

**Accentuating the Right to Ample Access to Quality Education in Rural South
Africa: Legal Analysis**

By

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Table of Contents

Abstract.....	iv
Dedication.....	vi
Acknowledgements.....	vii
List of Abbreviations.....	viii
Table of Statutes	x
Table of Cases.....	xi
CHAPTER 1: Research Proposal.....	1
1. INTRODUCTION	1
2. RESEARCH PROBLEM	1
2.1 Source of the research problem.....	1
2.2 Background to the problem.....	2
2.3 Statement of the research problem	8
3. DEFINITION OF KEY CONCEPTS	9
3.1 Ample	10
3.2 Quality education	10
3.3 Universal access.....	10
3.4 Rural area	11
3.5 Rural education.....	11
4. LITERATURE REVIEW	12
5. PURPOSE OF THE STUDY	14
5.1 Aim.....	14
5.2 Objectives	14
6. RESEARCH METHODOLOGY	14
7. SIGNIFICANCE OF PROPOSED RESEARCH.....	15
8. SCOPE AND LIMITATION.....	15
2.1 Introduction.....	17
2.2 The Constitution of the Republic of South Africa, 1996.....	17
2.3 The South African Schools Act (SASA) 1996	18
2.4 The white paper on education and training (1995).....	18
2.5 The 2003 National Plan of Action.....	20

2.6 Green Paper for Post-School Education and Training (2012).....	20
2.7 The National Development Plan (NDP) 2011	22
2.8 Conclusion.....	24
CHAPTER 3.....	26
3. INTERNATIONAL INSTRUMENTS SUPPORTING THE RIGHT TO EDUCATION.....	26
3.1 Introduction.....	26
3.2 The Universal Declaration of Human Rights (UDHR) 1948.....	26
3.3 International Covenant on Economic, Social and Cultural Rights, 1966	27
3.4 The Dakar Framework for Action, 2000	28
3.5 Convention on the Rights of the Child, 1989.....	29
3.6 Declaration on the Rights of the Child, 1959.....	30
3.7 African (Banjul) Charter on Human and Peoples' Rights, 1981	31
3.8 UNESCO, Convention against Discrimination in Education, 1960	32
3.9 Declarations on the Rights of Mentally Retarded Persons (1971), and on the Rights of Disabled Persons (1975).....	32
3.10 The Jomtien Conference, 1990.....	33
3.11 Conclusion.....	34
4. THE ROLE BEING PLAYED BY THE JUDICIARY IN PROMOTING THE RIGHT OF ACCESS TO EDUCATION.....	35
4.1 Introduction.....	35
4.2 The Nature and Meaning of the Right to Education.....	35
4.3 Accessibility of the Right.....	40
4.4 Adaptability of the right	45
4.5 International Case Law Promoting the Right to Education	47
4.6 Conclusion	48
5.1 Introduction.....	50
5.2 AUSTRALIA.....	50
5.2.1 A Brief Background of the Australian Government's Position on the Right to Access of Quality Education	50
5.2.2 Legislative Frameworks and the Right to Education.....	52
5.2.2.1 Australian Domestic Laws Related to the Right to Education.....	52
5.2.2.2 Australian Constitution	52

5.2.2.3 The Education Act.....	53
5.2.2.4 Other Legislation Promoting the Right to Education	53
5.3 CANADA	54
5.3.1 A Brief Background of the Canadian Educational System.....	54
5.3.2 Federal Legislative Frameworks Promoting Education in Canada.....	55
5.3.2.1 The Canadian Human Rights Act.....	55
5.3.2.2 The Canadian Citizenship Act.....	55
5.3.2.3 The Canadian Charter of Rights and Freedoms	56
5.3.2.4 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).....	56
5.3.3 Territorial and Provincial Legislations Promoting Education	56
5.4 Australia as a Model of South Africa in Promoting the Right to Education.....	57
6. CONCLUSION AND RECOMMENDATIONS	59
BIBLIOGRAPHY	62

Abstract

This mini dissertation seeks to articulate the issues and challenges being faced by the rural South Africa pertaining to the aspect of providing ample access to quality education. The structures, policies and programs of the flows of apartheid are therefore compared and contrasted to the post-apartheid (1994) structures, policies and programmes. It further argues that any impediment to the right is in contrast to the spirit and purport of the provisions of the Bill of Rights enshrined in the South African Constitution of 1996 which provides for this constitutional right. Although there was a radical transition in educational policies and programmes from apartheid to post-apartheid, till to date there are still numerous challenges within the basic and higher educational sectors within and between institutions. This mini dissertation recommends that government should make education completely free from levels such as primary, tertiary and the postgraduate levels, and to use education as an investment tool. In this regard, government will be investing in youth to contribute in developing solutions to aid the rural masses. It recommends that education be made compulsory from grade 1 to grade 12.

Declaration by Student

I, Isaiah Mmatipe Sefoka declare that “Accentuating the Right to Ample Access to Quality Education in Rural South Africa: Legal Analysis” 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 is my work in design and in execution, and that all material contained herein has been duly acknowledged.

