age of 15 years or until the learner reach the ninth grade, whichever occurs first.[199]

Skelton has criticised the Court for its narrow association of basic education with the compulsory schooling period because there has not been an explicit pronouncement whether learners older than 15 and beyond Grade 9, are claimants of the right to basic education.[200] Although the High court in *Phillips v Manser* restricted basic education to learners younger than 16, the Constitutional Court as the apex court has not finally pronounced on this matter. Therefore, the issue remains open for debate. I will argue below that a grey area in law exists in respect of these learners which has a dire impact on their constitutional rights, including the right to a basic education. Furthermore, I will contend that amending the definition of compulsory schooling as suggested above, may be a solution to the current dismal state of affairs.

6.3.4.1 Understanding the context: "Purging" the education system of "over-aged" learners

The post-apartheid regime encountered several economic difficulties during the late 1990s which hampered its ability to effectively address the resource constraints in former black

[199] *Juma Musjid CC* para 38. Italics my emphasis.
Section 3(1) of the Schools Act accords with the Basic Conditions of Employment Act (BCEA) 75 of 1997 and the ILO Minimum Age Convention 138 (1973) which set the minimum age of employment at 15. The Convention was, inter alia, adopted to abolish child labour worldwide. According to Gordon Brown, the UN Special Envoy for Global Education, compulsory education plays an important role in eradicating child labour. Thus, by "capping" the compulsory schooling age at 15, the South African government, among other things, is giving effect to its international law obligation to contribute to the abolition of child labour. (South Africa ratified the ILO Convention in 2000). See Brown G "Child labour & educational disadvantage-Breaking the link, building opportunity" (2012) 7 available at http://www.ungei.org/child_labor_and_education_US.pdf (accessed 15 April 2020);https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283(accessed 15 April 2020).
[200] Skelton (2012) 27 *SAPL* 403.

schools.[201] These schools, in particular, were characterised by exorbitantly high learner-to-educator ratios and in an effort to tackle this, the state turned its attention to reducing the vast amount of "over-aged learners" in the education system.[202] The government argued that "many such over-aged learners were learning little, were unlikely to eventually pass matric and were diverting resources from younger learners."[203] The majority of learners beyond the normal school-going age at that time consisted of black youths who reached advanced ages in school because of several reasons, including entering school later than normal and grade repetition.[204] In an attempt to diminish the large class ratios and free up limited resources in the schooling system, the national government adopted several policies with the effect of limiting access to schools for over-aged learners and restricting the amount of times a learner could repeat a grade.[205] To this end, current state policy defines the suitable age for admission to a grade as "the grade number plus 6."[206] For example, the normal school-going age for a Grade 2 learner is 8 years old. In order to ensure that learners remain the appropriate age for their grade level, the repetition of a grade is only allowed once during any of the education phases.[207] At the stage when a learner reaches Grade 9, she must be 15 years old, coinciding with the definition accorded to the compulsory schooling period in South Africa.[208] The status of a learner who has reached the age of 16 years or older, is regulated in terms of section 29 of the Admissions Policy for Ordinary Public Schools:

> A learner who is 16 years of age or older and who has never attended school and who is seeking admission for the first time or did not make sufficient progress with his or her peer group, must be advised to enroll at an Adult Basic Education and Training (ABET) centre.

Provincial education departments adopt their own age-related policies in line with the national regulations. Western Cape schools, for example, refuse admission to learners who have reached

201 Burger R *et al* "The unintended consequences of education policies on South African participation and unemployment" (2015) 83 (1) *South African Journal of Economics* 74.
202 Ibid 74-75.
203 Ibid.
204 Ibid 80.
205 Ibid.
206 NDBE "Age Requirements for Admission to an Ordinary Public School" (1998) as cited in Burger *et al* (2015) 83 (1) *South African Journal of Economics* 81.
207 Ibid. The four education phases are "the foundation phase (Grades R to 3), intermediate phase (Grades 4 to 6), the senior phase (Grade 7 to 9) and the further education and training phase (Grades 10 to 12).
208 Burger *et al* (2015) 83 (1) *South African Journal of Economics* 81.

an age that are two years beyond the suitable grade-age.[209] Since learners are legislatively required to stay in school until the age of 15[210], the students affected by age-related policies obviously include those who are beyond the age of 15.[211] Therefore, once a person reaches an age older than 15, two scenarios become possible: First, if she applies to a school for the first time or seeks re-admission after having dropped out at an earlier stage but is now beyond the normal grade-age, she will be refused admission; or second, if she is an existing member of a school but has reached an age not suitable for her particular grade, she will be forced out of school.

6.3.4.2 The right to adult basic education

As noted above, learners older than the appropriate grade-age will be advised to enroll at an adult basic education and training (ABET) centre. This suggests that learners older than 15, and not at their typical grade-age, become ineligible for formal schooling and are considered adults by the state. In this regard, the Green Paper on Adult Education defines an adult, for the purposes of adult education, as a person over the age of 15.[212] The logical inference, therefore, is that learners beyond 15 and not at the suitable grade-age, become claimants of the right to adult basic education. In terms of section 29(1)(a) of the Constitution, "[e]veryone has the right to basic education, including *adult basic education.*"[213] Based on the textual formulation of section 29(1)(a), the right to basic education is inclusive of adult basic education. The Constitutional Court's interpretation of the unqualified nature of section 29(1)(a) in *Juma Musjid* therefore applies to adult basic education.[214] This means that individuals older than 15 and beyond Grade 9 who has been excluded from formal schooling, can claim a right to adult basic education on demand from the state. However, the problematic regulation of adult education in South Africa, means that this group of learners often experiences challenges in accessing adult basic education as will be explained next.

Contrary to what the name suggests, adult basic education is not regulated by the Department of Basic Education, but forms part of the highly complex "post-school education and training" system.[215] Within this system, Public adult learning centres (PALCs), historically known as

[209] Ibid 82.
[210] Section 3(1) of the Schools Act.
[211] Burger *et al* (2015) 83 (1) *South African Journal of Economics* 81-82.
[212] Green Paper on Adult Education (2008) 5.
[213] Italics my emphasis.
[214] *Juma Musjid* para 37.
[215] White Paper on Post-school Education (2013) xi.

ABET centres, are administered by the National Department of Higher Education and Training.[216] The qualifications that are provided by PALCs, vary. In this regard, at some PALCs, programs of basic literacy are available, while at others, programs up to the level of Grade 9 or Matric (Grade 12) are on offer.[217] Various challenges plague the public adult education system. First, the availability of PALCs across provinces is uneven, with the most centres established in Gauteng.[218] Second, due to chronic "under-investment" in adult education, PACLs have been known to close down before an academic year is even completed.[219] Finally, research indicates that at some adult education centres, educators are appointed without meeting the accreditation requirements set by the South African Council of Educators.[220] This, coupled with the precarious working conditions that adult education educators are subjected to, results in a system plagued by concerns of quality control.[221] In sum, the practical impact of the current compulsory schooling definition coupled with the age-related policy framework explained above, is that learners beyond the age of 15 and not at their normal grade-age are caught between the proverbial rock and a hard place: Not only are they prohibited from accessing formal schools, but, the only state alternative, a public adult education centre, may also not be accessible. To add insult to injury, a private adult learning centre may be available in a certain area, but due to the commercialisation of private adult education, it is likely that many indigent learners will not go that route.[222]

What then is the solution to this conundrum? The answer to this question may be found in the approach adopted by the High court in *Harris v Minister of Education*.[223] In this case, the court considered the constitutional validity of a notice published by the Minister of Education, stating that a learner could only be admitted to Grade 1 at an independent school if she turns 7 during

[216] Ibid.
[217] Ibid 21.
[218] Green Paper on Adult Education (2008)17-35.
[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] Private adult education centres offer "literacy training, the ABET General Education and Training Certificate and the Senior Certificate." Their funding is received from various sources, including user fees. The South African government has made it clear that "[w]hile recognising and appreciating the role of private institutions, the Department believes that the public sector is the core of the education and training system. The government's main thrust, therefore, should be to direct public resources primarily to meeting national priorities and to provide for the masses of young people and adult learners through public institutions." See White Paper on Post-school Education (2013) xv, 42.
[223] (2001) JOL 8310 (T) ("*Harris*").

the year of admission.[224] The notice was challenged by the applicant, the parent of a 6-year old girl who was deemed too young to be admitted to Grade 1.[225] The applicant pointed out that the notice was notably unfair because it did not provide for any exceptions despite the fact that the underaged learner, and those similarly situated, were ready to enter Grade 1 after having received years of pre-school education.[226] The court per Coetzee J, applied *Harksen* which involves a two stage enquiry to determine whether differentiation amounts to unfair discrimination in terms of section 9(3) of the Constitution. The test has been framed by the Constitutional Court as follows:

> Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground [in terms of section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2) [of the Interim Constitution and section 9(3) of the 1996 Constitution).
>
> If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.[227]

The court found that the notice differentiated between underaged learners and those learners who were the normal age for admission.[228] Since the distinction was based solely on age, a listed ground in section 9(3) of the Constitution, unfair discrimination was assumed.[229] In terms of section 9(5) of the Constitution, the burden of proof shifted to the respondent, namely the

[224] *Harris* 2-5.
[225] *Harris* 2-5.
[226] *Harris* 14.
[227] *Harksen v Lane* para 53.
[228] *Harris* 12-13.
[229] *Harris* 12-13.

Minister who had to make a case that the discrimination was indeed fair.[230] The court held that the Minister could not refute the applicant's arguments that it would be in the learner's interest to enter Grade 1 and reached the conclusion that the Minister's action amounted to a violation of section 9(3) of the Constitution.[231] Coetzee J also launched an inquiry into section 28(2) of the Constitution which states that "[a] child's best interests are of paramount importance in every matter concerning the child." In this regard, the court dealt with section 28(2) not as a constitutional principle, but as an independent, substantive right.[232] The court held that the impact of the notice meant that the affected learner was forced to repeat her final year of pre-school or spend an entire year at home despite the fact that she possessed the intellectual, emotional and social readiness to enter Grade 1.[233] Coetzee J concluded that the Minister's notice violated the best interests of the underaged learner and similarly situated children.[234] However, this was not the end of the matter. The Minister still had recourse to section 36(1) of the Constitution (the limitation clause), in terms of which he could justify the infringement of sections 9(3) and 28(2) of the Constitution.[235] To this end, the Minister advanced three reasons: First, underaged learners apparently "clog the educational system as a result of high failure and repetition rates and …this carries financial implications for the government."[236] Second, no exceptions can be granted for the underaged learner and those similarly situated because "no educationally sound criteria" exists to establish whether a learner is ready to commence schooling.[237] Third, the requirement that learners enter school at age 7 is grounded in "sound educational principles".[238] Coetzee J rejected the first ground on the basis that the notice was only applicable to independent schools and since the funding at these schools are

230 *Harris* 13.
231 *Harris* 17.
232 *Harris* 17-18.
233 *Harris* 17-18.
234 *Harris* 17-18.
235 Section 36 (1) provides:
"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."
236 *Harris* 19.
237 *Harris* 19.
238 *Harris* 19.

solely dependent on private funds, the court held that the state does not incur any financial burden.[239] Furthermore, the Minister failed to provide any evidence to the effect that the entry of underaged learners into the education system led to higher failure and repetition rates.[240] The court also rejected the second ground of justification based on the expert evidence of a psychologist who testified that any challenges related to school readiness can be addressed through "dynamic testing."[241] Coetzee J discounted the third reason on the basis that no evidence was produced to counter the Minister's justification in that regard.[242]

(a) Applying Harris to the plight of over-aged learners

I am concerned with the specific group of learners older than 15, but younger than 18 and beyond Grade 9, who can be forced out of the formal schooling system in terms of the compulsory school provision of the Schools Act, read in conjunction with the age-related policy framework. As explained above, learners older than 15, and not at their typical grade-age, are regarded as overaged in the conventional schooling system. Hence, they become ineligible for this system and are considered adults by the state for the purposes of entering the adult education system. However, in actual fact, these learners are *not* adults, but children in terms of South African highest law.[243] In this regard, the Constitution defines a child as "a person under the age of 18".[244] Therefore, the best interests of the child standard applies to the group of overaged learners. Besides the best interests standard, the rights to basic education and equality of the former group is also implicated as will be discussed next.

(i) Unfair discrimination claim

The Admissions Policy for Ordinary Public Schools states that learners aged 16 and older who are not progressing on par with their peers, "must be advised" to enter the adult education system.[245] The policy therefore gives effect to the Schools Act which restricts compulsory

[239] *Harris* 19.
[240] *Harris* 19.
[241] *Harris* 20.
[242] *Harris* 21. *Harris* was appealed to the Constitutional Court. However, the Court decided the appeal on very narrow grounds by not dealing with the unfair discrimination claim and other wider constitutional arguments. The Constitutional Court confined the judgment to the legality of the Minister's conduct in respect of the notice that he issued. The Court held that the National Education Policy Act provided the Minister with the power to establish policy and not to "impose binding law." See *Minister of Education v Harris* 2001 (4) SA 1297(CC); Veriava and Coomans "The right to education" (2005) 67.
[243] Italics my emphasis.
[244] Section 28(3) of the Constitution.
[245] Section 29 of the Admissions Policy for Ordinary Public Schools.

schooling to learners younger than 16 and is capped at a Grade 9 education. Applying *Harksen*, a distinction can be drawn between learners of typical grade-age who are allowed to stay in the formal schooling system and overaged learners who are not academically progressing at an acceptable pace, and forced to leave school. On the face of it, the differentiation between these groups are based on two factors, namely age and academic competence. Since age is listed in terms of section 9(3) of the Constitution, discrimination is established in terms of this ground. Academic competence is not enumerated in section 9(3), therefore in accordance with *Harksen*, differentiation based on this ground will result in discrimination if it has the potential to impair a person's dignity or other comparable interests.[246] In this regard, section 5(2) of the Schools Act prohibits school governing bodies from administering any test in relation to the admission of learners to a public school.[247] Section 5(2) must be read in conjunction with section 5(1) of the Act which states that "[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way." The purpose of these provisions are to prevent schools from employing measures, such as academic testing that may result in discrimination against potential learners. In other words, the Schools Act aims to prevent a situation where the academic competence of a learner is used as a means of exclusion. In *FEDSAS*[248], the Constitutional Court agreed with the Gauteng education authorities that "schools [which] are told in advance of admission that a learner has learning or remedial difficulties, tend to refuse that learner's admission."[249] Viewed from this perspective, differentiation on the ground of academic competence therefore constitutes discrimination. A further ground for differentiation that is not immediately apparent, is that of race. Burger *et al* point out that the majority of overaged learners who were initially removed from the formal schooling system in the late 1990s were black.[250] That demographic trend has continued into the present. Hartnack argues that the biggest dropout in the South African education system occurs in Grades 10 and 11, thus directly after the compulsory schooling phase.[251] The author defines "dropout" as 'leaving education without obtaining a minimal credential' which in the

246 *Harksen* para 374.
247 Section 5(2) of the Schools Act provides: "The governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test."
248 2016 (4) SA 546 (CC).
249 *FEDSAS CC* para 32.
250 Burger *et al* (2015) 83 (1) *South African Journal of Economics* 74.
251 Hartnack A "Background document and review of key South African and international literature on school dropout" (2017) 1-2. (Report prepared for DGMT Foundation).

South African context, amounts to Matric.[252] Approximately half of all South African learners drop out of school before obtaining a Matric qualification and black learners constitute the overwhelming majority of this percentage.[253] On the face of it, the compulsory education framework appears to be neutral, but its operation results in indirect discrimination against black learners on the basis of race. This argument is reinforced by the Constitutional Court which held in *Pretoria City Council v Walker* that indirect discrimination occurs where conduct is neutral in appearance, but the consequences thereof result in discrimination.[254] The next stage of the *Harksen* enquiry is to establish whether the discrimination on the basis of age and academic competence amounts to unfair discrimination. The Constitutional Court has distinguished three factors that are considered cumulatively to determine whether discrimination is unfair.[255] These include:

> (a) The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;
> (b) The nature of the provision or power and the purpose sought to be achieved by it.
> (c) With due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental dignity or constitutes an impairment of a comparably serious nature.[256]

In respect of the first factor, the equality jurisprudence from the Constitutional Court indicates that a claim of unfair discrimination will usually be upheld where the complainant is a member of a historically disadvantaged group.[257] Thus, where the complainant is part of a vulnerable group and suffers discrimination that could lead to the perpetuation of historical disadvantage, it is likely that the court will find that unfair discrimination is present.[258] As reasoned above,

252 Ibid.
253 Ibid.
254 At para 32.
255 *Harksen v Lane* para 51. These factors are not an exhaustive list. The Constitutional Court has not always been consistent in applying these 3 factors. See Kruger R "Equality and unfair discrimination: Refining the Harksen test" (2011) 128 *SALJ* 479 for a critique on the Constitutional Court's application of the *Harksen* test.
256 Ibid.
257 See, for example, *Ex Parte Western Cape Provincial Government and Others; in re: DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (1) SA 500 (CC) ; *Bhe v Magistrate,Khayelitsha* 2005 (1) SA 563 (CC); *Moseneke v The Master of the High Court* 2001 (2) SA 18 (CC).
258 Ibid.

the majority of learners over 15 years is black and therefore constitutes a historically disadvantaged group. In respect of the second factor, the importance of a societal goal is directly related to the state's justification for adopting a discriminatory measure in the first place, which goes to the heart of the limitation enquiry which is considered below.[259] The third factor is regarded as the most important determinant of unfair discrimination. As noted elsewhere in this thesis, "dignity is generally recognised as the core value and standard of [the unfair discrimination enquiry under] section 9(3)."[260] In *Prinsloo v Van Der Linde*[261] the Court held that unfair discrimination "principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."[262] According to Currie and De Waal, unfair discrimination occurs when "law or conduct, for no good reason treats some people as inferior or incapable or less deserving of respect than others."[263] The authors' perspective is clearly grounded in *Hugo* where Goldstone J stated that:

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our… constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.[264]

In assessing whether the dignity of the group of overaged learners is infringed, it is imperative to analyse the situation in which these learners find themselves in once they are forced out of formal schooling and become subject to the adult education system. As noted above, public adult learning centres may not be available in the specific area in which overaged learners are residing, therefore in some cases, they literally would have no education centre to access. Furthermore, even if an adult education facility is provided, the possibility exists that the facility may close down before an academic year is completed due to the state's scant investment in the adult education system. Having been deprived of the choice to access a formal school as well as an adult education centre, these learners will no doubt end up as part of the approximately 50% of young people in South Africa without a matric certificate, the minimal

259 Kruger (2011) 128 *SALJ* 496.
260 Albertyn and Fredman (2015) *Acta Juridica* 435.
261 1997 (3) SA 1012 (CC).
262 At para 31.
263 Curie I and De Waal J *The New Constitutional and Administrative Law, Volume 1* (2001) 244.
264 *Hugo* para 92.

school-leaving qualification in South Africa.[265] It has been well-documented in this chapter that poverty, inequality and unemployment increases with a low level and poor quality of education. Therefore, it is indisputable that learners without even the minimal education qualification, are likely to become part of "the underclass of South African society where poverty and unemployment is the norm."[266] Furthermore, because the overwhelming majority of over-aged learners is black, it is clear that the current compulsory education framework perpetuates past patterns of racial disadvantage. Viewed against this background, the compulsory schooling provision, in conjunction with the age-related policy framework has a grave impact on the dignity of learners considered too old for the formal schooling system. To this end, it is argued that a claim of unfair discrimination on the basis of race, age and academic competence against learners between the ages of 16 and 18 is valid.

(ii) A violation of the best interest of the child standard and the right to basic education of over-aged learners

Section 29(1)(a) of the Constitution entrenches a right to basic education, including adult basic education. In terms of a textual interpretation of the Constitution, this right applies to learners in the formal schooling system as well as to learners in the adult education sector. In *Juma Musjid,* the Constitutional Court confirmed that *access* "is a necessary condition for the achievement of [section 29(1)(a)]'.[267] It has been argued above that learners over 15 years of age are placed in the dire position where once they are forced out of formal schooling, they face the distinct possibility of being denied access to adult education as well. Therefore, it is incontrovertible that an infringement of section 29(1)(a) occurs in respect of these learners. The best interest standard in terms of section 28(2) of the Constitution is also implicated with regards to learners older than 15 years. Section 28(2) is not merely a legal principle, but a substantive right that applies to an individual child, a group of children or to children in general.[268] In *Director of Public Prosecutions, Transvaal v Minister for Justice and*

[265] Hartnack Report (2017) 1-2.
[266] Spaull "Schooling in South Africa: How low quality education becomes a poverty trap" (2015) 37.
[267] *Juma Musjid* para 43. Italics my emphasis.
[268] General comment 15, para 6(a). The best interest standard is sourced in the Convention on the Rights of the Child to which South Africa is a state party. The Constitutional Court has pronounced that the CRC's general principles, including the one on the best interests of the child, "inform" the interpretation of the section 28(2) provision. The Court has repeatedly confirmed that section 28(2) is an independent right and that its application extends to all rights beyond those listed in section 28(1) of the Constitution. See *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC). ("*S v M*").

