

**ANALYSIS OF THE PERFORMANCE OF THE SOUTH AFRICAN
SCHOOLING SYSTEM AGAINST THE BACKGROUND OF THE
RIGHT TO EDUCATION**

BY

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SUMMARY

The continued poor performance of the South African schooling system has an effect in realizing the right to education as enshrined in the Constitution. In *Juma Masjid Primary School and others v Essay NO and others*¹ the Constitutional Court found that government has a duty to provide basic education in terms of its obligations under section 29(1)(a). This means that unlike “further” education, which the government need only make “progressively available” “through reasonable measures”, the right to basic education is incontrovertible and cannot be neglected on grounds of, say, a lack of funding or other resources however this right is effectively being denied by the poor quality of education.

The reason for this may be attributable to systemic challenges in the education sector as a whole, which may be causing poor performance as witnessed in the South African schooling system. The dawn of apartheid brought about many policy changes within the South African education system in order to address educational inequalities by deracialisation and compulsory schooling for all population groups. However, the South African schooling system is still characterised by unevenness and inequalities. In cases such as *Basic Education for All and others v Minister of Basic Education and others*² the court found that the right to basic education is not progressively realised, and does affect performance of the schooling system.

¹ CCT 29/10[2011] ZACC 13.

² 2014 3 All SA 56 GP.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND:

The educational crisis in South Africa is worse than ever. The current education system faces unprecedented challenges and the standard of education is very low, even in global terms.³ South African schools are amongst the worst performing in the world, in the World Economic Forum Report, South Africa was found to be the global worst for maths and science teaching.⁴ Challenges include parental indifference, ineffectual school governing bodies, poor teacher training, incompetent and unqualified teachers, ineffective district which are unable to address the day to day needs of schools, lack of accountability by those in charge of ensuring that budget allocation for the resources is distributed equally⁵ and widespread shortage of resources in education such as textbook, stationery and furnitures to enable continuous teaching, despite the large budgetary commitment by government. There can be no quality education under these circumstances.⁶

The pre-democracy education system was governed by the Bantu Education Act⁷ which created gaps in educational opportunities for different racial groups.⁸ Black education was not funded in the same manner as the education of the white minority. Control was centralised in the Bantu Education Department, a body dedicated to keeping education separate from and inferior to white education. The Bantu Education Act was succeeded by the National Policy for General Affairs Act⁹ which continued the differential treatment put in place by the Bantu Education Act.¹⁰ The

³ B M Modisaotsile The falling standards of basic education in South Africa Policy Brief 72 March 2012 pg 1.

⁴ Murphy O (2014) Realising the right to education in South Africa: The Role of Law, University of Sussex pg3.

⁵ Ibid n 3.

⁶ Ibid.

⁷ Act No.47 of 1953.

⁸ Ibid n 2.

⁹ Act No 76 of 1984.

¹⁰ http://www.photius.com/countries/south_Africa_society-Soweto-and-its-aftermath.

education system in the apartheid era was compulsory for all race and laws were enforced differently for whites and blacks.¹¹

The Bantu Education Act was probably one of the most significant pieces of legislation enacted by the apartheid government of South Africa. The impact of this Act continues to affect the educational and socio-economic landscape of the country, however the current crisis is overshadowing that legacy and is being greatly exacerbated for lack of attention in the interest of political expediency. When Hendrik Verwoerd launched the discriminatory legislation encapsulated in the Bantu Education Act 1953¹² he made the following unforgettable statement proclaiming a politics of exclusion:

There is no place for the Bantu in the European community above the level of certain forms of labour. It is no avail for him to receive a training which has as its aim, the absorption in the European community. That is quite absurd. Education must train people in accordance with their opportunities in life, according to the sphere in which they live.¹³

Post-apartheid government has brought transformation by dissolving the 19 ethnically, racially and regionally divided education departments into a single, non-ethnic, non-racial national education department.¹⁴ The emphasis of the post-apartheid government has been on the redress of the inequalities of the past. This is confirmed by Ramdass stating that the South African government strategized a programme on restructuring the education system on principles of equity, human rights, democracy and sustainable development.¹⁵ Changes included a unified, national education system, more democratic system of governance, new standards and qualifications authority, redistribution of financial and human resources, higher education reforms and the reorientation to outcomes based education.¹⁶ Furthermore, legislative and policy measures were adopted to put a more equitable

¹¹ Ibid n11.

¹² Ibid n7.

¹³ Lapping, 1987 cited by Boddy-Evans, 2009

¹⁴ Ibid n2.

¹⁵ Kem Ramdass, "Challenges facing education in South Africa.

¹⁶ Samantha Dominique Richmond, (2012) "South African Public Opinion on Government's Performance in the area of School Education in Post-Apartheid South Africa", Masters of Social Science in Democratic Governance, University of Cape Town.

system in place since 1994. The implementation of such regulatory mechanisms removed racial segregation in education .¹⁷

The first chapter of this dissertation sets forth the research problem; research aim or questions; assumptions; methodology; motivation or background and brief outline of chapters. The second chapter explores the history of the education system under the previous regime. The third chapter discusses the scope of application of the right to education and the extent of limitation. The fourth chapter analysis the current education policies and legislations. Chapter five discusses challenges faced by the South African schooling system, and chapter six provides recommendations and conclusions.

1.1 ASSUMPTION:

Education in South Africa is still in a state of crisis, although a greater portion of the country's annual national budget is allocated to the education sector. The current education system is still faced by challenges and the standard of quality education in South Africa is very low as comparable to other African countries.¹⁸ The current education system is faced by challenges, such as parents lack of participation in their children education; the weak functioning of School Governing Bodies(SGB's);poor teacher training; unskilled teachers; poor support for learners at home and shortage of resources in education despite the large budgetary commitment by government and lack of accountability.¹⁹ These challenges hinder the improvement of the quality of standards of education.²⁰Without resources, the school facilities and qualified teachers it is impossible to have efficient, effective and quality in education under these circumstances.²¹

1.2 RESEARCH PROBLEM

¹⁷ Ibid n 13.

¹⁸ B M Modisaotsile The falling standards of basic education in South Africa Policy Brief 72 March 2012 pg 1.

¹⁹ Ibid n 4.

²⁰ Supra note.21...

²¹ Ibid n 5.

Examining the challenges affecting performance of the South African school system, one can argue that policies and legislations in place provide a theoretically-sound framework to help address past legacies, as well the governing and financing of school education in South Africa.²² However, on the other hand, one cannot deny that there are still serious gaps not only between the rhetoric of school education policies and their practical implementation, but also between the monetary resources allocated to the school education system and the persistent inequalities in the provision and quality of school education in post- apartheid South Africa.²³

The South African schooling system is characterised by unevenness and inequality. Ocampo confirms that there are vast differences between historically privileged former white schools and the majority of deprived black schools. He argues that although South Africa's educational budget is proportionally among the highest in the world (20% of GDP), a crippling inequality, among other very serious problems of marked mismanagement, is still a very prominent feature after more than two decades of so-called radical reform.²⁴ These shortcomings present virtually insurmountable obstacles to the general well-being and progressive development of the South African schooling system.²⁵

In this dissertation poor educational performance will be measured against the constitutional obligation imposed on the education sector in the Constitution of the Republic of South Africa , 1996 (hereinafter referred to as "Constitution") and ultimately the national government. Specific attention will therefore be paid to educational policies and legislation as enabling mechanisms promoting realisation of universal access to equal and internationally benchmarked education.

1.3 RESEARCH AIM AND QUESTIONS

The study is premised on key questions:

²² Ibid n13.

²³ Supra n 1.

²⁴ M L Ocampo A brief history of education inequality from apartheid to the present.

²⁵ <http://www.news24.com/MyNews24/How-to-fix-SAs-education-system-20121106>.

- Is equal education for all realised as enshrined in the Constitution?.
- Do current education policies and legislations address the challenges faced by the South African school system, including inequities held over from the previous political dispensation, as well as obstacles to educational success subsisting contemporaneously under their own momentum?
- Is the poor performance of school system due to challenges within the education sector, and do the encountered challenges hinder the state realization of equal universal access of education to all as enshrined in the Constitution.

1.4 METHODOLOGY

On the first question the measures taken officially towards realising the constitutional right to education and the extent to which it is applied and limited will be investigated by analysing and applying the principles of law.

The effectiveness of policies and legislative measures in promoting performance of the education sector will be determined and its objectives analysed in response to the second question.

Challenges related to the education system, and the extent of their negative impact on the performance of the education sector will be identified and analysed in response to the third question.

The constitutional guarantees as laid down, together with relevant legislative measures, will be probed with particular reference to literature on the subject in order to shed further light on the subject as regards South African schools.

1.6 OUTLINE/STRUCTURE OF DISSERTATION:

The present study comprises six chapters: introductory chapter (research aim and questions, questions arising, and research methodology), four substantive discussion chapters, and chapter six containing recommendations and conclusions).

The second chapter comprises literature research (special reference is made to educational significance of apartheid during the period 1993-1999) .

Third: Scope of application of the right to education and extent of limitation of the right to education in terms of section 36 and realisation of the constitutional right to equal universal education on a competitive level is explored with particular reference to *Juma Masjid Primary School and others v Essay No and others*.²⁶

Fourth: Policy and legislative measures to enable and enjoin universal access to education of a proper (internationally benchmarked) standard throughout South Africa are examined with reference to their contribution or otherwise to fulfilment of the said constitutional injunction.

