

**Legislative interventions for educators in ensuring the right of access to quality
education in South Africa**

By

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Abstract

This study focuses on the legislative interventions for educators in ensuring the right of access to quality education in South Africa. It highlights the right of access to education as provided in section 29 of the Constitution of the Republic of South Africa. It examines the effect of poor education to the black majority and qualifications of educators during the apartheid period and how this has impacted black schools and learners. The structures, policies and programs of the apartheid are compared and contrasted to the post- apartheid (1994) structures, policies and programs. It argues that poor performance in black schools emanates from incapacity of educators in providing quality education. Although there was a radical transition in educational laws and programs from apartheid to post- apartheid, till date there are still challenges in the implementation of these policies and laws. The mini-dissertation recommends that government must capacitate and empower educators as this will enable them to deliver high standard pedagogy in black schools.

Declaration by Student

I, Shibe Rachel Mantshiu declare that “Legislative interventions for educators in ensuring the right of access to quality education in South Africa” hereby submitted to the University of Limpopo for the degree of Masters in Development and Management Law has not previously been submitted by me for a degree at this or any other university; that it represents my own work both in design and execution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Mantshiu SR (Ms)

Date

Dedication

My sincere gratitude goes to my late father, Lesetja Elias Teffo, and my mother, Velaphi Sylvia Teffo, for instilling the love of education in me. I further extend my heartfelt gratitude to my children Thabo and his wife Tumi, Sibongile and her husband Letimola, Macdon and Tshepo for their unfaltering love and support. My friends Mapula Mojabelo and Sara Ntsoane for their support and inspiration.

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List of Abbreviations

AITSL	Australian Institute for Teaching and School Leadership
ANC	African National Congress
ATPDF	Australian Teacher Performance and Development Framework
BEA	Bantu Education Act
CPTD	Continuing Professional Teacher Development
DA	Development Appraisal
DAS	Development Appraisal System
DBE	Department of Basic Education
DOE	Department of Education
DHET	Department of Higher Education and Training
EEA	Employment of Educators Act
ELRC	Education Labour Relation Act
ETDP SETA	Education, Training and Development Practices Sector Education and Training Authority
HOD	Head of Department
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International covenant on Economic, Social and Cultural Rights
IQMS	Integrated Quality Management System
MEC	Member of Executive Council
NCS	National Curriculum Statement
NDP	National Development Plan
NECC	National Education Co-ordination Committee
NEEDU	National Education and Evaluation Development Unit
NICPO	National Institute for Curriculum and Professional Development
OBE	Outcomes Based Education
PM	Performance Measurement
QMS	Quality Management System
RDP	Reconstruction and Development Programme
SASA	South African Schools Act

SACE	South African Council of Educators
SCSEEC	Standing Council on School Education and Early Childhood
SMT	School Management Team
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational Science and Cultural Organisation
UNICEF	United Nation's International Children's Emergency Fund
WSE	Whole School Evaluation

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- 1. Australian Education Act 2013**
- 2. Bantu Education Act 47 of 1953**
- 3. National Education Policy Act 27 of 1996**
- 4. South African Schools Act 84 of 1996**
- 5. The Constitution of the Republic of South Africa, 1996**
- 6. Employment of Educators Act**
- 7. Education Labour Relation Act**
- 8. National Education Policy Act**
- 9. The Australian Education Act 2013**

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CHAPTER I: LEGISLATIVE INTERVENTIONS FOR EDUCATORS IN ENSURING THE RIGHT OF ACCESS TO QUALITY EDUCATION IN SOUTH AFRICA.

1. 1 Introduction

The new democratic government that started in 1994 faced the task of transforming the education system from apartheid¹ to a national system that included all the racial groups in the country so that they will all receive quality education. Hence, the right of access to education is provided in section 29 of the Constitution² as a fundamental right, unqualified and human basic need which requires a full realization and implementation in order to achieve the constitutional mandate in ensuring that access to quality education is fulfilled.

The right to education is enshrined in the Bill of Rights chapter of the South African Constitution, section 29 which states that:

1. Everyone has the right
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
 - a. equity;
 - b. practicability; and
 - c. the need to redress the results of past racially discriminatory laws and practices.³

This right to education, because it resides in the Bill of Rights chapter of the Constitution, may be restricted only “in terms of law of general application to the extent that the

¹ Timothy Layman 2003 : Intergovernmental Relations And Service Delivery in South Africa
A Ten Year Review Commissioned by the Presidency page 3

²The Constitution of the Republic of South Africa, 1996.

³ The Constitution of the Republic of South Africa, 1996 Section 29(1)(2)

limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. ⁴

There is an obligation on the state in terms of section 29(1) to make education available and accessible to everyone; the Constitution explicitly guarantees the right to a basic education.⁵ However, it is important to note that section 29 does not specify the content and quality of the education that the state must provide,⁶ nor has the South African Constitutional Court considered the scope and content of the right to a basic education.⁷

Presently South Africa is experiencing crisis in its educational system, such as poor capacity of educators and poor performance in schools due to the fact that curriculum change was done without first retraining educators.⁸ The immediate requirement for the successful implementation of Curriculum 2005 (C2005), the South African version of Outcomes Based Education (OBE) approach, which was the curriculum that the government introduced to develop citizens with high level of skills, knowledge, and attitudes and values is that practising teachers should be retrained to facilitate the teaching of new content with its accompanying approach and methodology.⁹

Teachers in historically disadvantaged schools are not able to properly and effectively implement curriculum 2005 due to constraints such as large class sizes, lack of learning materials, and lack of financial backing to initiate further training as well as historical factors such as discrimination, poverty and perception of inferiority. The Department of Education and school management provided little support for teachers. This lack of support makes it difficult for teachers to implement the new curriculum in the classroom as it was intended.¹⁰

In South Africa capacitation of teachers before implementation of the new curriculum (Curriculum 2005) was not properly done. This need to be addressed, otherwise provision of quality education by educators as amplified in the Constitution would not be realised. The crisis is compounded by severe shortage of skilled and well trained educators and

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⁵ Arendse "The obligation to provide Free Basic Education in South Africa: An International Law Perspective" 2011 PEL 97

⁶ Taiwo Implementation of the Right to Education 116.

⁷ Arendse "The obligation to provide Free Basic Education in South Africa: An International Law Perspective" 2011 PEL 97

⁸ Withers 2015 Why staff training is often ineffective <http://www.trainingjournal.com>

⁹ Moyo Capacitate teachers for new curriculum August 26, 2016 Local News.

¹⁰ *Ibid*

radical change in educational policies. The government embarked on the development and implementation of Curriculum 2005 in order to correct the apartheid curriculum of the past¹¹.

The introduction of Curriculum 2005 was a new curriculum in a Post-apartheid system but was poorly implemented. Teachers' training for the new curriculum was poorly done because it was rushed, using cascade training model. The government provided emergency training and materials to ensure that all provinces could start from the same footing, however, in-service work with teachers and schools was at minimal and resources totally inadequate.¹² Most of the training time were spent on explaining the complex vocabulary and too little substance of OBE. Educators did not apply the principles of OBE in their own methodology. Time frames used had been unmanageable and unrealistic. Curriculum 2005 was implemented before it was ready for presentation; consequently implementation of Curriculum 2005 has been highly problematic.¹³ The then education minister, Sibusiso Bengu, released the new "Curriculum 2005" plan, which was implemented the following year with a very short lead-in time¹⁴. The government wanted to change the system too quickly. Teachers were not trained prior to the curriculum change processes with regard to their curriculum implementation. Only few teachers were exposed to minimal training workshops for pilot schools and that alone proved to be a limitation.¹⁵ The trainers themselves lacked confidence to practically demonstrate to trainees how an OBE classroom would look like.

1.2 Research problem

1.2.1 Source of the research problem

The failure of educators to provide quality education to learners in South Africa emanated from the Apartheid policies and laws whereby teachers were expected to implement new curriculum, using the old approaches, without being trained properly. The post-Apartheid era also created challenges to the educators in terms of implementation of new policies

¹¹De Waal Curriculum2005: Challenges facing teachers in historically disadvantaged schools in the Western Cape (2004) page 2

¹² Adedeji, 2009: The effectiveness of teacher development page 8

¹³ *Ibid* page 9

¹⁴ Carol Bertram: Review of Curriculum (<http://mg.co.za/section/education>) 03 June 2011 12:01.

¹⁵ *Ibid*

such as Curriculum 2005, Revised National Curriculum Statement Grade R-9 and the National Curriculum Statement G10-12. In 1999, government instituted a review of Curriculum 2005, which led to the so-called "Revised National Curriculum".¹⁶ Policy research shows that it simply does not work to rush the implementation of curriculum reform.¹⁷

Due to on-going implementation challenges the two policies, Revised National Curriculum Statements were combined to produce the National Curriculum Statement Grade R-12, which represents a policy statement for learning and teaching in South African Schools.¹⁸ The NCS Grades R-12 gives expression to the knowledge, skills and values worth learning in South African schools. This curriculum aims to ensure that children acquire and apply knowledge and skills in ways that are meaningful to their own lives. The curriculum promotes knowledge in local context, while being sensitive to global imperatives. The NCS serves the purpose of equipping learners, irrespective of their socio-economic background, race, gender, physical ability or intellectual ability, with the knowledge skills and values necessary for self-fulfilment, and meaningful participation in society as citizens of a free country.¹⁹ The change of policies was so radical that most of the black educators were unable to implement them properly as they lack capacity to do so. There has always been a problem in SA's previously disadvantaged communities to link their education with local contexts.

Another setback is that the period of training for educators was not enough to make them experts in terms of policy implementation. The government wanted to change the system too quickly, some teachers only had one week to learn OBE, which is the approach for Curriculum 2005, before it started. What exacerbated or frustrated the educators more was the duration of training or workshops. Teachers were trained in a short period of time, once a week during teaching time or three days a week during school holidays and expected to implement the policies at the same time instead of intensive training which requires the period of three months or more to enable them to implement the curriculum successfully. The speed at which policies were changed by the department also contributed towards failure of educators in providing quality education because they were not trained for new

¹⁶ School curriculum(<http://mg.co.za/article/2011-06-03-rusging-curriculum-reform-again>).

¹⁷ *Ibid*

¹⁸ See National Curriculum Statement (NCS) Department of Basic Education, Republic of South Africa.

¹⁹ *Ibid*

curriculum. The implementation of these policies in a very short space of time, lacked continuity and as such posed a challenge to educators as implementers of the curriculum policies. Educators dropped what they knew without a ladder of stepping or crossing over to the new curriculum. A chasm in learning and teaching developed immediately.

1. 3 Background to the study

In 1948, the Apartheid government was structured around racial segregation and the country was officially divided into four racial groups, Whites, Blacks, Indians and Coloureds.²⁰ In terms of allocation of resources, white educators in particular, were more resourced than other racial groups and blacks were the least resourced.²¹

Training colleges for educators were also grouped in terms of race. The duration for training also differed. Teacher training for blacks required only standard six or junior certificate and the duration for training were two years whereas the whites were required to pass matric and train for three years.²²

In 1953, the Bantu Education Act (BEA)²³ that officiated racism was passed. The curriculum was designed in such a way that the black child or educator would remain inferior to their whites' counterparts. Over and above blacks were not allowed to attend white universities. Mission schools that rejected Bantu Education were denied funding.²⁴

The apartheid system of education was designed clearly to make education for white students unequal to the black students. The University Education Act 45 of 1959 prevented black students from attending "white" Universities.

The African National Congress (ANC)'s Freedom Charter of 1955 intended to create an equal democratic system that will accommodate all learners regardless of colour. The freedom charter aimed to make education to be equal. In 1989, the National Education Co-ordinating Committee (NECC) adopted a declaration which pronounces that "Education is

²⁰Eugene Aims of Education in South Africa: Internationals Review of Education 36: 171-181.