Constitutional Development and Others[269], the Constitutional Court found that section 28(2) obliges all decision-makers in respect of children to guarantee "that the best interests of the child enjoy paramount importance in their decisions."[270] This means that the judiciary, administrative bodies and legislature, among others, must employ a child-centred approach.[271] For instance, legislation must be construed to the extent that it protects and advances children's interests and the courts must consistently show "due respect" for the rights of children.[272] South African jurisprudence does not endorse a fixed formula to determine the best interests standard. Although the indeterminacy of the concept has been criticised, the Constitutional Court per Sachs J argues that "it is precisely the contextual nature and inherent flexibility of section 28(2) that constitutes the source of its strength."[273] Since the context of each child or group of children is different, it is important that the content of the best interest standard be flexible and contingent on the actual facts of the specific case.[274] Therefore, an authentic child-sensitive approach necessitates a concentrated and personalised evaluation of the exact "real-life" circumstances in which children find themselves.[275]

Does the adoption of a child-sensitive approach mean that children's rights will always trump the rights of others or outweigh societal (or other) interests? In *De Reuck v Director of Public Prosecutions*[276], the Constitutional Court held that section 28(2) does not mean that the rights of children trump every other right in the Constitution as this would be in conflict with the notion that "constitutional rights are mutually interrelated and interdependent."[277] In *S v M*, the Court confirmed that section 28(2), similar to other rights in the Bill of Rights, may be limited in terms of the limitation enquiry set out in section 36 of the Constitution[278], thereby confirming the Court's approach in *Sonderup v Tondelli*.[279] In *S v M*, the Court held that the paramountcy of the principle does not mean that the best interests of children are absolute.[280] Judge Cameron, in *Centre for Child Law v Minister of Justice and Constitutional Development*, describes the

269 2009 (4) SA 222 (CC).
270 At para 73.
271 *S v M* paras 14-15.
272 *S v M* paras 14-15.
273 *S v M* para 24.
274 *S v M* para 24.
275 *S v M* para 24.
276 2004 (1) SA 406 (CC). ("*De Reuck*").
277 At paras 54-55.
278 *S v M* para 112.
279 2001 (1) SA 1171 (CC).
280 *S v M* para 26.

paramountcy principle as meaning that "the child's interests are more important than anything else, but not that everything else is unimportant."[281]

Having sketched the general principles that guide the application of the best interests standard in South African jurisprudence, the next section will focus on the interpretation of the standard in the seminal education law judgment of *Juma Musjid*. As stated earlier in the thesis, this case originated in the Kwazulu - Natal High court which sanctioned the eviction of Juma Musjid Primary school, operated on private property owned by the Juma Musjid Trust.[282] In reaching this decision, the High court held that the Trust enjoys the constitutional right to property[283] and may choose to make its property available for the purposes of education.[284] The High court stressed that the Trust has no constitutional duty towards the school's learners, as opposed to the state which carries the primary obligation to provide compulsory education.[285] In the appeal judgment, Nkabinde J, writing for an unanimous Constitutional Court confirmed that the state incurs the primary duty to provide a basic education.[286] However, the apex Court rejected the High court's finding that the Trust has no constitutional obligation at all in respect of the affected learners. In this regard, the Constitutional Court held that the Constitution imposes a negative obligation on the Trust not to impair the learners' right to basic education in terms of section 8(2).[287] Nkabinde J continued that the High court elevated the property rights of the Juma Musjid Trust over the right to basic education of the learners and failed to properly consider the best interests of the learners before granting the eviction order.[288] She stated specifically that the High court "failed to give consideration to the impact that the eviction order would have had on the learners and their interests."[289] The Constitutional Court concluded that the High court erred in granting the eviction order. For this reason, the Court provisionally set aside the eviction order and ordered the Kwazulu-Natal Education Department, the Trust and the particular SGB to engage with one another with the purpose of

[281] At para 29.
[282] *Juma Musjid CC* para 1.
[283] Section 25 of the Constitution.
[284] *Ahmed Asruff Essay N.O. and Eight Others v The MEC for Education KwaZulu-Natal and Four Others*, Case No. 10230/2008, KwaZulu-Natal High court, Pietermarizburg, 16 September 2009, unreported, para 23. ("*Juma Musjid HC*").
[285] *Juma Musjid HC* para 23.
[286] *Juma Musjid CC* para 57.
[287] *Juma Musjid CC* paras 58- 60. Section 8(2) of the Constitution provides that: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."
[288] *Juma Musjid CC* para 71.
[289] *Juma Musjid CC* para 68.

finding alternative accommodation for the affected learners.[290] The *Juma Musjid* judgment emphasises that the specific impact experienced by children is a decisive factor taken into account by the Constitutional Court when it determines what constitutes the best interests of children and when it weighs up children's rights against competing rights or interests. For instance, had the eviction order granted by the High court been implemented before alternative accommodation could have been secured, the affected learners would literally have been left without a school to access. Therefore, it seems that the more severe the impact, the more likely it is that the Constitutional Court will find that the best interests of the child has been violated and grant an order that guarantees that the rights of children trump rivalling rights or interests. Similar to the scenario sketched in *Juma Musjid*, children older than 15 years may find themselves in the dire position where they literally have no education facility to access. Drawing on the principles established in *Juma Musjid* and other best interests standard cases above, it is beyond dispute that the best interests of this category of children are being violated by the compulsory education legal framework.

(iii)The limitation enquiry

A finding of unfair discrimination is not the end of the matter. Any right in the Bill of Rights can be limited under the Constitution's general limitation clause.[291] In order to determine whether the state can justify its infringement of the rights of children older than 15, it is imperative to determine the reason behind these violations. As can be gleaned from the research, the government has adopted the compulsory education framework to reduce the amount of overaged learners in public schools, with the aim of freeing up resources in the basic education system.[292] At the core of the state's justification, is thus a budgetary restraints argument. It is against this background that the limitation enquiry has to be unpacked. Section 36(1) of the Constitution sets out the circumstances under which rights in the Bill of Rights may be limited:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;

[290] *Juma Musjid CC* para 74.
[291] *S v M* para 112.
[292] See Burger *et al* (2015) 83 (1) *South African Journal of Economics* 74.

(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

A significant obstacle to clear at the justification stage of the section 36 enquiry, is that the measure limiting the right must be "sourced" in a law of general application.[293] Therefore, the limitation of any right will always be unconstitutional if the right is limited by any measure other than a law of general application.[294] The meaning of a "law of general application" has been interpreted to mean as "something which the Court recognises as law", such as legislation and which applies generally.[295] The Admissions Policy for Ordinary Public Schools limits formal schooling to learners younger than 16 and subjects overaged children to adult education. In this regard, the policy gives effect to section 3(1) of the Schools Act which limits compulsory schooling to learners from the age of 7 up until 15. The effect of the compulsory school framework is that it forces over-aged children out of the formal schooling system and renders them subject to an adult education system, which in and of itself, violates the rights to basic education, equality and the best interest of the child as examined in detail above. Section 3(1) of the Schools Act is a law of general application that applies uniformly across the country. The first stage of the limitation enquiry is therefore complied with.

The second stage of the enquiry requires that the factors listed in section 36(1) are examined and weighed up against each other. Sachs J, per the Constitutional Court in *Christian Education South Africa v Minister of South Africa*[296], refers to this stage as a "…nuanced and context-sensitive form of balancing."[297] The Court, in *Makwanyane* expands on the balancing exercise:

> In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be

293 De Vos and Freedman (eds) *South African constitutional law in context* (2014) 360.
294 Ibid.
295 Ibid 361-362.
296 2000 (4) SA 757 (CC).
297 At para 30.

> necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[298]

In assessing whether a limitation of a right is justifiable, courts are not required to engage with the factors above as an exhaustive list. These factors are "key considerations" that can be used in combination with "any other relevant factors in the overall determination whether or not the limitation of a right is justifiable."[299] The right to basic education, like any other right in the Bill of Rights, is subject to the limitation enquiry. Nkabinde J's seminal ruling on the unqualified nature of section 29(1)(a) ruling does not mean that the state is always obliged to comply with its section 29(1)(a) duties irrespective of certain restrictions that may deem it impossible to fulfil those obligations. The Constitutional Court has ruled that the right may indeed be limited in terms of the Constitution's general limitation clause.[300] Therefore, where the state is unable to comply with its obligations under section 29(1)(a), there will be a limitation of the right.[301] In *Equal Education v Minister of Basic Education*, the High court held that "in the event that the [Minister of Basic Education] is unable to [comply with her duties in terms of section 29(1)(a)], it is incumbent upon her to justify that failure under section 36 or 172(1)(a) of the Constitution."[302] In other words, where a limitation of section 29(1)(a) occurs, it is up "…to the state to justify this limitation under [the limitation clause] of the Constitution or, if the limitation is not justified, to argue that immediate relief is not just and equitable."[303] Some academic commentators have deliberated that the Constitutional Court "… could conceivably go back on their approach [in *Juma Musjid*] by reading in qualifications to [section 29(1)(a)]."[304] As indicated above, this judgment essentially revolved around a private owner's right to evict a public school from its property and therefore concerned the enforcement of a negative obligation in terms of section 8(2) of the Constitution. Skelton argues that the eviction order granted by the Court resulted in the affected learners being placed in other schools "…which meant the expense to the state of placing them in those schools was negligible."[305] The Constitutional Court was therefore not tasked with ruling on the positive

298 *Makwanyane* para 104.
299 *S v Manamela (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC) para 33.
300 *Juma Musjid CC* para 37.
301 McConnachie and McConnachie (2012) 129 *SALJ* 557.
302 *Equal Education v Minister of Basic Education* para 185.
303 McConnachie and McConnachie (2012) 129 *SALJ* 557.
304 Ibid 564. See also Skelton (2012) 27 *SAPL* 397-399.
305 Skelton ibid.

dimensions of the right which would have carried a much higher "price tag" for the state.[306] In such a case, the Court would be cognisant of the possibility that the state would be unable to comply immediately with a court order that incurs significant costs.[307] As Skelton speculates, the Court would then probably circumscribe the right more tightly, as the authority of the Court is brought into question and the anticipated recipients left with no benefit if the court order is not complied with.[308] Skelton's analysis confirms the view that the Court is more cautious in its interpretive approach of the positive obligations stemming from socio-economic rights.[309] Brand brings up separation of power concerns as he points out that courts operate under the perception that "…enforcing negative duties require of them less interference in the sphere of power of the political branches than the enforcement of positive duties would."[310] Dugard and Wilson compare the Constitutional Court's interpretive approach in positive obligations cases with those judgments in which negative obligations are to be ruled on.[311] In *Jaftha v Schoeman; Van Rooyen v Scholtz* [312], the "Court considered whether the attachment and sale in execution of residential property without judicial oversight constituted a violation of the right of access to adequate housing."[313] The Court held that the lack of judicial oversight violated the right of access to adequate housing in terms of section 26(1) of the Constitution and that the limitation was not justifiable in terms of the limitation clause.[314] In coming to this conclusion , the Court relied directly on the international law concept of the minimum core content of a right to conclude that security of tenure was part and parcel of section 26(1).[315] In *Grootboom*, a case which concerned the positive enforcement of section 26, the Court refused to interpret section 26(1) as containing a minimum core content.[316] The juxtaposition of these two cases clearly shows a more generous approach to interpretation when the Court is dealing with the negative duties emanating from socio-economic rights. However, the Court's restrictive interpretive approach in positive obligation cases has to be viewed in context. This approach was forged in

[306] Ibid 396.
[307] Ibid 397.
[308] Skelton (2012) 27 *SAPL* 397.
[309] Dugard and Wilson "Constitutional jurisprudence: The first and second waves" (2014) 42.
[310] Brand "Introduction to socio-economic rights in the South African Constitution" (2005) 11- 26. See also *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa, 1996* (1996) 4 SA 744 (CC) para 78.
[311] Wilson and Dugard "Constitutional jurisprudence: The first and second waves" (2014) 41-42.
[312] 2005 (2) SA 140 (CC). ("*Jaftha*").
[313] *Jaftha* paras 25-34.
[314] *Jaftha* paras 25-34.
[315] *Jaftha* paras 25-34.
[316] *Grootboom* paras 26-33.

the interpretation of *qualified* socio-economic rights.[317] Therefore, it seems unlikely that the Court will backtrack and read restrictions into the right to basic education, given the unequivocal language in which Nkabinde J framed the unqualified nature of section 29(1)(a). Doing an about-turn would also call into question the institutional integrity of the Court. It seems more probable that the Court will engage in a section 36 analysis and be willing to be convinced "…by the state (with whom the duty to prove the justification lies) that in some situations the state's failure to provide basic education might be reasonable and justifiable."[318] I am particularly concerned here with the limitation of the rights of learners over 15 years old who are forced into the adult education system. As indicated above, the state has conceded that it has chronically under-invested in adult education. This means that the government is indeed advancing a budgetary constraints argument in respect of section 29(1)(a) which includes the right to adult basic education. Taking into account that the Court has already pronounced that section 29(1)(a) is not subject to the internal limitation of "within available resources", the perplexing question arises whether resource constraints can be used as a legitimate justification by the state under a section 36 enquiry? Mandla Seleoane observes that:

> [T]he desirability of limiting the right to basic…education on the basis of the availability of resources must be problematised. One must proceed on the basis that, where subjecting a social and economic right to the availability of resources was desired, the Constitution specifically provided for that. Therefore it would seem that the omission to subject the right to basic… education to available resources conveys that such subjection is undesirable. To limit the right on account of resource constraints would therefore, it seems, amount to defeating the objective of section 29(1)(a), namely, to free the right from such considerations.[319]

Seleoane seems to contend that the Constitution's explicit exclusion of "within available resources" from the textual formulation of section 29(1)(a) prevents the right from being subject to resource constraints under a section 36 enquiry. In coming to this conclusion, he relies on a pure textual interpretation of the Constitution citing that "where subjecting a social and economic right to the availability of resources was desired, *the Constitution specifically*

317 Italics my emphasis.
318 Woolman and Fleisch *Constitution in the classroom* (2009) 125.
319 Seleoane "The right to education: Lessons from Grootboom" (2003) 7 (1) *Law, Democracy and Development* 140-141.

provided for that."[320] However, the text of the Constitution also specifically provides that *all rights* in the Bill of Rights are subject to restriction under the limitation clause. Section 36 (1) does not distinguish between unqualified and qualified rights for the purpose of limiting these rights. The same can be said for section 7(3) which states that "[t]he rights in the Bill of Rights are subject to the limitations contained or referred to in section 36…" More importantly, the text of the Constitution does not specify which justifications are expressly prohibited from being relied upon for the purposes of a section 36 enquiry. Furthermore, the jurisprudence of the Constitutional Court supports the contention that the Court has the freedom to rely on "*any relevant [factor]* in the overall determination whether or not the limitation of a right is justifiable."[321] Therefore, provided that the limitation is through a law of general application, it will be legitimate for the state to bring up resource constraints in proving a justifiable limitation of the right.[322] For that reason, the question that should be focused on, is not whether resource constraints can be relied upon in a limitation analysis of section 29(1)(a), but *what weight will a court attach to budgetary constraints as justification by the state for its limitation of the right to basic education*.[323]

As mentioned previously, the courts have not been provided with a case where it was compelled to apply the limitation clause to the right to basic education. However, some guidance can be obtained from the jurisprudence stemming from cases dealing with the limitation of the other unqualified rights in the Constitution. An example of such a case is *Centre for Child Law v MEC for Education and Others.* [324] In this case , the Centre for Child Law lodged an application with the former Pretoria High court (now the North Gauteng High court) alleging, *inter alia*, that the deplorable physical environment in which learners at the hostels of JW Luckhoff school were housed, amounted to an infringement of *inter alia*, section 28(1)(c)[325] of the Constitution.[326] This section, similar to section 29(1)(a) of the Constitution is unqualified. The court observed that:

[320] Ibid. Italics my emphasis.
[321] *S v Manamela* para 33. Italics my emphasis.
[322] Woolman and Fleisch *Constitution in the classroom* (2009) 125.
[323] Italics my emphasis.
[324] Case No 19559/06 (T) (30 June 2006). ("*Luckhoff*").
[325] In terms of section 28(1)(c) of the Constitution, "[e]very child has the right to basic nutrition, shelter, basic health care services and social services." Section 28(1)(c) is part of the broader section 28 of the Constitution, a clause containing a list of children's rights.
[326] *Luckhoff* 1-2.

> What is notable about the children's rights in comparison to other socio-economic rights is that section 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation…[327]

The state argued that that it could not improve the physical conditions in which the learners were housed because of "budget constraints."[328] Of interest to this thesis, is the court's response to the latter justification. The court noted that:

> [O]ur Constitution recognises that, particularly in relation to children's rights…, that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. *The minimal costs or budgetary allocation problems in this instance are far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values.*[329]

The court's approach in *Luckhoff* alludes to a general principle that has been established in the Constitutional Court's jurisprudence on the section 36(1) enquiry, namely that "…the importance of the right [in light of the values of the Constitution] is a factor which must of necessity be taken into account in any proportionality analysis."[330] In *Makwanyane*, the Court held that "[i]n the balancing process, the relevant considerations will include the nature of the right that is limited, and *its importance to an open and democratic society based on freedom and equality*…"[331] Although the Constitutional Court has denied a hierarchy of rights under the Constitution, some of its pronouncements do indeed imply some sort of hierarchy.[332] For example, in *Makwanyane*, the Court held that "the rights to life and dignity are the most important of all human rights."[333] In *Bhe and Others v Khayelitsha Magistrate and Others*, the Court stated that "[t]he rights to equality and dignity are the most valuable of rights in any open and democratic state."[334] De Vos and Freedman reason that "[i]f there is some hierarchy,

327 *Luckhoff* 7.
328 *Luckhoff* 7-8.
329 *Luckhoff* 7-8. Italics my emphasis.
330 *National Coalition for Gay and Lesbian Equality v Minister of Justice* para 34.
331 *Makwanyane* para 104. Italics my emphasis.
332 De Vos and Freedman (eds) *South African constitutional law in context* (2014) 374.
333 *Makwanyane* para 144.
334 *Bhe* para 71.

logically those rights which are directly based on the founding constitutional values of dignity, freedom and equality are likely to receive greater attention than others."[335] Their contention finds approval in the jurisprudence of the Constitutional Court. In *S v Mamabolo*[336], the Court held that "human dignity, equality and freedom are conjoined, reciprocal and covalent values which are foundational to South Africa."[337] Retired Constitutional Court Judge, Kriegler J has warned that if the right to dignity is compromised, "the society to which we aspire becomes illusory."[338] He stated further that "any significant limitation [of the right to dignity], would for its justification demand a very compelling countervailing public interest."[339] In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*[340], Mokgoro J took a similar approach by asserting that the rights to life, equality and dignity must be given consideration in socio-economic rights cases.[341] She found that the denial of social security benefits to permanent residents was an infringement of not only section 27(1)(c) of the Constitution, but also of the rights to dignity and equality which were referred to as founding values lying "at the heart of the Bill of Rights."[342] Thus, based on the aforementioned jurisprudence, it becomes clear that where the values and/or rights of dignity, equality and freedom are implicated in the violation of a right, the Constitutional Court will likely find the limitation of the right unjustifiable unless the state provides compelling reasons for the justification. Regarding the right to a basic education, it is difficult to conceive of a right more

335 De Vos and Freedman (eds) *South African constitutional law in context* (2014) 374.
336 2001 (3) SA 409 (CC).
337 At para 41. Section 1 (a) of the Constitution states: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: *Human dignity, the achievement of equality and the advancement of human rights and freedoms.*" Section 7(1) of the Constitution provides: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms *the democratic values of human dignity, equality and freedom.*" Section 39(1)(a) of the Constitution: "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on *human dignity, equality and freedom.*" See also Moyo K "The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence" in Bohler-Muller *et al* (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 89. (Italics my emphasis).
338 *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) para 28.
339 *Ex parte Minister of Safety and Security and Others: in re S v Walters and Another* para 28. See also Moyo "The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence" (2018) 91.
340 2004 (6) SA 505 (CC).
341 At paras 40-44.
342 At para 85. Section 27(1) (c) of the Constitution provides: "Everyone has the right to have access to social security, including if they are unable to support themselves and their dependants, appropriate social assistance."

directly grounded in the foundational values of the Constitution. Kollapen J captures the essence of the right in *Section 27 v Minister of Basic Education:*

> [I]f regard be had to the history of an unequal and inappropriate educational system, foisted on millions of South Africans for so long, and the stark disparities that existed and continue to exist in so many areas and sectors of our society, education takes on an even greater significance. It becomes at the makro[*sic*] level an indispensable tool in the transformational imperatives that the Constitution contemplates and at the micro level it is almost a *sine qua non* to the self determination of each person and his or her ability to live a life of dignity and participate fully in the affairs of society.[343]

David Bilchitz argues that " the [transformative] Constitution places three central values at the core of the society it is designed to create: human dignity, the achievement of equality and the advancement of human rights and freedoms."[344] In other words, the ultimate outcome of the constitutional transformation project, is the establishment of a society based on the these values. As an "indispensable tool in the imperatives that the Constitution contemplates", the right to basic education is therefore essential in the establishment of a South African society based on the foundational values of the Constitution. At the micro level, education which has been described as a "…central and interlocking right in the architecture of the rights frame work in the Constitution"[345], plays a crucial role in unlocking the realisation of other rights.[346] This means that the right to basic education is fundamental to the development of individual lives lived in dignity, equality and freedom. Therefore, in light of the aforementioned, it is difficult to conceive that the state can convince the courts that a budgetary restraints argument in limiting the section 29(1)(a) right of over-aged learners is justified. Furthermore, the *Luckhoff* judgment suggests that a lack of state resources cannot be presented as a justifiable limitation on the urgent needs of children. The needs of children older than 15, in particular, who are placed in a situation where they are unable to access any type of educational facility, undoubtedly meet the threshold of urgency. Therefore, the state's budgetary restrictions

343 *Section 27 v Minister of Basic Education* (*'Textbook 1 judgment'*) para 5.
344 Bilchitz D "Does transformative constitutionalism require the recognition of animal rights?" in Woolman S and Bilchitz D (eds) *Is this seat taken? Conversations at the bar, the bench and the academy about the South African Constitution* (2012) 173.
345 *Textbook 1 judgment* para 2.
346 *Textbook 1 judgment* para 4.

argument would not constitute a justifiable limitation of the section 29(1) (a) right and the best interests standard of the group of learners older than 15.