Sefoka I.M (Mr.)

Date

Dedication

This dissertation is dedicated to my mother Mrs Madimetja Selinah Sefoka who has provided me with immeasurable moral, physical and spiritual support, without which the possibility of completing this work would have been far too remote. It is due to her parental love and respect that I realised I should always work hard, fly and let the sky be my limit. To my four precious sisters Mrs Mama Hendrica Mokgabudi, Mrs Mangwakwane Enny Popotwane, Makgahlele Fonda Sefoka, Makololo Cynthia Sefoka and also to my two brothers Mr Khulong Jeffrey Sefoka and Mr Tegelege Adolph Sefoka and their families for their support, patience and compassion, but above all, their prayers and understanding are highly appreciated. It is also dedicated to my late father Mr Lehwidi Aleck Sefoka who could not physically see the achievement of his son due to his untimely death.

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List of Abbreviations

ANC	African National Congress
ACT	Australian Capital Territory
AIDS	Acquired Immune Deficiency Virus
CETCs	Community Education and Training Centres
CASHRA	Canadian Association of Statutory Human Rights Agencies
DBE	Department of Bantu Education
DHET	Department of Higher Education and Training
DST	Department of Science and Technology
DCJ	Deputy Chief Justice
ECHR	European Convention on Human Rights
FET	Further Education and Training
HoD	Head of Department
HIV	Human Immunodeficiency Virus
HECS	Higher Education Contribution Scheme
ICESCR	International Covenant on Economic, Social and Cultural Rights
MEC	Member of Executive Council
NCV	National Certificate Vocational
NSFAS	National Student Financial Aid Scheme
NDP	National Development Plan
NECC	National Education Co-ordinating Committee
PhD	Doctor of Philosophy

RDP	Reconstruction and Development Programme
SAHO	South African History Online
SASA	South African Schools Act
SAIVCET	South African Institute for Vocational and Continuing Education and Training
SETAs	Sector Education and Training Authorities
SGBs	School Governing Bodies
US	United States
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations International Children's Emergency Fund
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund, formerly the United Nations Fund for Population Activities (UNFPA)

Table of Statutes

1. Bantu Education Act 47 of 1953
2. National Education Policy Act 27 of 1996
3. South African Schools Act 84 of 1996
4. Schools Assistance Act 153 of 2008
5. The Constitution of the Republic of South Africa, 1996
6. The interim Constitution of the Republic of South African, 1993 as amended in 1994
7. The Disability Discrimination Act 135 of 1992, as amended
8. The Indigenous Education (Targeted Assistance) Act 147 of 2000
9. The Canadian Human Rights Act, 1985

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1. *Adam Legoale v MEC for Education, North West, North West High Court, Mafikeng*, case no 499/11, unreported.
2. *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).
3. *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).
4. *Head of Department, Department of Education, Free State Province v Harmony High School and Another*, 2014 (2) SA 228 (CC).
5. *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC).
6. *MEC for Education, Gauteng and Others v Governing Body of the Rivonia Primary School and Others* 2013 (6) SA 582 (CC).
7. *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).
8. *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC)
9. *Mutukane and Others v Laerskool Potgietersrus* 996 (3) SA 223 (TPD).
10. *Minister of Education v Harris* 2001 (4) SA 1297 (CC).
11. *Plessy v. Ferguson*, 163 U.S. 537.
12. *Sonderup v Tondelli* 2001 1 SA 1171 (CC)
13. *Section 27 v Minister of Education* 2013 2 SA 40 (GNP)
14. *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB).

15. *Western Cape Forum of Intellectuals Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).

CHAPTER 1: Research Proposal

1. INTRODUCTION

Education is one of the most important foundations in life.¹ It is the pillar of any democratic country that seeks to develop human capital and provide opportunities for all.² It does not only make people more confident about themselves and their abilities, it also opens the door to opportunities otherwise not available and makes people more aware of the world around them.³ With better information access available in rural areas now, many parents are aware of the need and importance for their children to be well educated.⁴ Lack of access to education, however, still inhibits many parents' dreams of providing quality education for their children.⁵

Quality education is the cornerstone of a child's life. It is the medium through which children's dream of reaching the echelons/level of authority denied to their forefathers because of illiteracy can be achieved.⁶ There is a need in the rural areas to access good quality affordable education, so that children in those areas do not remain disadvantaged in comparison to their urban counterparts.⁷ This is because there are lesser resources in rural areas when compared to urban areas which make the learning curve to be more difficult.

2. RESEARCH PROBLEM

2.1 Source of the research problem

The colonial rulers brought with them educational systems that discriminated against the black majority they met in their different communities in South Africa. Quality education was given to the whites to the exclusion of the blacks which was based on

¹ See Hippocampus Education Centers Project Report, December 2011 page 1, par 1.

² See Plan of Action, Improving access to free and quality basic education for all, 14 June 2003, page 4.