²¹ *Ibid* pages 171-181

²² *Ibid* pages 171-181

²³Bantu Education Act 47 of 1953.

²⁴ Bantu Education Act 47 of 1953.

a basic human right. Schooling should be free and compulsory for all children”.²⁵

In 1976, the black students protested against apartheid oppressing educational system and demanded removal of Afrikaans as medium of instruction in half of the subjects.²⁶ Undeniably the students marched for equal and quality education for all in South African schools. Since members of the ruling National Party spoke Afrikaans, black students viewed it as the “language of the oppressor”. Moreover, lacking fluency in Afrikaans, African teachers and pupils experienced the negative impact of the new apartheid policy which introduced Afrikaans as the medium of instructions in half of the subjects in schools.²⁷

The 1993 South African Interim Constitution made provision for the right to basic education. The interim Constitution emphasised quality education and improvement of schooling with the intention of developing society. Continuing professional development of educators was also highly considered with the intention of improving quality performance in schools.

Despite the right of access to basic education for all, to date, the government is still struggling to provide access to quality education for all.²⁸ The former model C schools, which were the previous white schools are still benefiting more than the black schools. In black schools there are still many unqualified and under qualified educators. The problem is that most educators did not receive modern and informative educational training or developed themselves professionally but they still retained the inferior training given during Apartheid regime.

The Constitution of the Republic of South Africa guaranteed the right to access of quality education. However, it is still difficult for government to make sure that every person has access to quality education because most of the educators lack capacity.

In 2003, the National Plan of Action was adopted by the government with the intention of achieving improved access to free and quality basic education. The plan stipulated that by

²⁵ See National Education Co-ordinating Committee 1989.

²⁶ South Africa: Overcoming Apartheid. Visit also [Http://overcomingapartheid.msu.edu/sidebar.php=65-258-3](http://overcomingapartheid.msu.edu/sidebar.php=65-258-3) accessed 9th March 2016.

²⁷ Ibid.

²⁸ See The South African Human Rights Commission 3rd Economic and Social Rights Report 1998-1999, Chapter 3, page 79 par 1.

2015 all children of school going age should be provided with good quality education.²⁹ Curriculum 2005, with (OBE) approach was introduced with the promise of high quality education in preparation for the future of the black child.

Implementation of Curriculum 2005 generated new focus on teaching and learning, but having challenges in inadequate orientation, training and development of teachers. Due to the challenges of implementation of Curriculum 2005, the new policy, Revised National Curriculum Statement was produced and became policy early in 2002.³⁰ The curriculum framework that was to introduce OBE into our school system was named Curriculum 2005. The 2005 referred to the envisaged final year of implementation. When it was introduced time frames for implementation were envisaged. Curriculum 2005 was supposed to be reviewed after 2005 but due to implementation challenges it was reviewed earlier. Curriculum 2005 was revised to National Curriculum Statement (NCS) which became a policy in 2002.³¹

Teachers expressed their concerns about the various challenges in the implementation of the Revised National Curriculum Statement. The Minister of Basic Education appointed a task team to identify the challenges and the report showed that it negatively impacted on the quality of teaching in schools.³²

The Curriculum 2005 Review Report recommended that:

- The design of the curriculum be simplified
- Curriculum overload be addressed, including the reduction in the number of Learning Areas in the Intermediate Phase
- The terminology and language of the curriculum should be simplified
- Assessment requirements should be clarified
- Content had to be brought into the curriculum, and specified
- A plan needed to be developed to address teacher training for the successful implementation of the new curriculum
- Textbooks and reading had to be reintroduced as a widely recognised means to bridge the gap between teacher readiness, curriculum policy and classroom

²⁹ Plan of Action: Improving access to free and quality basic education for all (2003) para 6.

³⁰ *Ibid* page 7

³¹ Chisholm Report of the Review Committee on curriculum 2005 6 June 2000.

³² Msila Revised National Curriculum Statement 2001.

implementation.³³

In 2012 the government introduced the National Curriculum Statement which aimed at providing a clear specification of what is to be taught and learnt on a term-by-term basis and promotion requirements to be obtained.³⁴ National Development Plan provides that education, training and innovation are central to the South Africa's long term development.³⁵ In order to achieve these developmental goals, it is imperative and essential to equip teachers through on-going training and workshops to empower them in order for them to be able to discharge their pedagogical responsibility effectively and efficiently. The educational curriculum, policies and laws aimed at capacitating teachers must be, as a matter of urgency be implemented in order to enable educators to provide quality education to the learners.

1.4 Statement of the research problem

The 1996 Constitution stipulates that “the right of access to quality education must be realized”. However, lack of capacity of educators is hindering the realization of the right of access to quality education as mandated by the Constitution. This is the reason for the poor performance in South African black schools.

1.5 Definition of key concepts

1.5.1 Quality education

According to the United Nations International Children's Emergency Fund (UNICEF) 1946, quality education includes:

- “Processes through which trained teachers use child-centred teaching approaches in well-managed classrooms and schools and skilful assessment to facilitate learning and reduce disparities.
- Outcomes that encompass knowledge, skills and attitudes, and are linked to national goals for education and positive participation in society”.³⁶

³³ Department of Education: The Curriculum 2005 Review Report (2000).

³⁴ Department of Education.2011. National Curriculum Statement Grade R-12, 11 Sep.

³⁵ See the National Development Plan vision for 2030, (11November 2011), Chapter 9, page 261, par 1.

³⁶ See Defining Quality in Education, A paper presented by UNICEF at the meeting of the International Working Group

1.5.2 Lack of capacity of teachers

It means that you are unable to do something because you do not have the ability or you are too weak:³⁷ In this context, it means that a teacher is unable to produce good learners' performance due to lack of adequate skill required to discharge the responsibility.

1.5.3 Realization

It means the fulfilment or achievement of something desired or anticipated. Further, it means making real or giving the appearance of reality. In this context, it means making the right of access to quality education not only as a constitutional provision but also as a reality.

1.6 Literature review

Bernstein³⁸ observes that “there is a lack of “accountability” on the part of teachers” because they are not properly equipped to release quality education. And the reason for this is that “many teachers fail to deliver quality education due to their incapacity and as a result there is poor performance in South African black schools”.³⁹ Adedeji and Olaniyan are of the view that “capacitated educators are the important instruments which a country can utilise for the development and improvement of its educational system”.⁴⁰ They also assert that “any socio-economic strategy, aimed at improving schools and human development must, consider continuous teacher development programs”.⁴¹ They also indicate that “for a country to improve its educational system it needs to provide workable strategies that will improve the capacity and conditions of teachers and teaching in schools”.⁴²

on Education Florence, Italy June 2000, page 3.

³⁷ Cambridge dictionary – Daniel Jones, Peter Roach, Jane Setter and John Esling. Incapacity.

³⁸Bernstein The Center for Enterprise Development, a Johannesburg-based research institute www.cde.org.za 2015 page 23.

³⁹ South-african-teachers-strike-shuts-schools-compounds-educational-crisis accessed 15th MARCH 2016 Visit > <http://www.bloomberg.com/news/articles/2010-08-31/>.

⁴⁰ See Adedeji and Olaniyan, fundamentals of teacher education development; improving the conditions of teaches and teaching in rural schools across African countries, chapter 4 page 73.

⁴¹ Ibid page 74

⁴² Ibid page 76

Zimbo is of the view that “having an understanding of the benefits of quality education is important as it enlightens people about the reason why the legislature ensured that this right can be demanded immediately”.⁴³ Zimbo also says that “education is an ingredient for socio-economic development; hence educated individuals possess the ability to secure both the basic necessities for survival and the other material goods required for flourishing”.⁴⁴ Zimbo concludes by articulating that “educated person has more prospects of finding a job, which improves personal income and the ability to escape poverty”.⁴⁵ Accessibility of quality education by black learners in rural schools through empowered educators will enable previously disadvantaged groups to overcome poverty as they will access better jobs.

Tomasevski asserts that education plays a crucial role in fulfilment of socio-economic rights and decent employment.⁴⁶ Education enhances a person’s prospects of securing employment, which in turn secures access to food, housing and health care service”.⁴⁷ This means that a person who is educated or who has access to quality education has more chances of securing good employment as opposed to someone who is not educated⁴⁸.

Bekker says “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”.⁴⁹ Mailaret opines that “education has the ability to make individuals equal since it gives them the ability to be free to develop talents, individual callings and skills that enable a person to manoeuvre through all the difficulties that weaken the human condition”.⁵⁰

It is imperative for South African teachers to ensure that they implement National Curriculum Statement effectively without compromising the policies and standard. The

⁴³ See Zimbo, the right to basic education, the South Africa constitution and the *Juma Masjid case*: an unqualified human right and a minimum core standard, 2013 page 483. Also visit <http://dx.doi.org/10.4314/idd.v17i1.23> visited 16th March 2016.

⁴⁴ See Zimbo (footnote 42 above) also see Beiter K The protection of the right to education by international law (2006) at 28-30.

⁴⁵ See Zimbo (footnote 42 above) further see Coomans F “In search of the core content of the right to education” in Chapman AR Core obligations: building a framework for economic, social and cultural right, (2002) at 220.

⁴⁶ Katarina Tomasevski, Human Rights Obligations in Education page 46-47.

⁴⁷ See Katarina Tomasevski, Human Rights Obligations in Education page 47.

⁴⁸ Bekker, A compilation of essential documents on the rights to food and nutrition.

⁴⁹ Bekker, A compilation of essential documents on the rights to food and nutrition.

⁵⁰ Mialaret , the child ‘s right to education (1979) page 20.

success or realisation of quality education in South African black schools depends on dedicated educators.

South African Schools Act⁵¹ section 20 (i) (e) provides that “the school governing body must also support incapacitated educators in implementing quality education to promote the best interest of the school”⁵² On the other hand, the governing body of a public school must adhere to any actions taken by the Heads of Department in terms of section 16 of the Employment of Educators Act no 66 of 1998, to address the incapacity of a principal or educator to carry out his or her duties effectively in terms of quality education. ⁵³ Underperforming schools need to be attended to by the provincial and district officials responsible. The Head of Department (HOD) must issue a circular in compliance with section 16A and 58B of SASA with regard to school performance and the procedures to be followed by and for underperforming schools. The circular will be directed to the officials in the Districts, circuits and schools for implementation purposes in order to improve teachers’ performance.

The Integrated Quality Management System (IQMS) emanated from Schedule I of the Employment of Educators Act⁵⁴ where the minister required that the underperforming educators should be empowered to improve performance in schools. The Schools Management Team (SMT) must develop school improvement plan where capacity building plan would be included for underperforming educators.

The IQMS is composed of three programs namely Developmental Appraisal (DA), Performance Measurement (PM) and Whole School Evaluation (WSE) which aimed at capacity building, incentivising and personal and professional growth of educators. The purposes of DA, PM and WSE are to appraise individual educators in a transparent manner with a view to determining areas of strength and weaknesses, and to draw up programmes for individual development; evaluate individual teachers for salary progression, grade progression, affirmation of appointments and rewards and incentives; and evaluate the overall effectiveness of a school as well as the quality of teaching and learning respectively. These three programmes are implemented in an integrated way in order to ensure optimal effectiveness and co- ordination of the various programmes.⁵⁵ One of the main purposes

⁵¹South African Schools Act 84 of 1996.

⁵² See Section 20 of South African Schools Act 84 of 1996.

⁵³ The Employment of Educators Act No 76 of 1998.

⁵⁴ The Employment of Educators Act No 76 of 1998.

⁵⁵ Berger, Teacher Evaluation in South African Schools: Information South African Policy 2015.

of IQMS is to identify specific needs of educators and to evaluate an educator's performance.⁵⁶ If an educator performs according to expectations, he or she gets 1% as pay progression of their annual salaries and if they perform exceptionally well they get bonus which may be more than 5% depending on the availability of departmental budgets.