Lastly, I will examine whether the unfair discrimination finding in respect of these learners, is justifiable in terms of the limitation enquiry. An analysis of the equality provision has to take place against the understanding that the Constitution endorses a substantive notion of equality.[347] This particular form of equality was adopted with the purpose of eradicating systemic inequality in South African society so as to ultimately achieve the transformative vision of the Constitution.[348] The structural inequality in South African society as a result of the country's colonial and apartheid past is well documented in this thesis. For example, Chapter 2 read with Chapter 3 provides a detailed account of how the discriminatory policies of the previous regimes led to the entrenchment of structures that generate forms of disadvantage and privilege on the basis of race and/or class in the current public basic education system. In *Minister of Finance v Van Heerden*, the Constitutional Court held:

> This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.[349]

According to De Vos, the transformative vision of the Constitution requires that the right to equality be interpreted more widely so as to embrace a positive aspect.[350] In practical terms, this means that the state must take active steps to achieve the transformative objectives of the Constitution.[351] Whenever the courts examine a violation of equality, they therefore have to determine whether the impact of the infringing measure would further the goal of transformation or not.[352] Any measures that contributes towards the "creation or perpetuation of patterns of group disadvantage for groups disfavoured in the past, will be constitutionally suspect." [353] The current compulsory education framework results in the creation of patterns of perpetual disadvantage against black learners. These learners are condemned to a life of

347 See Chapter 3, sections 3.2 and 3.3.
348 Ibid.
349 At para 27.
350 De Vos (2001) 17 *SAJHR* 266.
351 Ibid.
352 Ibid.
353 Ibid.

unemployment and poverty, and are thus rendered incapable of contributing to the transformation of South African society. The Constitution demands that the state eradicate systemic inequality, not perpetuate it as is currently the case with the compulsory education framework. Viewed from this perspective, a resource constraints argument does not constitute a reasonable and justifiable limitation of the right to equality of over-aged learners. It is thus suggested that the Legislature revisit the compulsory education provision to the extent that learners up until the age of 18, not merely 15 are subjected to compulsory schooling.[354] This will ensure that overaged learners whose access to current public adult education centres are extremely precarious, are at least guaranteed admission to formal schools.

6.4 CONCLUSION

Chapter 6 has focused on the first understanding of "transformation" adopted in this thesis, namely transformation demonstrated as tangible outcomes through adjudication. In this regard, the content-based approach of the High courts and SCA in respect of the right to basic education has been examined. This approach was seemingly spurred on by the seminal Constitutional Court judgment of *Governing Body of the Juma Musjid Primary School v Essay NO*. Since *Juma Musjid* has also invoked academic debates about the relationship between "basic education" and "compulsory education", this Chapter additionally engaged with the meaning of basic education as it relates to compulsory education and the broader imperatives of transformation. As noted above, *Juma Musjid* seems to have emboldened the courts below the apex Court to provide detailed content to the right to basic education. The trajectory of cases examined in this chapter has revealed that the High courts and Supreme Court of Appeal have adopted an incremental approach in "filling out" the content of the right. Spanning a period of approximately eight years, the jurisprudence of the High courts and SCA has established that the right to basic education encompasses the following: Adequate school infrastructure, teaching and non-teaching staff, appropriate school furniture, a school environment that promotes the dignity of learners, teaching materials such as textbooks, transport to and from school at state expense (in appropriate cases) and the right of equal access to education. In light of the Constitutional Court's history of shying away from giving content

354 I am aware that an amendment of the compulsory schooling age may not only result in additional obligations on the South African government, but may have a range of consequences for affected learners and their families as well. My motivation to argue for a revision of section 3(1) of the Schools Act is rooted in the transformative imperatives of the Constitution. The exact details related to the potential impact of such an amendment falls beyond the scope of this thesis.

to socio-economic rights, the High courts and SCA have to be applauded for their progressive stance. Furthermore, the adoption of an incremental approach means that the right to basic education does not remain static, but can be continuously expanded to keep abreast with the changing circumstances of society.

Chapter 6 then proceeded to shed light on the meaning of the term "basic education." Although the Constitutional Court has been criticised for its narrow connection of basic education with the compulsory schooling period, the Court redeemed itself by adopting a purposive approach to education in *Juma Musjid.* In this regard, the Court emphasised the transformative potential of the right to basic education which prompted the suggestion that basic education should be understood as an education of adequate standard that is aimed at the transformation of South African society. Furthermore, Chapter 6 has shown that there is a direct link between a higher level of education in tandem with a good quality of education and the reduction of poverty, unemployment and inequality in South Africa. The latter three challenges are regarded as the legacy of apartheid and have intensified under the post-apartheid government. To this end, the majority of black and poor learners in South Africa are denied equal access to a quality basic education, a fact which had already been established in Chapter 3. Chapter 6 has further explained why an amendment of the compulsory schooling period would advance the transformative imperatives of the Constitution, but would be meaningless unless it is accompanied by a serious commitment on the part of the state to improve the poor quality of education experienced by the majority of black and poor learners in the public education system.

The final part of Chapter 6 has placed the emphasis on the constitutionality of the compulsory education legislative and policy framework. Since learners beyond the age of 15 are not legislatively required to remain in school, this chapter has established that children between 15 and 18 are considered over-aged and subject to the right to adult basic education in terms of section 29(1)(a) of the Constitution. Due to the government's poor regulation of adult education, this chapter has found that the constitutional rights to adult basic education and the best interest of the rights standard of the latter group are gravely violated. Furthermore, these learners are subjected to unfair discrimination on the grounds of age and academic competence. Chapter 6 concluded that the importance of the right to basic education in light of the values of the transformative Constitution will probably outweigh a budgetary constraints arguments advanced by the state in respect of section 29(1)(a)

CHAPTER 7
TRANSFORMATION AS RECONFIGURING THE DECENTRALISED SCHOOL GOVERNANCE SYSTEM: THE ROLE OF THE CONSTITUTIONAL COURT

7.1 INTRODUCTION

Chapter 6 has focused on the first understanding of transformation, namely the realisation of tangible outcomes through adjudication. To this end, the previous chapter has examined the role of the High courts and SCA in establishing a developing jurisprudence in respect of section 29(1)(a) that has resulted in the provision of entitlements of the right to basic education on an incremental basis. This approach undoubtedly plays a part in reducing the inequality gap in the basic education system and hence contributing to the broader objective of transformation. However, it is submitted that the substantive-based approach of the High courts and SCA is not enough to effectively address the systemic inequality in public basic education. In this regard, Chapter 4 has examined the extent to which the decentralised school governance system serves as a primary enabler of systemic inequality in the education system. Chapter 4 has determined that former white school governing bodies, in particular, use their autonomy under the school governance system to preserve historical privileges. Furthermore, whenever the actions of these SGBs are challenged by the state, a court battle ensues which has resulted in a very contentious relationship between the government and former Model C school governing bodies. Chapter 7, among other things, examines the role of the Constitutional Court in solving the disputes emanating from this acrimonious relationship. As the apex court of South Africa, the Constitutional Court plays a crucial role in addressing systemic inequality in the education system and hence, contributing towards the broader purpose of transformation. For this reason, Chapter 7 examines the primary judicial approach of the Court in solving education disputes between SGBs and the state. In terms of this approach, the Court does not solve a dispute in terms of a substantive deliberation on the meaning and enforcement of applicable constitutional rights. Rather, the Court removes itself from the issue under consideration and orders the disputing parties to meaningfully engage with each other with the purpose of settling the dispute between themselves. Chapter 7, *inter alia*, analyses whether meaningful engagement operates as a stumbling block to transformation in public basic education. In this regard, the particular deference that the Court displays towards SGBs begs the question whether the Court fails to interrogate the manner in which the decentralised system of school governance enables

school governing bodies to preserve and perpetuate systemic inequality in the basic education system. The chapter is set out as follows. In section 7.2, the development of the notion of meaningful engagement in socio-economic rights jurisprudence is traced. This is followed by the trajectory of the principle of meaningful engagement in education law jurisprudence in section 7.3. Section 7.4 attempts to answer the question whether the meaningful engagement approach has an anti-transformative impact on the public basic education system. Section 7.5 provides the conclusion.

7.2 THE IMPORTATION OF THE MEANINGFUL ENGAGEMENT PRINCIPLE INTO SOCIO-ECONOMIC RIGHTS JURISPRUDENCE

The meaningful engagement principle as applied in socio-economic rights jurisprudence, first gained prominence in *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*.[1] This case reached the Constitutional Court on appeal from the SCA which had authorised an eviction order on behalf of the City of Johannesburg against roughly 400 indigent occupiers (the applicants) from buildings in the inner city of Johannesburg.[2] The occupiers contended that the municipality's decision to evict them, was part and parcel of the City's "broader strategy to evict" approximately 67 000 people from hazardous buildings in the inner city.[3] The municipality did not establish a proper plan to deal with finding alternative accommodation for this large group of people.[4] The failure to adopt such a plan, caused the applicants to argue that the City of Johannesburg was infringing upon its obligations to provide housing in terms of section 26 of the Constitution.[5]

Two days after the oral arguments concluded in this case, the Court issued an interim order requiring the parties to "engage with each other meaningfully" so as to reach a solution.[6] An

1 2008 (3) SA 208 (CC) ("*Olivia Road*").
2 *Olivia Road* para 1.
3 *Olivia Road* para 3.
4 Dugard and Wilson "Constitutional jurisprudence: The first and second waves" (2014) 45. See also Khampepe S "Meaningful participation as transformative process: The challenges of institutional change in South Africa's constitutional democracy (2016) 27 *Stell LR* 441.
5 Dugard and Wilson ibid.
Section 26(1) of the Constitution provides that "[e]veryone has the right to have access to adequate housing." Section 26(2) states: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."
Section 26(3) provides: "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."
6 *Olivia Road* para 5.

agreement was subsequently reached between the applicants and the City of Johannesburg. In terms of this agreement, the applicants were provided with alternative accommodation in exchange for their agreement to vacate the buildings in the Johannesburg inner city.[7] The Court interpreted meaningful engagement as constituting a core component of the reasonableness test against which the state's conduct is measured for compliance with the enforcement of qualified socio-economic rights.[8] The Court held that "[a]s long as the response of the municipality in the engagement process is reasonable, that response complies with section 26(2)."[9] The Constitutional Court further imposed an obligation on every municipality to engage meaningfully with potential homeless persons before they are evicted.[10] To reiterate, the reasonableness approach rejects an inquiry into the precise goods emanating from the right itself, but merely examines whether the state's conduct in implementing the right is reasonable or not.[11] According to Pillay, the notion of meaningful engagement supplements the "tools" the courts have as at its disposal for gauging the reasonableness of the state's conduct.[12] Since *Olivia Road*, the Constitutional Court has ordered meaningful engagement in several other cases that have predominantly focused on eviction law and the broader right of access to housing/property.[13] The notion of meaningful engagement has also made its way into education law jurisprudence as will be discussed in the next section of this thesis.

7.3 MEANINGFUL ENGAGEMENT IN EDUCATION LAW JURISPRUDENCE: THE CASE LAW

I am concerned with the notion of meaningful engagement as it pertains to the radical transformation of the public basic education system. As argued in Chapter 4, the decentralised

7 *Olivia Road* para 26.
8 *Olivia Road* paras 17-18.
9 *Olivia Road* para 18. See also Ray B "Engagement's possibilities and limits as a socio-economic rights remedy" (2010) 9 *Wash. U. Global Stud. L. Rev*. 399-425.
10 *Olivia Road* para 18.
11 McConnachie and McConnachie (2012) 129 *SALJ* 562.
12 Pillay "Toward effective social and economic rights adjudication: The role of meaningful engagement" (2012)10 *International Journal of Constitutional Law* 746.
13 See, for example, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) ; *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC); *Pheko v Ekhurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC);*Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* 2012 (9) BCLR 951 (CC). For a critical evaluation of these cases and the principle of meaningful engagement in eviction law, see Muller G "Conceptualising 'meaningful engagement' as a deliberative democratic partnership" (2011) 3 *Stell LR* 742.

system of school governance, conferring autonomy on SGBs to adopt their own policies, have enabled predominantly former white schools to maintain and perpetuate patterns of disadvantage and privilege in the sphere of basic education. As noted in Chapter 3, the overcoming of these patterns is central to the achievement of substantive equality which, in turn, is a key objective of the transformative Constitution. Therefore, the cases which have been selected for the discussion below, concentrates on a direct consequence of the decentralised school governance system: The power struggle between school governing bodies and provincial education departments concerning the decentralised legislative autonomy of SGBs to adopt their own school policies.[14]

7.3.1 The *Ermelo* judgment[15]

In 2009, one year after *Olivia Road*, the Constitutional Court, laid the foundation for the introduction of the meaningful engagement principle into education law by way of the *Ermelo* judgment. The facts of this case are fully explained in Chapter 4.[16] The central issue before the Constitutional Court concerned a dispute between the SGB of Hoërskool Ermelo, a former white, exclusive Afrikaans medium school at the time of legal proceedings and the HOD of the Mpumulanga Education Department.[17] The dispute related to the school's enforcement of an Afrikaans language policy which had resulted in the exclusion of English-speaking black learners from the school.[18] The HOD withdrew the school governing body's power to determine the language policy and conferred it on an interim committee, which immediately changed the Afrikaans medium policy to "parallel medium" as a means of accommodating the affected learners.[19] Moseneke J, writing for an unanimous Court, identified two issues for determination. The first issue concerned the proper exercise of administrative law, in particular the legality of the HOD's conduct. In this regard, the Court was tasked with the question whether the HOD could legally withdraw the power of the SGB to establish a language policy and bestow that power on an interim committee.[20] In relation to this question, the Court also had to determine whether the committee had adopted a lawful language policy.[21] Moseneke J

14 See Chapter 4, section 4.2.2.
15 *Ermelo CC*.
16 Chapter 4, section 4.2.2.2.
17 Ermelo CC paras 1-6.
18 *Ermelo CC* paras 1-6, 38.
19 *Ermelo CC* paras 25-26.
20 *Ermelo CC* para 1.
21 *Ermelo CC* para 1.

classified the second issue as the "underlying substantive issue" namely the "appropriateness" of the Afrikaans language policy in light of its exclusionary impact on black learners who preferred to be taught in English.[22] Throughout the judgment, Moseneke J kept on referring to the "appropriateness'" and not the constitutionality of the Afrikaans language policy despite the fact that the applicants[23], in their Heads of Arguments, disputed the constitutional validity of the language policy on the basis that it discriminated against non-Afrikaner learners on the basis of language.[24] Thus, the applicants squarely put the issue of constitutionality before the Court. It is submitted that this careful phrasing of the underlying substantive issue was done in a deliberate effort to avoid an outright ruling on the constitutional validity of the language policy as is argued further below.[25]

7.3.1.1 Administrative law issues

The respondents in this case, namely Hoërskool Ermelo and its SGB, insisted that the case did not involve the language policy at all, but exclusively centred around the legality of the HOD's conduct.[26] In response, the Court held that the HOD may on reasonable grounds withdraw a school language policy in terms of section 22(1) of the Schools Act.[27] However, the exercise of this power has to be done reasonably and in a procedurally fair manner.[28] In determining whether the HOD acted in such a manner, an explanation of section 25(1) of the Schools Act is first required. This section provides:

> If the Head of Department determines on reasonable grounds that a governing body has ceased to perform functions allocated to it in terms of [the Schools Act] or has failed to perform one or more of such functions, he or she must appoint sufficient persons to perform all such functions or one or more of such functions, as the case may be, for a period not exceeding three months.

[22] *Ermelo CC* paras 38-40.
[23] The applicants in this case were the HOD for Education: Mpumulanga Education Department and the Minister of Education. The applicants, together, will also be referred to as "the state".
[24] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*: Applicants' Heads of Arguments paras 25-26.
[25] See section 7.4 below.
[26] *Ermelo CC* para 38. I will refer to the respondents interchangeably as "*Hoërskool Ermelo"* "the school" or "the SGB."
[27] *Ermelo CC* para 71. See also Smit M "Collateral irony and insular construction - Justifying single-medium schools, equal access and quality education" (2011) 27 *SAJHR* 398-410.
[28] *Ermelo CC* para 73.

According to the Court, section 25(1) is only triggered when a SGB has become "dysfunctional".[29] In Moseneke J's view, the SGB of *Hoërskool Ermelo* operated as a fully functional institution and therefore could not be labelled as "dysfunctional" as such.[30] He held further that because the HOD erroneously sought recourse to section 25(1), his resort to section 22 was tainted as well.[31] As a result, it was concluded that the interim committee was unlawfully created and that the actions of the HOD infringed the notion of legality.[32] Therefore, the parallel medium language policy adopted by this committee was found to be invalid.[33]

7.3.1.2 The "appropriateness" of the Afrikaans language policy

The applicants argued that the constitutionality of the language policy was at the centre of the challenge before the Court.[34] In this regard, the state contended that the language policy had the effect of marginalising English speaking learners, who happened to be "exclusively" black.[35] Despite his refusal to explicitly mention the constitutionality of the Afrikaans language policy, Moseneke J nevertheless devoted the bulk of the judgment to the principles that would inform a constitutionally compliant language policy.[36] In this regard, he started off by referring to the historical inequality that pervades the current education system:

> Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us. It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid

29 *Ermelo CC* para 73. See also Kamga S "The right to a basic education" (2017) 522-524.
30 *Ermelo CC* para 86.
31 *Ermelo CC* para 89.
32 *Ermelo CC* para 89.
33 *Ermelo CC* para 94. See also Daniel P and Greytak S "Recognising situatedness and resolving conflict: Analysing US and South Africa education law cases" (2013) 46 *De Jure* 36-41.
34 *Ermelo CC* para 38.
35 *Ermelo CC* para 38.
36 See for example, Liebenberg S "Remedial principles and meaningful engagement in education rights disputes" (2016) 19 *PER* 14-16.

> government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.[37]

In response to the systemic inequality outlined above, Moseneke J unequivocally declared that the Constitution mandates the *radical transformation* of the public education system.[38] He then proceeded to refer to a range of constitutional provisions aimed at fulfilling this transformative mandate, including section 29(1)(a), section 29(2) and section 9(3). The latter section, in particular prohibits unfair discrimination on a range of grounds including race and language.[39] The Constitutional Court's acknowledgment that a historical pattern of disadvantage on the basis of race has survived into the post-apartheid era as well as the reference to section 9(3) as a key provision aimed at effecting radical transformation of public education, created the expectation that the Court would examine whether the Afrikaans language policy discriminated against black learners on the basis of race and language. However, that was not the case. The Court focused on the interpretation of section 29(2), but declined to engage in an unfair discrimination inquiry per section 9(3).

(a) Section 29(2) of the Constitution

Section 29(2) of the Constitution provides:

> Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
> (a) equity;
> (b) practicability; and
> (c) the need to redress the results of past racially discriminatory laws and practices.

Section 29(2) consists of two clearly delineated, but mutually supporting components.[40] The first section confers a qualified right to receive education in the language of one's choice at a

[37] *Ermelo CC* paras 45-46.
[38] *Ermelo CC* para 47. Italics my emphasis.
[39] *Ermelo CC* para 47.
[40] *Ermelo CC* para 52.

public school.[41] The internal qualification in section 29(2) limits the application of this right to institutions where it is "reasonably practicable."[42] The extent to which public schools are available and accessible, their level of admission, the particular language of tuition that has been adopted by the SGB, the language preferences of learners and their parents and the particular curriculum presented by a school could constitute "reasonable practicable" circumstances.[43] The Court then proceeded to interpret the second component of section 29(2).[44] This part imposes an obligation on the state to weigh up "all reasonable alternatives", inclusive of "single medium" schools, in order to guarantee the realisation of the right to receive education in the language of choice.[45] In deciding which option to choose, for example a parallel medium or single medium school, the government must consider what is just, '"feasible" and fulfils the requirements to rectify the injustices of the past.[46]

(b) The application of the Schools Act

The Court shifted its attention to the Schools Act which regulates the powers of the so-called three-tier partnership that is responsible for the governance of public schools.[47] In this regard, Moseneke J held:

> An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.[48]

41 *Ermelo CC* para 52.
42 *Ermelo CC* para 52. See also Sacks V "Can law protect language: Law, language and human rights in the South African Constitution" (2002) 4(4) *International Journal of Discrimination and the Law* 343-368.
43 *Ermelo CC* para 52.
44 *Ermelo CC* para 53. See also Fessha Y "Tale of two federations: Comparing language rights in South Africa and Ethiopia" (2009) 9(2) *African Human Rights Law Journal* 501-523.
45 *Ermelo CC* para 53.
46 *Ermelo CC* para 53. See also Woolman and Bishop "Education" in Woolman *et al Constitutional Law of South Africa (*2010) Chapter 57.
47 *Ermelo CC* para 56.
48 *Ermelo CC* para 56. (footnotes omitted).