Fifth: Difficulties relating to internal dynamics of the South African schooling system seen in light of relevant cases such as *Section 27 and 2 Others v Minister of Education and Another*.²⁷

Six: Recommendations and conclusions deriving from the substance of the exploration contained in the substantive chapters are presented.

²⁶ 2011(8) BCLR 761(CC).

²⁷ Unreported case No:24565/2010 North Gauteng High Court.

CHAPTER 2

HISTORICAL OVERVIEW: COURSE OF EVENTS LEADING TO DEMOCRACY, AND THE EVENTS FOLLOWING THEREAFTER

2.1 Introduction:

This chapter will provide a historical overview of the evolution of education in South Africa, dating back to communalism²⁸ when education was administered informally in a tribal context among black populations inhabiting the southern African region,²⁹ mainly for the benefit of the extended family, up to colonial times when missionaries effectively took charge of education. This dispensation was eventually replaced by the era of apartheid,³⁰ for which read the overarching principle of racial segregation, predictably replaced in turn by the constitutional era when education was enshrined as an inalienable right protected in terms of section 29 of the Constitution. Apartheid introduced in 1948 under the then Nationalist government³¹ enforced segregation, racial discrimination and in effect political oppression,³² impacting negatively on education all round and prompting the national government to threaten a remedial takeover of education from the provincial governments who were then charged severally with their own respective education portfolios. The white race group was by far the better resourced of the spectrum of four classes (see below).³³

²⁸ SIMBO C (2013) The right to basic education, the South African constitution and the Juma Masjid case p 479.

²⁹ Ibid n 30

³⁰ Ibid n 30.

³¹ Fataar MA (1999) Education Policy Development 1994-1997 thesis Doctor of Philosophy, University of Cape Town.

³² Ibid n 34.

³³ Fataar MA (1999) Education Policy Development 1994-1997, thesis Doctor of Philosophy, University of Cape Town at 106.

2.2 Education in the apartheid era

Racial segregation in the apartheid era subsisted in dividing the population into four racial classes: Blacks, Indians, Coloureds and Whites. Each racial class had its own set of legislative provisions and educational dispensation set out in a separate curriculum.³⁴ The main features of the apartheid education system were huge inequality in the financing of education, different curricula for different race groups and restricted access of black learners to higher education.³⁵ The relevant statutory provisions as regards education were respectively contained in the Coloured Persons Education Act,³⁶ the Indian Education Act³⁷ and the Bantu Education Act.³⁸ The Bantu Education Act had two aims. First, it brought an end to missionary control of the education of black people and instituted a system of mass education, and secondly it legalised a special inferior form of education for blacks in South Africa. This education differentiated education more specifically from the education provided for the white minority.³⁹

Dr W.M Eiselen and Dr Hendrik F. Verwoerd were the architects of Bantu Education during the apartheid era.⁴⁰ Both Eiselen and Verwoerd followed Nazi-philosophy which was seen from Verwoerd's address to parliament on 03 September 1948 concerning a special form of education for natives.⁴¹ Verwoerd argued that "natives had limited opportunities in South Africa and as such they needed minimal education as they would never be absorbed in certain profession".⁴² He was quoted as saying:

There is no place for the Bantu in the European community above the level of certain forms of labour. It is no avail for him to receive a training which has as its aim, the absorption in the European community. Education must train people in

³⁴ Ibid 10.

³⁵ Nevondwe L, Odekuko 2013 Constitutional right to education in South Africa: Myth or reality?, University of Limpopo.

³⁶ No.47 of 1963.

³⁷ No.61 of 1965.

³⁸ No.47 of 1953.

³⁹ <http://overcomingapartheid.msu.edu/sidebar.php.lid=65-258-2>.

⁴⁰ Ibid.

⁴¹ Ibid n 37.

⁴² <http://hendrikverwoerd.blogspot.co.za/2010/12september-3-1948>.

accordance with their opportunities in life, according to the sphere in which they live.⁴³

In keeping with the ruling perceptions of the apartheid era, the curriculum for black students was designed to prepare them for unskilled jobs.⁴⁴ During apartheid-era, Black education was not supposed to drain government resources away from white education. This means that financial and other resources were for black education were limited. Furthermore, the curriculum for black students were designed to prepare them for unskilled jobs.⁴⁵

In 1976 violence erupted in Soweto when students took to the streets to protest against a government decision to offer high-school classes exclusively in Afrikaans⁴⁶. Most youths during the uprising abandoned schooling, while others left the country for military training camps run by the African National Congress (ANC).⁴⁷ The violent demonstrations prompted government to instruct the South Africa Institute of Race Relations to appoint a commission to investigate the matter. The finding was, predictably, that non discriminatory education should be offered⁴⁸, that community involvement should be encouraged, and that curricula and textbooks should be changed to ensure that blacks are not offended by default or otherwise.⁴⁹ The Research Council Review Commission was then appointed in June 1980 to review South African education, and the De Lange Commission was then appointed by the Review Commission to fill its brief. The said Commission's report stated that the equal status of black education should be duly recognised with all others as a basic right.⁵⁰ The outcome of findings published by the said commissions was that the legislator passed the National Policy for General Affairs Act⁵¹ in order to improve

⁴³ Ibid.

⁴⁴ Ibid n14.

⁴⁵ Ibid n12.

⁴⁶ SIMBO C (2013) The right to basic education, the South African constitution and the Juma Musjid case: An unqualified human right and a minimum core standard.

⁴⁷ Ibid.

⁴⁸ Ibid n 48.

⁴⁹ SIMBO C (2013) The right to basic education, the South African constitution and the Juma Musjid case: An unqualified human right and a minimum core standard.

⁵⁰ Ibid.

⁵¹ No.27 of 1984.

education for black people but without desegregating education, hence the vaunted Bantu Education system.⁵²

In 1983 the National Party (NP) Government introduced an amendment to the South African constitution to create the new Tricameral Parliament⁵³ consisting of three chambers, each being in charge of its own :The House of Assembly (White representatives);The House of Representatives (Coloured representatives) and The House of Delegates (Indian representatives).⁵⁴ The government argued that blacks did not qualify for representation in Parliament because they already had political rights in their respective homelands.⁵⁵ Each of the race groups represented as indicated above had its own education department (see earlier), and so did each. Education was compulsory for all race groups, but for different periods of their childhood. Black children were required to attend school between the ages of seven and sixteen years or Grade 7, depending which came first, and education for coloureds and whites also started at seven but continued for one statutory year less.⁵⁶

Since reforms kept on excluding blacks, however,President P.W. Botha indicated during his address at the opening of the National Party Natal Congress that apartheid was “outdated”. Consequently, in 1986 behind-the-scenes negotiations were initiated between government officials and the imprisoned ANC leader Nelson Mandela,⁵⁷ and by 1990 most apartheid laws were repealed and education was duly acknowledged to be a critical problem facing government.⁵⁸

2.3 Transition period between 1990 and 1999:

In 1990 President FW de Klerk established an Education Coordination Service charged with overall management of education on a unitary basis and do away with the bureaucratic duplication of designated race groups educational affairs as

⁵² <http://countrystudies.us/south-africa/56.htm>

⁵³ <http://www.sahistory.org.za/archive/tricameral-parliament>.

⁵⁴ Ibid n 54.

⁵⁵ <http://countrystudies.us/south-africa/56.htm>.

⁵⁶ Ibid n 53.

⁵⁷ “Rubicon Speech”.

⁵⁸ <http://countrystudies.us/south-africa/56.htm>

separate portfolios.⁵⁹ The transition era between 1990 has also seen a proliferation of education policies aimed addressing the legacy of apartheid.⁶⁰ In January 1993 De Klerk explicitly mentioned in his address to Parliament that racial segregation of the schooling system could no longer be countenanced and should be phased out, but that in doing so ample provision should be made for communities⁶¹ to preserve their religious and cultural values and their home languages.⁶²

Challenges of the pre-apartheid era were reflected in a number of white and green papers developed after transition period. The first White Paper on Education and Training Notice 196 of 1995 was more concerned with the transformation of the education and training system. From 1994 to 2007 education underwent transformation under a series of education ministers. First there was Minister Bengu whose term in office lasted from 1994 to 1999. He was succeeded by Asmal who vigorously sought to continue the transformation process until 2005. This was a period of adjustment to a democratisation process where parliament constituted for a five-year term⁶³ in terms of the Constitution and MPs sworn⁶⁴.

In 1995 White Paper on Education and Training Notice 196 which was aimed at transforming education and training, with particular reference to promoting non-discriminatory, democratic education ranging across issues such as access,⁶⁵ redress, equity and governance by School Governing Bodies (SGBs), with particular reference to the relationship between SGBs and provincial governance structures.⁶⁶

Education White Paper 2 Notice 130 of 1996 focused on Organisation, Governance and Funding of Schools (NDoE 1996) was an expansion of ideas developed in the First White Paper on Education and Training and proposed a new system of schools

⁵⁹ Ibid.

⁶⁰ Sayeed Y, Kanjee A & Nkomo M (2013) The search for quality education in post-apartheid South Africa Cape Town:HSRC.