Teachers feel that the issues of remuneration and teacher development should be separated and as such the IQMS should just focus purely on teacher development. The IQMS can be effective if the training is properly and effectively implemented. It is recommended that a team be established to investigate the effectiveness of the IQMS instrument and provide a new paradigm to guide implementation.⁵⁷ Where there are gaps, the Department should develop effective professional development model which will be easily implemented.

1.7 Purpose of the study

1.7.1 Aim

The mini-dissertation examines and scrutinises the laws, regulations, policies and documents that have been put in place to capacitate educators in order for them to provide and deliver high quality teaching and learning in schools in order for the learners to realise the right of adequate access to high standard quality education.

1.7.2 Objectives

The key objective of this study is to utilise laws and policies to showcase how the existing laws and policies can be used to improve educators' skills and capacitate them for good teaching and learning delivery for learners at schools. The other objective relevant to the key objective is to encourage government to conduct vigorous workshops on teacher's development programmes for purpose of improving and strengthening implementation in order to promote, provide and deliver constitutionally mandate of quality education.

⁵⁶ See IQMS ><http://wced.pgwc.gov.za/circulars/minutes04/ehrd43.pdf> visited on 17 March 2016.

⁵⁷ See Scielo><http://www.scielo.org.za> visited 21 September 2016

1.8 Research method

The research methodology in this study is non-empirical (qualitative) as opposed to empirical (quantitative) generally acceptable in legal research activity. This research was library based and relies heavily on scholarly legal lexicons including but not limited to textbooks, articles, case law, legislations, regulations, previous works scholarly articles dealing with the right to access to quality education.

1.9 Significance of the research

Research on capacitating educators in South African black schools for effective pedagogy delivery will make the following contributions to the body of knowledge thus:

- Establishes the development of legal reforms that will improve capacity for educators.
- Beneficial to school leaders and managers, curriculum advisors, and other professionals who support teaching and learning to assist in developing relevant programmes for capacity building of educators.
- Contribute to the government's measures stipulating to improve and facilitate the realization of the right to quality education in South African Black Schools.⁵⁸
- Contribute to how the law and policies can be implemented to provide the right to quality education as mandated by the Constitution.
- This study will also assist the Department of Education and other relevant stakeholders in implementation of laws and policies which are promoting the fundamental rights to quality education.

1.10 Scope and limitation

This mini dissertation comprises of six chapters. Chapter one is an introductory chapter which lays down the foundation. Chapter two discusses the normative framework for the realisation of the right to education under international law. Chapter three discusses policies and legislative frameworks for capacitation of educators in ensuring the right of access to quality education. Chapter four deals with contribution of judiciary in ensuring access to the right of education. Chapter five is a comparative study of capacitation of

⁵⁸ Sefoka and Odeku (2015), providing ample access to quality Education in South Africa: Socioeconomica.

educators in ensuring access to quality education in other countries. Chapter six deals with conclusion drawn from the whole study and recommendations.

CHAPTER 2: NORMATIVE FRAMEWORK FOR THE REALISATION OF THE RIGHT TO EDUCATION UNDER INTERNATIONAL LAW.

2.1 Introduction

Internationally teachers and school leaders are being challenged to transform educational outcomes, often under difficult conditions.⁵⁹ Teachers need to personalize learning experiences to ensure that every student has a chance to succeed and to deal with increasing cultural diversity in their classrooms and differences in learning styles. They also need to keep up with innovations in curricula, pedagogy and the development of digital resources.⁶⁰ The challenge is to equip all teachers for effective learning, how the performance of struggling teachers is improved and how the best performing teachers are given opportunities to acquire more status and responsibility.⁶¹ In many high performing education systems teachers do not only have central role to play in improving educational outcomes, they are also at the centre of the improvement efforts themselves. In these systems it is not that top-down reforms are ordering teachers to change, but that teachers embrace and lead reform, taking responsibility as professionals.⁶² The international summit on the teaching profession brings together education ministers, union leaders and other teacher leaders from high-performing and rapidly improving education system to review how best to improve teacher quality and the quality of teaching and learning.⁶³

The summit provided that:

- A high-quality teaching force is not due simply to a traditional cultural respect for teachers; it is a result of deliberate policy choices that are carefully implemented over time. The highest-performing countries show that thoughtfully designed and purposefully executed systemic efforts can build a high-quality teacher workforce.⁶⁴

⁵⁹ Building a high quality teaching profession: Lessons from around the world 2011 page 2.

⁶⁰ *Ibid* page 3

⁶¹ Building a high quality teaching profession: Lessons from around the world 2011.page 5

⁶² *Ibid* Page 9

⁶³ *Ibid* Page 70

⁶⁴ The International summit of teacher profession. 2011, Improving teacher quality around the world Page 70

- Teacher policy needs to be linked to curriculum reform and school-management reform. New kinds of school leaderships, for example, are central to creating and sustaining the conditions that make professional practice possible. High-quality education is the result of a system, not just of the work of individual teachers.
- The discussion echoed the importance of “getting it right from the start”. High-performing systems build their human resource systems by putting the energy up front in attracting, training, and supporting good teachers rather than on the back end of reducing attrition and firing weak teachers.
- Making teaching an attractive profession requires more than recruitment campaigns. It means supporting continuous learning; developing career structures to give new roles to master teachers; and engaging strong teachers as active agents in school reform, not just as implementers of plans designed by others. Teachers need to be respected as skilful professionals and active masters of educational advancement.⁶⁵

South Africa is an active party or signatory to most if not all of the international conventions or treaties like The Universal Declaration of Human Rights, international Covenant on Economic, Social and Cultural Rights, The United Nations Educational, Science and Cultural Organisation, etc., supporting the right to education. This right has been discussed and upheld in various covenants from the four corners of the world. In these conventions it has been shown that the “right to education”, in particular the “right to basic education” is in fact a cornerstone to every individual right and therefore must be made free and compulsory. These instruments further provide that further education must also be made available and accessible. This means that the right to education in general is internationally recognised.

2.2 The United Nations Educational, Scientific and Cultural Organisation (UNESCO)

The UNESCO Convention was the first international treaty to recognize a binding “right to education”.⁶⁶ Through its programme on the Right to Education UNESCO develops, monitors and promotes education norms and standards in order to foster the

⁶⁵*Ibid Page 70*

⁶⁶ The UNESCO Convention against Discrimination in Education (UNESCO Convention), adopted by the General Conference at its 11th Session in Paris, 14 December 1960. Membership of UNESCO is concurrent with membership of the United Nations, and is therefore near universal page 45

implementation of the right to education at country level and advance the aims of Education 2030 agenda.⁶⁷

Education in itself is an empowering right and one of the most powerful tools by which economically and socially marginalised children and adults can lift themselves out of poverty and participate fully in society.

In order to do so there must exist equality of opportunity and universal access. Normative instruments of United Nations and UNESCO lay down international legal obligations which recognise and develop the right of every person to enjoy access to education of good quality. This legal framework is considered of great importance by Member States and the international community in implementing the right to education.

UNESCO supports States to establish solid national legal and policy frameworks that create the foundation and conditions for the delivery and sustainability of quality education. In turn, governments must be held accountable to fulfil their legal and political obligations to provide good quality education for all and to implement and monitor education policies and strategies more effectively.⁶⁸

2.3 The Universal Declaration of Human Rights (UDHR) 1948

The “right to education” was firstly expressed internationally under the UDHR.⁶⁹ Article 26 provides that “everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms”.

South Africa is implementing the content of this declaration because the Constitution provides that “everyone has the right to education”.⁷⁰ Nine years of schooling (grade 1 to

⁶⁷ UNESCO page 47

⁶⁸ UNESCO page 48

⁶⁹ See the UDHR adopted and proclaimed by the General Assembly Resolution 217A (iii) on 10 December 1948.

⁷⁰ Section 29 (1) (a) of the Constitution of the Republic of South Africa, 1996.

7) is free and compulsory as provided by SASA, and the state is making further education “progressively available and accessible through reasonable measures” to everyone.⁷¹

2.4 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR devotes two articles to the right to education, articles 13 and 14. Article 13 is the most wide-ranging and comprehensive article on the right to education in international human rights law.⁷² The Committee has adopted General Comment 11 on article 14(plans of action for primary education). The two articles (13 and 14) are complementary and should be considered together. The Committee is aware that for millions of people throughout the world, the enjoyment of the right to education remains a distant goal and also conscious of the formidable structural and other obstacles impeding the full implementation of article 13 in many State parties.⁷³

Like all human rights, the right to education imposes three levels of obligation on States: to respect, protect and fulfil the right to education. The obligation to **respect** requires States to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to **protect** requires States to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to **fulfil** means that States must take positive measures that enable and assist individuals and communities to enjoy the right to education.⁷⁴

The obligations related to each of the “essential features” of the right to education are categorised under four areas: availability, accessibility, acceptability, adaptability:

Educational institutions and facilities have to be **available** in sufficient quantity (buildings, sanitation facilities for both sexes, safe drinkable water, trained teachers receiving domestically competitive salaries, teaching materials):

Educational institutions have to be **accessible** to everyone, without discrimination, in law and in fact:

⁷¹ See section 3 (1) of the South African Schools Act 84 of 1996 and Section 29 (1) (b) of the Constitution of the Republic of South Africa, 1996.

⁷² UN Economic and Social Council Committee on Economic, Social and Cultural Rights 1999 E/C.12/1999/10 p1-16

⁷³ *Ibid* p1.

⁷⁴ Right to Education ([http://en.unesco.org/themes/right to education](http://en.unesco.org/themes/right%20to%20education)) Right to Education- State Obligations and Responsibilities.1-2.

The form and substance of education have to be **acceptable** to both students and parents: relevant, culturally appropriate and of good quality:

Education has to be flexible, **adaptable** to the needs of changing societies and responding to the needs of students within their diverse social and cultural settings.

While the Covenant requires that “the material conditions of teaching staff shall be continuously improved”, in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many State parties in recent years. Not only this is inconsistent with article 13, but it is also a major obstacle to the full realisation of students’ right to education.

Most sovereign states have enshrined the right to education in their constitutions. They have also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Covenant on the right of the child both of which they include the right to education.⁷⁵

Almost eighteen years after the South African government signed ICESCR, Cabinet has finally approved that South Africa will ratify the ICESCR. This important decision to ratify, which means that the ICESCR will be legally binding, was included in a statement issued in Pretoria on 10 October 2012. Civil society organisations have been calling for many years for the South African government to ratify ICESCR.⁷⁶ The ICESCR, together with the International Covenant on Civil and Political Rights (ICCPR), optional protocols to these covenants, the UN Charter and the Universal Declaration on Human Rights constitute the International Bill of Rights.⁷⁷

2.5 Global Database on the right to education

The Global Database on the Right to Education is a rich resource and powerful tool offering 195 country profiles and an online library of over 1,200 documents to learn more about the status of implementation of the right to education around the world.⁷⁸

⁷⁵ Joubert Incorporating international standards into national law in South Africa: The accountability of the state (2014) 29 SAPL page 2

⁷⁶ *Ibid* page 2

⁷⁷ *Ibid* page 2

⁷⁸ Français UNESCO www.unesco.org/new/e visited 12 June 2017

Although education is a well-established and universally recognized human right under international law, it remains out of reach to many. Globally millions of children are out-of-school and millions of adults are deprived of learning opportunities. Despite advances in improving access to education through the adoption of strong national legal and policy frameworks, there is still much work to be done.⁷⁹

In this context, the Global Database on the Right to Education exists as a powerful tool for monitoring, research and advocacy. The Database hosts examples of measures taken by all UNESCO Member States to implement legal and policy frameworks to ensure the right to education. Besides individual profiles for each country, the Database hosts a library of over 1,200 official documents, including constitutions, legislations and policies on education from nations across the globe.⁸⁰

This online platform, which is enriched continuously, aims to inform key players on the legal status of education worldwide and foster regional and international cooperation. In the context of the Education 2030 Agenda, the sharing of information on the database can also help improve the quality of education. UNESCO's Member States are strongly encouraged to inform the UNESCO's Right to Education Programme of any recent information so as to further update their country profile and to offer access to the latest national laws and policies.⁸¹

2.6 African (Banjul) Charter on Human and Peoples' Rights, 1981

South Africa is a member state to the African Charter on Human and Peoples' Rights which is one of the International human rights treaties that also suggest that “states have an obligation to make primary education compulsory and free of charge”. Article 17 concisely provides that “every individual shall have the right to education”.⁸² To support the right stipulated in article 17, Article 1 provides that “the Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give

⁷⁹ Français UNESCO www.unesco.org/new/e visited 12 June 2017

⁸⁰ *Ibid*

⁸¹ *Ibid*

⁸² Article 17 (1) of the African Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

effect to them”. Article 2 further stipulates that “every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”.⁸³

South Africa is promoting the contents of this charter because it undertook to adopt legislative frameworks and other measures such as the Constitution and SASA to give effect to the “right to basic education”. This shows that the state is obliged to ensure provision of quality education as mandated by the Constitution.