Section 6(2) of the Schools Act confers the power to determine a language policy on the governing body of a school.[49] As institutions expected to be "beacon[s] of grassroots democracy", the Court held that representatives of governing bodies are ordinarily best placed to establish the language policy to be adopted by a particular school.[50] However, the Court was quick to point out that a governing body's power to determine a language policy is not exclusive.[51] That power must be exercised subject to the "broader contours" of the Constitution and any enabling national legislation, as well as the relevant provincial legislation.[52] The Court was adamant that a narrow interpretation of section 6(2) which singularly vests power in the hands of a SGB, would be an impediment to the transformative imperatives of section 29(2).[53] The Court held that it would be erroneous to interpret the decentralisation of power to SGBs as unqualified and immune to the intervention of the executive, taking into account that SGBs could exercise their powers unfairly and in violation of sections 29(1)(a) and (2) of the Constitution.[54] Therefore, when crafting a language policy, a school governing body is not permitted to only take into account the exclusive interests of its particular school,[55] but must be aware of the broader imperatives of the transformative Constitution. In the words of Moseneke J:

> The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution.[56]

Drawing on its broad "remedial powers" in terms of section 172(1)(b) of the Constitution, the Court did not itself provide a decision on the "appropriateness" of the language policy but ordered the SGB of Hoërskool Ermelo to review its language policy "in the light of the considerations set out in [the] judgment."[57] These "considerations" clearly referred to the

[49] Section 6(2) provides: "The governing body of a public school may determine the language policy of the school subject to the Constitution, [the Schools] Act and any applicable provincial law."
[50] *Ermelo CC* para 57.
[51] *Ermelo CC* para 58.
[52] *Ermelo CC* para 59.
[53] *Ermelo CC* para 77.
[54] *Ermelo CC* para 78.
[55] *Ermelo CC* para 58.
[56] *Ermelo CC* para 80.
[57] *Ermelo CC* para 98.

Court's very meticulous interpretation of section 6(2) of the Schools Act in light of section 29(2) of the Constitution as outlined above. This interpretation essentially set out the principles that should be considered in determining whether a school language policy is constitutionally sound. As observed by Liebenberg, Moseneke J went into great detail to explain the principles to be considered by SGBs in the formulation of a constitutionally compliant language policy.[58] Moreover, the Mpumulanga Department of Education was ordered to set out and report back to the Court on a specific plan, detailing the stages it would take to ensure that the great demand for grade 8 English places would be met in the upcoming school year.[59] This order was in response to the fact that all the English schools in the town of Ermelo were filled to capacity which necessitated Hoërskool Ermelo to (unwillingly) accommodate the English-speaking black learners in the first place.

(c) Ermelo: The "first seeds" of meaningful engagement

Whereas the Constitutional Court reached a definite conclusion on the administrative law aspects of the judgment, it did not make a decision on the underlying substantive issue, namely the "appropriateness", or in more correct legal terms, the *constitutionality* of the school language policy.[60] Rather, the Court deferred this issue to the SGB by instructing it to draw up a new language policy in light of the principles laid out in the judgment. Even though *Ermelo* does not provide an explicit order of meaningful engagement, the judgment is vital in the broader education law jurisprudence on the concept. *Ermelo* provides the justification for the approach as well as the example of judicial method in terms of which the principle would be applied in subsequent cases. To be more clear: it was Moseneke J, in *Ermelo,* who popularised the concept of the three-tier statutory partnership referred to above, which has since become the foundation on which the meaningful engagement principle in education law is based as is explored further below. This approach involves the Constitutional Court writing a judgment that provides the legal principles governing a specific issue, but not reaching a decision based on those principles. Rather, the SGB and the education department are ordered to meaningfully engage with each other to reach an outcome in light of those principles. Whether the *Ermelo* approach is conducive to radical transformation, will be explored in section 7.4 below.

58 Liebenberg (2016) 19 *PER* 18.
59 *Ermelo CC* para 106.
60 Liebenberg (2016) 19 *PER* 14-16. Italics my emphasis.

7.3.2 The *Welkom* judgment[61]

This case reached the Constitutional Court by way of an appeal from the SCA[62] and centred around the adoption of pregnancy policies by the SGBs of Welkom High school and Harmony High school, respectively.[63] Subsequent to giving birth during the mid-year 2010 holidays, a 16-year-old learner from Harmony High school returned to school to complete Grade 11.[64] However, one month before writing her final examinations, the learner was informed that she would not be allowed to complete the 2010 school year in terms of the conditions set out in the school's pregnancy policy, and could only return to school in January 2011.[65] Had this decision been fully implemented, the learner would have been forced to repeat the entire Grade 11.[66] In addition to barring access to education for the affected learner, the Harmony pregnancy policy also differentiated between male and female learners.[67] Whereas the pregnant learner was forced to leave school, the male learner who impregnated her, was allowed to remain in school and complete his education free from any disruptions.[68] The Free State Department of Education intervened after the mother of the pregnant learner requested its support.[69] The Department asked the school to review its policy in lieu of a provincial circular which pointed out first, that expulsion on the basis of pregnancy is prohibited, second, that pregnancy policies are not meant to be "punitive" and third, that schools should encourage learners to resume their education "as soon as possible after giving birth."[70] After the school's refusal to review its decision to expel the learner, the Head of the Free State Education Department (HOD) issued an instruction to the school to re-admit the learner immediately.[71] A standoff ensued between the Harmony SGB and the HOD: the school refused to obey the HOD's instruction whilst the

61 *Welkom CC.*
62 The matter was initially launched in the Free State High court as two separate cases concerning the Welkom and Harmony High schools, respectively. The High court heard the two cases together. The case was then appealed to the SCA before it reached the Constitutional Court. The High court judgment is reported as *Welkom High School & Another v Head, Department of Education, Free State Province and Another Case* 2011 (4) SA 531 (FB). The SCA judgment is reported as *Head of Department: Department of Education, Free State Province v Welkom High School and Another, Head of Department: Department of Education, Free State Province v Harmony High School and Another* 2012 (6) SA 525 (SCA).
63 *Welkom CC* para 6.
64 *Welkom CC* para 8.
65 *Welkom CC* para 8.
66 *Welkom CC* para 8.
67 *Welkom CC* paras 113-114.
68 *Welkom CC* paras 113-114.
69 *Welkom CC* para 9.
70 *Welkom CC* para 9.
71 *Welkom CC* paras 10-11

state functionary refused to rescind the directive.[72] A similar tug of war erupted between the SGB of Welkom High school and the HOD after a Grade 9 learner at the school became pregnant in 2010.[73] Three months short of completing Grade 9, the learner was instructed by the principal to leave school and to return in 2011, in keeping with the school's pregnancy policy.[74] Had the decision been fully implemented, the learner would have had to repeat Grade 9 in 2011.[75] The Welkom pregnancy policy detrimentally impacted on the right to education of the affected learner. Moreover, the policy was inherently biased against female learners by giving a one year "leave of absence" to the father only if the pregnant learner could prove that the father was in attendance at the school.[76] This meant that male students who were not at the same school as the female learners whom they impregnated, escaped all accountability and were allowed to carry on with their schooling without any disruptions at all.[77] Despite receiving a letter from the South African Human Rights Commission detailing the constitutional invalidity of its decision to expel the learner, the SGB refused to readmit the learner.[78] The governing body also ignored the contents of the provincial circular referred to above in the Harmony school matter.[79] Three days after the learner had given birth, the HOD instructed the Welkom SGB to readmit the learner with immediate effect.[80] Both the Welkom and Harmony governing bodies maintained that the HOD did not have the requisite authority to order the readmission of the affected learners.[81] Their insistence on this stance led to court proceedings being launched in this matter.[82]

72 *Welkom CC* paras 12-14.
73 *Welkom CC* para 15.
74 *Welkom CC* para 15.
75 *Welkom CC* para 15.
76 *Welkom CC* para 176.
77 Fredman S "Procedure or principle: The role of adjudication in achieving the right to education" (2016) 6 *Constitutional Court Review* 167.
78 The family of the learner approached the SAHRC for assistance in the matter. The SAHRC indicated that the expulsion of the learner based on the ground of pregnancy, amounted to the violation of the constitutional right to education. See *Welkom CC* para 17.
79 *Welkom CC* para 17.
80 *Welkom CC* para 19.
81 *Welkom CC* paras 14, 21.
82 The learners were readmitted to their respective schools pending the outcome of the High court case. The Welkom learner eventually passed Grade 9 and the Harmony learner was in Grade 12 during the court proceedings. See *Welkom CC* paras 14, 21.

7.3.2.1 The perplexing judgment by Khampepe J

Khampepe J, writing for the majority, identified two issues to be resolved in this matter. The first question was aimed at establishing whether a HOD has the capacity to issue an instruction, demanding of public school principals to "ignore" existing school governing body policies.[83] The second issue sought to determine the degree to which the Court *could* deal with the constitutional validity of the pregnancy policies.[84] The latter issue was formulated quite bizarrely, since the manifest discriminatory nature of these policies was clearly an invitation to the Court to examine the constitutional validity of the policies, and not merely to decide whether it *could* deal with the constitutionality of the pregnancy policies.[85]

(a) The legality of the HOD's conduct

Khampepe J held that the HOD acted unlawfully by issuing the instruction to the principals to readmit the affected learners.[86] The Court emphasised that "the Schools Act does *not* empower an HOD to act as if policies adopted by a school governing body do not exist."[87] Khampepe J found that the HOD was required to first consult with the governing body before taking over its function to determine the pregnancy policy in terms of section 22 of the Schools Act.[88] She held further that since a HOD does not possess the capacity to determine a pregnancy policy in terms of the Schools Act, the Free State HOD "usurped" this power when he issued the instructions to the relevant SGBs to "ignore" their existing pregnancy policies.[89] The HOD claimed that his directive to the principals emanated from the belief that the pregnancy policies were manifestly unconstitutional.[90] Furthermore, the HOD noted that as an organ of state, he was compelled by the Constitution to protect the constitutional rights of the pregnant learners in accordance with section 7(2) of the Constitution.[91] The Court, however, was unwavering in its assertion that the rule of law required that the "correct legal process" must be used by an organ of state.[92] Although she admitted that the HOD was constitutionally obliged to protect

83 *Welkom CC* para 28.
84 *Welkom CC* para 29. Italics my emphasis.
85 Italics my emphasis.
86 *Welkom CC* para 72.
87 *Welkom CC* para 72. Italics the emphasis of Khampepe J.
88 *Welkom CC* para 72.
89 *Welkom CC* para 80.
90 *Welkom CC* para 83.
91 *Welkom CC* para 83. Section 7(2) of the Constitution states: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."
92 *Welkom CC* para 86.

the learners in terms of section 7(2) of the Constitution, Khampepe J held that this provision did not entitle the HOD to do whatever he "wished" to do so as to address the constitutional invalidity of the policies.[93] The Court was adamant that the HOD was compelled to exhaust the requirements set out in section 22 of the Schools Act first before he could protect the learners' rights.[94] In other words, the constitutional protection of the learners' rights was contingent on the HOD following the correct procedure set out in section 22 of the Schools Act. In my view, it seems inexplicable that the Court could expect of the HOD to do anything but discount pregnancy policies that so blatantly discriminated against female learners and deprived them of their constitutional right to access a basic education. Fredman, for example, has argued that the HOD was the only person willing to come to the defence of the pregnant learners.[95] Furthermore, the minority court diverged significantly from Khampepe J on her particular framing of the issues. Zondo J, writing on behalf of the minority, held that the fundamental question before the Court concerned the extent to which a SGB has the capacity to adopt a policy that is in violation of specific legislation or the Constitution.[96] In the minority's view, a governing body does *not* have the power to adopt a policy that infringes upon an Act of Parliament or the Constitution.[97] Furthermore, Zondo J held that the HOD as the employer of school principals does have the power to command a principal to not implement a policy that violates any legislation or the Constitution.[98]

(b) A prima facie finding of constitutional invalidity

Whereas the HOD contended that the pregnancy policies violated several constitutional rights of the affected learners, including the rights to equality and basic education, the respective schools declined to make any submissions on the constitutionality of the policies.[99] Khampepe J cited the schools' failure in this regard as the reason for her refusal to make an outright finding on the constitutional validity of the pregnancy policies.[100] Rather, she held that the pregnancy policies were merely *prima facie* unconstitutional. To that end, the Court held that

93 *Welkom CC* para 90.
94 *Welkom CC* para 90.
95 Fredman (2016) 6 *Constitutional Court Review* 165-179.
96 *Welkom CC* para 168.
97 *Welkom CC* para 168. Italics my emphasis.
98 *Welkom CC* paras 171, 192.
99 *Welkom CC* paras 110-111.
100 *Welkom CC* para 110.

the policies amounted to "presumptively unfair discrimination on the basis of sex"[101] and "limited" the right to basic education of pregnant learners.[102] Moreover, the Court found that the pregnancy policies *prima facie* infringed the rights to human dignity[103], privacy[104], bodily and psychological integrity[105] and "may" have contravened the best interests of the child.[106]

(c) Cementing the principle of meaningful engagement

A *prima facie* declaration of constitutional invalidity, in and of itself, has no teeth. Rautenbach, for example, argues that the *prima facie* status of the pregnancy policies left it open to the SGBs to justify the content of the policies in terms of the limitation clause if they were so inclined to keep the policies intact.[107] Khampepe J was no doubt painfully aware of this. For instance, she stated that learners who were not parties to this particular case, and who may never dispute a pregnancy policy, could have suffered "far-reaching" consequences if "relief" was not awarded by the Constitutional Court. [108] Her idea of an effective remedy to vindicate the rights of the affected learners, and all others similarly situated, entailed ordering the governing bodies of the respective schools to review their pregnancy policies in light of the judgment.[109] She directed the SGBs and the HOD to meaningfully engage in order to give effect to the remedy[110], thus suggesting that the Court expected of the HOD and the governing bodies to cooperate with the purpose of the SGBs adopting a new pregnancy policy that would satisfy the considerations/principles set out in the judgment. Khampepe J pointed out that she granted the order of meaningful engagement so as to "respect the scheme of powers under the Schools Act and the principle of co-operative governance."[111]. The "scheme of powers" is reference to the legislative framework which encompasses the powers of the three-tier partnership that is responsible for the governance of public schools. In particular, Khampepe J highlighted the role of the SGB within this partnership which she referred to as a

101 *Welkom CC* para 113.
102 *Welkom CC* para 114.
103 Section 10 of the Constitution.
104 Section 14 of the Constitution.
105 Section 12(2) of the Constitution.
106 Section 28(2) of the Constitution. *Welkom CC* paras 115-116.
107 Rautenbach I "Overview of Constitutional Court judgments on the Bill of Rights – 2013" (2014) *J. S. AFR. L* 385.
108 *Welkom CC* para 119.
109 *Welkom CC* para 128.
110 *Welkom CC* para 128.
111 *Welkom CC* para 125.

"democratically constituted body" and thus in the "best position to fashion policies that take into account the needs of their particular schools."[112] Furthermore, the principle of cooperative governance is a reference to the constitutionally entrenched principle which requires that the national, provincial and local spheres of government "co-operate with one another in mutual trust and good faith."[113] The Court's order of meaningful engagement between the HOD (as representative of the Free State provincial education department) and the SGBs of Welkom and Harmony High schools (as representatives of local community governance), therefore noticeably gives expression to the notion of cooperative governance. The judicial approach undertaken in *Welkom* is clearly modelled on that of the *Ermelo* Court. As noted above, Moseneke J did not declare the Afrikaans language policy unconstitutional in the *Ermelo* judgment. However, he set out the principles that have to be considered by SGBs in the formulation of a constitutionally compliant language policy. He then ordered the governing body of Hoërskool Ermelo to review their policy in light of those principles. Khampepe J did the same in *Welkom*. She did not declare the pregnancy policies unconstitutional as such, but provided the reasons/ principles which informed her view that the policies were *prima facie* unconstitutional. She then ordered the SGBs and the HOD to engage meaningfully with each other with the purpose of reviewing the pregnancy policies in light of those reasons/principles. Whether this approach has proven to be effective and radically transformative will be explored in section 7.4 below.

7.3.3 The *Rivonia* judgment [114]

This case, launched in the South Gauteng High court[115], reached the Constitutional Court on appeal from the SCA.[116] Rivonia Primary School[117] is a former Model C school situated in a privileged, former white area of the Gauteng province.[118] The school, due to its capability to employ additional teachers from its affluent budget, could maintain a low learner-to-educator ratio. To that end, the school could preserve a learner-to-teacher ratio of 1:27, in comparison

[112] *Welkom CC* para 125.
[113] Section 41(1)(h) of the Constitution.
[114] *Rivonia CC.*
[115] *Governing Body of Rivonia Primary School and Another v MEC for Education: Gauteng* 2012 (1) All SA 576 (GSJ) ("*Rivonia HC*").
[116] *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* 2013 (1) SA 632 (SCA) (*"Rivonia SCA*").
[117] Hereafter referred to as "the school" or "Rivonia Primary."
[118] *Rivonia CC* para 9.

to 1:40 which is the national average laid down by the National Department of Basic Education.[119] In contrast, Rivonia Primary's historically disadvantaged counterparts in the region accommodated up to 55 learners in a classroom, putting into sharp focus the systemic inequality in the basic education system.[120] In 2010, the school refused admission to a Grade 1 learner for the upcoming school year.[121] Upon receiving the news that her child's application was unsuccessful, the mother of the learner appealed the school's decision directly to the office of the MEC for Education in Gauteng.[122] Subsequently, the principal of Rivonia received a letter from the MEC, stipulating that after perusal of the "10th day statistics"[123], Rivonia Primary had failed to reach its capacity.[124] ("Capacity" in this instance refers to the maximum number of learners a school can accommodate.) The school was then directed by the MEC to admit the Grade 1 learner immediately.[125] The principal refused to accept the learner. In response to the principal's refusal, a departmental official informed the principal that her admission function in terms of a circular had been revoked.[126] The principal was notified that this function had been delegated to a departmental official by the province's HOD.[127] This particular official later showed up at the school, physically walked "the learner to the nearest Grade 1 classroom and deposited her on an empty desk".[128] In response, Rivonia Primary launched court proceedings against the Gauteng Education Department.

7.3.3.1 Who has the final say in school capacity?

The Constitutional Court was tasked with the question whether a school governing body or the provincial education department has the ultimate authority to determine the capacity of a public school.[129] At the time that the case reached the Constitutional Court, the Department had

[119] First to third respondents' answering affidavit in the matter between the *Governing Body of Rivonia Primary School and the MEC for Education: Gauteng* in the South Gauteng High Court para 45.1.
[120] Ibid para 45.2.
[121] *Rivonia HC* paras 7-8.
[122] *Rivonia HC* para 9.
[123] The "10th day statistics" is reference to the "number of learners in the school on the 10th day of the new school year." *Rivonia HC* para 10.
[124] *Rivonia HC* para 10.
[125] *Rivonia HC* para 10.
[126] *Rivonia HC* para 12.
[127] *Rivonia HC* para 13.
[128] *Rivonia HC* para 13.
[129] *Rivonia CC* para 35.

conceded that a governing body has the right to determine capacity as part of its admission function under section 5(5) of the Schools Act.[130] This section provides:

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

Rivonia Primary argued that SGBs possess the sole power in terms of section 5(5) to establish an admission policy.[131] The school mounted an administrative law defense by arguing that the principle of legality dictates that the MEC or HOD is prohibited from overriding that policy and determining a school's capacity.[132] The Department, on the other hand, argued that if schools were allowed the exclusive power to determine their capacity, the state would be barred from using the public provincial resources (including former Model C schools as public institutions) in a fair and effective manner, and that this would result in the violation of access to education for a group of learners.[133] Therefore, the determination of capacity had to be determined at a systemic level.[134] Furthermore, the Department contended that the historical racial inequalities in the basic education system would be perpetuated if former white schools were provided with the exclusive power to determine their own capacity.[135] The Department sourced its arguments in section 39(2) of the Constitution which requires that any legislation must be interpreted with the intention of giving effect to the "spirit, purport and objects of the Bill of Rights". To this end, the Department argued that school capacity must be established by the provincial education department and not by the SGB in order to realise the rights to equality and education.[136]

Mhlantla AJ (as she was known then) did not engage in a section 39(2) analysis, but reached her conclusions on a pure textual interpretation of the Schools Act and the relevant provincial legislation. She held that although public schools may make a decision as to capacity in terms of s 5(5) of the Schools Act, that power is not absolute. Section 5(5) is subject to other provisions of the Act and provincial law.[137] In particular, the Court referred to section 5(9) of

130 *Rivonia CC* para 27.
131 *Rivonia CC* para 30.
132 *Rivonia CC* paras 30-31.
133 *Rivonia HC* para 16.1-16.2.
134 *Rivonia HC* para 16.1-16.2.
135 *Rivonia HC* para 16.3.
136 *Rivonia CC* para 29.
137 *Rivonia CC* paras 41-42.

the Schools Act which allows the MEC to overturn admission decisions taken at school level and Regulation 13(1) of the Gauteng Regulations which empower the HOD to overturn a school's decision to reject a learner.[138] Moreover, the Court found that Rivonia Primary's admission policy did not bind the Gauteng HOD, since policies by nature are not binding, but only serve as guides in taking a decision.[139] The HOD of the provincial education department, ultimately, therefore, has the power to override a school's admission policy.[140]

7.3.3.2 Resolving systemic capacity problems through cooperation/meaningful engagement

Mhlantla AJ characterised the *Rivonia* case as "a reflection of [the] type of failure [that ensues] ... when we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet the educational needs of our children."[141] Here the Court referred to the personal harm inflicted on the Grade 1 learner as a result of being caught in the power struggle that erupted between the Department and the Rivonia governing body.[142] For Mhlantla AJ, the violation of the best interests of the learner could have been avoided had the state and the governing body cooperated with one another.[143] The notion of meaningful engagement which she referred to as the "required general norm" in disputes between SGBs and provincial education departments, is therefore regarded as a measure to ensure, among other things, that the interests of individual learners are protected.[144] However, Mthlantla AJ did not merely approach the notion of meaningful engagement from an individual perspective, but implied that the problems of systemic capacity and access to quality education can be resolved through cooperation between individual school governing bodies and provincial education departments.[145] In what seemed to be an attempt to explain the respective roles of schools and education departments in solving these problems, the Court held that SGBs and parents are invested in the quality of education that their children receive, and that parents, in particular, improve the quality of education through the payment of school fees.[146] As to the

138 *Rivonia CC* paras 44-45.
139 *Rivonia CC* paras 54-55.
140 *Rivonia* CC para 56. The Court held that the HOD acted in a procedurally unfair manner by not granting the principal the opportunity to state her case and respond to the tenth-day statistics report before the forceful placement of the learner. See *Rivonia CC* paras 60-68.
141 *Rivonia CC* para 2.
142 *Rivonia CC* para 77.
143 *Rivonia CC* para 77.
144 *Rivonia CC* para 69.
145 *Rivonia* CC para 70.
146 *Rivonia CC* para 70.

role of the state, the Court held that provincial governments are obliged to provide sufficient "school places" for all children.[147] Whereas it is quite obvious that the state's obligation to build schools is a crucial factor in solving the problem of systemic capacity[148], Mthlantla AJ did not elaborate on the link she alluded to between school fees and access to quality education.[149] The Court's failure to interrogate the latter issues against the background of the historical and social inequality in public basic education will receive further consideration in section 7.4. Furthermore, Mhlantla AJ's misplaced belief in meaningful engagement as a remedy for systemic capacity problems will also be critiqued in section 7.4 below.