⁶¹ Sayeed Y, Kanjee A & Nkomo M (2013) The search for quality education in post-apartheid South Africa Cape Town:HSRC.

⁶² Ibid n 59.

⁶³ Section 49(1) of the Constitution: The National Assembly is elected for a term of five years.

⁶⁴ Section 48 of the Constitution: Before members of the National Assembly begin to perform their function in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with schedule 2.

⁶⁵ Part 1.3 of Education White Paper 2 of 1996.

⁶⁶ Part 17(5) of Education White paper 2 of 1996.

organisation, governance and funding.⁶⁷ Both Education White Paper 3 Notice 1196 of 1997 and Education White Paper 4 Notice 2188 focused on the transformation of higher education and further education and training.

The first period of transition between 1993 and 1999 was especially significant as it required legislation and policy frameworks to expunge apartheid and transform the education system⁶⁸, for example promulgation of the National Education Policy Act, the Higher Education and Training Act, and the Further Education and Training Act.⁶⁹ Furthermore the Education Labour Relations Council (ELRC), the South African Quality Assurance Authority (SAQA), the National Qualifications Framework (NQF) and the South African Council for Educators (SACE) were established.⁷⁰

Besides 16 full statutes, a number of draft amendment bills introduced by Bengu were enacted during Asmal's tenure⁷¹, the most significant being South Africa Council for Educators Act⁷² (SACE), the Adult Basic Education and Training Act⁷³ (ABET) and the General and Further Education and Training Quality Assurance Act⁷⁴ (GFETQA), along with amendments to the Education Amendment Act⁷⁵ and the Higher Education Amendments Act⁷⁶, White Paper 5 on Early Childhood Education and White Paper 6 on Special Needs Education. The purpose of the two white papers was to create a more inclusive education and training system.⁷⁷

Legislation passed during Naledi Pandor's tenure from 2004 to 2009 included a White Paper on Education and the Education Laws Amendment Act⁷⁸. One of the biggest changes during this tenure was centralised planning regulated by promulgation of the National Education Policy Act (NEPA)⁷⁹ which mandates the education minister to determine national policy for the planning, provision, financing,

⁶⁷ Ibid n 58.

⁶⁸ Ibid 58.

⁶⁹ Ibid.

⁷⁰ Ibid n 58.

⁷¹ Ibid.

⁷² No.31 of 2000.

⁷³ No.52 of 2000.

⁷⁴ No.58 of 2001.

⁷⁵ No.48 of 1999.

⁷⁶ No 1001 of 1997.

⁷⁷ Sayeed Y , Kanjee A & Nkomo M (2013) The search for quality education in post-apartheid South Africa Cape Town: HSRC page 21.

⁷⁸ No 24 2005.

⁷⁹ No 27 of 1996.

staffing, coordination, management, governance, monitoring and evaluation of education in consultation with provinces⁸⁰, to develop policies in consultation with relevant bodies⁸¹, and to promote cooperative governance in educational matters within organs of state⁸².

Minister Pandor's focus was on school governance. The biggest challenge was to develop a unified education system from a fragmented, racially divided system. The legislative framework which transformed the educational governance in South Africa was the South African Schools Act (SASA)⁸³ and the National Education Policy Act (NEPA)⁸⁴. Access to schooling was based on criteria other than race, and school administration was regulated in each instance by School Governing Bodies (SGBs) composed of teachers, parents, to which were added learners in secondary schools⁸⁵ so that all stakeholders would be actively involved in the operation and decision-making process of their schools. To ensure the provision of education to poor communities the department of education introduced the No-Fee policy in 2006⁸⁶ to enable a ministerial grant of exemption from fees where schools were judged too poor, thus serving the constitutional principle of not allowing socio economic difficulties to stand in the way of providing education for the entire population.

2.4 Conclusion:

⁸⁰ Section 3: **Determination of national education policy by Minister.**—(1) The Minister shall determine national education policy in accordance with the provisions of the Constitution and this Act.

⁸¹ Section 3(5): **Consultation on national education policy.**—(1) Policy contemplated in section 3 shall be determined by the Minister after consultation with such appropriate consultative bodies as have been established for that purpose in terms of section 11 or any other applicable law, and with the Council.

⁸² Section 3(4)p: Subject to the provisions of subsections (1) to (3), the Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system and, without derogating from the generality of this section, may determine national policy for— (p)

co-operation between the Department and—

- (i) other state departments;
- (ii) provincial education departments;
- (iii) local government; and
- (iv) non-government organisations,

with a view to advancing the national education policy contemplated in this section and the Reconstruction and Development Programme;

⁸³ No 84 of 1996.

⁸⁴ Ibid n 78.

⁸⁵ Ibid.

⁸⁶ Notice No 1052 of 2006.

In summary: Education provision progressed from communalism to colonialism to Bantu Education (under apartheid) until it was eventually protected by a constitutional set of democratic guarantees, particularly s 29 of the Constitution. Given the unfavourable history of education, the post-apartheid government has declared its commitment to ensuring equality, democracy, efficiency, quality and effectiveness throughout the education system. A variety of policies and legal dispensations have been introduced to fulfil government's undertaking concerning education, but instead of the gradual improvement one would naturally expect in view of the declared commitment there seems to be a worsening of conditions judging by results, which seems to be causing mounting dissatisfaction. Politicians' pretexts and excuses seem to be wearing thin, as well they might after two decades of promises.

What should be acknowledged, however, is that 19 racially, ethnically, and regionally divided departments of education have been united into a single centralised system since 1994 and discriminatory access to education has been abolished. Despite remedial measures as noted, however, education in South Africa remains parlous, to say the least (in fact, it remains to be seen whether the situation is at all remediable, and if so whether remediation will be at all adequate).

CHAPTER 3

SCOPE OF APPLICATION OF THE RIGHT TO EDUCATION AND EXTENT

3.1 Introduction

This chapter will address the question of whether the right to education as enshrined in the Constitution of the Republic of South Africa, 1996 is duly observed in that equal education of an internationally acceptable and competitive standard is a practical reality that is maintained consistently from year to year. It will therefore pay close attention to the quality of education provided across the board in South Africa in accordance with the country's Constitution, and the extent to which s 36 of that Act is upheld as a limiting provision. It will further discuss obligations imposed by international instruments or conventions on the right to equal education for all and how and to what extent they influence the right to equal education in South Africa will be analysed. Compliance with obligations imposed by International Instruments or Conventions concerning education provision as noted above will also be considered with particular reference to measures introduced by the state towards enabling proper education for all.

The right to education is protected in section 29(1) which states that: (1) Everyone has the right (a) to basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible. Section 29 of the Constitution is two fold consisting of the right to basic education and to further education. The right to basic education is not contingent upon resources available to the state and it is also not subject to the qualification applicable to further education. The state is required to realise further education by ensuring that "it is progressively available and accessible through its reasonable measures ". Like all other rights, the right to basic education imposes a

triad of obligations on the state which includes obligation to respect, protect and fulfil this right.⁸⁷

Principles of law applied on the case of *Juma Masjid Primary School and others v Essay No and others*⁸⁸ will be discussed to determine the extent to which the right to education can be limited.

3.2 The right to education:

The right to education is a fundamental human right not only because it contributes to the achievement of other rights, but also because the United Nations (UN) has given priority to it as one of the goals to be achieved in the Millennium Development Goals (MDG).⁸⁹ The right to education is protected by internationally agreed instruments in the form of Declarations, Covenants and Conventions. The said instruments have been written into South Africa domestic law that must be obeyed.⁹⁰ These international instruments, treaties and covenants once they are ratified and incorporated into the domestic law they become law and are legally binding therefore form the basis for legal protection of human rights.⁹¹ Of particular relevance in this

⁸⁷ Khayundi F 2014 The South African Human Rights Commission Role in the provision, protection and monitoring the rights to education in South Africa, Rhodes University.

⁸⁸ 2011(8)BCLR 761(CC).

⁸⁹ Djouguella FD 2013 The right to education for the girl-child and problem facing adolescent girls in pursuit of their right to education: A focus of South Africa, University of Pretoria pg 2.

⁹⁰ Section 231. (1) of the Constitution: The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) 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.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

⁹¹ Section 231. (1) of the Constitution: The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly

regard is General Comment 13 of the International Covenant on Social, Economic and Cultural Rights (ICESCR), which reads as follows:⁹²

Comment 46: The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

47: According to comment 47 the obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. States parties have an obligation to fulfil or provide the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.

The right to education is recognised across the globe and is protected by constitutions of most countries.⁹³ It encompasses three basic rights to receive education, choose education and equal education.⁹⁴ Various Conventions such as the Recommendation Concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms⁹⁵ adopted in 1974 define education as an overarching or comprehensive social process by means of which individuals and social groups learn to develop consciously as a sustained intellectual endeavour. The Covenant further states that education is for the benefit of national and international communities regardless of

and the Council within a reasonable time.

(4) 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.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

⁹² Article 13 of the International Covenant on Economic, Social and Cultural Rights (1966) Para 46 and 47.

⁹³ Sithole M D 2012 Child refugee rights in Cape Town: The right to access education, Masters of Philosophy in Development Studies, University of Cape Town,

⁹⁴ Ibid n 90.