2.7 The Jomtien Conference, 1990

This Conference was held in Thailand (Jomtien) in 1990 against the backdrop of continuing exclusion of a significant proportion of both child and adult populations from education, the UDHR’s proclamation of a right to education for everyone. The conference adopted a “Declaration on Education for All and a Framework for Action to Meet Basic Learning Needs”. This Declaration reiterated the right of every person to “benefit from educational opportunities designed to meet their basic learning needs”.⁸⁴ The Declaration identified the need to review the meaning and scope of basic education to embrace an expanded vision that entails, amongst other things, broader resource levels and institutional structures.⁸⁵ The expanded vision would also encompass the universalization of access and promotion of equity which would entail expansion of measures and equal opportunity for all children to achieve and maintain an acceptable level of learning.⁸⁶

2.8 The Dakar Framework for Action, 2000

South Africa is an active party or signatory to the Dakar Framework for Action, where it commits itself to “combating poverty and uplifting its people through the provision of basic education that is compulsory for all children of school-going age that is of good quality and in which financial capacity is not a barrier to access for any child”.⁸⁷ The Dakar agreement

⁸³ See Article 1 and 2 of the African Charter on Human and Peoples' Rights.

⁸⁴ See article I (1) of the World Declaration (Jomtien Conference)

⁸⁵ See article II of the World Declaration (Jomtien Conference).

⁸⁶ See article II (2) & article 3 of the Jomtien Conference.

⁸⁷ See the Dakar Framework for Action, Education for All: Meeting our Collective Commitments, adopted by the World Education Forum 26-28 April 2000, Dakar.

provides that “this target should be achieved by 2015”.

2.9 Conclusion

In light of the above mentioned international covenants and treaties, the reality has shown that the right to education is fully supported and promoted not only locally but also internationally. This means that all the signatories to these conventions have in addition to their own local legislative frameworks, policies and other measures support of the right to education. International instruments supporting access to the right to education in ensuring access to quality education as mandated by the Constitution of the Republic of South Africa are very important for the improvement of performance in black schools.

CHAPTER 3: POLICIES AND LEGISLATIVE FRAMEWORKS FOR CAPACITATION OF EDUCATORS IN ENSURING THE RIGHT OF QUALITY EDUCATION.

3.1 Introduction

The end of apartheid regime in 1994 was regarded as victory for democracy and human rights nationally and internationally. It created unique opportunities and responsibilities to build the divided fragmented system of education and establish equality participatory democracy on which the Department of Education envisions as:

*“South Africa which all people have equal access to lifelong education and training opportunities which will contribute towards improving the quality of life and build a peaceful, prosperous and democratic society”.*⁸⁸

National laws and policies were introduced, aimed at redressing the past injustices and inequalities which denied access to quality education. It is pertinent to mention that access to quality education can be realized through capacitation of educators in curriculum implementation.

3.2 The Constitution of the Republic of South Africa, 1996

Section 29 of the Constitution provides that “everyone has the right to a basic education, including adult basic education; and to further education, which the state through reasonable measures must make progressively available and accessible.”⁸⁹

In the case of *The School Governing Body of the Juma Musjid Primary School v/s Essay NO* the court stated the following:

“It is important for the purpose of this judgement, to understand the nature of the right to ‘a basic education’ under section 29 (1) (a). Unlike some of the other socio – economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to basic education in section 29(1) (a) may be limited only in terms of

⁸⁸ The Department of Education 1996 Page 5

⁸⁹ Section 29 (1) (a) and (b) of the Constitution of the Republic of South Africa, 1996.

a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1) (b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressive available and accessible'.⁹⁰

The right to a basic education promised by section 29(1) (a) 'can only be achieved through the provision of classrooms, teachers and textbooks'. The problem of non-delivery of textbooks to schools in the Limpopo Province in 2013 resulted in the organisation Section 27 bringing an urgent application to the Gauteng High Court to compel the Minister of Basic Education to ensure that the textbooks were delivered by a specified deadline to schools in Limpopo. The court declared that the failure to deliver textbooks was an infringement of the right to a basic education and made an order to compel effective delivery and directed the Department of Basic Education to make a 'catch up' plan to ameliorate the effects of the failure on learners.⁹¹

The constitution allows everyone who is empowered to establish independent institution to capacitate educators for quality education. Currently there are many private schools which might just save South Africa.⁹² With teacher trade unions opposing policies that might improve teacher quality, our minister of education seems paralyzed.⁹³ Corruption often means that budgets are either unspent or spent inefficiently. Private schools have become an alternative for middle-income families wanting a better future for their children.⁹⁴ Private schools generally have better facilities, smaller classes, effective educator and the culture of high performance.

One possible source of better performance in private schools than government schools is that independent schools provide principals and teachers with stronger incentives for good performance than in the public schools. The demand for private schooling is often driven by dissatisfaction with the quality of education available in the public schools due to lack of proper resources.

⁹⁰ Joubert Incorporating international standards into national education law in South Africa: The accountability of the state (2014) 29 SAPL page 14

⁹¹ *Ibid* pages 14-15.

⁹² Jacobs Time to learn Fin24 Friday 3 February 2017.

⁹³ *ibid*

⁹⁴ *Ibid*

3.3 The White Paper on Education and Training (1995)

The white paper on education and training gives directions to how South African education system must be provided. The paper intends to build a system of education and training that are founded on equity and non-discrimination and respect diversity, honour learning and strive for excellence.⁹⁵

The paper provides that “for the first time in South Africa's history, a government has the mandate to plan the development of the education and training system for the benefit of the country as a whole and its entire people”. “The challenge the government faces is to create a system that will fulfil the vision to open the doors of learning and culture to all”.⁹⁶ This paper suggests a just and equitable educational system which will give all learners of South Africa education of good quality. This is the first priority of the government under the “Reconstruction and Development Programme (RDP)”. The main aim of the RDP is to make sure that the country's human resources are fully developed. Quality educational and training can be used as a strong tool to empower people and to encourage them to participate actively in all process involving the democratic society which is free from any other form of discrimination.⁹⁷

Investing in teacher effectiveness is key to improving student learning. The impact of teacher quality outweighs the impact of any other school education programme or policy. In fact, teacher effectiveness is the largest factor influencing student outcome, outside the family background.⁹⁸

Teacher capacity is influenced at two distinct stages. The first is during initial teacher education, and the second is over the course of a teacher's career.⁹⁹ Top performing education systems invest heavily in initial teacher education to ensure graduates are well prepared by the time they enter classroom.¹⁰⁰ Newly qualified teachers then engage in

⁹⁵ The White Paper on Education and Training.

⁹⁶ The White Paper on Education and Training (nota 91 above), chapter 3 page 11 par 1.

⁹⁷ See The White Paper on Education and Training (note 94 above) par 2.

⁹⁸ Microsoft in education: Building Leaders and Educator Capacity for transformation 2014 www.microsoft.com/education.

⁹⁹ Ibid para 4

¹⁰⁰ Ibid para 6

intensive on the job training in their first year of work to cement core skills and competencies. Professional learning remains important throughout teachers' careers so that they can continually improve and spread good practice to others.¹⁰¹

3.4 The South African Schools Act (SASA) 1996

SASA is aimed at doing away with the apartheid educational system and focus on an equal and uniform high quality education.¹⁰² SASA also wants to empower schools and communities to make a difference.¹⁰³ It provides that “subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first”.¹⁰⁴ The Act further provides that “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 the redress of past inequalities in education provision”.¹⁰⁵

Section 58B (1) of SASA requires the Head of Department (HoD) to identify underperforming public schools.¹⁰⁶ The HoD must annually from the report contemplated in section 16A (1) (b) and from other relevant reports, identify any public school that is underperforming in relation to any matter referred to in subsection (2) (a) (b) or (c).¹⁰⁷ The HoD is further required to issue a written notice to the school contemplated in subsection

¹⁰¹ Ibid para 7

¹⁰² The preamble of the South African Schools Act provides that “this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State”.

¹⁰³ SASA's framework includes: Making nine years of schooling compulsory (grade 1 to 7), Localizing power in school community. As a result governing bodies could develop their own admissions policy, language policy (subject to the constitution), code of conduct for learners (excludes corporal punishment) and determine fees. At the same time the Act prevented schools from excluding learners on the basis of entrance tests and being unable to afford the set fee. Offering greater powers to schools that applied for and were accepted for section 21 status. This meant that these schools could purchase their own textbooks or pay for services.

¹⁰⁴ See section 3 (1) of the South African Schools Act 84 of 1996.

¹⁰⁵ See section 34 (1) of the South African Schools Act 84 of 1996.

¹⁰⁶ See section 58B (1) of South African Schools Act 84 of 1996.

¹⁰⁷ See South African Schools Act 84 of 1996.

(1) if he or she is satisfied that:

- The standard of performance of learners is below the standards prescribed by the National Curriculum Statement and is likely to remain so unless the HoD exercises his or her powers in terms of this Act.¹⁰⁸
- There has been a serious breakdown in the way the school is managed or governed which is prejudicing or likely to prejudice the standards of performance.¹⁰⁹
- The HoD must take all reasonable steps to assist a school identified in terms of subsection (1) in addressing the underperforming.¹¹⁰

The Head of Department must identify underperforming schools in the Province with the intention of making stakeholders aware of status of performance in those schools. Announcement of underperforming schools by the HOD will compel the SGB to build capacity for incapacitated educators in those schools (underperforming schools) for access to quality education.

In terms of the functions of the SGB section 20 (1) (e)

Subject to this Act, the governing body of a public school must

Support the principal, educators, and other staff of the school in the performance of their professional functions;

Section 21(1) (c) further provides that:

Subject to this Act, a governing body may apply to the Head of Department in writing to be allocated the following function;

to purchase textbooks, educational materials or equipment for the school

In terms of allocated functions of governing bodies. This section empowers the SGB to ensure the realisation of access to quality education by supporting educators in their performance of their responsibilities.

3.5 Employment of Educators Act (EEA) 1998

One of the purposes of the Act is to empower the employer to discharge an educator from service if an educator performs poorly in terms of schedule 1 section 1 (1). The employer

¹⁰⁸ See South African Schools Act 84 of 1996.

¹⁰⁹ See South African Schools Act 84 of 1996.

¹¹⁰ See South African Schools Act 84 of 1996.

can discharge an educator after following due processes regarding the applicable provisions of the Labour Relations Act 66 of 1995, schedule 8. In respect of poor work performance, the relevant employer must assess the incapacity of an educator by considering the extent to which the educator lacks the necessary skills to perform in accordance with the educator's job description, the nature of the educator's work and responsibilities and circumstances of the educator.¹¹¹ The employer, who is the Head of the Department or Director – General of the Department of Education can discharge a poorly performing educator from service. Section 16 of the Act talks about incapable educators. The section makes provision for the Head of Department to assess the capacity of the educator if it is alleged that an educator is unfit for the duties attached to the educator's post or incapable of carrying out those duties effectively.