7.3.4 The *FEDSAS* judgment[150]

As noted above, the *Rivonia* Court determined that the Gauteng provincial education department has the power to override a school's admission policy and, is therefore the final arbiter of school capacity. Mhlantla AJ reached this decision on a pure textual interpretation of the Schools Act. Therefore, the Constitutional Court did not provide the substantive reasoning behind the decision: In other words, drawing on the transformative approach to adjudication elucidated in Chapter 5, which political/social/moral/ other considerations, if any, played a role in the Court's decision that the state and not an individual school has the final say over school admissions and capacity? To some extent, the *FEDSAS* judgment sheds light on this question. The judgment also confirms the Constitutional Court's endorsement of the notion of meaningful engagement.

7.3.4.1 The Gauteng Schools Admission Regulations

In 2012, the MEC of Education in Gauteng, one of the respondents in this case, promulgated the Regulations Relating to the Admission of Learners to Public Schools.[151] These regulations

[147] *Rivonia* CC para 71. Section 3(3) of the Schools Act provides: "Every Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school…" Section 3(4) of the Schools Act provides: "If a Member of the Executive Council cannot comply with subsection (3) because of a lack of capacity existing at the date of commencement of this Act, he or she must take steps to remedy any such lack of capacity as soon as possible…"

[148] The primary obligation to eradicate inequality, achieve access to education and improve the quality of education remains that of the state in terms of section 7(2), 9 and 29 of the Constitution.

[149] See generally, Venter F "Quality and equality in South African education after 20 Years" (2014) *Int'l J. Educ. L. & Pol'y* 11.

[150] *FEDSAS CC*.

[151] *FEDSAS CC* para 6. Gauteng School Education Act (6/1995): Regulations Relating to the Admission of Learners to Public Schools, 2012, GN 1160 *Provincial Gazette* 127 (9 May 2012).("Gauteng Schools Admission Regulations").

were published in terms of the Gauteng School Education Act and set out to regulate the admission of learners in the Gauteng province.[152] The applicant in this case, the Federation of Governing Bodies for South African Schools (FEDSAS) disputed several of these regulations as discussed below. It is important to note that since the *FEDSAS* case concerns the application of regulations to schools in Gauteng, the ruling of the Constitutional Court has no bearing on other provinces, except the Gauteng province. The different regulations are discussed next.

(a) Regulation 3(7) – Unfair discrimination

In terms of Regulation 3(7), a prospective school may not request a confidential report from the current school.[153] Thus, this provision prohibits a prospective school from having access to confidential information of a learner before deciding whether to admit the learner or not.[154] The regulations define a "confidential report" as "a report containing information about the financial status of a parent, whether the parent can afford school fees and employment details of a parent or *any other information* that may be used to unfairly discriminate against a learner".[155] FEDSAS contended that the definition prohibited prospective schools from discriminating fairly in the admission process.[156] The applicant also claimed that the words "any other information" renders the provision too wide and suggested that the regulations should specify which information could be accessed or not.[157] The Constitutional Court rejected FEDSAS's contentions and agreed with the Gauteng Department of Education that having access to a learner's confidential report may provide an incentive to schools to discriminate unfairly against prospective learners.[158] Thus, for example, the state provided uncontested evidence revealing that schools which are informed of a learner's disciplinary or remedial problems before admission, more than often refuse admission to such a learner.[159] Schools may even block admission due to reasons that are not based on the disciplinary or remedial difficulties of a learner. The Court thus held that the Department acted reasonably and justifiably in adopting a regulation which places a ban on the release of a confidential report before admission. It should be pointed out that the ban is only in place during the

152 *FEDSAS CC* para 6.
153 *FEDSAS CC* para 30.
154 *FEDSAS CC* para 30.
155 Regulation 1 of Gauteng Schools Admission Regulations. Italics my emphasis.
156 *FEDSAS CC* para 30.
157 *FEDSAS CC* para 30.
158 *FEDSAS CC* paras 31-32.
159 *FEDSAS CC* para 32.

admission period. However, once a learner is admitted, a school may request a confidential report from the previous school.[160]

(b) Regulation 4 – Feeder zones

At the time that proceedings were launched in this matter, Regulation 4 stated:

> (1) Subject to the National Education Policy Act No. 27 of 1996 and other applicable laws the MEC may, by notice in the Provincial Gazette, determine the feeder zone for any school in the Province, after consultation with the relevant stakeholders have been conducted.
> (2) Until such time as the MEC has determined a feeder zone for a particular school, in relation to a learner applying for admission to that school, the feeder zone for that school will be deemed to have been determined so that a place of residence or work falls within the feeder zone, if:
>
> (a) relative to that place of residence or place of work, the school is the closest school which the learner is eligible to attend; or
> (b) that place of residence or place of work for that parent is within a 5 km radius of the school.

A "feeder zone' is defined as "an area that a school should prioritise when admitting learners and taking into consideration learners who live close or whose parents work close to that school." [161] In terms of Regulation 4(2) above, a default feeder zone was created in terms of which a learner who lived or whose parents worked within 5 kilometres of a school would be prioritised to access that particular school.[162] FEDSAS and Equal Education, the amicus curiae in this matter, expressed their objections about the default feeder zone regime, albeit on different grounds. According to the FEDSAS, the rights of school governing bodies to be consulted before the determination of feeder zones in terms of Regulation 4(1) were frustrated by the adoption of a default regime.[163] Moseneke J, writing for an unanimous Court agreed with FEDSAS that a default establishment of feeder zones do prevent relevant stakeholders from participating meaningfully in matters that may affect schools.[164] The amicus, on the other hand, contended that Regulation 4(2) amounted to unfair discrimination because it perpetuated

[160] *FEDSAS CC* para 32.
[161] Equal Education's Heads of Arguments as amicus curiae in the matter of *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* para 14. ("Equal Education HOA").
[162] Ibid para 16.
[163] *FEDSAS CC* para 35.
[164] *FEDSAS CC* para 37.

apartheid era geography.[165] Moseneke J did not entertain the unfair discrimination claim, but an examination of the amicus' submissions to the Court provide more insight in this regard. According to Equal Education, the default feeder zone regime was established exclusively on the distance (of 5km) between a school and a learner's home address or the workplace of the parent.[166] Although this proximity was seemingly applied as a neutral factor in the determination of the feeder zones, its impact has resulted in unfair discrimination against black learners.[167] In this regard, Equal Education referred to proven research that geography and race are intricately connected in Gauteng to the extent that black learners continue to reside in predominantly former black areas.[168] As a result, these learners will be categorised into the feeder zones for former black schools that "continue to be poor, under-resourced and under-performing."[169] White learners, on the other hand, residing primarily in former white areas, automatically fall within the feeder zones for historically white, advantaged schools.[170] Although learners may apply to a school outside their particular feeder zone, schools are legislatively required to prioritise the admission of learners who fall within a feeder zone before considering learners outside such feeder zone.[171] The amicus noted that "the limitation of schools' intake based on geographical location results in the exclusion of black learners from more affluent schools despite them having the capacity to take on more learners."[172] The Constitutional Court, although admitting that there was "traction in the contentions of the amicus", declined to make a ruling on the unfair discrimination claim.[173] Moseneke J held that it was, in any case, not necessary to decide on the unfair discrimination matter because he ordered the MEC to issue new feeder zone regulations.[174] Approximately two years after the delivery of the judgment, the MEC for Education adhered to the Court's order by adopting a policy which have extended the feeder zone radius of schools in Gauteng to 30km.[175] The MEC

165 *FEDSAS CC* para 38.
166 Equal Education HOA para 15.
167 Ibid para 23.
168 Ibid para 24.
169 Ibid.
170 Ibid.
171 Ibid para 18.
172 Ibid para 26.
173 *FEDSAS CC* para 39.
174 *FEDSAS CC* para 51.
175 GDE Policy for the Delimitation of Feeder Zones for Schools (18 September 2018) available at https://www.gdeadmissions.gov.za/ (accessed on 13 November 2019); https://mg.co.za/article/2018-11-16-00-gauteng-school-feeder-zones-expanded-to-30km (accessed 12 November 2019).

has praised the new feeder zone requirements as transformative.[176] To this point, he argues that the new feeder zones ensures that access to schools in the Gauteng province is non-racialised, "fair, transparent and conducted in an equitable manner."[177] The impact of the Court's ruling and the resultant new feeder zone regime on transformation in the Gauteng province as well as other provinces will be explored in section 7.4 below.

(c) *Regulation 5 (placing an unplaced learner at any school) and Regulation 8 (declaring a school full)*

Regulation 5(8) administers the admission of learners who have not been placed at a school at the end of the admission phase for a particular school year.[178] In terms of this regulation, the District Director may direct any school which has not been declared full, to accept an unplaced learner. [179] Furthermore, in terms of Regulation 8, the determination of the enrolment capacity of a school is at the behest of the HOD who also has the right to declare that a school is full once it has reached its capacity.[180] Both regulations operate despite the individual admission policy of a public school.[181] FEDSAS disputed these regulations on three grounds. First, they contended that the regulations are not in harmony with sections 5(1) to (3) of the Schools Act which deals with the admission of learners to public schools.[182] Secondly, the applicant argued that the regulations "oust a vital partner – the school governing body – from the public school model imagined in the Schools Act" and thirdly that the powers granted in terms of these regulations are "open-ended" and could thus be exercised arbitrarily by the HOD and District Director.[183] Therefore, the crux of FEDSAS's contentions seemed to be that the role of school governing bodies in the admission process is unduly curtailed by the powers granted to the state in terms of Regulations 5 and 8. The respondents, on the other hand maintained that the objective of the powers awarded by Regulations 5 and 8, is to guarantee the placement of all unplaced learners as required by the Constitution and the Schools Act.[184]

176 https://www.news24.com/SouthAfrica/News/new-school-feeder-zones-ensure-transformation-and-fairness-lesufi-20190310 (accessed 23 November 2019).
177 Ibid.
178 *FEDSAS CC* para 40.
179 *FEDSAS CC* para 40.
180 *FEDSAS CC* para 40.
181 *FEDSAS CC* para 40.
182 *FEDSAS CC* para 41.
183 *FEDSAS CC* para 41.
184 *FEDSAS CC* para 41.

In response to the arguments above, Moseneke J reiterated the outcome of the *Rivonia* judgment in which the Court held that the power of school governing bodies to determine their own admission policies is not unqualified, but restrained by the broader constitutional and legislative framework.[185] In particular, the Court emphasised the legislative obligation imposed on the MEC to guarantee the school placement of all learners in the province.[186] Furthermore, the Court confirmed that the HOD has the final say in the determination of the capacity of an individual school.[187] Moseneke J pointed out that the HOD and MEC will be unable to ensure that each and every learner is awarded a school place if they are stripped of the powers to do so.[188] For the Court, state intervention into the admission powers of school governing bodies is not only mandated by the legal framework, but is required to mitigate the impact of school governing bodies' tendency to act in the exclusive interests of their schools. To this end, Moseneke J states:

> It is so that when a school fashions its admission policy it will be actuated by the internal interests of its learners. It is also quite in order that a school seeks to be a centre of excellence and to produce glittering examination and other good outcomes. But public schools are not rarefied spaces only for the bright, well-mannered and financially well-heeled learners. They are public assets which must advance not only the parochial interest of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education. [189]

The quote above suggests that the Constitutional Court is aware that in the absence of state intervention, some school governing bodies will impede access to learners that present with disciplinary problems, are not performing well academically and who are poor. Therefore, the Court recognises the danger if SGBs are granted unfettered autonomy to determine admission policies. However, a shortcoming in Moseneke J's statement is that he fails to explicitly acknowledge that race also plays a role in the exclusion of mostly black learners from historically privileged schools. I will expand on this argument in section 7.4 below.

185 *FEDSAS CC* paras 42-46.
186 *FEDSAS CC* paras 42-46.
187 *FEDSAS CC* paras 42-46.
188 *FEDSAS CC* paras 42-46.
189 *FEDSAS CC* para 44.

7.3.4.2 The notion of meaningful engagement

Subsequent to his ruling that the Gauteng education authorities have the power to intervene in the admission process of public schools, Moseneke J pointed out that the Constitutional Court has in the past "cautioned against the undue dominance of school governing bodies by the provincial Executive."[190] Although not explicitly referring to any previous judgments, Moseneke J's reference to the past is, in my view, a throwback to the *Rivonia* judgment where the HOD of the Gauteng Education Department was lambasted by the Court for his "heavy-handed approach" of the matter as explained above.[191] In that judgment, Mhlantla AJ also criticised the HOD for disregarding the role that school governing bodies can play in solving the problem of systemic school capacity in the Gauteng province.[192] She strongly invoked the notion of meaningful engagement by insisting that governing bodies and the state must cooperate with one another to solve issues of systemic capacity and all matters arising from disputes between SGBs and the state.[193] The *FEDSAS* judgment can be distinguished from *Rivonia* (as well as *Ermelo* and *Welkom*) to the extent that the main issue in *FEDSAS* did not arise from a specific dispute between an individual school governing body and the state. In *Welkom*, the Court specifically ordered meaningful engagement between the contentious parties with the purpose of solving the dispute. However, this was not the case in *FEDSAS.* Therefore, it seems puzzling that Moseneke J still invoked the notion of meaningful engagement in the *FEDSAS* judgment, not as part of the Court's final order, but seemingly as a warning to SGBs and provincial education departments. For instance, immediately after cautioning against the "undue dominance" of provincial government in the affairs of school governing bodies, Moseneke J emphasised that the Court has "called for cooperative governance between statutory creatures – school governing bodies and the MEC and HOD – entrusted with effective and universal access to basic education."[194] Why? In my view, the Court recognised that state intervention into the decentralised autonomy of SGBs is fraught with difficulties because of the contentious relationship between SGBs from predominantly former white schools and the state. For example, in the opening paragraphs of *FEDSAS*, Moseneke J held:

190 *FEDSAS CC* para 47.
191 See section 7.3.3 above.
192 Ibid.
193 *Rivonia CC* paras 69-75.
194 *FEDSAS CC* para 47.

> There are continuing contests on the governance of public schools and policies on the admission of learners. This, despite a number of precedents of our courts that were meant to clear the murky waters of the shared space between school governing bodies and provincial executives charged with the regulation of public schools.[195]

One of the precedents referred to in the quote above, includes *Rivonia* in which the Constitutional Court had already determined that the HOD of the Gauteng Education Department and *not* individual schools have the final say over school admissions and capacity.[196] However, despite the *Rivonia* ruling, FEDSAS still contested the admission powers of the provincial executive in terms of Regulation 5 and 8 explained above. Therefore, some SGBs seem not to want to accept the authority that the state has over them in respect of school admissions. As a result, it is possible that the implementation of Regulations 5 and 8 may still erupt in future tussles between individual Gauteng schools and the provincial executive. Viewed against this background, it is submitted that Moseneke J's reference to meaningful engagement in the *FEDSAS* judgment, was made in anticipation of possible future disputes that may still feature in terms of school admissions in Gauteng. In my view, he alerted the provincial executive and the school governing bodies in the province to solve any future related problems of admission by cooperating with each other before turning to the courts. Such an approach is in line with the Constitutional Court's separate, but concurring judgment in *Welkom* in terms of which Froneman and Skweyiya JJ held that "there is a constitutional obligation on the partners in education to engage in good faith with each other on matters of education *before* turning to courts."[197]

7.3.5 Summary of the meaningful engagement approach in education law jurisprudence

At this juncture, it is apposite to provide a summary of the notion of meaningful engagement in education law jurisprudence. Meaningful engagement is described by the Constitutional Court as the "required general norm" in disputes between SGBs and provincial education departments concerning the adoption of contested school policies.[198] However, in *Rivonia*, Mhlantla AJ went further by declaring that governing bodies and the state are obligated to

195 *FEDSAS CC* para 4.
196 Italics my emphasis.
197 *Welkom CC* para 135. Italics my emphasis.
198 *Rivonia CC* para 69.

engage meaningfully on "*any disputes*", not merely policy-related ones.[199] Thus, for the Court, meaningful engagement is the prism through which all educational disputes must be resolved. The apex Court locates the justification for the principle in two sources, namely the Schools Act which creates the three-tier partnership between school governing bodies and the state [200] and the constitutional scheme of cooperative governance which requires that the different levels of government work together in good faith.[201] The notion of meaningful engagement operates in two distinct ways. In order to understand the first manner in terms of which the principle is employed, it is prudent to have regard to *Welkom* where Khampepe J emphasised the significance of the three-tier partnership in the public education system. She pointed out that:

> Parliament has elected to legislate [on the powers of the three-tier partnership] in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education. That detail *must be respected* by the Executive and the Judiciary.[202]

The quote above is noteworthy for the following reasons. First, it identifies the role players in the three-tier partnership as the primary actors responsible for the realisation of the right to basic education. Second, the quote suggests that the Constitutional Court assumes a position of deference towards these actors in education matters. To this end, *Welkom* and *Ermelo* are classic examples of judgments where the Court did not make a decision on the substantive merits of the case. In other words, it declined to make an outright finding on the constitutionality of the language and pregnancy policies respectively. In *Welkom*, the Court ordered meaningful engagement/cooperation between the SGBs and the state functionaries with the ultimate aim that the SGBs would revise the policies themselves in light of the guiding principles provided in the judgment. Based on Khampepe J's quote above, the Court does so to honour the intention of the legislature which has devolved decision-making on the right to basic education to the partners in education. Thus, it is submitted that the Court avoids taking a decision themselves because, in their view, that would result in an intrusion into the domain of the three-tier partnership, in particular that of the school governing body. Therefore, the Court's actions in this regard is based on a conventional understanding of the doctrine of separation of powers. Thus, the first manner in which the notion of meaningful engagement is

199 *Rivonia CC* para 49. Italics my emphasis.
200 *Welkom CC* para 124; *Rivonia CC* paras 36, 39.
201 *Welkom CC* paras 121, 123, 125; *Rivonia CC* para 49.
202 *Welkom CC* para 49. Italics my emphasis.

employed, comes to the fore when the constitutionality of a school policy is in question. In this particular instance, the Court avoids reaching a decision on the constitutional validity of a school policy because it regards itself as institutionally illegitimate to declare the content of such a policy unconstitutional. Instead, the governing body is recognised as the most suitable institution to adopt and revise a school policy because it is a democratically elected body that best represents the school community's interests.[203]

The second way in which the meaningful engagement approach operates, is evident in the separate, but concurring judgment of Froneman and Skweyiya JJ in *Welkom* and to a lesser extent in *FEDSAS*. In these cases, the Constitutional Court invokes meaningful engagement as an internal remedy that must be exhausted *before* opposing parties turn to the courts.[204] Froneman and Skweyiya JJ held that "section 41(1)(h)(vi) of the Constitution appears to require a form of exhaustion of internal remedies *before* organs of state within a sphere of government should turn to the courts."[205] The Court held further that the parties in the *Welkom* matter should have engaged in good faith before involving the judiciary which could have spared them the "long journey through the courts."[206] Natasha Watt argues that the Constitutional Court seemingly requires that parties are obligated to engage meaningfully before approaching the courts and if they do not do so, "the Court would take a negative view of that failure." [207] I agree with Watt and am concerned about the impact of such an approach on subsequent applications filed to the Constitutional Court. For instance, will the Court summarily dismiss applications because it is of the view that the matter should have been resolved in terms of meaningful engagement? If so, what is the impact of such an approach on the radical transformation of the public basic education system? These questions will be addressed in section 7.4.