³ See Hippocampus (note 1 above).

⁴ See Hippocampus (note 1 above) at page 1, par 2.

⁵ See Hippocampus (note 1 above) at page 1.

⁶ See Hippocampus Education Centers Project Report December, 2011 page 7.

⁷ See footnote 6 above.

apartheid policies and laws. After the implementation of various legislative frameworks and policies which were aimed at eradicating apartheid laws and accelerating the enforcement of the implemented laws, the implementation still appears to be poor, as a result, rural masses are not accessing and enjoying the right to quality education.

2.2 Background to the problem

The origin of schooling in South Africa can be traced back from the first colonial conquest by the Dutch East India Company in the mid-seventeenth century.⁸ In 1815, the British took over the Cape Colony. Schooling for the indigenous people was provided under the Dutch but more expansively under the British through various missionary establishments.⁹ Education under the British was meant to spread the British language and culture amongst blacks and serve as a means and instrument of social control.¹⁰ From that time, education was configured along race, class and geographical lines. Generally, the best available education was provided for the landed urban white classes while rural whites (generally Afrikaners) provided mainly religious schooling for their children.¹¹ This continued even after the establishment of two Afrikaner independent states in the North of South Africa.

In 1855, the then Governor of the Cape, Sir George Grey, made the following statement in Parliament: “If we leave the natives beyond our border ignorant barbarians, they will remain a race of troublesome marauders. We should try to make them a part of ourselves, with a common faith and common interests, useful servants, consumers of our goods, contributors to our revenue. Therefore I propose that we make unremitting efforts to raise the natives in christianity and civilisation, by establishing among them missions connected with industrial schools”.¹²

⁸ See Aslam Fataar, Access to Schooling in a Post-Apartheid South Africa: Linking Concepts to Context, page 338.

⁹ See footnote 8 above.

¹⁰ See Aslam Fataar (note 8 above).

¹¹ See Aslam Fataar, (note 8 above) page 338, par 2.

¹² See Jill Adler and Yvonne Reed, Challenges of teacher development, An investigation of take-up in South Africa (2002) page 19, par 1.

A powerful educational philosophy, Christian National Education, based on Afrikaner exclusivity, began to emerge.¹³ It was this philosophy which undergirded (began) apartheid education when the Afrikaner-dominated National Party came to power in 1948. The provision of missionary schooling before the introduction of mass schooling for Africans in 1948 was negligible.¹⁴ Only a few Africans went to mission schools, while most received no education at all.¹⁵ Missionary schooling focused on basic reading, writing and industrial skills.¹⁶ Many missionary trained Africans became priests, court interpreters, clerks and teachers.¹⁷ They became the purveyors of modernity in carrying “civilisation” to the traditional people who did not go to school. They also contributed to the destruction of traditional modes of life and the alienation of Africans from their land.¹⁸

The right to education was firstly expressed internationally by the Universal Declaration of Human Rights (UDHR) in 1948.¹⁹ This Declaration provides in its article 26 that "everyone has the right to education" and that "education shall be free, at least in the elementary and fundamental stages." It provides further that "elementary education shall be compulsory".²⁰ The elements of “free” and “compulsory” were also attributed to “the right to elementary education” by other international treaties and covenants following the 1948 UDHR.²¹

While white schooling expanded rapidly; schooling for Africans, Coloureds and Indians grew incrementally.²² African schooling was the most neglected sector, because Africans did not have their own schools or compulsory schooling like whites but

¹³ See footnote 11 above.

¹⁴ See Aslam Fataar, (note 8 above), page 338 par 3.

¹⁵ See footnote 14 above.

¹⁶ See footnote 14 above.

¹⁷ Ibid footnote 14.

¹⁸ Aslam Fataar, (note 14 above) Page 338 par 3.

¹⁹ Adopted and proclaimed by General Assembly Resolution 217A (III) on 10 December 1948.

²⁰ Beiter, *Protection of the Right to Education* 90. According to Beiter elementary and fundamental education are synonyms for primary education. Only the method of instruction differs.

²¹ L Arendse, the obligation to provide free basic education in South Africa: an international law perspective.

²² See Aslam Fataar, Access to Schooling in a Post-Apartheid South Africa: Linking Concepts to Context. Page 339 par 4.

depended on missionaries. Missionary schooling remained the dominant form of schooling for Africans. From the 1920s, however, this type of schooling began to experience major crises. As the demand for schooling increased, missionary societies became increasingly unable to fund schools adequately.²³ There was free compulsory primary schooling for whites, but schooling for blacks was neither free nor compulsory nor large scale.²⁴ There were no dedicated teacher's education institutions for Africans.²⁵ Secondary schooling was the blacks teacher's education. However, it was during the same period that teacher's education for whites was located in post-matriculation colleges or universities.²⁶

There were, therefore, racially divided streams of teacher's training for black and white learners at very different educational levels, with only white teacher's education conceived of as professional practice.²⁷ Even when colleges were set up for black teacher education, the normal period of study was different for the different groups. For example, three- and then four-year qualifications for white teachers, and two- and then three-year qualifications for black teachers.²⁸ There was intermittent student unrest because of inferior school conditions which characterised the missionary schools until the 1940s.²⁹ The missionary school system as a whole, despite isolated successes, began to collapse.³⁰

In 1953, the government passed the Bantu Education Act,³¹ which contradicted people's needs. The Act was passed to ensure that black children only learn things that the government wanted and not what they wanted to learn. For example to work in

²³ See footnote 22 above.