The HOD has to take action against the educator in accordance with the incapacity code of good practice and procedure for poor work performance as provided in schedule one of the Act. In applying this code and procedures, the HOD must assess the extent to which the incapacity impacts on the work of the public school. The HOD is empowered by this Act to capacitate poor performing educators in the Province. The HOD is expected to build capacity for these educators to improve their performance.

The HOD will issue a written notice to the principals of the underperforming schools, declaring the school underperforming. The HOD will advise the principals to identify root causes for underperformance and direct them to submit their plans for improving their academic performance of their schools.

If managers are supporting educators, providing resources, underperformance would be the issue of the past. The Act empowers the employer to identify underperforming educators and discharge them if they have been provided with skills but still unable to perform up to the standard. In the case of *Grey v/s Education Labour Relations Council and others*, a high school educator was dismissed on the grounds of unprofessional conduct for contravening section 17(1)(c) of Employment of Educators Act.

3.6 The 2003 National Plan of Action

In 2003, the National Plan of Action was adopted by the department of education which

¹¹¹ Employment of Educators Act 1998.

seeks to “improve access to free and quality basic education for all”. The plan declares that “it is well on the way to attaining the provision of basic education that is compulsory for all children of school-going age that is of good quality and in which financial capacity is not a barrier for any child before 2015.”¹¹² This plan provides that “there is a need for free and quality education for all”.¹¹³

The government is providing compulsory and free education up to grade 9. Even if the government alleges to provide compulsory, free and quality education, in real the government does not monitor the provision of compulsory and free, let alone quality education. There are many black learners who drop out before they reach grade 9 but there is no punishment or any means that compels their parents to leave them in schools until grade 9. Access to quality education also is not realized in black schools because of insufficient resources.

The plan provides effective deployment of trained teachers.¹¹⁴ That teachers must be deployed based upon subject teaching needs and teachers’ specialisation, give priority to schools in remote, as well as incomplete rural schools.¹¹⁵ The plan also emphasises the importance of improved quality of in-service training. The plan suggests that unqualified teachers need to be trained. It further emphasises training of management and supervision of schools.¹¹⁶

Despite significant investments world-wide, the vast majority of professional learning has little impact.¹¹⁷ Few teachers report professional learning as useful.¹¹⁸ However when it is done well, professional learning can significantly improve student learning.¹¹⁹

3.7 Integrated Quality Management System (IQMS) for School-Based Educators

An agreement was reached in the ELRC (Resolution 8 of 2003) to integrate the existing programmes on quality management in education. The existing programmes were the

¹¹² See footnote 48 above.

¹¹³ See Plan of Action: Improving access to free and quality basic education for all (2003) page 8, para 14.

¹¹⁴ The 2003 National Plan of Action Page 91.

¹¹⁵ *Ibid* page 92

¹¹⁶ *Ibid* page 93

¹¹⁷ Microsoft in Education: Building Leader and Educator Capacity for Transformation 2014: www.microsoft.com/education.

¹¹⁸ *Ibid*

¹¹⁹ *Ibid*

Developmental Appraisal System (DAS) that came into being on 28 July 1998 (Resolution 4 of 2008), the Performance Measurement System that was agreed to on 10 April 2003 (Resolution 1 of 2003) and the Whole-School evaluation (WSE). The IQMS is informed by Schedule 1 of the Employment of Educators Act, No 76 of 1998, “where the Minister is required to determine performance standards for educators in terms of which their performance is to be evaluated.

The IQMS is an integrated quality management system that consists of three programmes, which are aimed at enhancing and monitoring performance of the education system.”

The purpose of IQMS is:

- “To identify specific needs of educators, schools and district offices for support and development;
- To provide support for continued growth;
- To promote accountability;
- To monitor an institutions overall effectiveness;
- Provide basis for paying salary progression, rewards and other incentives, and
- To evaluate an educators’ performance

The implementation of the IQMS is guided by the following principle:

- The need to ensure fairness, for example, there can be no section against an educator in respect of his/her performance before providing meaningful opportunities for development.”¹²⁰

Professional development of teachers is a cornerstone for the provision of quality teaching and learning in an education system in a country.¹²¹ Studies have shown that effective professional development programmes of teachers stand at the centre of the proposal for improving the quality of teaching and the transformation of education. The integrated quality management system has been placed to develop the competencies of teachers in South Africa.¹²²

The implementation of the IQMS was hampered by a combination of factors, including the inadequate advocacy programme of the national Department of Education (DoE) in introducing IQMS to schools, poor training in some provinces, inadequate leadership by

¹²⁰ Integrated Quality Management System (IQMS) for School-Based Educators.

¹²¹ <https://journals.co.za/content/jeds/1/26/2017>

¹²² *Ibid*

principals, and teachers' resistance to the process.¹²³ Despite the efforts to strengthen the implementation of the IQMS, schools have struggled to work with it¹²⁴. As a result, the DoE commissioned a review of its implementation in 2007. The review identified two main challenges which are a skewed emphasis during IQMS training on performance measurement for pay and level progression in order to get buy-in to the system by teachers, with the result that professional development was not understood as part of the process; and the lack of professional development opportunities for all teachers and a lack of quality assurance of development programmes.¹²⁵

In 2008 the DoE appointed external moderators in the provinces to monitor the implementation of the IQMS processes and procedures in the schools. Problems like inadequate training of both school teachers and education officials on IQMS processes¹²⁶ were identified. The team found that "the professional development aspect of the IQMS has been neglected because schools have not had the time or skill to implement all the requirements".¹²⁷

Similarly a Ministerial Committee on the National Education and Evaluation Development Unit (NEEDU), which was established in 2008, reviewed the IQMS and identified fundamental problems.¹²⁸ It found no evidence that the IQMS would be able to serve as an effective mechanism for accountability, because most teachers do not know how to conduct an effective analysis of teacher performance or how to prioritise teacher development needs and the outcome are heavily weighted in favour of the teacher's self-assessment.¹²⁹ It further noted that "the existing list of performance standards was cumbersome and time-consuming, generating considerable volumes of paperwork for heads of departments, and does not capture adequately the most important core function of schooling, namely the level of learning achieved by learners".¹³⁰

A major problem in professional development programmes of teachers offered is that teacher competencies seem not to be improving as envisaged, mainly because of

¹²³ Berger: *Teacher Evaluation in South African Schools, Informing South African Policy: 2015.*

¹²⁴ *Berger Teacher Evaluation in South African Schools 2015, 9th Edition page 6.*

¹²⁵ *Berger: Teacher Evaluation in South African Schools, informing South African Policy:2015.*

¹²⁶ *Ibid page 9*

¹²⁷ *Ibid page 9*

¹²⁸ *Ibid page 10*

¹²⁹ *Ibid page 11*

¹³⁰ *Ibid page 12*

problems experienced in implementation. For example, challenges to the (IQMS) include a tendency to lose sight of the objectives and processes.¹³¹ The focal point in implementation becomes securing awards rather than improving the quality of teaching and learning, because the same instrument is used for development and performance management. ¹³²Another challenge is that the IQMS policy does not directly encourage and motivate teachers or improve their morale as it focuses mainly on monitoring school effectiveness. Shortage of adequately quality staff and large learner-teacher ratios exacerbate the problem in the implementation of the policy.

A new system to strengthen teacher development in the public sector has recently been introduced. In 2007, SACE was given overall responsibility for the implementation, management and quality assurance of a Continuing Professional Teacher Development (CPTD) Management System. The aim is to enhance the quality of teaching in public schools through a process of recognising, supporting and tracking teacher professional development. The SACE Council approved the CPTD implementation plan in November 2012 and it has subsequently been implemented on a phased-in basis, beginning with principals and deputy principals in January 2014.

The CPTD system requires public school educators to accumulate 150 professional development points in every three-year cycle. Points can be accumulated through three types of activity: teacher initiated activities, school-initiated activities, or externally-initiated activities by providers. Only the courses of a SACE-approved service provider will attract points. Educators must report their participation in professional development twice a year to SACE and maintain a Professional Development Portfolio according to SACE guidelines.

SACE has advised that for the first six years (from 2014 to 2019) no penalty will be imposed on teachers who do not achieve their 150 points target. The CPTD system is available to all teachers in South Africa but is compulsory for teachers in the public sector.

These problems can be effectively addressed if principals can draw up a monitoring instrument which could direct the class visits. An Integrated Quality Management System programme should also be put in place. Structures such as school development teams and

¹³¹ *Ibid*

¹³² *Ibid*

development support groups should be in place, effectively and functionally. The appraisal of educators should take place for educators to share their experiences and offer each other moral support.¹³³ Proper training of principals and SMTs is very important for effective and efficient implementation of IQMS. Robust advocacy of IQMS programmes will effectively address the problems of implementation.

3.8 The Teacher Development Summit 2009

Continuing problems with the implementation of the IQMS, among other issues, led to the two national departments, the DBE and the Department of Higher Education and Training (DHET), calling a multi-stakeholder teacher development summit to examine all the challenges relating to the teacher development and propose strategies to address them.¹³⁴ In terms of the IQMS specifically, the view taken was that it was not effective and had many problems and inconsistencies. Arguments were advanced for the separation of appraisal for development purposes from appraisal for remuneration purposes. It was argued that the IQMS locates teachers as both referees and players, with no systems in place to monitor implementation. The Teacher Summit concluded that the linking of the IQMS with pay progression has “distorted its development purpose and value”.¹³⁵

The participants resolved that a new, strengthened, integrated national plan for teacher development be developed to include a clear, coherent policy and regulatory environment for both teacher appraisal and teacher development. It was decided that teacher development appraisal be delinked from issues of remuneration, the IQMS be streamlined and rebranded, and all standards and criteria around teacher competence and performance, and assessment instruments, should be reassessed to determine their relevance.¹³⁶

3.9 Integrated Strategic Planning Framework for Teacher Education and Development in South Africa (2011-2015)

While the lead government departments have been identified in the previous paragraph, it

¹³³ Badugela Problems facing educators in implementing the National Curriculum Statement: University of South Africa: 2012.

¹³⁴ Berger: *Teacher Evaluation in South African Schools, informing South African Policy:2015*

¹³⁵ Berger, *Teacher Evaluation in South African Schools, Informing South African Policy 2015*

¹³⁶ *Ibid*

is recognised that other stakeholders in education have an important role to play in ensuring that teachers have access to quality teacher education development opportunities. Teacher unions have a responsibility to promote teacher professionalism, South African Council of Educator (SACE) for quality management in promoting and supporting the system for identifying and addressing teacher development needs, the universities to ensure that their programmes are accessible to teachers, ETDP SETA ensuring that its activities are directed towards the support of teachers to register for short courses or qualification programmes, supporting new teacher induction. The plan is strongly aligned with national imperatives that are currently in place, including the following:

- The DBE's Action Plan 2014, which has among its goals the following, towards the achievement of which this Plan will directly contribute:
 - Attract a new group of young, motivated and appropriately trained teachers into the teaching profession each year.
 - Improve the professionalism, teaching skills, subject knowledge and computer literacy of teachers through their entire careers.
 - Strive for a teaching workforce that is healthy and enjoys a sense of job satisfaction.
- The DHET's Revised Strategic Plan (2010/11-2014/15), which has among its strategic objectives the following:
 - To monitor the production of initial teachers and the development of practising teachers through qualification programmes, in order to inform planning and determine enrolment and graduation targets.
 - To strengthen the capacity and capability for the provision of school teacher education in university in order to produce and develop sufficient quality teachers in line with Ministerial targets.

The plan advocates the creation of new structures, including a National Institute for Curriculum and Professional Development (NICPD), District Teacher Development Centre, Professional Learning Communities, Teacher Education Institution, and Teaching Schools and Professional Practice Schools, to provide teachers with support and access to development opportunities. It also formally delinks teacher appraisal for development from appraisal for remuneration and salary progression. The ELRC was tasked with the responsibility to streamline and rebrand the IQMS.