⁹⁵ 19 November 1974.

the capacities, attitudes, aptitudes and knowledge of the persons concerned.⁹⁶ The definition of the Recommendation is in agreement with the provisions of General Comment No.1 on article 29 (relating to education for children) of the Convention on the Rights of the Child(CRC)⁹⁷ in terms of which education is considered to embrace a broad range of life experiences and learning processes, that will enable children, individually and collectively, to develop their personalities, talents and abilities and live a full and satisfying social life.⁹⁸ Article 13 of ICESCR ⁹⁹ further emphasises that education should confer the ability to appreciate and uphold human rights, besides developing learner's ability to make sound political and civil choices.The Covenant further emphasises compulsory education and explains state obligations for a detailed plan of action for the progressive implementation of the right to compulsory education free of charge for all.¹⁰⁰

As previously stated, section 29(1) of the Constitution states that everyone has the right (a) to basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively accessible by taking positive measures to remove barriers (eg. discrimination) to further education.¹⁰¹ Socio-economic rights such as the right to education are subject to progressive realisation.¹⁰² However there is widespread acceptance at the international level that children's right to primary education is not subject to progressive realisation.¹⁰³ Primary education is also considered to be a minimum core obligation for all states, and therefore there is a duty upon states to implement it immediately.¹⁰⁴ Education is not only a basic right but the cornerstone of socioeconomic development¹⁰⁵; moreover it equips people to gain the necessities

⁹⁶ Simbo C (2013) The right to basic education, the South African constitution and the Juma Masjid case: An unqualified human right and a minimum core standard 481.

⁹⁷ General Comment No.1 (2001) Article 29(1).

⁹⁸ Ibid n 35.

⁹⁹ Adopted General Assembly Resolution 2200A(XXI) of 16 December 1966.

¹⁰⁰ Kamga SAD 2011 Realising the right to primary education in Cameroon,University of Pretoria at Art 14 and ESRC Committee General Comment 11.

¹⁰¹ Simbo C (2013) The right to basic education, the South African constitution and the Juma Masjid case: An unqualified human right and a minimum core standard.

¹⁰²Murungi LN 2015 Inclusive education in South Africa:issues in its conceptualisation and implementation, North West University pg 18.

¹⁰³ Ibid 99,

¹⁰⁴ Supra above.

¹⁰⁵ Beiter K The protection of the right to education by international law 2006 at 28-30.

for survival and prosperity¹⁰⁶ (eg. securing employment that offers an escape from poverty)¹⁰⁷, and enables people to uphold cultural and religious values that form the substance of a way of life that preserves a satisfying cultural identity and a sense of collective worthiness and solidarity that the population can share equally¹⁰⁸ in a mutually helpful way that empowers them to realise their potential as individuals by freely and confidently developing skills and talents and a sense of vocation, all of which conduce to their self-esteem and strength of character, with the result that they will be able to overcome setbacks and difficulties encountered in the normal course of their lives with relative ease and even grow stronger and wiser in the process.¹⁰⁹ Education enables a person to participate diligently in the community by adding and conserving cultural and religious values, thereby enabling the community to choose the way it wants to live.¹¹⁰

Education further has the ability to make individuals equal in terms of competing against one another, since it gives them the ability to be free to develop talent, individual callings and skills that enable a person to manoeuvre through all difficulties that weaken the human condition.¹¹¹ The denial of access to education is also the denial of the full enjoyment of other rights that enable an individual to develop to his or her full potential and participate meaningfully in society.¹¹² As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.¹¹³

¹⁰⁶ Ibid.

¹⁰⁷ Coomans F "In search of the core content of the right to education" and Chapman A R Core obligations: building a framework for economic, social and cultural rights(2002) at 220.

¹⁰⁸ Beiter K The protection of the right to education by international law Dordrecht Martins Nijhoff Publisher 2006 at 28-30

¹⁰⁹ Article 13 of the International Covenant on Economic, Social Cultural Rights (1966) Para 46 and 47.

¹¹⁰ Beiter K The protection of the right to education by international law Dordrecht Martins Nijhoff Publisher 2006 at 28-30

¹¹¹ Ibid 95.

¹¹² Du Plessis P, Conley L, Loock C 2007 The right to education: Are we facing challenges? University of Johannesburg.

¹¹³ Mbajorgu G Striving for quality education: The right to education as a socio-economic right 2014 University of Limpopo.

It follows, therefore, that education is an indispensable tool to protect human dignity and ensure personal development in accordance with article 1 of the Universal Declaration of Human Rights(UDHR)¹¹⁴ which states that by definition all human beings are born free and equal, and are therefore naturally endowed with human dignity and the rights that are indispensable to upholding human dignity.UDHR proclaim the right to education as an important right, because education is considered by the Declaration to be not only a right in itself but also a means of promoting peace and respect for human rights and fundamental freedoms.¹¹⁵ Education is therefore the cornerstone of a worthy human existence.The significance of education as noted here will be explored in the next paragraph with particular reference to consonance with international instruments.

3.3 The extent to which the right to education is upheld in compliance with international instruments

Obligations imposed by international instruments such as UDHR¹¹⁶; the Convention Against Discrimination in Education (CDE) adopted 14 December 1960; the Convention on the Rights of the Child (CRC)¹¹⁷ and the ICESCR¹¹⁸ and their influence on practical realities of education in South Africa are discussed in this paragraph.

Within the context of the Constitution, international human rights instrument such as UDHR of 1948, ICESCR of 1960, International Covenant on Civil and Political Rights (ICCPR) of 1966, and the African Commission on Human and Political Rights (ACHPR) of 1990 inspired the content of the South African Bill of Rights.¹¹⁹ South Africa has ratified the principal instrument on children's rights, namely the Convention on the Rights of the Child. It has signed but not ratified the Convention

¹¹⁴ Adopted by General Assembly Resolution 217A(III) of 10 December 1948.

¹¹⁵ Chofor Che.C Educational opportunities for the girl child in Africa:A necessary revisit of discrimination factor with reference to Egypt,South Africa & Cameroon,The American University in Cairo,Egypt.

¹¹⁶ Ibid.

¹¹⁷ Ibid n 91.

¹¹⁸ Ibid n 93.

¹¹⁹ L Arendse The obligation to provide free basic education in South Africa:An international law perspective PER/PELJ 2011 volume 14 no 6 99..

against Discrimination in Education and the ICESCR.¹²⁰ Non-ratification of does not preclude consultation of such documents to determine the extent to which the right to basic education is upheld in South Africa. South African common law treats international law as part of its national law.¹²¹ The Constitution is explicit that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. In interpreting the rights in the Bill of Rights, section 39(1)(b) of the Constitution requires courts to take cognisance of international law, which is particularly apposite when interpreting the Bill of Rights.

As regards instruments relating to the right to education, CDE reaffirms the values of the United Nations Educational, Scientific and Cultural Organization (UNESCO), and advocates the ideals of equality of educational opportunity without regard to race, sex, or any other consideration¹²², CDE not only promotes discrimination in education, it also promotes equality of opportunity and equal treatment for all.¹²³ The ICESCR emphasises the importance of education and recognition of the right to education by states who are parties to that covenant.¹²⁴, in particular, article 13 of the ICESCR promotes full realisation of the right to education by state parties who must therefore adopt reasonable measures to ensure that primary education is compulsory and freely available¹²⁵ while technical and vocational secondary education¹²⁶ must be at least available and accessible.¹²⁷ The Committee on Economic, Social and Cultural Rights (hereafter referred to as the "Committee") has stated that 'reasonable measures' means that the state must demonstrate that the measures are "deliberate, concrete and targeted as clearly as possible" towards meeting its obligations.¹²⁸ The Committee has also identified the essential elements to the right to education as including accessibility and availability.¹²⁹ It further considers that primary "education

¹²⁰ Ibid.

¹²¹ Section 232 of Constitution: Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

¹²² Article 1 Convention Against Discrimination in Education 1960.

¹²³ Article 1,2,3,4,5 Convention Against Discrimination in Education 1960.

¹²⁴ Article 13 International Covenant on Economic, Social and Cultural Rights of 1966.

¹²⁵ Article 13(2)(a) International Covenant on Economic, Social and Cultural Rights of 1966.

¹²⁶ Article 6(2) of International Covenant on Economic, Social and Cultural Rights of 1966.

¹²⁷ Article 13(2)(b) International Covenant on Economic, Social and Cultural Rights of 1966.

¹²⁸ Committee on Economic, Social and Cultural Rights General Comment 3, The nature of states parties obligations (fifth session 1990, U.N Doc.E/1991/23.

¹²⁹ Committee on Economic, Social and Cultural Rights Twenty-First session 15 November-3 December 1999.

must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community.¹³⁰

In its paper for a twenty-first session to discuss General Comment 13 ICESCR¹³¹ has asserted that availability implies availability that is ample for the relevant needs as dictated by the day to day functioning of schools, while accessibility means that education should be physically and economically accessible to all without discrimination and free from barriers, especially financial barriers.¹³² Article 13(2)(c) further state that further education should be made equally accessible to all, base on available capacity and through every appropriate means. The Committee on Economic, Social and Cultural Rights ('CESCR') considers that primary "education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community.

Recognition of the right to education in Article 11 (3) of African Charter on the Rights and Welfare of the Child; Article 13 (2) of ICESCR; Article 28 of the CRC and Article 26 (1) of the UDHR provides for basic compulsory education¹³³, while Article 26(2) makes the development of the human personality and the strengthening of respect for human rights and fundamental freedoms part of the content of human rights education.¹³⁴The question of how and to what extent international instruments influence the right to equal education in South Africa is answered and evident on the fact that some educational policies and legislations are developed to be in line or consistent with international instrument.