7.4 IS MEANINGFUL ENGAGEMENT ANTI-TRANSFORMATIVE?

In this part of the chapter, I interrogate the link between the application of meaningful engagement in education law jurisprudence and the constitutional mandate of radical transformation by focusing on four sub-topics: Democracy in school governance, the broad

[203] *Welkom CC* para 125.
[204] Italics my emphasis.
[205] *Welkom CC* para 162.
[206] *Welkom CC* para 135.
[207] Watt N "A critical examination of 'meaningful engagement' with regard to education law" (2014) LLM Dissertation (University of Pretoria) 28. ("Watt (2014) LLM Dissertation")

systemic impact of meaningful engagement, the potential "chilling effect" of the principle and finally the link between meaningful engagement and a "colour-blind racism" approach to the law.

7.4.1 Democracy in school governance

Lillian Chenwi argues that meaningful engagement amounts to the crafting of a creative and effective remedy on the part of the Constitutional Court.[208] For Chenwi, the remedy of meaningful engagement is intrinsically related to the notion of participatory democracy.[209] In *Doctors for Life*, the Constitutional Court held that an essential element of the South African constitutional democracy is a pledge to the values of "accountability, responsiveness and openness" which indicates that our democracy embraces the notion of representation and participation.[210] Therefore, Chenwi contends that the meaningful engagement remedy plays a crucial part in the advancement of participatory democracy for poverty stricken citizens.[211] Dennis Davis agrees that meaningful engagement is representative of the values of accountability and participation which may be utilised by homeless people in opposition to

[208] Chenwi L "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others*" (2009) 2 *Constitutional Court Review* 377-382.
The Constitution provides broad powers to the courts to grant appropriate and effective remedies in vindicating socio-economic rights claims. See, for example, sections 38 and 172(1) of the Constitution.
Section 38 of the Constitution states:
"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members."
Section 172(1) of the Constitution provides:
"When deciding a constitutional matter within its power, a court -(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[209] Chenwi (2009) 2 *Constitutional Court Review* 381.

[210] *Doctors for life* para 111. Section 1(d) of the Constitution states: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure *accountability,responsiveness and openness*." (Italics my emphasis).

[211] Chenwi (2009) 2 *Constitutional Court Review* 381.

"absolute power of property."[212] Davis and Chenwi write mainly from the perspective of the application of meaningful engagement in eviction/property/housing law. In the sphere of education law, the SCA states:

> Indeed one of the fundamental changes affected by our democracy in reforming the education system was through the implementation of participative and co-operative school governance which included stake holders such as the government, education authorities and the school governing bodies. This kind of participation intends to enhance access to education for all learners irrespective of their race, class and intellectual dispositions [213]

Marius Smit finds a link between the notion of democracy and the *Ermelo* Court's interpretation of section 22 of the Schools Act.[214] In this regard, the Constitutional Court held that section 22 of the Act confers the power on a HOD to revoke a governing body's function to adopt a language policy, subject to reasonableness and procedural fairness.[215] Smit supports Malherbe who contends that the functions set out in sections 6 to 9 of the Schools Act concerns "a school's domestic affairs" and are irrevocable by section 22.[216] Malherbe argues that these "core" competences, which includes the school's power to adopt a language policy in terms of section 6(2), can only be "temporarily withdrawn" but, in the end, return to the governing body.[217] Furthermore, Smit contends that to *not* vest exclusive competence in SGBs as it relates to these functions would be a violation of the principle of participatory democracy as envisaged in the Schools Act.[218] In his view, the basis of participatory democracy is that "original authority vests in the people."[219] Applying his view to school governance, Smit claims firstly, that "authority" vests in the "local community" which he defines as "parents, educators and

[212] Davis D "Socio-economic rights: Do they deliver the goods?" (2008) 6 *International Journal of Constitutional Law* 706.
[213] *FEDSAS SCA* para 11. See also Quan G "The transformative approach of the South African Constitutional Court in selected cases dealing with access to basic education" (2017) LLM Dissertation (University of Pretoria) 59. ("Quan (2017) LLM Dissertation").
[214] Smit (2011) 27 *SAJHR* 402-406.
[215] *Ermelo CC* paras 63-81.
[216] Malherbe E "Taal in skole veroorsaak nog 'n slag hoofbrekens: Regspraak" (2010) 3 *Tydskrif vir Suid-Afrikaanse Reg* 609-22. The functions set out in sections 6 to 9 of the Schools Act are: Language policy of public schools; Curriculum and assessment; Non-discrimination in respect of official languages; Freedom of conscience and religion at public schools; Code of conduct; Random search and seizure and drug testing at schools; Suspension and expulsion from public schools.
[217] Malherbe ibid.
[218] Smit (2011) 27 *SAJHR* 405-406.
[219] Ibid 405.

learners" and secondly, that governing body members are assigned with the power to execute that authority.[220] Smit then embarks on an analysis, which, in my view, reveals the real reason for his conservative stance that SGBs should be entrusted with exclusive powers in some instances. He argues that parents and community members are more inclined to make financial contributions if they are permitted participation in school governance.[221] In his words:

> The parents of quintile 3 to 5 schools contribute large percentages of the budget of schools by way of school fees, fundraising and voluntary performance of maintenance and service functions at schools. Many public schools continually face the real likelihood that disenchanted parents will choose to place their children in independent schools. In the context of an education system that suffers the embarrassment that approximately 80 per cent of the schools are dysfunctional and in view of the restricted budgetary allocations for schools, it is of utmost importance that the goodwill and support of parents and the school community must be maintained.[222]

In light of the above, Smit argues that the function of a governing body must principally only be withdrawn "in the most desperate or urgent matters" since participation of parents will be undermined if the sovereignty of the school community is usurped.[223] He does not define which circumstances would qualify as "desperate" or "urgent". A serious shortcoming of Smit's approach is his failure to situate the legislative power to adopt a language policy within the historical, social and cultural context of the public education system. A key consideration in *Ermelo* was the exclusionary impact of the Afrikaans medium policy on black learners.[224] Woolman and Fleisch, tracing the history of Afrikaans schools in South Africa, argue that the maintenance of the Afrikaner culture has historically been tied to the preservation of Afrikaans medium schools.[225] For instance, they contend that "the belief that single-medium schooling would serve as the glue that bound the unique linguistic, cultural and religious features of the Afrikaner people" has survived beyond apartheid [226]. This belief spurred the apartheid regime to negotiate for the protection of single medium schools in the new constitutional dispensation

[220] Ibid 405-406.
[221] Ibid.
[222] Ibid.
[223] Ibid 406. For an opposite view to Smit, see Woolman and Fleisch "The problem of the 'other' language" (2014) 5 *Constitutional Court Review* 135.
[224] *Ermelo CC* paras 38-40.
[225] Woolman and Fleisch *Constitution in the classroom* (2009) 49.
[226] Ibid.

which eventually culminated in the inclusion of section 29(2) in the 1996 Constitution.[227] Hoërskool Ermelo, an exclusive Afrikaans medium institution for 91 years until the launch of the first proceedings in the High Court, is not an exception to the history described by Woolman and Fleisch.[228] Taking into account that the right to be taught in Afrikaans was never threatened for the Afrikaans, white learners at the school[229], it is my view that the school's persistent efforts to keep the black learners out, amounted to an attempt to preserve the school's white, Afrikaner culture.[230] In this regard, the school's governing body was taken to task by the High court for their tactics to exclude the affected (black) learners.[231] Smit's analysis of section 22 of the Schools Act, as it relates to his understanding of participatory democracy, therefore, has to be critiqued within the context set out above.

Sandra Fredman states that the separate but concurring judgment penned by Froneman and Skweyiya JJ in *Welkom*, focuses strongly on democracy as co-operation and consultation.[232] For instance, the two judges make it clear that "there is a constitutional obligation on the partners in education to engage in good faith with each other on matters of education before turning to courts."[233] Fredman continues her discussion on the notion of democracy in school governance by referring to the majority decision of Khampepe J in the same judgment. Here, the Constitutional Court, drawing on the Schools Act's purpose to ensure democratic school governance in public schooling, adopts a subsidiarity view of democracy by regarding the school as the most suitable entity to develop a pregnancy policy because the school governing body is best attuned to the domestic context.[234] Furthermore, Fredman argues that the Court understands democracy in terms of the separation of powers principle.[235] To this end, she refers specifically to Khampepe J in *Welkom*:

> [P]ublic schools are run by a partnership involving the state, parents of learners and members of the community in which the school is located. Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education

227 Ibid 49-51.
228 *Ermelo CC* para 6.
229 *Ermelo CC* para 26.
230 Daniel and Greytak report how "white parents rallied against the admission of the black" learners at Ermelo High School. See Daniel and Greytak (2013) 46 *De Jure* 37.
231 *Ermelo HC* para 66.
232 Fredman (2016) 6 *Constitutional Court Review* 173.
233 *Welkom CC* para 135.
234 Fredman (2016) 6 *Constitutional Court Review* 174.
235 Ibid.

> services to learners. ... [T]he interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by the Act. *Parliament has elected to legislate on this issue in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education. That detail must be respected by the Executive and the Judiciary*.[236]

In response to the quote above, it is submitted that the Court's insistence that the legislative "detail" governing the three-tier partnership must be respected, suggests a very narrow understanding of the separation of powers principle. The use of the word "must" implies that the Judiciary and the Executive are absolutely prohibited from threading into the domain of the powers of the three-tier partnership. Khampepe J's refusal to declare the manifestly unconstitutional pregnancy policies in contravention of the Constitution, seems to be informed *inter alia*, by a belief that the powers of the partners in education cannot be disrupted by the Court. However, in a constitutional democracy, the different arms of government keep checks and balances on each other in order to prevent the abuse of power by one arm of the state.[237] That is the key principle of the separation of powers doctrine.[238] A school governing body as an organ of state must therefore be subject to intervention by other state bodies. If not, one of the primary principles of our transformative democracy, namely a culture of justification as elucidated in Chapter 5, is disregarded.[239] Moreover, since the South African Constitution is a post-liberal document, it should be born in mind that classic liberal notions such as the separation of powers principle can be interpreted more generously to give effect to the transformative mandate of the Constitution as argued in Chapter 5.[240] Furthermore, the three-tier partnership is a legislative construct. The primacy awarded to the this construct as the starting point in education disputes is at odds with the Constitutional Court's established jurisprudence of interpreting legislation through the prism of the supreme Constitution.[241] The courts have an obligation to interpret legislation in conformity with section 39(2) of the Constitution even if a litigant has not directly invoked this section.[242] As Lourens Du Plessis states:

[236] *Welkom CC* para 49. Italics my emphasis.
[237] Heywood A *Political ideologies: An introduction* (4th ed) (2007) 39-40.
[238] Ibid.
[239] Mureinik (1994) 10 *SAJHR* 32.
[240] Chapter 5, section 5.3.
[241] *Bato Star* para 72.
[242] *Rivonia HC* para 20.

> [Section 39(2)] cannot be overridden by 'legislative intent' couched in (allegedly) 'clear and unambiguous language'. The 'intention of the legislature, in all its possible significations, will always be subject (and second) to the Constitution, and not only when a statute is (allegedly) inconsistent with a provision or provisions of the Constitution.[243]

Commenting further on the notion of democracy, Fredman argues that the *Welkom* majority judgment ignores the "classic democratic dilemma", namely, that the minority's rights will be overruled by the majority.[244] According to the author, Khampepe J presumes that the interests represented by the three-tier partnership are homogenous, and that in the event of a conflict of interests, the majority will prevail.[245] Fredman claims that the interests of pregnant learners had been ignored by parents and local community members for several years.[246] She implies that the conduct of these parents and community members is actually typical of a broader pattern worldwide in terms of which teachers, parents and community leaders are in favour of expelling pregnant learners from school, because it upholds the "moral norm prohibiting teenage sex."[247] For all these reasons, Fredman concludes that it is not adequate for SGBs to be left with the capacity to justify an exclusionary pregnancy policy.[248] I agree with the views of Fredman. A shortcoming of her approach though is that she fails to recognise that the moral and/or religious perspectives of parents and local community members (represented in a SGB) regarding the pregnancy of learners are indicative of the larger problematic institutional culture in South African schools that operates to the detriment of the constitutional rights of our learners as I have analysed in Chapter 4.[249] The latter chapter concluded that despite a strong anti-discrimination legal framework and an array of government policies aimed at guiding schools on developing inclusive codes of conduct, SGBs continue to adopt school policies imbedded in racism and other prejudices which may be informed by, *inter alia*, religious and moral bigotry.

The *Welkom* case illustrates that SGBs do adopt school policies that are discriminatory towards its own learners. However, school governing bodies also adopt and/or interpret policies in such

243 Du Plessis 2015) 18(5) *PER* 1338. (References to footnotes omitted).
244 Fredman (2016) 6 *Constitutional Court Review* 174.
245 Ibid.
246 For instance, "Khampepe J referred to statistics from Harmony which showed that two-thirds of the learners subject to the pregnancy policies before 2010 never returned to complete their secondary-school education." Fredman (2016) 6 *Constitutional Court Review* 167; *Welkom CC* para 114.
247 Fredman (2016) 6 *Constitutional Court Review* 175.
248 Fredman ibid.
249 See Chapter 4, section 4.2.3.

a manner that may prevent potential learners to access a school as illustrated in the judgments of *Ermelo* and *Rivonia* noted above. To that end, the notion of democracy in schools is also problematic in the sense that SGBs operate in favour of their own interests because they are naturally inclined (and legislatively empowered) to take decisions in the best interests of their schools.[250] As Fredman notes:

> The SGB, by definition, is accountable to its parent body and local community and will therefore make decisions to further their interests. Learners who are not admitted to the school do not have a voice in this process. The natural tendency of the SGB is to favour the 'ins' and resist attempts to incorporate the 'outs.'[251]

Thus, although Moseneke J, in the judgment of *Ermelo* held that governing bodies are supposed to be "beacons of grassroots democracy"[252] and that a SGB does not only operate in its own school's interests, but also "in the interests of the broader community in which the school is located",[253] these pronouncements refer to an archetype of a school governing body. In reality, it is highly probable that a governing body will always prioritise the needs of "insiders" over "outsiders."[254] This is clearly seen in some academic commentary post the seminal *Ermelo* judgment. De Waal and Serfontein, for example, criticise the Constitutional Court's pronouncement that the larger community interests should be considered by a school governing body. The authors argue that the interests of an individual school must take preference over the interests of the broader community by emphasising that a SGB "stands in a relationship of trust towards *the school*", not the larger community, and secondly, that a SGB should promote the best interests of *the school*, not the community.[255] It is submitted that De Waal and Serfontein's arguments fail to take into account that SGBs are not abstract, neutral bodies that are dislodged from a specific political, religious, social or cultural context. For instance, in *Ermelo*, the SGB's decision to doggedly insist on an Afrikaans medium policy was clearly rooted in the school's desire to remain a cultural, linguistic, and possibly racially homogenous community.

250 Section 20(1)(a) of Schools Act provides that a governing body "must promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school."
251 Fredman (2016) 6 *Constitutional Court Review* 186.
252 *Ermelo CC* para 57.
253 *Ermelo CC* para 80.
254 Fredman (2016) 6 *Constitutional Court Review* 185-186.
255 De Waal and Serfontein (2013) 46 *De Jure* 61. See sections 16(2) and 20(1)(a) of the Schools Act. Italics emphasis of the authors.

In terms of the *Rivonia* judgment, it is contended that the governing body's argument for exclusive capacity determination powers, was based in the school's desire to remain a privileged institution with no obligation to historically disadvantaged learners.[256] In this regard, the views of Motala and Lewis are apt. The authors contend that "there does not appear to be recognition that the representative democracy being promoted through SGBs is…a decidedly political one."[257] They argue further that:

> [T]he conspicuous silence in the Schools Act, among other things, on racial, gender and class conflict in democratic school governance, extends to the inaccurate conception of representative democracy as a benign collaboration of local actors as partners rather than competitors for power.[258]

7.4.2 The systemic impact of meaningful engagement

7.4.2.1 Academic commentary

Dugard and Wilson, commenting on the *Olivia Road* judgment claim that meaningful engagement essentially gives effect to the *audi alteram partem* rule which is an "administrative common law principle."[259] In their view, *Olivia Road* is representative of the Constitutional Court's tendency to proceduralise socio-economic rights through an administrative law paradigm.[260] In this case, the Court did not deal with the right to housing in substantive terms, but rather developed the concept of meaningful engagement as an additional tool to measure the reasonableness of the state's conduct to provide housing in terms of section 26 of the Constitution.[261] The tangible content of section 26, however, was left to be potentially negotiated by the parties in the "space" that allowed for meaningful engagement.[262] The Constitutional Court, when ordering meaningful engagement in the sphere of eviction law, thus defers to the disputing parties to negotiate the content of the right to housing themselves. For

256 Fredman (2016) 6 *Constitutional Court Review* 185.
257 Lewis and Motala "Educational de/centralisation and the quest for equity, democracy and quality" (2004) 121.
258 Ibid 126.
259 Dugard and Wilson "Constitutional jurisprudence: The first and second waves" (2014) 46.
260 Ibid. Pillay points out that in the case of *Joe Slovo*, "Justice O'Regan recognised [that] the obligation to engage meaningfully derives not just from section 26 (2) of the Constitution but should be understood in light of the right to procedurally fair administrative action protected in section 33 and fleshed out in sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000." See Pillay (2012)10 *International Journal of Constitutional Law* 746.
261 Pillay ibid.
262 Dugard and Wilson "Constitutional jurisprudence: The first and second waves" (2014) 46.

this reason, McLean has critiqued the Court's application of the principle by describing it as a failure on the part of the Court to deal with the "hard" or substantive matters itself.[263] In the realm of education law, Fredman contends that the Constitutional Court elevated procedure above substance in *Welkom* and *Rivonia*.[264] As noted above, the *Welkom* Court adopted the view that the rule of law required the HOD to follow the proper legislative procedures before the rights of the pregnant learners could be vindicated. Fredman argues that Khampepe J's approach to the rule of law, requiring strict compliance with the Schools Act's procedures, allowed the manifestly unconstitutional pregnancy policies to remain valid until it could be reevaluated by the SGBs.[265] Van Leeve, although agreeing with Fredman that the policies patently infringed on the learners' constitutional rights, poses the question whether the *prima facie* declaration of constitutional invalidity by the Court may not have been enough to deter SGBs from adopting constitutionally invalid policies in future.[266] Van Leeve then makes the following statement which will be dissected in the next section:

> The reach of *Welkom*, particularly as it pertains to the rights of female learners, is yet to be tested, and the outcome of meaningful engagement aimed at reviewing the policies is not yet known.[267]

In respect of *Rivonia*, although the Constitutional Court did not order meaningful engagement in this judgment, it strongly emphasised the significant role it plays in the resolution of disputes in education law.[268] In this instance, Fredman expresses her frustration with the Court's criticism of the HOD and the SGB's failure to engage with one another.[269] Fredman is perplexed as to what exactly the engagement was supposed to accomplish. She speculates that the principal and SGB would probably have emphasised that the school possessed extra capacity because they built additional classrooms out of the school's budget.[270] Furthermore, while the HOD may have suggested that such a privileged school should "share their bounty",

263 McLean K "Towards a framework for understanding constitutional deference" in Woolman and Bishop *Is this seat taken?* (2012) 316.
264 Fredman (2016) 6 *Constitutional Court Review* 165.
265 Ibid 172.
266 Van Leeve (2016) 10 *Constitutional Court Review* 205-206.
267 Ibid.
268 Liebenberg (2016) 19 *PER* 34.
269 Fredman (2016) 6 *Constitutional Court Review* 185.
270 Ibid.

the SGB may have responded that it not their duty, but that of the state to build more schools.[271] Fredman continues by stating that:

> The Court …gave no credence to the very fundamental conflict of interests at the heart of the dispute: that the SGB will inevitably give the interests of 'insiders' priority over 'outsiders' and that unless there are extra resources, giving to some might take away from others. Thus a mere duty to give a hearing to the other side simply resurrects the underlying conflict…. *A duty of consultation as a mere rule of law exhortation does not seem to bear the weight the Court placed on it.*[272]

Natasha Watt expresses more faith in meaningful engagement than Fredman and is more certain of the potential success of the remedy than van Leeve. Watt argues that the application of meaningful engagement will be effective if the parties commit to work together, are creative and put the interests of children first.[273] She emphasises that the power of engagement should not be underestimated by the state and SGBs if they commit to undertake the process in good faith.[274] For Watt, meaningful engagement places the parties in a position where they can negotiate an outcome that is a "tailor-made 'win-win' situation as opposed to the normal situation of 'win-lose' found in most litigation matters."[275] For her, the parties to the engagement are more "equipped" than the courts to find solutions that are creative and fair.[276] Furthermore, she agrees with Skelton that participatory remedies should be attuned to the specific context of the situation and have the capacity to ensure that long-term resolutions are found that in turn guarantees the right to basic education.[277] In what seems to be an attempt to prove the success of the meaningful engagement remedy, Watt refers to the long-term impact of the *Ermelo* judgment. Although the Constitutional Court did not explicitly order meaningful engagement in this case, I argued above that *Ermelo* has laid the foundation for the introduction of the meaningful engagement principle into education law.[278] Watt firstly refers to Van Der Vyfer who notes that the end result of *Ermelo* was a change from the exclusive Afrikaans