²⁴ See Jill Adler and Yvonne Reed, Challenges of teacher development, an investigation of take-up in South Africa (2002) page 19, para 3.

²⁵ See Jill Adler and Yvonne Reed, Challenges of teacher development, an investigation of take-up in South Africa (2002) page 19, para 4.

²⁶ See footnote 25 above. Further see Kema Irogbe, Transformation in South Africa: A Study of Education and Land, International Third World Studies Journal and Review, Volume XIV, 2003, page 11.

²⁷ Jill Adler and Yvonne Reed, Challenges of teacher development, an investigation of take-up in South Africa (2002) page 19, para 4.

²⁸ See footnote 27 above.

²⁹ See footnote 22 above.

³⁰ Ibid footnote 22.

³¹ Act 47 of 1953.

factories. The black children were therefore not given the same learning curriculum at schools like the white children.³² Black children's school attendance was divided into two shifts a day, one in the morning and one in the afternoon and they were to attend only three hours each day. This was to ensure that a large number of children could get a little bit of education without the government having to spend a lot of money on their education.³³

The Bantu Education Act was one of apartheid's legislations intact with racist laws. The Act brought the educational system of all blacks under the oppressive control of the government and as such extended apartheid to black schools. Previously, the majority of blacks' schools were run by missionaries with the assistance of the state.³⁴ However, Bantu education took away the rights and relative autonomy enjoyed by the missionary schools. The Department of Bantu Education (DBE) then administered the government's funding of black people schools which was conditional and based on racially and discriminatory curriculum. Most mission schools for Africans opted not to transform the apartheid educational system but rather close the schools.³⁵

Apartheid government did not only deny blacks ample access to education, but also denied them the formation of the distinguished unequal educational system.³⁶ What blacks strongly opposed was the creation of distinguished and unequal educational system for blacks and whites rather than a single public schooling system for all South Africans.³⁷ The minority government under the whites intended that Bantu educational

³² See Beard, Frances, and Barbie Schreiner. *My Spirit is not Banned*. Harare: Zimbabwe Publishing House, 1986. Also available at <http://www.sahistory.org.za/pages/library-resources/online%20books/beard/>, retrieved 28 March 2015.

³³ See Frances, Beard and Barbie Schreiner, *My Spirit Is Not Banned* part 2, 2012 par 1.

³⁴ See Beiter, *Protection of the Right to Education* 90. See further Beard and Schreiner, *My Spirit is Not Banned*, Part 2, 2012 par 2.

³⁵ See Beard and Schreiner, *My Spirit is Not Banned*, Part 2, 2012 par 2.

³⁶ See Beard and Schreiner, (note 35 above) Part 2, 2012 par 3.

³⁷ See footnote 36 above, further see South Africa: overcoming apartheid building democracy.

system was passed purposely to make African learners to be hewers of woods and drawers of water for the white society despites the learners' ability and aspirations.³⁸

In 1955, the right of access to elementary education was recognized by the Freedom Charter.³⁹ The African National Congress (ANC)'s Freedom Charter (which was adopted from the Congress of the People) stipulates that "the doors of learning shall be opened to all. The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace. Education shall be free, compulsory, universal and equal for all children."⁴⁰ In 1989, the National Education Co-ordinating Committee (NECC) adopted a declaration which pronounces that "Education is a basic human right. Schooling should be free and compulsory for all children".⁴¹

In 1993, the right of access to basic education was also provided for in the South African Interim Constitution which provides that "every person shall have the right (a) to basic education and equal access to educational institutions; (b) to instruction in the language of his or her choice where this is reasonably practicable; and (c) to establish, where practicable, educational institutions based on a common culture, language or religion provided that there shall be no discrimination on the ground of race".⁴²

Despite the right of access to basic education for all, after 1994, the government is still struggling to provide access to ample and quality education to all.⁴³ In recent years, the educational system still distributes more adequate resources to the former white schools than other racial groups. Multiple education authorities caused duplication and

³⁸ See South Africa: overcoming apartheid building democracy, Baard and Schreiner, *My Spirit is Not Banned*, Part 2, and 2012 par 3, Kema Irogbe, *Transformation in South Africa: A Study of Education and Land and the African Research Group, Race to Power: The Struggle for Southern Africa* (New York: Anchor Books, 1974), page 14–15.

³⁹ See the African National Congress Freedom Charter 1955.

⁴⁰ See footnote 39 above.