3.10 The Quality Management System

Accordingly, a new Quality Management System (QMS) was developed by a task team of the ELRC. The purpose of the QMS is to evaluate the performance levels of individual school-based educators in order to improve accountability and achieve high levels of school performance. It provides a mechanism for assessing educators, taking into account the context within which they operate, and is the basis for paying salary progression, rewards and other incentives. Most significantly it does not include a professional development component.

The QMS places responsibility for implementation and management on the School Management Team (SMT) together with the principal, who is accountable for ensuring consistency of application in the school and verifying the appraisal processes. Circuit managers are responsible for evaluating principals' performance and the moderation of school appraisals. Grievance committees are also to be set up in schools and circuits.¹³⁷

3.11 Green Paper for Post-School Education and Training (2012)

The Department of Higher Education and Training (DHET) published a green paper that is aimed at improving educational system of South Africa.¹³⁸ The paper provides that "the education system is still plagued by inequalities in terms of race, class and gender". The green paper aimed at improving education system of South Africa, ensuring that people are qualified and competent. The paper further provides that "education institutions in the historically black areas are still under-resourced and disadvantaged.

The post school education and training envisaged by the DHET must be equitable, accessible and affordable to all sections of the population, including free education and training for the poor.

The paper proposed that come 2030 the country should have a post-secondary school system that will change the face of education and training in the post-school sector as follows:

¹³⁷ Berger, Teacher Evaluation in South African Schools: Informing South African Policy 2015.

¹³⁸ See the National Development Plan vision 2030 chapter 9 page 276. See also the Department of Higher Education and Training's Green Paper for Post-School Education and Training, Summary prepared by Yuven Gounden for the National Science and Technology Forum (NSTF) March 2012.

- Improving the quality of the TVET colleges, developing innovative programmes and upgrading lecturer qualifications.
- Establishing institutions which will provide a link between education, training and labour market.¹³⁹

The paper will ensure a continuing professional development for full-time staff in the post-schooling sector, and for the increasing numbers of part-time (e) tutors and (e) mentors, in appropriate resource-based and/or distance education approaches.¹⁴⁰

The paper further provides that teaching needs to be taken seriously and a great deal of effort needs to go into improving its quality and supporting teachers at all levels of the post-school system. The DHET strategy must build, support and resource its expanded system.¹⁴¹

The goal of attaining meaningful post schooling will be supported by the development and sharing of well-designed high quality learning resources that build on the expertise and experience of top quality scholars and educators.”¹⁴²

3.12 The National Development Plan (NDP) 2011

The National Planning Commission published the NDP which provides that “although progress has been made in all subsectors of the education and training system since 1994, there are problems that must be solved to achieve the vision for education, training and innovation”.¹⁴³

The NDP provides that “education, training and innovation are central to the South Africa’s long term development. They are the core elements in eliminating poverty and reducing inequality, and the foundations of an equal society. The quality of schooling system impacts significantly on further education, college, higher education and society’s ability to innovate”.¹⁴⁴

The NDP provides that “despite many positive changes since 1994, the legacy of low

¹³⁹ See the Department of Higher Education and Training’s Green Paper (note 91above) page 1 par 3.

¹⁴⁰ See the Department of Higher Education and Training’s Green Paper

¹⁴¹ See the Department of Higher Education and Training’s Green Paper

¹⁴² See the Department of Higher Education and Training’s Green Paper

¹⁴³ See the National Development Plan vision 2030 chapter 9.

¹⁴⁴ National Development Plan (note 102 above), page 262 par 1.

quality education in historically disadvantaged parts of the school system persists. This is hampering the education system's ability to provide a way out of poverty for poor children".¹⁴⁵

The NDP provides further that "although progress has been made in all subsections of education and training system, there are severe problems that must be solved to achieve the vision for education, training and innovation. Many parts of further education, training and skill development are severely underperforming. There are not enough public institutions providing learning opportunities in this sector, despite the millions of young people who are eager to learn. Although there are some strong institutions, the college sector is small and weak".

The NDP proposed that "the higher education system should be diverse so that institution can build on its strengths and expand area of specialization. However, differentiation need to take place in a context that takes account of social justice and equity imperatives; this means that historically disadvantaged institution must be given adequate support and incentives to develop their own area of excellence in both research and teaching".¹⁴⁶

The NDP has good intention in terms of teacher capacity. Unfortunately, in historically disadvantage black rural schools, teacher training and in- service training or skills development are not taking place. South Africa has good policies but it lacks implementation and monitoring strategies of these policies. There are many programmes for teacher training but black school educators do not access these programmes due to poor capacity of some of the principals and Departmental officials. The ruling party which introduced these programmes does not even bother to monitor the implementation of these policies especially in rural areas. The level of corruption in the country is disadvantaging the implementation of the good policies. Due to corruption and nepotism administrators and officials who are responsible for allocation of resources do not consider capacitation of black school educators in black schools.

¹⁴⁵ See the National Development Plan (note 102 above) page 269 par 6.

¹⁴⁶ See Allais S, Lolwana P & Marock (2011). Further Education and Training and Skills Development. A report prepared for National Planning Commission. See further the National Development Plan vision 2030 chapter 9 page 267-268.

3.13 Conclusion

In South Africa, legislative intervention measures and frameworks for educators in ensuring the right of access to quality education are sufficiently developed. However, the challenge is lack of proper implementation and monitoring of these frameworks. It is imperative for the government to ensure that the enforcement of these legislative frameworks is compulsory. It is again the responsibility of the government to ensure that educators are capacitated for successful delivery of their pedagogical responsibilities. The successful improvement of performance in black schools depends on capacitated educators. The leaders and stakeholders in the Department of Education are compelled to ensure full support and compliance of implementation and monitoring of these policies and frameworks for access to quality education and improve performance in black schools.

CHAPTER 4: THE CONTRIBUTION OF THE JUDICIARY IN ENSURING ACCESS TO THE RIGHT TO EDUCATION

4.1 Introduction

The delivery of the right to education in a democratic country is an exercise that engages all arms and spheres of government working hand in hand, including the judiciary¹⁴⁷ After the legislature has made the framework available, it is the executive's duty to ensure that the right is enforced and achieved through practical measures such as the provision of sufficient schools, classrooms, transport where necessary, properly trained teachers, appropriate learning materials and the delivery of teaching and assessment while the judiciary must ensure that the right in question is interpreted appropriately.¹⁴⁸ The effective provision of education need a good co-operative governance approach between the national and provincial departments or/and spheres not excluding a strong partnership with local governing bodies. It is an undisputed fact that litigation can be seen as adversarial; however, it can open the door to achieve an appropriate improved "access to the right to education". The "right to education" has also been discussed and interpreted by the judiciary in both the local and the international courts.

4.2 The Nature and Meaning of the Right to Education

*Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*¹⁴⁹ was the first case that proclaimed the "nature" and meaning of the right to basic education as immediately realisable. "The case concerned the plight of learners enrolled at Juma Masjid School, a public school that was located on private property. The Juma Masjid Trust, the owner of the private property obtained an eviction order against the state in the High Court and effectively, against the learners situated at the school. The state and the school governing body unsuccessfully appealed the High Court decision in the Supreme Court of Appeal and ultimately sought relief in the Constitutional Court. The main concern of the Court was that the learners should not be left without alternative placements".¹⁵⁰

¹⁴⁷ Skelton The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical valuation of recent education case law 2013 pp1

¹⁴⁸ *Ibid* pp1

¹⁴⁹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).

¹⁵⁰ See *Juma Masjid Primary School* para 74 and 78.

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

In *section 27 v Minister of Education*¹⁵¹ “an urgent application was brought before the North Gauteng High Court, seeking a declaratory order that the failure by the Department of Basic Education to provide textbooks to schools in Limpopo was a violation of the right to basic education, equality and dignity, and an order directing the department to urgently provide textbooks for Grades R, 1, 2, 3 and 10, by no later than 31 May 2012 to the schools that had not yet received textbooks”. This application was the culmination of efforts by applicants through correspondence and meetings, to ensure that the Limpopo Department of Basic Education would provide the required textbooks. Kollapen J, citing the *Juma Masjid* case¹⁵², found that children have an immediately realisable right to a basic education. The court also found that textbooks are an essential component of quality learning and teaching, and that the failure by the respondents was a violation of the right to a basic education.¹⁵³ The court observed that “education is critical in both freeing and unlocking the potential of each person and it also found that textbooks are an essential component of quality learning and teaching”.¹⁵⁴ In this regard the court concluded that “the failure by the respondents to provide text books constitutes a violation of right to basic education”.¹⁵⁵ The court granted the declaratory order, ordered the department to deliver the textbooks, and also ordered a “catch up” plan to set out various remedial measures such as the provision of extra classes.

The Court’s decision in this case was protecting and promoting the right to quality education, as the right to quality education cannot be achieved without text books.

¹⁵¹ *Section 27 v Minister of Education* 2013 2 SA 40 (GNP)

¹⁵² *Juma Masjid* case par 21.

¹⁵³ Par 32

¹⁵⁴ See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 22.

¹⁵⁵ See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 32.

In *Madzodzo and Others v Minister of Basic Education and Others*¹⁵⁶ the Eastern Cape High Court handed down judgment in an application brought against the National and Provincial Education Departments to compel the delivery of school furniture to schools across the province. The applicants, Madzodzo and others were parents whose children attended junior and senior public schools in the Eastern Cape. Although the application was initially about children attending three public schools in the province, other parents joined the proceedings and eventually the remedy sought was in respect of the whole of the province.

The Education Departments argued that “the allocation of resources, procurement and delivery of furniture could only happen after an independent audit of furniture shortages across all schools in the Eastern Cape was completed later that month”.

The Court rejected this argument and held that “school furniture is an integral component of “the right to basic education” enshrined in section 29(1) (a) of the Constitution, and that the state is obliged to “take all reasonable measures to realise the right with immediate effect.”¹⁵⁷ The Court held that “the respondents were in breach of the constitutional right of learners in public schools in the province as provided for in s 29 of the Constitution by failing to provide adequate age-and-grade-appropriate furniture that would enable each child to have his or her own reading and writing space”. “This means that learners were entitled, as of right, to have immediate access to basic education as well as to be treated equally and with dignity. Lack of adequate age-and-grade-appropriate furniture in public schools, particularly by schools located in deep rural and impoverished areas, undermined the right to basic education while the persistent failure to deliver such appropriate furniture to public schools’ amounts to violation of the right to basic education”. The Court recognised that “the national and provincial Education Departments had been aware of the furniture shortages for a long time, and therefore ordered them to deliver the furniture by 31 May 2014”.¹⁵⁸

¹⁵⁶ *Madzodzo and others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

¹⁵⁷ See *Madzodzo* (note 154 above) para 17.

¹⁵⁸ See Lucy Jamieson (Children’s Institute, University of Cape Town), Nikki Stein (Section 27), and Samantha Waterhouse (Community Law Centre, University of the Western Cape), *South African Child Gauge 2014*, part one: Children and law reform, page 15.

This was also a way of protecting and promoting the right to quality educations as it cannot be achieved without the availability of the furniture in those schools.

4.3 Accessibility of the Right

Accessibility of the right to education refers to “the child’s ability to enrol and as a result attend school”. In *Adam Legoale v MEC for Education, North West*,¹⁵⁹ “an application was brought to the North West Court in Mafikeng by the applicants and the Centre for Child Law, represented by the Legal Resources Centre. The applicants were the parents or caregivers of children who attend the Rakoko High School in Mabeskraal, North West”. “The families all live in Siga Village which is 25 km from Mabeskraal. The children previously attended a local school (JC Legoale Commercial School) within walking distance of their homes in Siga Village until it was closed down by the government in 2009, as part of the rural rationalisation process”.¹⁶⁰

“Since transport was not provided some of the learners’ families could not afford the bus fare and had dropped out of school, whilst others struggled to pay out the transport costs from their incomes, mostly from pensions or/and grants. The relief sought in the application was the provision of adequate learner transport to learners, free of charge. The Centre for Child Law asked for the plans and programmes in the North West province for the provision of learner transport to be produced and for the details to be made public, so that learners and their parents could be made aware of their rights. The matter was settled, and a settlement agreement was made an order of court on 10 August 2011”.