Legislation such as the South African Schools Act 86 of 1996 has been developed to be in line with international instruments such as the African Charter on the Rights and Welfare of the Child; Article 13 (2) of the ICESCR; Article 28 of the; and Article 26 (1) of the UDHR, stating that education from Grade R to Grade 9 is compulsory, but

¹³⁰ Mokkelgjerd A 2011The right to primary education in Africa-A human right or an unfulfilled promise during situations of emergency, University of Oslo pg 11.

¹³¹ Ibid.

¹³² Ibid n 114.

¹³³ Heyman J,Ramba A,Cassola A 2014 Constitutional rights of education and their relationship to National Policy and school enrolment,UCLA fielding school of Public Health.

¹³⁴ Horn N Introduction:Human rights education in the context of United Nations.

unlike international instruments, falls short of stating that it is free.¹³⁵ In terms of Article 13 of the ICESCR basic education should not only be compulsory but also free; moreover that secondary education in its different forms, including technical and vocational secondary education, should be generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.¹³⁶ The right to education is a fundamental right incorporated in the bill of rights, which was drafted in consonance with international instruments promoting the right to education.

3.4 Limitation of the right to education in terms of section 36 of the Constitution

The paragraph provides the extent to which the right to education as enshrined in the Constitution is applied and limited in terms of section 36 of the Constitution. In determining the extent of application of the right to education as prescribed in the Constitution one will have to distinguish the application and limitation of the right.

3.4.1 Section 36 analysis on the right to education:

Rights laid down in the South African Bill of Rights in chapter 2 of the Constitution are subject to the general limitations clause contained in section 36 of the Constitution to the effect that the rights as stipulated in the Bill of Rights may be limited only in terms of law of general application, provided such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and provided further that due cognisance is taken of all relevant factors, including the following—

¹³⁵ The following instruments provides for compulsory basic education:
Article 11 (3) of African Charter on the Rights and Welfare of the Child.
Article 13 (2) of International Covenant on Economic, Social and Cultural Rights.
Article 28 of the Convention on the Rights of the Child.
Article 26 (1) of the Universal Declaration of Human Rights.

¹³⁶ Article 13(2)(b).

- (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.

The analysis of the limitation of the applicable right involves the court applying the factors listed above in order to determine whether the limitation of that right is constitutionally reasonable and justifiable. There are two general requirements that the limitation would have to comply with in order to satisfy the criteria in section 36. Firstly, it must constitute a law of general application and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The South African constitutional framework therefore envisages situations where rights enshrined in the Constitution can be limited, but sets a high standard for when such limitations would be justifiable.

3.4.2 Limitation of the right to education.

The provision of basic education is not subject to a restriction like “reasonable legislative and other measures”, which is at the core of the reasonableness standard adopted by the Constitutional Court in social and economic rights cases dealing with the right to housing, health care and water.¹³⁷ This means that section 29(1)(a) is not dependent on the availability of resources. The Constitutional Court stated in the *Grootboom* case that: “when interpreting socioeconomic rights that are dependent on the availability of resources the government’s obligation depends on the availability of resources and such obligation cannot be more than what the government’s resources permit”.

In *ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of certain provisions of the Gauteng School Education Bill of 1995*¹³⁸, the court held that:

¹³⁷ Woolman S & Fleisch B *The Constitution in the classroom: Law and education in South Africa 1994-2008* (2009) at 120.

¹³⁸ 1995 3 SA 165 (CC).

The right to basic education 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.¹³⁹

Berger further states that section 29(1)(a) is a strong positive right, a right that can be asserted regardless of the state's other budgetary imperatives.¹⁴⁰

The state is obliged to take positive steps to ensure that basic education is provided. Unlike further education, which the government need only make "progressively available" "through reasonable measures", the right to basic education appears absolute.¹⁴¹

In *Juma Masjid Primary School and others v Essay NO and others*¹⁴² Justice Nkabinde pointed out that the right to basic education guaranteed in section 29(1)(a) of the Bill of Rights, unlike some of the other socio-economic rights, is immediately realisable. The Constitutional Court further confirms in the said case that because there is no internal limitation in section 29(1)(a) requiring "access" to the right, that the right be progressively realised within available resources, subject to "reasonable legislative measures". The right to basic education as provided 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".

The Constitutional Court further held that in *Juma Masjid* judgment that government had failed to fulfil its constitutional obligation to provide basic education by failing to pay the Juma Masjid Trust its outstanding arrears for the maintenance of the buildings it was using as the Juma Masjid Primary School. When it comes to the provision of basic education, the government should endeavour diligently to provide basic education or to mobilise resources for its provision since the lack of resources does not relieve it from its obligations imposed by section 29(1)(a).

¹³⁹ Ibid par 9.

¹⁴⁰ E Berger *The Right to education under the South African Constitution* 2003 103(3) *Columbia Law Review* 625.

¹⁴¹ Ibid n 39.

¹⁴² 2011 (8) BCLR 761 (CC).

Section 29(1)(a) ought to mean that basic education is not subject to provision over time but to immediate provision when needed, and the government cannot absolve itself from its obligations on grounds that it is in the process of meeting them.¹⁴³ The distinction between section 29(1)(a) and 29(1)(b) ought to justify the argument that basic education is an unqualified human right that should be provided immediately as the need arises. It is quite clear that, based on its formulation the Constitutional Court in the *Juma Masjid* case¹⁴⁴ has made it abundantly clear that section 29(1)(a) is an unqualified right which is not subject to available resources of the state. Both section 29(1)(a) and (b) can only be limited in terms of the law of general application provided that all the factors considered in section 36 are taken into account.

3.5 Measures taken by the state to give effect to the right to education

Measures and their adequacy taken by the state to enable the maximum performance of the South African schooling system are surveyed in this paragraph. As noted, the Constitution is explicit that this right is absolute regardless of the availability state resources and therefore is not qualified by the availability of resources.

The schooling system still has major difficulties to overcome. In the case of *Basic Education for All and others v Minister of Basic Education and others*¹⁴⁵ the court held that the non-delivery of textbooks to learners in Limpopo was a violation of learners' right to basic education and their right to equality and dignity. The aforesaid proceedings against the minister is illustrative of the said difficulties. The court determined that despite Government's endeavours the right to education was nevertheless infringed in the state's failure to deliver textbooks as required.¹⁴⁶

Another case in point is *Centre for Child Law v Government of the Eastern Cape Province*¹⁴⁷ (so called "Mud School" case): In this case the school has battled for

¹⁴³ Berger E "The right to education under the South African constitution" (2003)103(3) Columbia Law Review 625.

¹⁴⁴ Supra n 61.

¹⁴⁵ Supra n 2.

¹⁴⁶ Ibid n 138.

¹⁴⁷ Case No 504/10 Eastern Cape Province Eastern Cape High Court, Bisho.

almost a decade to get attention from the provincial department about their severe infrastructure problems. The schools faced problems presented by the dilapidated mud building serving as school premises, lack of furniture and poor sanitation provision. The Legal Resource Centre in Grahamstown took up the matter on behalf of the school, and the Centre for Child Law which acted in the public interest and on behalf of the learners. The Minister of Basic Education was joined as respondent and the relief was framed to benefit not only the 7 schools but all schools suffering from similar infrastructure backlog. The court settled the matter resulting in a far-reaching “memorandum of understanding” which pledged a total of 8.2 Billion over a 3 year period, specific amounts earmarked for the 7 schools, and a plan for infrastructure to be managed by the national Department of Basic Education, undertaking about interim arrangement such as prefabricated buildings and installations of water tanks.¹⁴⁸

3.6 Conclusion:

My inference will be based on analysis of the right to education as enshrined in the Constitution, the extent to which the right to education can be limited in terms of Section 36 of the Constitution, obligations imposed by international instruments or conventions, and whether measures taken by the state are adequate to allow the maximum performance of the South African schooling system. The right to education is protected in section 29(1) which states that everyone has the right (a) to basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible. Lack of resources is not a justifiable ground for failure to take measures to realise the right to basic education¹⁴⁹

Recognition of the right to education, internationally and in the South African constitutional context, is based on human rights instruments ratified by national states in the form of declarations, covenants and conventions signifying the upholding of human rights. Section 231(1) of the Constitution outlines the process of

¹⁴⁸A Skelton A critical evaluation of recent education law (2013) 1 p 7 De jure.

¹⁴⁹ SIMBO C (2013) The right to basic education, the South African constitution and the Juma Masjid case: An unqualified human right and a minimum core standard.

incorporating international instruments into national law. The Constitution is also explicit on the fact that international customary law is a law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. On this basis international instruments such as the Universal Declaration of Human Rights (UDHR), the Convention against Discrimination in Education (CDE) adopted 14 December 1960, the Convention on the Rights of the Child (CRC), and the International Covenant on Economic Social Cultural Rights (ICESCR) reaffirmed recognition of the right to education, from which it is clear that the right to education is universally recognised.¹⁵⁰

In terms of Section 36 of the Constitution all rights contained in the South African Bill of Rights are subject to the general limitations clause which states that the said rights may be limited in terms of law of general application provided 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.