⁴¹ See National Education Co-ordinating Committee 1989.

⁴² See chapter 1, clause 32 of the interim Constitution of the Republic of South African 1993 as amended in 1994.

⁴³ See The South African Human Rights Commission 3rd Economic and Social Rights Report 1998-1999, Chapter 3, page 79, par 1.

inefficiency. The educational system has many unqualified educators in black communities than in the former white schools.⁴⁴

In 1995, the Department of Education provided a blueprint policy which gives direction on how South African educational system must be provided to the people of South Africa.⁴⁵ The then Minister of Education, Sibusiso Bengu commented on the preamble of the policy that “it is essential for us to build a system of education and training with which all our people can identify because it serves their needs and interests. Such a system must be founded on equity and non-discrimination, it must respect diversity, it must honour learning and strive for excellence, it must be owned and cared for by the communities and stakeholders it serves, and it must use all the resources available to it in the most effective manner possible.”⁴⁶ In 1996, the Constitution explicitly guarantees the right to education and mandates the State to provide essential services to realize the right.⁴⁷ However, it is still difficult for government to make sure that every person has access to quality education.

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” to all South Africans. It declared 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.”⁴⁸

In 2010, the National Planning Commission published the National Development Plan (NDP)⁴⁹ which 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. Education empowers people to define their identity, take control of their lives, raise healthy families, take part

⁴⁴ See footnote 43 above.

⁴⁵ The White Paper on Education and Training by the Department of Education, Notice 196 of 1995.

⁴⁶ The White Paper on Education and Training by the Department of Education, Notice 196 of 1995, page 3, par 11.

⁴⁷ See section 29 of the Constitution of the Republic of South Africa, 1996.

⁴⁸ Plan of Action: Improving access to free and quality basic education for all (2003) par 6.

⁴⁹ The National Development Plan vision for 2030, (11 November 2011).

confidently in developing a just society and play an effective role in the politics and governance of their communities.⁵⁰ Education, training and innovation are not the solution to all problems, but society's ability to solve problems, develop competitively, eliminate poverty and reduce inequality is severely hampered without them. The quality of schooling system impacts significantly on further education, college, higher education and society's ability to innovate".⁵¹

While years of apartheid had left consequential inequalities in schooling and the entire educational sector, in recent years, the new democratic government has exacerbated the problem by not providing essential services that will make the right to education realizable not to talk of it being fulfilled.⁵²

2.3 Statement of the research problem

The right to access to education in South Africa is guaranteed and provided in the Constitution, the ANC Freedom Charter as well as other policies outlined above.⁵³ The reality, however, is that there are still some unsatisfactory features such as dilapidated classrooms, lack of text books, toilets, reading tables and chairs and so on. The implementation of the right still shows some elements of discriminations in delivering of education in South Africa where it is beneficial to one group and detriment to the other especially the historically disadvantaged black majority. The reality has shown that this fundamental right is not fully accessed by all South African communities in particular the previously disadvantaged rural communities.

The major problem with the enforcement of this right is that there is still a distinction between what is termed rural and urban communities which brings inequality. Notwithstanding the fact that the South African Schools Act (SASA)⁵⁴ was enacted to

⁵⁰ See the National Development Plan vision for 2030, (11 November 2011), Chapter 9, page 261, par 1.

⁵¹ See the National Development Plan (note 49 above), Chapter 9, page 262, par 1.

⁵² See Ndimande, Choices of Township School Parents in Post-Apartheid South Africa: Contradictions in Education Reforms.

⁵³ See the Constitution of the Republic of South Africa, 1996, the South African Schools Act, ANC Freedom Charter etc.

⁵⁴ South African Schools Act 84 of 1996

create “equality” of education and funding in schools,⁵⁵ there are still inequalities as far as treatment in rural and urban schools are concerned. SASA’s framework includes:

- Making nine years of schooling compulsory (grade 1 to 7)
- School governing body being given the power to develop admission policies, language policy and code of conduct of the learners as a way of giving power to the school community.
- Offering the schools the power to be responsible for the purchase of their own textbooks and the payment of services.⁵⁶

School communities could not effect changes in schools on the basis that it was faced with the challenge of inequality in as far as the resources are concerned.⁵⁷ This means that there is no equal allocation of resources in rural and urban schools which led to poor quality education in rural areas.

3. DEFINITION OF KEY CONCEPTS

Ample. Quality education. Universal access. Rural area. Rural education.

It is significant to take a look at the meaning of certain concepts being used in this study. It is also important to keep in mind that defining legal term is always difficult. However, Okunniga once said that: “nobody, including the lawyer, has offered, nobody, including the lawyer is offering, nobody, including the lawyer, will ever be able to offer a definition of law to end all definition. This is not advocating pessimism. It is because the nature of law makes it very pliable when it comes to the problem of definitions.”⁵⁸ Keeping in mind the fact that defining most of the legal concepts is controversial, the following are some definitions:

⁵⁵ See Zenex foundation, Shifts in education policy (1994 - 2012) 13 March 2013, par 3.