271 Ibid.
272 Ibid 185-186. Italics my emphasis.
273 Watt (2014) LLM Dissertation 35.
274 Ibid.
275 Ibid.
276 Ibid.
277 Skelton(2012) 27 *SAPL* 408.
278 See section 7.3.1 above.

policy to the adoption of a language policy catering for both Afrikaans and English learners.[279] The *Ermelo* judgment has also been called "remarkable" by Daniel and Greytak who praises the Court for its particular stance that exclusion on the ground of language is "unacceptable."[280] The authors argue that the Court's application of "equity, practicability and the need" to repair the injustices of the past forced Hoërskool Ermelo to transform from an exclusive medium school into a dual medium institution.[281] Secondly, Watt refers to a study done by Serfontein and De Waal who conducted telephonic interviews with some SGB members of Hoërskool Ermelo to assess the effectiveness of the court order.[282] According to these members, the Court's approach has been successful in "remedying the battles between SGBs and the state" in so far as language policies in public education is concerned.[283] Sandra Liebenberg also examines the notion of meaningful engagement in the *Ermelo* and *Welkom* judgments. First, she claims that although the Constitutional Court in *Ermelo* provided adequate "normative guidance" to the school governing body and to other SGBs in the country on what constitutes a constitutionally compliant language policy in the supervisory order, the same guidance was not given to the state in respect of ensuring enough school placements for learners who choose to be taught in English.[284] In order to satisfy the Court's order, Liebenberg suggests that the DBE would have had to consult Afrikaans medium schools with additional capacity in an effort to convince them to modify their language policies to accommodate English learners.[285] She also suggests that the state should build more English medium or parallel medium schools.[286] In respect of the *Welkom* judgment, Liebenberg argues that the Court's directive should have included a wider range of parties than merely the HOD and the relevant SGBs.[287] She suggests that the inclusion of stakeholders such as the "Commission for Gender Equality, the Human Rights Commission, representative organisations of school governing bodies, as well as NGOs and academics specialising in gender equality, children's rights and the right to education" would have guaranteed that more expertise informed the pregnancy policies and made them

279 Van Der Vyfer J "Constitutional protection of the right to education'"(2012) 27 *SAPL* 336 as cited in Watt (2014) LLM Dissertation 23.
280 Daniel and Greytak (2013) 46 *De Jure* 36-37.
281 Ibid 37.
282 Serfontein (2013) *De Jure* 59 as cited in Watt (2014) LLM Dissertation 23.
283 Ibid.
284 Liebenberg (2016) 19 *PER* 18.
285 Ibid.
286 Ibid 19.
287 Ibid 25.

more "broadly acceptable."[288] The legal commentator contends that the contribution of all the different role players would have resulted in an outcome that could have effected a "broader systemic impact" on pregnancy policies across South African schools.[289] A further criticism of *Welkom i*s that although the Court provided a timeline in which the schools had to report back to the Court to provide feedback on the meaningful engagement process and to lodge the revised pregnancy policies, the Court did not produce a "follow-up judgment", setting out whether meaningful engagement had indeed taken place and whether the policies complied with the principles contained in the main judgment.[290] In other words, the Court never reported publicly whether the new pregnancy policies were indeed constitutionally compliant. Liebenberg notes that such a judgment would have had an impact on the broader education system by providing schools with clear guidelines on what constitutes a pregnancy policy that complies with the Constitution.[291] She argues further that the meaningful engagement order in the *Welkom* judgment was chiefly structured to facilitate a solution "between the immediate parties to the litigation" and, therefore "a broader systemic impact on school pregnancy policies in South Africa", was lacking in the Court's approach.[292] Veriava agrees that although *Welkom* "addressed the discriminatory policies of the individual schools, it failed to provide a solution to the systemic exclusion and *de facto* expulsion of pregnant learners."[293]

7.4.2.2 Analysis

(a) Ermelo

I agree with Watt that meaningful engagement has the potential to provide a "win-win" situation for the parties concerned as opposed to the traditional approach where the Court is the final decision-maker. However, Watt's approach is narrow to the extent that it only focuses on the immediate success of the principle at local school level. For instance, her discussion of the study conducted by De Waal and Serfontein provides some evidence that the outcome in *Ermelo* led to an improvement of the initial contentious relationship between Hoërskool Ermelo and the Mpumulanga Education Department. This has subsequently resulted in the

288 Ibid 25-26.
289 Ibid 26.
290 Ibid.
291 Ibid. See also Van der Berg S "Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance? (2013) *SAJHR* 376-398.
292 Liebenberg ibid.
293 Veriava F "Teen pregnancy and the right to education in South Africa" (2015) 24 *HUM. RTS. DEFENDER* 14.

school adopting a language policy that now accommodates Afrikaans and English learners. However, the notion of meaningful engagement has not resulted in broad systemic change in the rest of the country in so far as the adoption, implementation and the impact of language policies on issues such as racial inequality, are concerned. Almost a decade after the *Ermelo* decision, the acrimonious relationship between predominantly former white SGBs and provincial education departments continue as evidenced in the 2018 *Overvaal* decision. As mentioned in my analysis on this case in Chapter 4, the mere fact that Hoërskool Overvaal has managed to remain 95% white despite the diverse demographics surrounding the school[294], attests to the probability that the governing body's defence of its Afrikaans language policy may have been racially motivated. Although the notion of meaningful engagement requires that parties solve disputes before coming to court, Hoërskool Overvaal and the provincial education authorities could not agree on a solution that would benefit the excluded black learners.[295] The matter eventually ended up in court because the relationship between the parties were so acrimonious. Furthermore, even though the *Ermelo* Court had provided "normative guidance" to schools on what constitutes a constitutionally compliant language language in 2009 already , this has obviously not filtered through to schools such as Hoërskool Overvaal, bearing in mind that the *Overvaal* ruling was issued nine years after *Ermelo*. It is also important to restate that FEDSAS has admitted that Afrikaans schools "use their language policies as a mechanism for screening applications in a manner that suggests that the screening occurs with racist intent."[296] Thus, these schools persist in their agenda to adopt language policies contrary to the transformative mandate of the Constitution. Why? It is submitted that the white, Western institutional culture that the majority of our schools are embedded in as analysed in Chapter 4, plays a significant role in the continuation of the adoption of racially motivated school language policies. Moreover, the decentralised system of school governance allows schools to adopt policies that enable them to maintain such a culture.

(b) Welkom

First, I agree with Fredman's assessment that a violation of constitutional rights can occur while the parties to the meaningful engagement process negotiate a new pregnancy policy.

294 https://www.dailymaverick.co.za/article/2018-08-14-race-and-language-concourt-misses-chance-to-guide-transformation-of-the-education-system/ (accessed 28 November 2019).
295 Chapter 4, section 4.2.2.2.
296 Ibid.

Thus, the effective implementation of learners' constitutional rights is effectively "put on hold" until such time as a constitutionally compliant pregnancy policy can be adopted by a governing body subsequent to the exhaustion of the meaningful engagement process between the state and the SGB. However, it is Liebenberg's contention that a subsequent judgment was needed to provide more guidance on the constitutionality of pregnancy policies to South African schools that is relevant to the issue of systemic change. Liebenberg is suggesting that the main judgment, although providing a *prima facie* declaration of constitutional invalidity, was never effective at effecting broad systemic change in the education system. Before determining whether her analysis turned out to be valid, it is appropriate to return to van Leeve's comments that "the reach of *Welkom*, particularly as it pertains to the rights of female learners, is yet to be tested, and the outcome of meaningful engagement aimed at reviewing the policies is not yet known."[297] The article in which these remarks appear, was published in 2016.[298] Three years after this publication, and six years subsequent to the *Welkom* judgment, the South African media has widely reported that learners are being expelled from school on account of their pregnancies.[299] Furthermore, although the National Department of Basic Education embarked on a consultative process to produce a Learner Pregnancy Policy, no final version has been published as yet.[300] Thus, the reach of *Welkom* and the objective of meaningful engagement aimed at changing unconstitutional pregnancy policies are now known: It is *not* effective at inducing broad systemic change in the public basic education system in so far as unconstitutional pregnancy policies are concerned.[301] Why not? Again, the same criticism levelled above in respect of the systemic outcome of *Ermelo* is applicable to *Welkom*. In the the *Welkom* case, the institutional culture of the SGB was probably informed by moral and/or religious bigotry which led to the adoption and implementation of pregnancy policies that discriminated against female learners on the basis of sex and gender. Once again, the autonomy granted to SGBs under the school governance system facilitated the adoption and implementation of these exclusionary policies.

297 van Leeve (2016) 10 *Constitutional Court Review* 205-206.
298 Ibid.
299 http://www.sabcnews.com/sabcnews/limpopo-schools-expel-pregnant-pupils/ (accessed 17 January 2020).
300 Verified per electronic communication by Karabo Ozah, Director of the Centre for Child Law, University of Pretoria on 17 April 2020.
301 Italics my reference.

(c) Rivonia

At the heart of Fredman's frustration as it pertains to *Rivonia*, in my view, is the contention that the notion of meaningful engagement is not conducive to solving the systemic problem of unequal access to quality education for black and poor learners in this country. To this end, the Constitutional Court's mandatory process of engagement between the state and former white schools such as Rivonia Primary school, leads to a stale mate: On the one hand, former Model C schools endeavour to retain their inherited privilege(s) and present private parental funding as a justification for doing so. On the other hand, the state views these schools as public entities which, owing to their inherited benefits from the apartheid government, have a constitutional (and possibly ethical) duty to contribute to transformation. In light of the aforementioned, I share Fredman's frustration in respect of the Constitutional Court's focus on meaningful engagement in the *Rivonia* judgment. In my view, the systemic impact of meaningful engagement on the education system is not that significant. It is submitted that the Court's failure to engage in a section 39(2) enquiry impeded Mhlantla AJ from making a proper connection between school fees and the lack of access to quality education for black and poor learners in the education system. In this regard, the Constitutional Court could have borrowed from the reasoning of the court of first instance (the South Gauteng High court) which did engage in a section 39(2) analysis and correctly referred to the section 39(2) obligation as a duty in respect of which the courts have "no discretion".[302] Mbah J, writing for the High court pointed out that Rivonia Primary school is a historically privileged school due to the racially discriminatory funding regime of the former government.[303] This race-based policy allowed former white schools to accumulate vastly superior resources, which in turn resulted in lower learner-to-teacher ratios than at their disadvantaged counterparts.[304] Because former white schools are served predominantly by middle class to wealthy communities, the High court argued that historical inequality continues to exist.[305] Rivonia Primary argued that its governing body used private funding to have additional classrooms constructed, and to appoint extra

[302] *Rivonia HC* para 20. See *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 47 where the court held that "[s]ection 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights."

[303] *Rivonia HC* para 70.

[304] *Rivonia HC* para 70. See also Fredman (2016) 6 *Constitutional Court Review* 182-185.

[305] *Rivonia HC* para 72. The court held : "The second applicant is no exception to this pattern of continued racial disparity. It operates in a predominantly white area and continues to serve a predominantly white group of children while maintaining the lowest learner to class ratio in the area."

educators in an effort to maintain its low learner-to-teacher ratio.[306] The High court praised the school's "desire to offer the best possible education for its leaners."[307] However, Mbah J held that "the Constitution does not permit the interest of a few learners to override the right of all other learners in the area to receive a basic education."[308] Thus, unlike the Constitutional Court, the High court acknowledged that the financial ability of parents from historically advantaged schools to invest in private funding, such as school fees, enables the provision of a better quality of education and thus perpetuates historical privileges in the education system. For instance, van Leeve points out that school fees result in extra resources for a school, but also exclude learners and "generate massive educational inequity" as well as create the perception that those with money are "more equal than others."[309] Whereas the High court understood issues of systemic capacity and access to quality education in a contextual framework that is cognisant of the historical and social inequality in the basic education system, Mhlantla AJ devoted the bulk of the Constitutional Court judgment to the principle of meaningful engagement. To this end, she held that meaningful engagement is required when the Gauteng Department of Education instructs an individual school to enrol learners, in excess of the capacity provided for in its admission policy.[310] According to Mthlantla AJ, the "heavy-handed" conduct by the HOD indicated that "the [d]epartment would use its powers to deal with systemic capacity problems in the province without any regard for the role of school governing bodies in the Schools Act's carefully crafted partnership model."[311] The Constitutional Court continued that "one organ of state cannot use its entrusted powers to strong-arm others", but that "all sides" (ostensibly referring here to SGBs and provincial education departments) are "required to work together in partnership to find workable solutions to persistent complex difficulties."[312] In this regard, the Court gives the impression that cooperation/meaningful engagement between the provincial education departments and governing bodies is enough to solve "persistent and complex" problems. However, the Court seems to be ignorant of the fact that the content of these problems extend to much more than issues of systemic capacity, namely the lack of enough school places in the country. As examined comprehensively in Chapter 3, the public

306 *Rivonia HC* para 72.
307 *Rivonia HC* para 72.
308 *Rivonia HC* para 72.
309 van Leeve (2016) 10 *Constitutional Court Review* 207.
310 *Rivonia CC* para 72.
311 *Rivonia CC* para 75.
312 *Rivonia CC* para 78.

basic education system is characterised by distinct patterns of disadvantage that manifest in unequal access to quality schooling for the majority of black and poor learners.[313] In practical terms, this means that the latter cohort of learners perform academically worse than their white and/or more socio-economically advanced black counterparts; still attend schools that suffer from inadequate infrastructure and facilities in the form of poor provision, or complete lack, of school buildings, school furniture, libraries, laboratories, textbooks and scholar transport; are housed in schools located in communities plagued by issues such as dire poverty and service delivery protests which have a proven detrimental impact on their right to education; and trained by teachers whose morale may be low due to overcrowding in their classes, the dismal physical conditions under which some of them are forced to teach, and the failure of the State, in some instances, to remunerate them. There is no doubt that these "persistent and complex" problems are incapable of being solved through meaningful engagement alone.

(d) FEDSAS

Although the Constitutional Court in *FEDSAS* did not issue an order of meaningful engagement, Moseneke J did emphasise the importance of the principle in education law. There is no significant link between Moseneke J's observations on cooperation/meaningful engagement and broad systemic change of the public basic education system. However, the *FEDSAS* judgment, in so far as its pronouncements on feeder zones is concerned, is relevant to the issue of broad systemic change in public education. In this regard, the Constitutional Court's order resulted in the feeder zone radius of Gauteng schools to be extended from 5km to 30km.[314] The MEC of the Gauteng Education Department has lauded these new feeder zone regulations as transformative, ostensibly on the ground that the former 5km feeder zone requirement, barred primarily black learners from accessing former white schools on account of South Africa's historical spatial injustice. Although the new feeder zone regime will undoubtedly broaden access to a wider range of learners than before, it should be borne in mind that access to education is not only inhibited by geographical considerations. The MEC has failed to consider that economic inequality plays a major rule in the type of school a learner accesses. In 2014, I made the following observations which still hold true in 2020:

313 See Chapter 3, section 3.3.

314 GDE Policy for the Delimitation of Feeder Zones for Schools (18 September 2018) available at https://www.gdeadmissions.gov.za/ (accessed on 13 November 2019); https://mg.co.za/article/2018-11-16-00-gauteng-school-feeder-zones-expanded-to-30km (accessed 12 November 2019).

> Bar the exceptions, most learners who will seek a placement at former Model C schools are part of middle class or elite households. The overwhelming majority of disadvantaged learners in South Africa will continue to apply to the former black schools because of the fee-free status of these schools. …[T]he transformation of the public education system is limited by 'the liberal democratic constitutional paradigm in which the transformative project is embedded. South Africa has joined other liberal capitalist democracies where significant political freedom far outweighs economic freedom. According to Ntsebeza, South Africa's commitment to a neo-liberal capitalist agenda has made it improbable that political equality will translate into economic equality. The overwhelming majority of South Africans, regardless of race and class, enjoy traditional liberal freedoms, such as the right to vote in free and fair elections. However, it is the black majority that remains entrenched in abject poverty as a result of the racist policies of the past. The minority who has benefited from these unjust policies continue to enjoy their inherited privilege due to a capitalist system that serves the interests of the elite and middle class. The South African public education system, despite some socialist interventions, reflects this uncomfortable reality. The majority of learners are situated at disadvantaged schools because of the fee-free status of these schools. The interests of the elite and middle class are served by the former Model C schools which maintain their privilege as a result of the charging of school fees. The impoverished black majority have no choice but to remain at dysfunctional schools where they are confined to an education devoid of any meaningful quality.[315]

A further noteworthy issue of *FEDSAS* is that the judgment is applicable to the Gauteng province only.[316] In terms of South Africa's constitutional framework, each province is empowered to adopt its own legislation and regulations on basic education.[317] Thus, at the moment, Gauteng has a different feeder zone regime than other provinces where a 5km regime may still apply. This means that the rest of the country still employs a feeder zone regime that has the effect of restricting access to former Model C schools for black learners on account of where they live or where their parents work. Thus, bearing in mind that the 30km feeder zone requirement does not benefit other provinces besides Gauteng, the broad systemic impact of the *Fedsas* judgment is questionable.

[315] Arendse L "Beyond Rivonia: Transformative constitutionalism and the public education system" (2014) 19 *SAPL* 171 (footnotes omitted).
[316] See section 7.3.4 above.
[317] See Schedule 4 of the Constitution.

7.4.3 The potential "chilling effect" of meaningful engagement

In *FEDSAS* the following observations were made by Moseneke J:

> There are continuing contests on the governance of public schools and policies on the admission of learners. This, despite a number of precedents of our courts that were meant to clear the murky waters of the shared space between school governing bodies and provincial executives charged with the regulation of public schools.[318]

At this stage of the study, it is obvious that the Constitutional Court's reference to the "murky waters" in the quote above, is code for the contentious relationship between SGBs and provincial education authorities. Furthermore, the analysis of case law thus far has made it evident that the notion of meaningful engagement has been developed by the Court to "clear the murky waters", namely to resolve this acrimonious relationship. However, despite the principles of meaningful engagement established in these judgments as well as the Constitutional Court's warning that SGBs and the state should engage with one another on disputes before turning to the courts, the past keeps repeating itself. To name a few examples: First, in *Rivonia,* the Constitutional Court held in 2013 that the HOD of the Gauteng Education Department and *not* individual schools has the final say over school admissions and capacity. However, three years later, the same admission powers of the provincial executive were contested in the *FEDSAS* judgment. Second, in *Welkom*, also decided in 2013, the Constitutional Court ordered the SGBs and HOD to meaningfully engage with the aim of amending the discriminatory pregnancy policies in line with the principles laid out in the judgment. However, in 2019, the media reported that governing bodies expelled learners from schools on account of their pregnant status. I am concerned that the Constitutional Court may reach a stage where it dismisses future applications on disputes between SGBs and the state on the ground that the matter should have been resolved in terms of meaningful engagement *first.*[319] The *Overvaal* matter certainly indicates that my concern may be valid. As examined in Chapter 4, the Pretoria High court set aside an instruction from the Gauteng Education Department to Hoërskool Overvaal to admit 55 black learners seeking education in English.[320]

[318] *FEDSAS CC* para 4.
[319] Italics my emphasis.
[320] *Overvaal judgment* 50-51.

The High court agreed with the school's decision to deny access to the learners on the following reasoning: First, Afrikaans schools are exempt from providing access to English speaking learners where other neighbouring English schools have the capacity to accommodate them and second, the court held that the Gauteng Education Act does not empower the District Director to unilaterally override a school's language policy.[321] For these reasons, the Department's conduct was held to be in violation of the principle of legality.[322] In response to the High court decision, the Department appealed the matter directly to the Constitutional Court.[323] However, the Court dismissed the application on the ground that the case "bore no prospects of success."[324] Therefore, the Court did not even entertain a hearing on the matter. Ally and Brenner commented as follows on the Court's failure to hear the matter:

> A judgment of the Constitutional Court could have clarified the role of principles such as equity and redress in admissions decisions, particularly where enforcement of language policies impede transformation. The Constitutional Court also missed an opportunity to expand on how the meaningful engagement and prioritisation of the best interests of the learners involved should be practically implemented. *The Constitutional Court justices should not be reluctant to hear future cases involving provincial departments and school governing bodies contesting each other's terrain.* It is the very recurrence of these cases which shows that jurisprudence on issues such as meaningful engagement, the interplay between language and admissions policies, and the importance of redress and equity in the public education system can and should be refined.[325]

Ally and Brenner reinforce my contention that cases involving the persistent tug of war between SGBs and the state keep on recurring. Furthermore, by arguing that the recurrence of these cases indicates that the jurisprudence on the notion of meaningful engagement has not been "refined" and by positioning the remedy within the broader context of "redress and equity in the public education system", they are disputing the success of meaningful engagement in effecting transformation of the basic education system. Ally and Brenner also confirm my concern that the *Overvaal* judgment has triggered a reluctance on the part of the Court to hear similar cases in future. In my view, the Constitutional Court dismissed the *Overvaal* appeal on

321 *Overvaal judgment* 35.
322 *Overvaal judgment* 35.
323 Chapter 4, section 4.2.2.2.
324 Ibid.
325 Ibid. Italics my emphasis.

the following grounds: First, the Court was of the opinion that it has already provided normative guidance in *Ermelo* on what constitutes a constitutionally compliant language policy for the benefit of schools such as Overvaal. Thus, since the Department's application was summarily dismissed, the Court seems to confirm that the Overvaal language policy is constitutionally sound. Second, the Court was loyal to its own jurisprudence that the parties to the case should have meaningfully engaged with one another before involving the Court. If the latter observation is indeed true, then the notion of meaningful engagement has the potential of having a "chilling effect" on future education rights cases which involve disputes between governing bodies and the state on issues related to the core problem of South Africa's public basic education system: Unequal access to quality education for black and poor learners in the public school domain. Such a chilling effect will unquestionably have an anti-transformative impact on the public basic education system.