On balance, however, the scope of application of the right to education one can conclude that it is promoted vehemently in most of the covenant and international instruments. Drafters of the Constitution formulated s. 29 (1) (a) of the Constitution in unconditional terms¹⁵¹, to ensure that its realisation is not and is not subject to available resources. Despite the favourable legislative climate, however, educational standards in South Africa are unacceptably low compared to the generality of other states regardless of their relative state of prosperity.

¹⁵⁰ Ibid n 109.

¹⁵¹ Seloane M "The right to education: Lessons from Grootboom.

CHAPTER FOUR

ANALYSIS OF CURRENT EDUCATION POLICIES AND LEGISLATION:

4.1 Introduction:

This chapter addresses the second research question, namely whether post-apartheid policy or legislative measures address challenges faced by the South African school system, and if so, to what effect. The specific focus will be on how and to what extent they are responsible for the poor performance of schools. The demise of apartheid in 1994 was heralded nationally and internationally as a victory for democracy and human rights.¹⁵² It offered unique opportunities and responsibilities to repair a highly fragmented and discriminatory system, and to establish a unified national system underpinned by democracy, equity, redress, transparency and participation.¹⁵³ Social reconstruction had to be linked to economic development in the context of global economies and internalisation.¹⁵⁴ The vision of the new government with regard to education, as expressed in the Constitution, became that of “a future founded on recognition, democracy and opportunities for all south africans, irrespective of colour, race, class, belief, and sex”.¹⁵⁵

In the build-up to the 1994 election, several organisations produced policy statements that had a profound influence on education policy-making and implementation.¹⁵⁶ The National Education Coordinating Committee (NECC) had led the way in tabling a policy framework asserting the right of all people to education and calling for the integration of progressive education norms into the post-apartheid

¹⁵² Education in South Africa: achievement since 1994. compiled by officials of the Department of education and education policy unit of the University of Witwatersrand.

¹⁵³ Ibid 1.

¹⁵⁴ Supra above.

¹⁵⁵ National Department of Education 1997b:9.

¹⁵⁶ Jonathan D. Jansen & Yusuf Sayed(2001) Implementing education policies: the South African experience at Ch 6 at 74.

education model.¹⁵⁷ NECC's assertions of people's right to education empowered communities and individuals by giving them an equal opportunity in education, a new curriculum and ethos, and a voice in the governance of education and the formulation of education policy.¹⁵⁸ The NECC sponsored the NEPI (National Educational Policy Investigation) process which went on to provide a set of policy options that incorporated the principles that had been articulated by the NECC. NEPI gave a clear indication of the complex nature of the policy changes that a new educational dispensation would require.¹⁵⁹ The new educational dispensation sought to address the inequitable policies which exclude most black children generally, children with disabilities and children living in rural areas from access to quality education.¹⁶⁰

4.2 Objectives of post-1994 education policies and legislation

Educational transformation was a top legislative priority during the transition to democracy¹⁶¹; consequently a number of enactments and policies were proclaimed to eliminate discrimination and inequalities in the system. In the list of legislative priority the following areas to be changed were identified: the development of an integrated approach to education and training based on a new national qualifications framework; the provision of free and compulsory education for ten years to all children; restructuring the basis of school ownership, governance and finance; and the restructuring of the higher education system.

Government initiatives leading to the educational framework of 1994 will be discussed in the next paragraph under the following heads: development of an integrated approach to education and training based on a new national qualifications

¹⁵⁷ See id at 74.

¹⁵⁸ Ibid n 151.

¹⁵⁹ Jonathan D. Jansen & Yusuf Sayed (2001) Implementing education policies: the South African experience at Chapter 6.

¹⁶⁰ Sayeed Y, Kanjee A & Nkomo M (2013) The search for quality education in post-apartheid South Africa Cape Town: HSRC.

¹⁶¹ Ibid 76.

framework; provision of free and compulsory education for ten years across the entire population; restructuring the basis of school ownership, governance and finance; and restructuring the higher education system.

4.2.1 The Constitution:

The process of transforming the education sector started with promulgation of the SA Constitution. The South African constitution entrenches both civil and political rights and socioeconomic rights.¹⁶² It provides the mechanism for our departure from apartheid and its legacy of injustice, inequality and deprivation, and contains the directives for creating a new society based on human dignity, equality, freedom and justice.¹⁶³ As noted above, according to Section 1 of that document education had to be freely accessible to all and based on values of human dignity, equality, human rights and freedom, non-racism and non-sexism¹⁶⁴ The 1996 Constitution laid the foundation for a democratic and open society which has high regard for human rights, children's rights and in particular the right of learners to education.¹⁶⁵ Modern human rights terminology distinguishes three generations of human rights. The first generation of civil and political rights, the second generation of economic, social and cultural rights, and the third generation of solidarity or group rights.¹⁶⁶ The right to education is the only right that reveals aspects of all three generations.¹⁶⁷ One of the most interesting commentaries on the role of Constitution is to be found in the White Paper on Education and Training published in March 1995 (DoE, 1995d), which affirms and specifies the fundamental rights and freedoms of all persons¹⁶⁸; and in the same vein the 1995 Education White Paper specifying that the unqualified right to education applies "to all persons and basic education is a legal entitlement to which every person has a claim and attaining this level of availability of opportunity for basic

¹⁶² Theooha RH 2011 Realising the right to education in Lesotho 2011, University of Pretoria pg 12.

¹⁶³ Malherbe R 2000 A fresh start I : Education rights in South Africa, Rand Afrikaans University.

¹⁶⁴ Section 29(1) of Constitution.

¹⁶⁵ Mavibela UJ 2001 Learners right to education and the role of the public schools assisting learners to realise this right, Masters of education, University of South Africa pg 3.

¹⁶⁶ Mavibela UJ 2001 Learners right to education and the role of the public schools assisting learners to realise this right, Masters of education, University of South Africa pg 3.

¹⁶⁷ Ibid.

¹⁶⁸ Enver Motala and John Pampallis (2001) Education & Equity: The impact of state policies on South African Education.

education will be an immense achievement in the reconstruction and development of the country.”¹⁶⁹

4.2.2 The National Education Policy Act:

The National Education Policy Act (NEPA)¹⁷⁰ operationalises the constitutional provisions relating to education and formalises relations between national and provincial authorities and encapsulated the policy, legislative and monitoring responsibilities of the Minister of Education, as well as the relations between national and provincial authorities, in a statutory enactment. The constitutional provisions relating to education are operationalised through the National Education Policy Act.¹⁷¹ The principles on which the South African Schools Act (SASA) ¹⁷² are based are echoed and reaffirmed in the National Education Policy of 1996. The NEPA established the Council of Education Ministers (CEM) and Heads of Education Departments Committee (HEDCOM) as intergovernmental forums to collaborate in building the new systems and provides for the determination of national policies in general and further education and training for amongst others, curriculum, assessment, language policy and quality assurance. NEPA embodies the principle of cooperative governance, elaborated in Chapter 3 of the Constitution.¹⁷³

4.2.3 The South African Schools Act:

The South African Schools Act (SASA)¹⁷⁴ promotes access, quality and democratic governance in the schooling system. It ensures that all learners have the right to access quality education without discrimination and make schooling compulsory for children aged 7-14 years.¹⁷⁵ It provides for independent¹⁷⁶ and public schools¹⁷⁷. The

¹⁶⁹ Ibid n 158.

¹⁷⁰ No 27 of 1996.

¹⁷¹ Ibid n 160.

¹⁷² No 84 of 1996.

¹⁷³ Section 40 and 41 of Constitution.

¹⁷⁴ Ibid n 162.

¹⁷⁵ Section 3(1) of Act 84 of 1996.

¹⁷⁶ Section 45 of Act 84 of 1996.

¹⁷⁷ Section 12 of Act 84 of 1996.

Act provides for democratic school governance through school governing bodies (SGBs) in public schools countrywide.¹⁷⁸ The school funding norms outlined in SASA prioritise redress and target poverty in funding allocations to the public schooling system.¹⁷⁹ According to section 34(1) of the Act, the state must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and redress of past inequalities.¹⁸⁰ It enables schools to set fees in order to supplement public funding.¹⁸¹

4.2.4 White Paper on Further Education and Training (FET)(1998):¹⁸²

Section 29(2) of the Constitution clearly states that everyone has a right to further education, which the state, through reasonable measures, must make progressively available and accessible. In pursuit of this right, and in fulfilment of government's obligations under the Constitution to make further education progressively available, a new framework for FET was put forward. The FET policy framework outlines a vision for a nationally coordinated system of FET which will provide access to high quality education and training within a differentiated system, which will offer a wider range of learning options to a diverse range of learners, including schoolgoing young people and out-of-school youth.¹⁸³

The framework was aimed at the development of a vibrant, innovative and responsive FET system, through which the people of South Africa can develop their full human potential and contribute to the building of a just, democratic and prosperous society. The main vision of the FET policy framework when enacted was to address the challenges of the past such as lack of coherence and coordination; lack of funding coherence; the legacy of apartheid; weak linkages with industry and

¹⁷⁸ Section 16 of Act 84 of 1996.

¹⁷⁹ Section 35 of Act 84 of 1996.

¹⁸⁰ Section 34 of Act 84 of 1996.