⁵⁶ See section 3(1), sec 5, sec6 (2), sec 8 (1) and (2), sec 10, and sec 39 (3) of the South African Schools Act 84 of 1996.

⁵⁷ See Zenex foundation, (note 55 above) par 4.

⁵⁸ See Okunniga, Transplants and Mongrels and the Law: the Nigerian Experiment (Inaugural Lecture Series 62 delivered at University of Ife, Nigeria on 17 May 1983) page 2.

3.1 Ample

The Oxford dictionary meaning of the word “ample” refers to enough or more than enough; plentiful.

3.2 Quality education

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

- “Learners who are healthy, well-nourished and ready to participate and learn, and supported in learning by their families and communities;
- Environments that are healthy, safe, protective and gender-sensitive, and provide adequate resources and facilities;
- Content that is reflected in relevant curricula and materials for the acquisition of basic skills, especially in the areas of literacy, numeracy and skills for life, and knowledge in such areas as gender, health, nutrition, HIV/AIDS prevention and peace.
- 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”.⁵⁹

3.3 Universal access

“Universal access to education” is the ability of all people to have equal opportunity in education, regardless of their social class, gender, ethnicity background or physical and mental disabilities. This encourages a variety of pedagogical approaches to accomplish the dissemination of knowledge across the diversity of social, political, cultural, economic, national and biological backgrounds.⁶⁰

⁵⁹ See Defining Quality in Education, A paper presented by UNICEF at the meeting of the International Working Group on Education Florence, Italy June 2000, page 3.

⁶⁰ See Anita Nevin, Universal Access on Prezi, also available at <https://prezi.com/dkxxlusmz9ql/universal-access/> retrieved 25 -03-2015.

3.4 Rural area

There is no single, universally preferred definition of rural area. Different countries have different perceptions of what rural area is, which makes comparison difficult.⁶¹ The definition of Ashley and Maxwell appears to be the most appropriate. These authors describe rural areas as “ the space where human settlement and infrastructure occupy only small patches of the landscape, most of which are dominated by fields and pastures, woods and forests, water, mountain and desert, where activities are affected by a high transaction cost, associated with long distance from cities and poor infrastructure”.⁶² According to National Geographic Education of the U.S. a rural area is an open swath of land that has few homes or other buildings, and not very many people. A rural area’s population density is very low. Their homes and businesses are located very close to one another.⁶³

In general, a rural area is a geographic area that is located outside cities and towns. The Health Resources and Services Administration of the U.S. Department of Health and Human Services define the word "rural" as encompassing "all population, housing, and territory not included within an urban area. Whatever is not urban is considered rural."⁶⁴

3.5 Rural education

Rural education is education provided to communities, which are characterised by geographical isolation, limited access to the usual social amenities and facilities, high levels of poverty and low levels of services.⁶⁵

⁶¹ See David Atchoarena and Lavinia Gasperini, Education for rural development: towards new policy responses page 36, par 4.

⁶² See Johannes Seroto, The Provision of Rural Education In three Provinces of South Africa since 1994: Implications for School Improvement, page 139-140.

⁶³ See <http://education.nationalgeographic.com/encyclopedia/rural-area/> retrieved 2015-04-08.

⁶⁴ See Defining the Rural Population at www.Hrsa.gov. Retrieved 2015-04-08.

⁶⁵ See Johannes Seroto, (note 62 above). See also Atchoarena & Gasperini, 2003: 36-46; Republic of South Africa, 1995:9-13.

4. LITERATURE REVIEW

According to Motala access to education is a corner stone in development strategies linked to the Millennium Development Goals (2007)⁶⁶ and the Dakar Framework for Action (2000)⁶⁷ associated with education for all.⁶⁸ Motala argues that while substantial physical and structural access to schooling has been achieved in South Africa, it does not provide that learners have equal chances or experience equal access to “quality” education. Emphasis has to be placed not only on expanding access but also on meaningful access.⁶⁹

Motala suggests further that “the experience of apartheid education requires a view of educational access which is wider than mere structural access to schooling.⁷⁰ Under apartheid, most black South Africans did have access to schooling, but this access was based on separation and inequality”.⁷¹ Motala suggest further that “what is particularly relevant to the South African case is that educational access is not only about how many learners of school-going age are in school, nor even about how many successfully complete their schooling. Educational access is also about who has access to what kind of schooling, and on what basis”.⁷²

Motala suggest further that “in order to create an enabling environment for access to quality schooling, issues of financing and resourcing continue to be of greatest concern.⁷³ The policy challenge is about improving efficiency and must at the same time ensure that access is not denied to younger children and those with special needs and learning difficulties because of policies too intent on efficiency.⁷⁴ There continues to be

⁶⁶ United Nations Millennium Project (1 January 2007). Retrieved on 2011-02-14.

⁶⁷ Education for All: Meeting Our Collective Commitments adopted by the World Education Forum Dakar, Senegal, 26-28 April 2000.