7.4.4 Meaningful engagement and the ideology of "colour-blind racism"

Achille Mbembe argues that the abolition of "legalised white supremacy"/ apartheid in South Africa has not resulted in the end of racial inequality in our country.[326] Chapter 3 confirms Mbembe's argument that a distinct pattern of racial disadvantage runs through the public basic education system that manifests as unequal access to quality education for black and poor learners. Bonna-Silva contends that "colour-blind racism" usually transpires in a society subsequent to the eradication of official systems of racial discrimination (such as apartheid) to justify the existing "racial order."[327] Bonna-Silva defines colour-blind racism by explaining that it "operates by means of four discursive or rhetorical frames that are mobilised to justify racism and racial inequality and in this way is central to the reproduction and enforcement of the *status quo*."[328] For Joel Modiri, these frames, *inter alia*, cover and disguise the operation of racial domination and "distort the social reality of race."[329] For the purposes of this thesis, I will only focus on two of those frames. The first frame is *abstract liberalism*.[330] Modiri, drawing on Bonilla-Silva interprets abstract liberalism as using classic liberal notions such as

[326] Mbembe A "Passages to freedom: The politics of racial reconciliation in South Africa" (2008) *Public Culture* 6.
[327] Bonilla-Silva E *Racism Without Racists: Colour-blind Racism and the Persistence of Racial Inequality in the United States* (2010) (3rd ed) 25.
[328] Ibid.
[329] Modiri J "Race as/and the trace of the ghost: Jurisprudential escapism, horizontal anxiety and the right to be racist in *BOE Trust Limited*" (2013) 16(5) *PER* 601.
[330] Ibid 602. Italics my emphasis.

the rule of law in an abstract way by not linking such notions to the real challenges of racial inequality in our society.[331] In this regard, it is submitted that Modiri's interpretation correlates with Klare's suggestion that liberal notions such as the rule of law should be interpreted in a more politicised manner by the courts with the aim of giving effect to the transformative vision of the Constitution.[332] The second frame is *minimisation of racism*.[333] This frame is based on the contention that the lives of black people in the post-apartheid era is no longer significantly affected by discrimination and that the issue of race and racism do not require "legal attention and public concern."[334]

How does the ideology of colour-blind racism relate to the notion of meaningful engagement? Drawing on the academic commentary and my analysis of the Constitutional Court's approach in particularly *Ermelo* and *Rivonia* above, it is submitted that besides classical liberal notions such as the rule of law, the notion of meaningful engagement can also be understood through the prism of abstract liberalism. In these cases, the Constitutional Court has managed to interpret meaningful engagement in such an abstract manner which has resulted in the Court failing to link the concept to the racial inequality that permeates through the education system. In this regard, the Court's preoccupation with cooperation between SGBs and the state has developed into a situation where the Court is unable to problematise meaningful engagement within the context of the racial inequality perpetuated by SGBs of former white schools.[335] For example, in *Ermelo,* Moseneke J refused to explicitly call out the SGB's racial motivation behind the school's language policy (as opposed to the High court) and in *Rivonia*, Mhlantla AJ, unlike the High court, could not properly establish any type of contextual link between the admission powers of a historically privileged school such as Rivonia Primary and the perpetuation of racial inequality in the basic education system. In respect of the second frame, it is contended that in both of these judgments stated above, the Constitutional Court unintentionally minimised the significant extent to which the lives of black learners are still impacted by racial discrimination committed by former white school governing bodies. This contention ties in with my analysis in Chapter 4 that former Model C schools utilise their autonomy under the school governance system to preserve inherited privileges from our colonial and apartheid past and thus perpetuate systemic inequality (based *inter alia* on race)

331 Ibid.
332 Klare (1998) 14 *SAJHR* 150.
333 Modiri (2013) 16(5) *PER* 602. Italics my emphasis.
334 Ibid.
335 See Chapter 4, sections 4.2.2. and 4.2.3.

in the education system. Thus, in both *Rivonia* and *Ermelo,* the Court failed to give the issue of racism the legal attention that it deserved.[336] To this end, the Court's "colour-blind racism" approach inadvertently contributed to the "reproduction and enforcement of the *status quo*"[337], namely the perpetuation of unequal access to quality education for black learners in post-apartheid South Africa.

7.5 CONCLUSION

Chapter 7, the final substantive chapter in this thesis, has examined seminal Constitutional Court judgments in education law jurisprudence, including *Ermelo*, *Rivonia*, *Welkom* and *FEDSAS*. Each judgment, some to a greater extent than others, has contributed to the notion of meaningful engagement becoming the primary approach in terms of which the Constitutional Court solves disputes between school governing bodies and the state. Meaningful engagement applied at the remedial phase of a judgment, is faithful to fundamental principles of South Africa's constitutional democracy. It advances the notion of participatory democracy by providing ordinary citizens with the means to participate in a process that may have a major impact on their lives, be it in the sphere of housing or education. South African society emerges from an oppressive past where the voices of the majority of citizens were rendered powerless. Thus, the value of meaningful engagement as a remedy which enhances participation and accountability in a post-apartheid democracy, premised on a culture of justification, is priceless. However, Chapter 7 has focused primarily on problematising, *inter alia*, concepts such as "democracy" within the context of investigating the link between the notion of meaningful engagement in education law jurisprudence and the radical transformation of the public basic education system. Besides the issue of democracy in school governance, this chapter has also examined the impact of the following topics on the transformation of public education: the broad systemic impact of meaningful engagement, the potential "chilling effect" of the remedy on future education rights cases and the link between meaningful engagement and a "colour-blind racism" approach to the law. An analysis of these topics reveal that the Constitutional Court's application of meaningful engagement is intrinsically connected to the manner in which the decentralised system of school governance system enables school governing bodies from predominantly former white schools to preserve and perpetuate

[336] Modiri (2013) 16(5) *PER* 602.
[337] Ibid 601.

systemic inequality in the basic education system, and thus impede transformation. This observation ties in with Brand's second conceptualisation of transformation, namely that contemporary South African political/social/ cultural institutions or systems are structured or composed in such a way that it obstructs transformation, and that they need to change in order for radical transformation to occur. Chapter 7 has also established that the Constitutional Court's failure to recognise the link between meaningful engagement and the role of SGBs in upholding systemic inequality contributes to the continuation of the *status quo* in basic education: Unequal access to quality education for black and poor learners in the public school domain.

CHAPTER 8
THE CONCLUSION

8.1 INTRODUCTION

As this thesis concludes, it is apt to restate its title : "Inequality in the public basic education system: The role of the South African courts in effecting radical transformation." Drawing on its title, this thesis has been divided into two main parts: Part I, comprising out of Chapters 2, 3 and 4 aimed to situate the systemic inequality in the public basic education system not only in a legal context, but also to understand it from a broader historical, political and social perspective. Part II, consisting out of Chapters 5, 6 and 7 sought to elucidate the role that the South African courts have played in the transformation of public basic education. In the sections that follow, I will provide a brief summary of each chapter before offering what I regard as the contribution of this thesis to education law jurisprudence.

8.2 PART I: INEQUALITY IN THE PUBLIC BASIC EDUCATION SYSTEM

In **Chapter 2**, I traced the history of the South African education system from the 17th century until the early 1990s to explore its colonial and apartheid origins. This chapter found that the Dutch and British colonisers laid the foundation for racial and class inequality that was then further entrenched by the Union government and later the apartheid regime. The education policies of the apartheid administration, in particular, culminated in the racial segregation of public schools in terms of which whites were guaranteed superior resources and a better standard of education, while black learners were confined to schools characterised by deplorable physical conditions and an education of inferior quality. Although former white/Model C schools granted access to a set quota of black learners in 1991(owing, in part, to the domestic and international political climate of the time), Chapter 2 concluded that class inequality became interwoven with racial inequality in the public basic education system in the early 1990s because only a minority of black learners could afford the high school fees charged by former white schools. The quota system, fee structure and selective academic testing imposed by historically white schools were part of a broader agenda of the apartheid regime to retain a white majority at these schools and thus, in my view, to reinforce the ideology of white supremacy and black inferiority which had been the central dogma of apartheid.

Chapter 3 focused on the reproduction of systemic inequality in the post-apartheid public school domain. The chapter found that despite the adoption of a progressive rights framework

rooted in a post-liberal Constitution with a transformative mandate, patterns of racial and class disparities have transferred into the post-1994 era. Situating my analysis within Kishore Singh's UN report "Normative action for quality education", I have found that quality education encompasses more than the level of learners' academic achievement. A holistic approach to quality, as advanced by Singh, incorporates:

> a minimum level of student acquisition of knowledge, values, skills and competencies; (ii) adequate school infrastructure, facilities and environment; (iii) a well-qualified [motivated and well looked after] teaching force; (iv) a school that is open to the participation of all, particularly students, their parents and the community.[1]

A clear pattern has emerged in my analysis of each barometer of quality: The majority of black and poor learners are denied equal access to quality education in post-apartheid South Africa. I come to this conclusion for the following reasons. Firstly, an analysis of local and international standardised assessments indicate that black and poor learners perform significantly worse than their white and/or more socio-economically advanced black counterparts. Secondly, many historically disadvantaged schools (especially those located in the former Bantustan territories) still suffer from inadequate infrastructure and facilities in the form of poor provision, or complete lack, of school buildings, school furniture, libraries, laboratories, textbooks and scholar transport. Thirdly, the educator profession in South Africa faces various obstacles. To begin with, a disparity in the quality of the training of teachers from historically white and historically black Higher Education Institutions seems to indicate that teachers from former white institutions bar the exceptions, receive a "better" qualification than their counterparts at former black institutions (the majority of whom go on to teach in historically black schools). Next, an inappropriate culture of teaching and learning in former black schools, emanating from an entrenched culture of opposition to the apartheid state, has transferred to the post-apartheid dispensation. Furthermore, former black schools are located in communities plagued by service delivery protests which, according to the SAHRC, has resulted in the violation of the right to education of these learners. Additionally, the morale of teachers at former black schools is low due to overcrowding in their classes, the dismal physical conditions under which some of them are forced to teach, and the failure of the state, in some

[1] Singh Report on Quality Education (2012) 7.

instances, to remunerate these teachers. The last barometer of quality education focuses on the practice of participatory democracy in schools. In this chapter, I have found that in former white schools the high education level and socio-economic status of the parent constituency are some of the currencies that secure participation in the decision-making processes of SGBs. However, in former black schools, bar the exceptions of course, the illiteracy, poverty and lack of confidence of black parents sometimes prevent them from making decisions on their children's education. In this instance, principals and teachers tend to make decisions for these parents, resulting in a clear violation of the Schools Act and the principle of substantive participatory democracy.

The role of the decentralised school governance system in perpetuating systemic inequality in the public basic education system was addressed in **Chapter 4.** To this end, I have established that SGBs from mainly former Model C schools use their autonomy under the Schools Act to deny access to specific groups of leaners on a range of grounds, including race, socio-economic class and language. This chapter also concluded that the institutional culture of South African schools, grounded mainly in a white, Western paradigm plays a significant role in the agenda of predominantly former white schools to adopt exclusionary policies.

8.3 PART II: THE ROLE OF THE COURTS IN THE RADICAL TRANSFORMATION OF PUBLIC BASIC EDUCATION

Chapter 5 introduced the second part of this thesis by examining the notion of "radical transformation." Since the courts have a constitutional obligation to contribute to the fulfilment of the radical transformation of public basic education and considering that this part of my thesis is devoted to the role of the courts in effecting transformation, I devoted Chapter 5 to a critical analysis of the term "radical transformation". In this chapter, I drew on the notion of transformative constitutionalism, academic commentary on the concept "radical transformation" as well as the courts' approaches to transformation in the sphere of the right to basic education (and related rights) to develop a framework within which to assess the radical transformation of public basic education. This chapter concluded that "radical transformation" requires more than the production of tangible outcomes through the process of adjudication, but necessitates a foundational change of the political/social/cultural institutions/systems of our country that may obstruct transformation because of the way they operate and/or are composed. The framework developed in Chapter 5 provided the lens through which the

substantive-based approach of the High courts and SCA (in Chapter 6) and the meaningful engagement approach of the Constitutional Court (in Chapter 7) are analysed.

The next chapter proceeded to expand on the first notion of transformation, namely the understanding of transformation as tangible outcomes through adjudication. In this regard, **Chapter 6** has provided the trajectory of cases by the High courts and SCA which illustrate these courts' substantive approach to "fill out" the right to basic education incrementally. So far, the jurisprudence of the High courts and SCA have determined that section 29(1)(a) encompasses the following entitlements: Adequate school infrastructure, teaching and non-teaching staff, appropriate school furniture, a school environment that promotes the dignity of learners, teaching materials such as textbooks, transport to and from school at state expense (in appropriate cases) and the right of equal access to education. To this end, the substantive approach illustrates the application of the first conceptualisation of transformation noted in this thesis. Chapter 6, drawing on the integral link between the right to basic education and transformation additionally analysed whether the current compulsory period of education (which provides a vessel through which basic education is fulfilled) is conducive to the transformative objectives of the Constitution. The chapter recommended a revision of compulsory education in South Africa.

Chapter 7, the final substantive chapter of this thesis primarily focused on the second conceptualisation of transformation advanced in this study in so far as it relates to the notion of meaningful engagement, which is the Constitutional Court's principal method of solving disputes between the state and school governing bodies. The second understanding of transformation acknowledges that political/social/cultural institutions/systems can impede transformation because of the way they are structured and/ or are operated. In this regard, the chapter found that although meaningful engagement as a remedy is valuable to the idea of participatory democracy, among other things, it is fundamentally linked to the way in which school governing bodies from predominantly former white schools use the decentralised system of school governance system to preserve and perpetuate systemic inequality in the basic education system, and thus impede transformation. Furthermore, Chapter 7 determined that the Constitutional Court's omission in acknowledging this link is a factor in the protraction of the *status quo* : Unequal access to quality basic education for black and poor learners in the public school domain.

8.4 THE CONTRIBUTION OF THE THESIS TO BROADER EDUCATION LAW JURISPRUDENCE

Law and education are considered separate disciplines, but they are significantly interconnected. As our particular history of colonialism and apartheid depicts, it is ill-considered to assess the law in a vacuum as it is undeniably shaped, among other things, by the political and social context of a particular era. Likewise, education is not a neutral enterprise, but is innately political in nature because it is intrinsically connected to the society in which it is embedded. To that end, this thesis has demonstrated how the former colonial and apartheid regimes utilised the courts as well as the education system as two of their primary tools to impose the supremacy of one race over the other.

Twenty-six years into post-apartheid South Africa, our judiciary has not entirely discarded its conservative legacy. However, it would be disingenuous to claim that the courts have not been involved in advancing the transformative agenda of the South African Constitution. In this regard, the jurisprudence of the High courts and SCA in the sphere of basic education has to be commended. Given the Constitutional Court's reluctance to provide normative content to socio-economic rights, the substantive-based approach of the High courts and SCA in respect of section 29(1)(a) has to be valued. Although criticism has been advanced in respect of the courts' failure to provide an objective test in establishing the content of the right to basic education, I contend that the ever changing context of our society requires that the right does not become fixed, but keeps on evolving. In this regard, it is recommended that civil society litigators from organisations such as Section 27, Equal Education and the Centre for Child Law continue to identify and litigate potential violations of the right to basic education before the High courts. Furthermore, it is also suggested that the transformative impact of the current compulsory education period is disputed before these courts especially as it relates to learners older than 15 but younger than 18. In light of the Constitutional Court's narrow association of basic education with the current compulsory education period in so far as it restricts basic education to learners younger than 16, I argue that the High courts and/or the SCA may provide a more positive outcome in this regard since they have displayed a progressive stance in respect of providing content to section 29(1)(a).

However, the substantive-based approach of the High courts and SCA has not been enough to effectively contribute to the eradication of systemic inequality in the basic education system. The framework of "radical transformation" developed in this thesis, shows that the

decentralised school governance system enables the perpetuation of historical inequalities by predominantly former white school governing bodies. To that end, this thesis has identified a shortcoming in the approach of the courts in respect of not being able to identify the underlying systems/institutions that perpetuate inequality in public schooling. As I have shown in this study, former white school governing bodies, in particular, manipulate the post-apartheid legislative system to reinforce their inherited privilege(s). Of course, the post-1994 Legislature, I suspect, could not have foreseen that the decentralised powers awarded to school governing bodies would be manipulated in such a manner. The Schools Act was enacted with the purpose of, *inter alia*, establishing a school governance system to make a decisive break from the authoritarianism of the previous regime by establishing institutions such as school governing bodies through which participatory democracy could be realised. As this thesis illustrates, the nefarious utilisation of the school governance system by former Model C schools has resulted in a very acrimonious relationship between the government and former white schools. The disputes between these schools and government have played out numerous times before the courts which have been unable to adequately critique concepts such as "democracy in school governance" within the broader context of the Constitution's mandate to effect radical transformation in public schooling. The courts' reluctance to interrogate the notion of democracy in school governance stems from their respect for the doctrine of separation of powers. In this regard, the courts have been reluctant to "inhibit the executive and the legislature to take the necessary steps to carry out their mandate."[2] This reluctance extends to school governing bodies. In this regard, the Constitutional Court, in particular, has been hesitant to declare manifestly unconstitutional school policies unconstitutional but rather orders the state and SGBs to meaningfully engage with the ultimate purpose that the SGB will amend the policy itself. The Court shies away from declaring the policy unconstitutional because in its view, it is usurping the function of the governing body to decide on the content of the particular school policy. However, the courts are "constitutionally mandated to determine whether…policies and programmes are consistent with the Bill of Rights, and to provide 'appropriate relief' when infringements are found." [3] Furthermore, declaring a school policy unconstitutional is not akin to the Court writing the policy itself. Determining the

[2] O'Regan K "Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution" (2005) *PER* 5 ; Skelton (2012) 27 *SAPL* 394.
[3] Liebenberg S "Social rights and transformation in South Africa: Three frames" (2015) 31(3) *SAJHR* 447; Section 38 and section 172 of the Constitution.

substance of a policy falls within the purview of the SGB and a declaration of invalidity from the Court does not negate this. Additionally, by adopting this position of undue deference to governing bodies, the Court fails to recognise that SGBs are not necessarily benevolent institutions that are loyal to the transformative vision of the supreme South African Constitution. These institutions are inhabited by members whose views are rooted in a particular culture that may lead to the exclusion of learners on the basis of *inter alia*, race, language, class and pregnancy as this thesis has evidenced.

Although I have been very critical of the Constitutional Court's meaningful engagement approach in this study, I do not hold the view that the remedy is ineffective and inappropriate in *all* circumstances.[4] In certain instances, meaningful engagement amounts to a creative and effective remedy that can be employed by the courts in the protection of constitutional rights.[5] However, the Constitutional Court's jurisprudence is clear that meaningful engagement is the required norm in *all* education disputes.[6] Meaningful engagement has become the prism through which education-related disputes have to be resolved. This is problematic, in my view, precisely because the remedy is *not* appropriate in all circumstances. For example, how does meaningful engagement change the racist or intolerant culture of a school governing body? Of course, it is always a good idea to engage on issues such as racism in our country, however the distrust between people of different backgrounds in South Africa is so deeply entrenched that it is difficult to conceive how meaningful engagement can succeed in this regard.

Naturally, I am not oblivious to the institutional limitations of the courts. As Liebenberg denotes, the courts are not "directly responsible for making policy or advocating for social change."[7] However, the judiciary can protect its own institutional integrity and respect the legislative domain of SGBs while still honouring the transformative imperatives of the Constitution. In this regard, the Constitutional Court, as the apex Court of South Africa can play a symbolic role through the reasoning deployed in their judgments which can promote

4 Italics my emphasis.
5 Chenwi (2009) 2 *Constitutional Court Review* 381.
6 Italics my emphasis.
7 Liebenberg (2015) 31(3) *SAJHR* 447.

constitutional values and influence public discourse[8] on the systemic inequality in basic education perpetuated by school governing bodies.

Finally, I want to conclude this thesis by referring to an Amnesty International Report that was released in 2020 on the state of public schooling in South Africa. The reports finds that:

> Many schools and the communities they serve continue to live with the consequences of the political and economic decisions made during the apartheid era. The result is that a child's experience of education in South Africa still very much depends on where they are born, how wealthy they are, and the colour of their skin.

This thesis offers a contribution in elucidating how these historical patterns of systemic inequality are perpetuated in post-apartheid South Africa as well as demonstrating the weaknesses in the courts' approach to effectively remedy this disparity. By advancing the framework of "radical transformation" through which the systemic inequality in public basic education can be assessed, it is my hope that this thesis contributes to the academic discourse aimed at providing solutions to the marred legacy of inequality in our public schools.

[8] Brand D "The 'politics of need interpretation' and the adjudication of socio-economic rights claims in South Africa" in van der Walt AJ (ed) *Theories of social and economic justice* (2005) 17, 24 as cited in Liebenberg ibid 447-448.

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