¹⁸¹ Sithole MD(2012) Child refugee rights in Cape Town: The right to access education, Masters of Philosophy in Development Studies pg 14.

¹⁸² South Africa Department of Education White Paper 4: A program for the transformation of further education and training Notice 1196 of 1997.

¹⁸³ South Africa Department of Education White Paper 4: A program for the transformation of further education and training Notice 1196 of 1997.

many more challenges faced by higher education.¹⁸⁴ Other policies, such as Education White Paper 4 on Further Education and Training¹⁸⁵ and the National Strategy for Further Education and Training, were enacted in line with the objectives of the FET framework. The purpose was to achieve a nationally coordinated further education and training system comprising the senior secondary component of schooling and technical colleges.

4.2.5 Higher Education Act 1997:¹⁸⁶

The Higher Education Act makes provision for a unified and nationally planned system of higher education and creates a statutory Council of Higher Education (CHE) which provides advice to Minister and is responsible for quality assurance and promotion. The objective of the Act was to establish of a single coordinated system; to transform of programmes so that they can respond better to the human resources, economic and development needs of the Republic; and to redress discriminatory practices in respect of representivity and access.¹⁸⁷ According to the Act higher education institutions must enjoy freedom and autonomy in their relationship with the state within the context of public accountability and the national need for advanced skills and scientific knowledge.¹⁸⁸

4.2.6 Education White Paper 3:

The Education White Paper 3: A Programme for the Transformation of Higher Education (DoE 1997), preceded the Higher Education Act¹⁸⁹, which list the fundamental principles guiding the transformation of higher education institutions.

The objective of this prospective piece of legislation was to achieve equity and redress¹⁹⁰ by striving to ensure that higher education is democratic, representative,

¹⁸⁴ Green Paper on further education and training, 15 April 1998.

¹⁸⁵ South Africa(1998) Ministry of Education.White Paper 4 Notice 2188 March 15

¹⁸⁶ Act No 101 of 1997.

¹⁸⁷ Preamble of Act 101 of 1997.

¹⁸⁸ Enver Motala and John Pampallis(2001) Education & Equity: The impact of state policies on South African Education pg 23.

¹⁸⁹ Act No 52 of 2000.

¹⁹⁰ Clause 2.26 of Education White Paper 3.

participatory, characterised by mutual respect and tolerance¹⁹¹, as well as responsible decision-making, performance of duties and usage of resources.¹⁹²

4.2.7 White Paper on Education and Training 1995:¹⁹³

This document sets out the values and principles which drive national policy in education and training. It reaffirms that education and training are basic human rights which the state must advance and protect in terms of its constitutional obligation so that citizens can develop their potential and contribute materially to the betterment of society.¹⁹⁴

4.2.8 Adult Education and Training Act:¹⁹⁵

This Act was promulgated to provide for the establishment of public and private adult learning centres¹⁹⁶; funding for ABET provisioning; the governance of public centres and quality assurance mechanisms for the sector¹⁹⁷.

4.3. Educational policies' contribution to poor performance of the school system

Post-apartheid government was faced with challenges of exceptional magnitude to transform the polity, society and the economy to redress geographical inequality.¹⁹⁸

¹⁹¹ Clause 1.19 of Education White Paper 3.

¹⁹² Ibid n 179.

¹⁹³ South Africa (1995) Department of Education White Paper on education Notice 196 March 15.

¹⁹⁴ (DoE; 1995d:21).

¹⁹⁵ Act No 52 of 2000.

¹⁹⁶ Section 3 of Act No 52 of 2000.

¹⁹⁷ Section 7 of Act No 52 of 2000.

Policy reformulation was largely used to effect transformation. The dismantling of apartheid legacies has involved a process of rereading and rewriting the legal and social contracts that govern the relationship between state and society.¹⁹⁹ The reconstruction of education and training lies at the heart of this transformation because education marks a path for individual, community, and collective development. As indicated in paragraph 4.2, educational policies on curriculum and school governance, on training and teaching, have been rewritten and parliament has made laws and policies accordingly to accommodate educational needs at different organisational levels, including schools, districts, provinces and overarching national levels²⁰⁰, yet transformation and delivery stubbornly remain vexed issues contributing to a national crisis that is threatening the very fabric of society.²⁰¹

Marked changes have occurred since 1994. Former Model C schools have been deracialised.²⁰² Participation of parents, learners and communities has been institutionalised through the creation of school governing bodies (SGBs) in terms of SASA.²⁰³ SGBs are empowered by the South African Schools Act of 1996 which provides for democratic school governance. However, as noted, the process has stalled (in fact it is disastrously bogged down).

For example, a major systemic problem subsists in the fact that the Ministry liaises with the Department of Finance for the education budget as a whole and has access to the Cabinet and major teacher unions and teaching staff associations, while the provinces are responsible for policy implementation, service delivery and monitoring of education districts, thus creating an organisational disjunct/hiatus between state control and provincial implementation.²⁰⁴

¹⁹⁸ Education & Equity: The impact of state policies on South African Education, Enver Motale and John Pampallis: The South African State in transition: A question of Form, Function and Fragmentation: Sophie Oldfield.

¹⁹⁹ Ibid n 193.

²⁰⁰ Richmond SD (2012) South Africa Public Opinion on Government's Performance in the area of School Education in Post –Apartheid South Africa, Masters of Social Science, University of Cape Town.

²⁰¹ Ibid n 196.

²⁰² Richmond SD (2012) South Africa Public Opinion on Government's Performance in the area of School Education in Post –Apartheid South Africa, Masters of Social Science, University of Cape Town pg 30.

²⁰³ Ibid 189.

²⁰⁴ F Pretorius & E.M. Lemmer South African Education & Training: Transition in a Democratic Era.

4.4 Conclusion:

New policy and legislative measures were obviously aimed at redressing past inequities, serving a new social order, meeting pressing national needs and dealing with new realities and opportunities. The question here is whether post-apartheid policy and legislative measures serve their intended purpose of redress.

Paragraph 4.2.1 of this chapter concerns the constitutional guarantee of the right to education (ie. s. 29), which subsumes the values of human dignity, equality, human rights and freedom, non-racism and non-sexism. These essential corollaries of the right to education were not guaranteed under the early post-apartheid system, human rights and freedom, non-racism and non-sexism were not part of the post apartheid education system. NEPA was formulated as an overarching legislation which give effect to the principles of the Constitution. The principles on which SASA are based are echoed and reaffirmed in the National Education Policy of 1996. It was also formulated in such a way that it embodies the principle of co-operative governance, elaborated in Chapter 3 of the Constitution

The South African Schools Act (SASA) promotes access, quality and democratic school governance. It ensures that all learners have the right to access quality education without discrimination and make schooling compulsory for children aged 7-14 years²⁰⁵ instead of 7 to 16, alternatively attainment to Grade 7, for blacks and 7 to 15 for coloureds and whites.²⁰⁶ The Act further provides for democratic school governance through school governing bodies (SGBs) in public schools²⁰⁷ so that parents, students and whole communities can collaborate fully on school governance.

The White Paper on Further Education and Training of 1998 aimed to outline the vision and policy framework for a nationally coordinated system of FET, which will provide access to high quality education and training. The framework was intended to ensure development of a vibrant, innovative and responsive FET system through which the people of South Africa would be able to develop their full human potential

²⁰⁵ Ibid n 165.

²⁰⁶ <http://countrystudies.us/south-africa/56.htm>.

²⁰⁷ Section 16 of Act 84 of 1996.

and contribute to the building of a just, democratic and prosperous society. Section 29(2) of the Constitution clearly states that everyone has a right to further education, which the state, through reasonable measures, must make progressively available and accessible.

The object of the Higher Education Act was to establish a single coordinated system; to transform programmes so that they are more in line with the available human resources, the economic and development needs of the Republic, and improve representivity and access (eg. to universities)²⁰⁸ by eliminating race- and gender-based discrimination. This Act was preceded by Education White Paper 3 of 1997 which was intended to ensure that higher education is democratic, representative and participatory and characterized by mutual respect and tolerance.²⁰⁹

It is clear that the role of the state is one of intervention and mediation. The objectives of most policy and legislative measures were to redress inequalities²¹⁰ by actively intervening to that end²¹¹ in accordance with constitutional guarantees. Poor performance remains endemic in the system, however, which fails to deliver at every level and is falling ever further behind local needs as well as international benchmarks that need to be attained and maintained in terms of socio-economic development. It must therefore be concluded that the education sector simply cannot do justice to its mandate and is approaching irremediable failure, particularly in light of the global explosion of knowledge, technological innovation and changes in the world of work. The school is dependent on multisectoral strategies and action. For example, schools need financial assistance by the state, which also needs to provide buildings and other facilities, remuneration of staff and integrated education and training. Schools are also dependent on the employment sector to provide jobs for those who have finished their schooling and to keep education, in general, informed of skills needed in contemporary vocations. Schools also need the parent body to be actively involved in the education and training of their children.

²⁰⁸ Ibid n 175.

²⁰⁹ Ibid n178 and 179.

²¹⁰ Enver Motala and John Pampallis(2001) Education & Equity: The impact of state policies on South African Education, pg 30.

²¹¹ Ibid n 191.