⁶⁸ See Shireen Motala, Educational access in South Africa, 2011, page 84 par 1.

⁶⁹ See Shireen Motala, (note 68) page 84, (abstract).

⁷⁰ See Shireen Motala, (note 68), page 96 par 2.

⁷¹ Ibid footnote 70.

⁷² Ibid.

⁷³ See Shireen Motala, (note 68), page 87 par 3.

⁷⁴ See Shireen Motala, Educational access in South Africa, 2011, page 87 par 3.

a need in South Africa to bridge the inequalities across the public schooling system through better redistribution, and possibly expanded provision, of resources”.⁷⁵

Motala concluded by saying that “quality educational access is an essential component of efforts to arrive at a more equitable, just, prosperous, sustainable and harmonious world order.”⁷⁶ Government should be making sure that it is at this stage of education wherein quality education or resources and opportunities are made available to the children because it is at this stage where they are fully matured and ready to take educational responsibilities and informed choices.

Devenish asserts that “education is of seminal importance as far as human rights are concerned, since it liberates people from the bondage of ignorance, superstition and fear”. “It gives to them dignity and self-confidence and is a basic right, on which the materialization of many other rights depend. Education is of cardinal importance for meaningful human existence, it enables a person to fully participate and function in society”.⁷⁷ In the same manner, Bekker asserts that “the right to vote, freedom of expression, freedom of information, freedom of association, labour rights and the right to participate in the cultural life of one’s community are all linked to the right to education. These rights can only be meaningfully exercised in the context of a certain minimum level of education having been achieved”.⁷⁸

Dlamini opined that “the importance of education lies in the fact that it develops the human mind to think critically about issues. Education is fundamental to human existence. It is the process through which human beings develop to full humanity or maturity. This development is acquired through the acquisition of knowledge which makes a difference in human condition”.⁷⁹

⁷⁵ See Motala (note 74 above).

⁷⁶ Shireen Motala, (note 74 above), page 98 par 1.

⁷⁷ Devenish “Aspects of the Right to Education in the Constitution” 1998 2 *De Jure* 224-225. Also see Bukola Ruth Akinbola, The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities, *African Human Rights Law Journal*, vol 10, 2010 page 457-477.

⁷⁸ Bekker, A compilation of essential documents on the rights to food and nutrition.

⁷⁹ See Bekker (note 78 above).

According to Tomasevski “education also plays a crucial role in the fulfilment of socio-economic rights: education enhances a person's prospects of securing employment, which in turn secures access to food, housing and health care services”.⁸⁰ This means that a person who is educated or who had access to quality education has more chances of securing good employment as opposed to someone who is not educated.

5. PURPOSE OF THE STUDY

5.1 Aim

This study is aimed at conducting a critical analysis of the laws, regulations, policies and guidelines dealing with the provision and promotion of fundamental right of access to education.

5.2 Objectives

The objectives of this study are therefore to articulate and evaluate the implementation as well as the enforcement of the fundamental right of access to education. The other objective relevant and connected to the key objective is to ensure that the laws promoting the right to education are enforced so that the right to quality education is fully accessed and enjoyed by the rural dwellers.

6. RESEARCH METHODOLOGY

The research methodology in this study will be purely non-empirical (qualitative) generally acceptable in legal research activities. This research will be library based and rely heavily on scholarly legal lexicons including but not limited to textbooks, articles, case law, legislations, regulations, previous works and the collection of papers dealing with the right to access to education. A legal comparative method will be applied to find solutions, particularly an investigation on the way forward for the enforcement of the right to access to education. This study intends to establish the development of legal

⁸⁰ See Katarina Tomasevski, Human Rights Obligations in Education page 47.

rules, the interaction between laws, and proposed solutions to the existing laws based on empirical and historical facts.

7. SIGNIFICANCE OF PROPOSED RESEARCH

The implementation of the right of access to quality education will make the following contributions to the body of knowledge thus:

- This study will contribute to the government's measures and instruments to realize the right to access education in South Africa.
- It will further contribute to the usage of law to enforce the realization of the right of access to adequate education as stipulated in the constitution.
- This study will also assist the Department of Education and other relevant stakeholders in realization of proactive implementation of laws which are in favour of the protection of the fundamental right of access to education.
- This study will assist the government and other stakeholder entrusted with the protection of socio economic rights to learn the enforcement and best practices of protecting socio economic rights, and also to take them as their first priority.
- Lastly, this study will help students who are studying in various fields including but not limited to Constitutional law, Administrative law and Human rights and also academics who are intending to research on similar topic in the near future to bring insight to their research projects.

8. 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 policies and frameworks in educational sector. Chapter three discusses the international instruments supporting the right to education. Chapter four deals with the role played by the Courts (judiciary) in supporting the right of access to education. Chapter five is a comparative study with

other countries. Chapter six deals with conclusion drawn from the whole study and make recommendations.