The urgent interim measures of the agreement was that, “the Department of Public Works and Transport, in conjunction with the Department of Education, were to provide transport for the children from Siga Village to their places of learning at Mabeskraal from 8 August 2011 for 3 months or until longer term measures are put in place, whichever occurred later. The transport was to be fully subsidised by the two departments and scheduled appropriately to the needs of the children. The agreement also allows the applicants to

¹⁵⁹ *Adam Legoale v MEC for Education, North West*, North West High Court, Mafikeng, case no 499/11, unreported.

¹⁶⁰ In the Affidavit filed on behalf of the Centre it was pointed out that the closure of public schools is regulated by s 33 of SASA, which involves a consultative process with the school governing body. Closure of a rural school should be governed by the underlying principles set out in the Report of the Ministerial Committee on Rural Education: A new vision for rural schooling, which also requires a consultative process.

contact the two departments to check on progress. If in any event the terms of the agreement were not complied with, any party was permitted to approach the High Court on an expedited basis”.¹⁶¹ Lack of transport or long distances would render quality teaching and learning ineffective because tired learners can impede effective teaching and learning. For educators to provide teaching and learning effectively, punctuality of learners is important.

The Constitutional Court also handed down judgment in *MEC for Education in Gauteng v The Governing Body of Rivonia Primary School*.¹⁶² This case “involved the relative powers of school governing bodies and provincial Education Departments in determining a school’s capacity to accommodate learners. In this case, the Head of the Gauteng Department of Education instructed the school governing body of Rivonia Primary School to admit a learner, even though the school was full in terms of its own admissions policy”. The school governing body challenged this, arguing that “the provincial department did not have the power to issue such an instruction”. The Court ruled that “provincial Education Departments can override school admissions policies, but they must do so in a way that is procedurally fair and in accordance with their powers under the SASA and any other relevant laws”. The Court described the “right to education” as “an empowerment right that enables people to realise their potential and improve their living conditions”,¹⁶³ and relate this to the General Comment 13.¹⁶⁴ The Court also emphasised the fact that “it is important to engage all role-players in education to ensure that the best interests of learners are promoted at all times.

In *Linkside & others v Minister of Basic Education*¹⁶⁵ the case involves the ongoing failure by the Eastern Cape Department of Basic Education to appoint educators in vacant posts at various public schools throughout the province, and the consequent violation of the right of the children at those schools to basic education as guaranteed by Section 29 of the

¹⁶¹ See Ann Skelton, The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law, page 11-17.

¹⁶² *MEC for Education, Gauteng and Others v Governing Body of the Rivonia Primary School and Others* 2013 (6) SA 582 (CC).

¹⁶³ *MEC for Education* (note 160 above) Para 26.1.

¹⁶⁴ See Para 28 of the judgement (this quotation from General Comment 13) which provides that “Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities”.

¹⁶⁵ *Linkside & Others v Minister of Basic Education and Others* (3844/2013) (2015)

Constitution.¹⁶⁶ The applicants are public schools who opted to pay the educators occupying substantive posts on provincial educator post establishment. It is declared that each of the amounts paid by the school governing body of those schools constitutes a debt against the state in terms of State Liability Act 20 of 1957. The first respondent is the Minister of Basic Education who bears Constitutional and statutory responsibilities in respect of the provision of basic education and funding of public schools.¹⁶⁷

Roberson J made the following order, which was substantially in accordance with the relief sought by the applicants:

“That in respect of the specific amounts paid by the applicant schools’ governing bodies to educators occupying substantive vacant posts, the respondents are directed to reimburse the applicants schools, by paying the applicant school governing bodies the amounts paid. That all educators who are Funza Lushaka bursary holders will be appointed permanently”.¹⁶⁸

The Court held that for those people in this country who take for granted not just education but quality education the notion of a school with insufficient educators, or no educators, is unthinkable and incomprehensible. The court held that the children of the poor families will suffer the most because the schools they attend cannot afford to pay educators who occupy the vacant posts. A decent education is probably the only means of escape for these children from the confines of their poverty. The court held further that the ongoing violation of the right to basic education constitutes exceptional circumstances. This is a case where the permanent appointment of educators in substantive vacant post should not be left to the designated functionary.¹⁶⁹

The significance of the right to basic education was dealt with in *Governing Body of the Juma Masjid Primary School and others v Essay NP and Others 2011 (8) BCLR 761 (CC)* as follows: “That Basic education is an important socioeconomic right directed, among other things at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities. To this end, access to school is an

¹⁶⁶ *Ibid* (par 2)

¹⁶⁷ *Linkside & Others v Minister of Basic Education (3844/2013)* (15)

¹⁶⁸ *Ibid* paras 1 and 2

¹⁶⁹ *Ibid* par 25

important component of the right to a basic education guaranteed to everyone by section 29(1) (a) of the Constitution – is a necessary condition for the achievement of this right.”

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*The Minister of Basic Education v Basic Education for All*¹⁷¹

This case is about the importance of textbooks in schools and it explores the role that they (textbooks) play in a child’s and adult’s right to basic education. The DBE appeals against the order that non-delivery of prescribed textbooks to certain learners in Limpopo Province in 2014 academic year before the teaching of the curricular for which such textbooks were prescribed was due to commence was a violation of such learners’ rights to a basic education in terms of section 29(1)(a) of the constitution.¹⁷²

The department of basic education has adopted a clear national policy that each learner must be provided with a textbook for each subject before commencement of the academic year.

The court held that the department’s failure to provide textbooks to each learner infringe their right to basic education, and failure to provide textbooks to a small number of students in Limpopo amounted to unfair discrimination against them. Order of the court a quo requiring department to deliver textbooks and report to respondents accordingly confirmed and appeal dismissed.¹⁷³

It is declared that section 29(1)(a) of the constitution entitles every learner at public schools in Limpopo to be provided with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed; declared further that it is the duty of the State in terms of section 7(2) of the Constitution, to fulfil the section 29(1)(a) right of every learner by providing him or her with every textbook prescribed for his or her grade before commencement of teaching.¹⁷⁴

The court found that textbooks are an essential component of quality learning and teaching, and that the failure to provide such was a violation of the right to a basic education.

*Tripartite Steering Committee v/s Minister of Basic Education.*¹⁷⁵

This case concerns whether the right to basic education includes as part of it a right to be

¹⁷⁰ *Ibid par 24*

¹⁷¹ Minister of Basic Education v Basic Education for All 20793/2014

¹⁷² *Ibid pp 3*

¹⁷³ *Ibid pp 3*

¹⁷⁴ *Ibid pp 4*

¹⁷⁵ Tripartite Steering Committee v Minister of Basic Education (1830/20150) (15)

provided with transport to and from school at the States expense for those scholars who live distance from their schools and who cannot afford the cost of that transport. It also concerns the validity of decisions taken by officials of the Eastern Cape Department of Education to refuse a number of scholar transport to and from school, a failure to provide others with transport after undertaking to do so and whether mandatory relief should be granted in connection with a process currently underway to formulate a new scholar transport policy.¹⁷⁶ The applicants seek orders; directing the respondents to provide scholar transport within 30 days, to the individual learners who cannot afford to pay transport to their schools, who have been denied scholar transport and who the applicants assert, should be transported to and from school at State expense. ¹⁷⁷Reviewing and setting aside the refusal to provide scholar transport to some learners, alternatively the failure to take a decision on their applications for scholar transport.

The court held that in Eastern Cape Province large number of scholars of all ages live far from the schools they attend and, if they are not provided with transport to and from their schools by the State, they have to walk, come rain or shine, to or from each day. The issues of safety, waking extremely early, getting home late especially when they engage in extramural activities, become problems, with the results that less time than would be desirable is available for study, homework and leisure.

The importance to the right to basic education was highlighted in *Governing Body of the Juma Masjid Primary School & others v Essay NO & others* in which Nkabinde stated: 'Indeed, basic education is an important socio- economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and world opportunities. To this end, access to school is an important component of the right of basic education guaranteed to everyone by section 29(1) (a) of the Constitution which is a necessary condition for the achievement of the right.'¹⁷⁸

The court held further that in instances where scholars' access to schools is hindered by distance and inability to afford the costs of transport, the State is obliged to provide

¹⁷⁶ Tripartite Steering Committee v Minister of Basic Education para (2)

¹⁷⁷ *Ibid* para (10)

¹⁷⁸ *Governing Body of the Juma Masjid Primary School & others v Essay NO & others* (16)

transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education. As Pickering J pointed out in *Truckstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v/s Head of the Department of Transport, Province of the Eastern Cape and others* the reality of the situation is that if the provincial government does not provide scholar transport ‘many thousands of scholars would simply not be able to attend school’.¹⁷⁹

Plasket J ordered that respondents are directed to provide scholar transport, by 20 July 2015 to all deserving scholars. The respondents are directed to report to the court, on affidavit, by 14 August 2015 on their progress in adopting a new policy on scholar transport and how and when it either has been or will be published.¹⁸⁰

4.4 Conclusions

In light of case laws discussed, it is apparent that the judiciary has contributed immensely in enforcing and realising education as a right and also making it clear to the government that policies and legislative frameworks for capacitation of educators in ensuring the right of quality education must be implemented to ensure performance in schools. To further indicate to the people that “the right to education is an empowerment right that enables educators to realise their potential and improve their pedagogical responsibilities”.

¹⁷⁹ *Tripartite Steering Committee v Minister of Basic Education* para (19)

¹⁸⁰ *Ibid para 67*

CHAPTER 5: COMPARATIVE ANALYSIS OF CAPACITY DEVELOPMENT OF EDUCATORS IN AUSTRALIA AND CHINA

Australia

5.1 Introduction

There are a number of laws that promote capacity for educators in Australia. The teaching profession has an immense responsibility, and much hope is placed on quality teaching and school leadership for the future of Australian students, citizens and workers. To enhance performance in education, it is important to empower educators. Therefore to understand quality teaching and school leadership it is necessary to understand how:¹⁸¹

- contextual factors influence the dynamics of schools and school processes—and how quality teachers and school leaders act thoughtfully and tactfully in engaging with and responding to these contextual factors—in order to enhance students' learning outcomes;
- Professional practices influence students' learning outcomes, attributes and capabilities of teachers and school leader's influence students' learning outcomes.¹⁸²

5.1.1 *The Australian Education Act 2013*

The Parliament of Australia acknowledges that all students in all schools are entitled to an excellent education, allowing each student to reach his or her full potential so that he or she can succeed, achieve his or her aspirations, and contribute fully to his or her community, now and in future.¹⁸³ It is essential that the Australian schooling system be of a high quality and be highly equitable in order for young Australians to become successful learners, confident and creative individuals, active and informed citizens. A high quality and highly equitable Australian schooling system will also create a highly skilled, successful and inclusive workforce, strengthen the economy, and increase productivity, leading to greater prosperity for all.¹⁸⁴ For the Australia to realize the envisaged education, it is imperative for the government to focus on teacher capacity.