CHAPTER 5

CHALLENGES FACED BY THE SOUTH AFRICAN SCHOOL SYSTEM AND APPLICABLE CASE LAW

5.1 Introduction

This chapter will address the third research question, namely whether the poor performance of the South African school system is attributable to endemic problems affecting the education sector. One such problem is unevenness (eg. considerable inequality between privileged and less privileged learners). Differences between white and black learners are particularly marked, except in instances where whites fall under the significant destitute class that is gaining increasing prominence²¹².

Despite Government massive investment, many schools still lack basic resources that will ensure the effective day to day running of the school. Since the beginning of the new dispensation, the emphasis has been on the redress of the inequalities of the past. The South African government introduced a programme of restructuring the education system on principles of equity, human rights, democracy and sustainable development.²¹³ Changes brought about by the new dispensation in transforming the education sector included a unified, national education system, more democratic system of school governance, new standards and qualifications authority, redistribution of financial and human resources, higher education reforms and the re-orientation to outcomes-based education.²¹⁴

²¹² Ibid n 26.

²¹³ K Ramdass The challenges facing education in South Africa (2009).

²¹⁴ Ibid n 206.

Against all this effort of transforming the education sector, the south african schooling system is still faces major challenges, with political instability at the forefront of education.”²¹⁵

5.2 Analysis of current educational challenges and effects detracting from performance of the sector in South Africa

Current challenges in the education sector and the extent of their influence on schools’ performance are analysed in this section. More than 20 years after apartheid with South Africa having one of the highest budget spending on education in the world (20% of GDP), the South African education system still propagates inequality .²¹⁶ The new system has brought major challenges with it despite unprecedented budgetary spending. The Government appointed a National Planning Commission in 2011 to report on challenges in the education system.²¹⁷

In his article titled “A five-year plan for South African schooling” Nick Taylor lists a number of challenges affecting education in South Africa²¹⁸, including the following: unimproved learning outcomes; lack of accountability in schools; teachers’ incapacity as a result of ignorance; teachers’ lack of content knowledge and teaching skills; and lack of infrastructure and resources to enable efficient operation of schools.²¹⁹

In an International Business and Economic Research Journal (herein referred to as “The Journal”)²²⁰ critical challenges of the south african school system were analysed. In comprehending the vastness of the challenges encountered in the school system the challenges were differentiated into those facing learners; those facing teachers; and indirect challenges. The Journal has identified challenges affecting learners: These include violence in schools where children are raped,

²¹⁵ <https://ujdigispace.uj.ac.za/handle/10210/5397>.

²¹⁶ Ibid n 94.

²¹⁷ N Taylor 2011 Priorities for addressing South Africa’s education and training crisis: “A review commissioned by the National planning commission”.

²¹⁸ N Taylor A five year Plan for South African Schooling 15 October 2015.

²¹⁹ Ibid n 96

²²⁰ 2013 12 “International Business & Economics Research Journal”1.

attacked and assaulted; learners attack teachers while under the influence of drugs; learners are unpunctual in school attendance or simply don't turn up because parents and teachers neglect supervision; and financial pressures, teenage pregnancies and drug abuse present serious difficulties hampering school performance²²¹. These are all highly disruptive obstacles to teaching and learning. The journal further noted challenges that affect teachers negatively and detract from overall educational performance. Outcomes Based Education (OBE) and Curriculum 2005 pose a huge challenge for teachers as they are not adequately trained and receive no support and guidance from the Department of Education; lack of adequate resource material for teaching and learning and the administrative burden of implementing OBE and curriculum 2005.

Another detractor is teachers low morale, attributable to political and economic instability throughout the country, curriculum changes, high teaching staff turnover causing work stress, unsafe working environment and employment uncertainty. To these are added detractors occasioned by post-apartheid policies and legislative measures. Yet another detractor is incapacity to fulfil the requirements of new policy and legislative measures adopted under the new democratic dispensation. For example, staff had to contend with unfamiliar meeting procedures, unwonted large volumes of administrative work, and unfamiliarity with the purport of legislative and policy^{222, 223}. The Journal further state that corruption; socio economic factors; lack of community support and politics in schools are major obstacles to performance of the schooling system.

The Minister of education is being blamed for educational deficits, such as the Limpopo textbook debacle caused by late delivery of textbooks to start the new academic year in Limpopo, which resulted in the case *Section 27 and 2 others v Minister of Education and Another*.²²⁴ In this instance the court decided that providing prescribed learner support material (eg. textbooks) was integral to fulfilling the right to education.

²²¹ Id n214 at 33 and 34.

²²² Act No 84 of 1996.

²²³ Ibid n 100.

²²⁴ Unreported case No: 24565/2010 North Gauteng High Court.

5.3 Conclusion

In light of the challenges rehearsed above education is clearly in an unprecedented crisis in South Africa (cf. *Section 27 and 2 Others v Minister of Education and Another* which arose from late delivery of textbooks in Limpopo²²⁵. Lack of resources cannot serve as a defence against the charge of failing to advance the universal right to education, yet school leavers can barely demonstrate the most rudimentary skills (3 Rs – reading, writing, arithmetic).²²⁶ South African teachers do not have the content knowledge to impart the skills needed by our learners. Schools' resources are used wastefully with little accountability and transparency.²²⁷ Constant curriculum changes are confusing and discouraging; OBE is a massive failure foisted on teachers willy nilly; and provision of basic infrastructure and learning resources is seriously inadequate. Challenges facing the schooling system are immense and it is necessary that the recommendations be implemented by all stakeholders. Conclusions and recommendations as to remediating the problems outlined here are covered in chapter 6.²²⁸ .

²²⁵ Unreported case No: 24565/2010 North Gauteng High Court.

²²⁶ N Dicks 2013 The Challenges of South Africa's education system.

²²⁷ Ibid n 218.

²²⁸ Ibid n 212.

CHAPTER 6

6.1 CONCLUSION AND RECOMMENDATION

Having addressed the three questions of the research, my inference will be based on the conclusions drawn from the discussions of the chapters. It is clear from the provision of section 29 of the Constitution that the right to education give effect to the realisation of equal education to all. The purport of section 29 of the Constitution is twofold in that it guarantees the right to both basic and further education. Further education in the sense contemplated in s 29 (1) demands actual further education rather than a promise of further education.²²⁹ The right to basic education is not made contingent upon resources being available to the state, and the contingency is in fact precluded²³⁰ since the right to basic education is unconditional while the availability of resources can be cited as a condition for further education. The right to education can only be limited in terms of section 36 of the Constitution the law of general applications. Paragraph 3.4 discusses the limitation of the right to education in terms of section 36 of the Constitution. Section 36 subject Bill of Rights to the law of general application. The provision state that the all bill of rights may only be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom taking into account 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;
- (e) less restrictive means to achieve the purpose.

Recognition of the right to education is universal since it derives from the Universal Declaration of Human Rights (UDHR) of 1948²³¹ as enshrined in declarations, covenants and conventions ratified to that effect. Examples are the. International

²²⁹ SIMBO C (2013) The right to basic education, the South African constitution and the Juma Musjid case pg 479.

²³⁰ Ibid n 215.

²³¹ Mwanza P 2013 The role of non-governmental organisation in basic education policy reform in Lusaka province of Zambia, University of Edinburgh.

Covenant on Economic, Social and Cultural Rights (CESCR) of 1960, the International Covenant on Civil and Political Rights (ICCPR) of 1966, and the African Commission on Human and Political Rights (ACHPR) of 1990. The South African Bill of Rights was signed into law in virtue of these international instruments.²³² Proof of the universality of recognition of the inalienable right to education subsists in Article 11 (3) of the African Charter on the Rights and Welfare of the Child; Article 13 (2) of the International Covenant on Economic, Social and Cultural Rights; Article 28 of the Convention on the Rights of the Child; and Article 26 (1) of the Universal Declaration of Human Rights (the latter advocates for compulsory basic education).²³³

In order for the state to ensure that the right to education is fulfilled and protected, policies and legislations were enacted to ensure that the education system functions efficiently and in a manner that everyone has access to education. Policies and legislations put in place provided a theoretically sound framework for a fair and equitable system of governance and financial management that is well-suited to the needs of a post-apartheid South Africa. Transformation brought about a unified national education system, democratic school governance, a new standards and qualifications authority, equitable redistribution of financial and human resources, higher education reforms and reorientation to OBE.²³⁴ With the Constitution being explicit in realizing the universal right to education it seems reasonable to expect the quality of education in South Africa to be competitive with international benchmarks; however, standards remain unacceptably low despite massive government spending on the sector, and there are still major challenges that impact detrimentally on the quality of education vouchsafed to learners.

As discussed in chapter 5, it is clear that South African schooling is not measuring up to the challenges of its mandate. Schools and other institutions for education and training, including the educators, cannot meet learners' needs, nor can the system attain to the national socio-economic benchmarks of success, which are set by a highly competitive international climate characterised by explosive expansion of knowledge,, technological innovation and changes in the world of work. The school is

²³² Ibid n 109.

²³³ Ibid 91.

²³⁴ Ibid n 198.

dependent on multisectoral strategies and action. For example, schools need financial assistance from the state to provide buildings and other facilities, to remunerate teachers, and to integrate education and training. Schools are also dependent on the employment sector to provide jobs for those who have finished their schooling and to keep the education sector informed of skills needed in contemporary vocations. Schools also need the parent body to be actively involved in the education and training of their children.

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