¹⁸¹ Katina Zammit, *Teaching and leading for quality Australian schools a review and synthesis of research-based knowledge*, February 2007 Page iii

¹⁸² Katina Zammit, *Teaching and leading for quality Australian schools a review and synthesis of research-based knowledge*, February 2007 Page v

¹⁸³ Australian Education Act 2013

¹⁸⁴ *Ibid*

5.1.2 The Australian Charter for Professional Learning of Teachers and School Leaders

The charter aims to:

- affirms the importance of learning in improving the professional knowledge, practice and engagement of all teachers and school leaders to achieve improvement in student outcomes
- articulates the expectation that all teachers and school leaders actively engage in professional learning throughout their careers
- Describes the characteristics of a high quality professional learning culture and of effective professional learning, to assist teachers, school leaders, and those who support them to get the most from their professional learning.¹⁸⁵

5.1.3 The Australian Teacher Performance and Development Framework

Performance and development is about a culture of teacher quality, feedback and growth for all teachers within all schools. The Australian performance and development framework was endorsed by education ministers at the Standing Council on School Education and Early childhood (SCSEEC) on 3 August 2012.¹⁸⁶Nationally and internationally, there is unequivocal evidence that the quality of teaching is the most significant in school factor affecting students' outcomes. There is also evidence that better appraisal and feedback leading to targeted development can improve teacher performance.¹⁸⁷

The framework highlights what is required to build a comprehensive and effective approach to high performance and development. It outlines the characteristics of a successful system and the culture that needs to be in place for sustained improvements to occur in schools. It also describes the characteristics of an effective performance and development cycle, including the elements of the cycle that are essential for success and should be implemented in all Australian schools. ¹⁸⁸The framework provides a structure for appraising, developing and improving teaching practice as well as recognising the entitlement of teachers to meaningful feedback and support.¹⁸⁹

¹⁸⁵ Australian Institute for Teaching and School Leadership 2012 page 4

¹⁸⁶ www.aitsl.edu.au/professional-growth/australian-teacher-performance-and-development 2011 page 1

¹⁸⁷ *Ibid* Page 1

¹⁸⁸ *Ibid* Page 1

¹⁸⁹ *Ibid* Page 3

5.1.4 Australian Institute for Teaching and School Leadership (AITSL)

AITSL provides tools and resources to support the enactment of the Charter including case studies from school and systems willing to share their strategies for establishing professional learning cultures.¹⁹⁰

AITSL will also support research into determining useful and practical methodologies for teachers and school leaders to apply in order to effectively evaluate the impact of professional learning in their school and as a result on the outcomes of their students.¹⁹¹

The education system of Australia emphasises the important of quality educator's professional development if prioritised for quality education and good learner performance.¹⁹²

5.1.5 Lessons to be drawn from Australian system

In capacitating educators, the Australian system considers the importance of quality school leadership, contextual factors, and the culture of teacher quality and growth for all teachers within all schools. South Africa can learn from Australian system the importance of quality school leadership and establishing the culture of sustainable teacher development programmes which may not be derailed by teacher unions. Further, the South African system must recognize the contextual factors of educators, particularly those in rural schools in implementing policies for professional development of educators.

5.2 CHINA

5.2.1 Introduction

Many countries are engaging in serious and promising educational reforms, one of the key elements in most of these reforms is the professional development of teachers.

¹⁹⁰ Australian Institute for Teaching and School Leadership 2011 Page 8

¹⁹¹ *Ibid* Page 9

¹⁹² *Ibid* Page 10

Professional development is common to top performing systems. China is one of the countries that invest in professional and development of teachers.¹⁹³

Substantial progress in education has been witnessed in China, embracing educational policies, institutional management and teacher training. After graduation, the schools where educators work may then provide limited–in–service training including mentored teaching, basic skills training modern technology training, short-term training in holidays, participation observation and collegial lesson planning.¹⁹⁴

5.2.2 A brief background of the Chinese Government’s position on capacity of educators

In terms of the Constitution of the People’s Republic of China 1982, as stated in Article 46, citizens of China have the duty as well as the right to receive education. The state promotes the all-round moral, intellectual and physical development of children and young people through capacity of educators. Article 47 further states that the state must encourage and assist creative endeavours conducive to the interests of the people in education, science, technology, literature, art and other cultural work.

5.2.3 Teacher Development in China

Since the release of Teachers Law in 1993¹⁹⁵ professional development of teachers has become major component of educational reforms in China. The primary goals of the educational authorities have been to develop professional development policies which provide teachers with a set of guides to their learning and development and the frameworks within which teachers gradually improve their pedagogy with children. These reforms brought into prominence a set of policies and practices of teachers’ professional development in the early childhood sector.¹⁹⁶

The Ministry of Education in China seeks to develop teachers by involving all elementary and middle school teachers in the enterprise of professional development with the intention

¹⁹³ Understanding Teachers Development in China: An illustrative ‘Snap – shot of Three Teachers’ professional lives. Caishun: 2004 Hong Kong Teachers Central. Journal Vol 3.

¹⁹⁴ Understanding Teachers Development in China: An illustrative ‘Snap – shot of Three Teachers’ professional lives. Caishun: 2004 Hong Kong Teachers Central. Journal Vol 3.

¹⁹⁵ Ministry of Education in China, 1993

¹⁹⁶ Yan Yong, Australian Journal of Teachers Education, 2013, volume 38/issue 6, page 88

of raising the quality of education. Knowledge of subject matter has long been considered central in China's teacher education system.¹⁹⁷ Professional development emphasizes teachers' personal understanding of their daily practice local.

On-going curriculum reform in China demands that teachers and principals shift their norms of practice to facilitate student learning.¹⁹⁸ Principals are expected to take a more hands-on approach and work more collaboratively with teachers towards curriculum change. Principals shape teachers' development activities which build teacher understanding and capacity to meet the requirements of the curriculum reform. Principals proactively promote teacher development and identify some of possible gaps in their strategies. Implications are drawn about the relationships between curriculum reform, school leadership and teacher development.¹⁹⁹ Three aspects of teacher development in China are professional knowledge teachers' commitments and community practice.

In the two countries, teacher capacitation is prioritized. The Chinese model of teacher Development is intensive because it takes into consideration the contextual environment. Training of teachers starts at the school level which assists the novice teachers.

5.2.4 Theories of Teacher Development in China

There are three aspects of teacher development in China namely professional knowledge, teachers' commitments and community practice.²⁰⁰

Professional knowledge

The main drive of professional activities is the imposed "official knowledge" from top down. The primary duty is to fulfill the requirements listed in the syllabi and help students achieve high marks in exams. The official guidelines are internalized as the perception of teachers' duty, and are embodied in their pedagogical discourse in terms of both their teaching

¹⁹⁷ Li, Defeng (1999), Modernisation and Teacher in China. *Teaching and Teacher Education* 15, 179-192

¹⁹⁸ Taylor, How principals promote and understand teacher development under curriculum reform in China, 06 August 2013

¹⁹⁹ Taylor, How principals promote and understand teacher development under curriculum reform in China, 06 August 2013

²⁰⁰ *Ibid*

content and method.²⁰¹

Teachers' commitment

Teachers' commitment refers to the self-elaboration of authenticity of teachers' practice i.e. the personal horizon which a teacher explores in order to enact his authentic understanding in his professional life.²⁰²

Community of practice

This concept allows schools to design their own training plans, objectives and content based on the school and teachers' specific practical needs. Teachers are expected to achieve development in their own daily practice. This approach towards teacher development aims to shape "teachers as learners" and "schools as learning communities."²⁰³

The Chinese model of teacher development is far much better than the South African model as the Chinese model localises teacher development, taking the contextual situation of teachers into consideration. South African can learn from China and engage educators in developing professional development model.

In both Australia and China teacher capacity is a key dimension in realising essential goals for developing students' reasoning and thinking.²⁰⁴ That teacher capacity needs to be explored further focussing on specific contents in different subjects.²⁰⁵ Both countries further state that "the implementation of curriculum change is never simple from the top down. Teachers' interpretations and responses at the level of practice are never simple reflections of what is contained in official curriculum documents. While curriculum documents set out broad directions for changes, any successful implementation of the

²⁰¹ Taylor, How principals promote and understand teacher development under curriculum reform in China, 06 August 2013

²⁰² *Ibid*

²⁰³ *Ibid*

²⁰⁴ Zhang and Stephens, Profiling Teacher Capacity in Statistical Thinking of National Curriculum Reform: A comparative Study between Australia and China 2015.

²⁰⁵ *Ibid*

curriculum change depends on teachers' capacity to apply subtle interpretations and careful local adaptation. They regard teacher professionalization and curriculum implementation with great significance."²⁰⁶

²⁰⁶ *ibid*

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

The South African system of education has strong and sufficient pieces of legislation and other instruments for empowering educators with the purpose of ensuring that they provide the right of access to quality education to learners. On the other hand, lack of proper implementation and monitoring of these legislatives and policy interventions are the problems making educators to provide low quality education to learners especially in black schools.

Poor capacity of educators to provide, promote and fulfil the right of access to quality education and lack of resources hinder the realization of the right as mandated by the Constitution. Many educators fail to deliver quality education due to lack of resources as such there is poor performance in South African black schools.

The problem of failure of educators in providing access to quality education is compounded by facilitators, curriculum advisors; managers who fail to implement and monitor the strong policies and instruments for teacher empowerment. Hence the right to education and improvement of performance in black schools suffer. The educational curriculum policies and laws aimed at capacitating educators must be complied with and implemented at all costs in order to enable educators to provide quality education. For educational system of South Africa to access the right to education resources must be marshalled to schools in black schools in particular.

Availability of qualified and empowered educators is the most important human resource for the right to education, development and improvement of education system. Continuous teacher development programmes and proper implementation and monitoring of them (programs) are very important. The right to education, capacitation and empowerment measures of educators are supported by National and International instruments. It is imperative for South African black schools depends on availability of resources and dedicated educators.

It is imperative for South African black teachers to ensure that they implement curriculum effectively without compromising policies. The success or realization of quality education in South African black schools depends on availability of resources and dedicated educators.

Although the government is trying at all costs to make the right to education realizable by providing strong pieces of legislation and other instruments, there are still some challenges that need to be eradicated. The challenge is that implementation and monitoring of legislative instruments in black schools is poorly managed. The department of education must conduct vigorous workshops and teacher development programs in order to promote, provide and deliver constitutional mandate of providing right to quality education.

A person who is educated or had access to quality education has more chances of securing good employment. It is important for the black learners to be taught by quality educators for quality education, to get quality jobs or good employment. It is therefore imperative for South African educators to ensure that they implement curriculum effectively without compromising policies for realization of the right to quality education.

Lessons drawn from Australia and China as alluded in comparative analysis can strengthen South African provision of the right to education and teacher development but contextual factors need to be taken into consideration to localize the model in terms of implementation.

6.2 Recommendations

In order to have quality and the best educators to access the right to quality education as a country this mini dissertation recommends that:

- The government must conduct vigorous workshops and teacher development programs in order to capacitate black school educators for provision of quality education.
- Educators in urban and rural schools be treated the same in terms of capacity building and allocation of resources. The State is obliged to provide rural schools with libraries, laboratories, computer labs and any other relevant facility which will enable access to right to quality education.

- Increase continuous teacher training programs in Black schools. Teachers who are continuously empowered, supported and guided are in a better position to can perform better in terms of realisation of the right to quality education
- Provide in-service training were teachers can be skilled for more than three months in a year.
- Improve the quality of teacher's education and development in order to improve quality of teachers and teaching.
- Capacitate teachers to enable them to take substantial responsibility for their own development.
- Improve the professionalism, teaching skills, subject knowledge and computer literacy of black teachers through their entire careers.
- Make available bursaries to retrain educators who are under qualified.
- Implement a monitoring and evaluation system, used for informed decision making during identification of deserving under qualified educators. This will assist in giving relevant educators bursaries. Visit them at the institutions where they are studying and assess them for progress and give them support and remedial measures to enable them to achieve the objective of the bursary.
- Avail incentives to motivated and performing educators who are already teaching at black schools to encourage them to remain at those schools. It will be hard to retain them at black schools without incentivizing them because they can migrate to white schools or for greener pastures. On the other hand, these educators will be able to induct and assist novice educators.
- Create good relationships and co-operations amongst educators, SMTs, support staff, parents, SGBs, learners and other stake holders in schools. Relationships and conducive environment will enhance programs for teacher empowerment and capacity building for access to the right to quality education.

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