CHAPTER 2

2. POLICIES AND LEGISLATIVE FRAMEWORKS PROMOTING ACCESS TO QUALITY EDUCATION

2.1 Introduction

South Africa has the national legislative frameworks, policies and supporting papers aimed at redressing the past injuries and inequalities in educational sector to give its people an education of high quality for talent and capabilities.⁸¹ All these policies and frameworks are strongly supporting the effective realization of the right to education. They also stand against the unfair discrimination and intolerance and contribute towards eradicating poverty and also uphold the rights of learners, parents and educators as well as promoting the “governance and funding of schools” hand in hand with the state.

2.2 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.⁸² 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 equity, practicability; and the need to redress the results of past racially discriminatory laws and practices.⁸³ Everyone has the right to establish and maintain, at their own expense, independent educational institutions that do not discriminate on the basis of race; are registered with the state; and maintain standards that are not inferior to standards at comparable public educational institutions.⁸⁴

⁸¹ See the preamble of the South African Schools Act 84 of 1996.

⁸² Section 29 (1) (a) and (b) of the Constitution of the Republic of South Africa, 1996.

⁸³ Section 29 (2) (a), (b) and (c) of the Constitution of the Republic of South Africa, 1996.

⁸⁴ Section 29 (3) (a), (b) and (c) of the Constitution of the Republic of South Africa, 1996.

Subsection (3) does not preclude state subsidies for independent educational institutions”.⁸⁵

2.3 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.⁸⁶ SASA also wants to empower schools and communities to make a difference.⁸⁷ 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”.⁸⁸ 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”.⁸⁹

2.4 The white paper on education and training (1995)

In 1995, the Department of Education published a white paper on education and training which gives direction on how South African educational system must be provided to the people of South Africa.⁹⁰ This paper was the first document by the democratically

⁸⁵ See section 29 (4) of the Constitution of the Republic of South Africa, 1996.

⁸⁶ 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”.

⁸⁷ 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.

⁸⁸ See section 3 (1) of the South African Schools Act 84 of 1996.

⁸⁹ See section 34 (1) of the South African Schools Act 84 of 1996.

⁹⁰ The White Paper on Education and Training by the Department of Education, Notice 196 of 1995.

elected government of South Africa concerning “education and training”.⁹¹ The then Minister of Education, Sibusiso Bengu commented on the preamble of this policy that “it is essential for us to build a system of education and training with which all our people can identify because it serves their needs and interests. Such a system must be founded on equity and non-discrimination, it must respect diversity, it must honour learning and strive for excellence, it must be owned and cared for by the communities and stakeholders it serves, and it must use all the resources available to it in the most effective manner possible.” He further commented that “as the title makes clear, it represents only our first steps on a long road. My hope is that it blazes the trail of opportunity and self-fulfilment for all our citizens.”⁹²

The then Deputy Minister of Education Renier Schoeman also commented on the paper that “I sincerely hope that all South Africans will now put that which was negative in the past behind them (also in respect of education), and will use the opportunities presented by this white paper to the full, in their own interests and in the interests of South Africa. It is a wonderful chance for a fresh start in education - let's use it to the best advantage of our country”.⁹³

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 all its 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”.⁹⁴ This paper suggested 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

⁹¹ The White Paper on Education and Training by the Department of Education, Notice 196 of 1995, page 3 par 7.

⁹² See the White Paper on Education and Training (note 91 above); page 3 par 6 and 7.

⁹³ The White Paper on Education and Training (note 91 above) page 4 par 5.

⁹⁴ The White Paper on Education and Training (nota 91 above), chapter 3 page 11 par 1.

encourage them to participate actively in all process involving the democratic society which is free from any other form of discrimination.⁹⁵

2.5 The 2003 National Plan of Action

In 2003, the National Plan of Action was adopted by the department of education which seeks “improving 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”.⁹⁶ This plan provides that “there is a need for free and quality education for all”. This means that -

- Public funding of learners educational needs need to be ample to cover all the costs for “quality education”;
- Schooling must equip all the learners with the knowledge and skills that will enable them to participate fully in the country’s economic, political and cultural life; and
- No learner particularly those at the elementary level should have any barriers to attend school.⁹⁷

Government has tried its best to achieve the aims and objectives of this plan on the basis that there is no learner particularly those at the elementary level who pays school fees in a public school.

2.6 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.⁹⁸ The paper provides that “the education system is still plagued by inequalities in terms of race, class and gender”. This Paper was developed with the intention of expanding job opportunities so as to

⁹⁵ See The White Paper on Education and Training (note 94 above) par 2.

⁹⁶ See footnote 48 above.

⁹⁷ See Plan of Action: Improving access to free and quality basic education for all (2003) page 8, para 14.

⁹⁸ 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.

build sustainable livelihoods. It is also a consideration to ensure that people particularly those in work places is qualified and competent. This Paper presents an idea of post 1994 on educational system of South Africa.⁹⁹ The paper further provides that “education institutions in the historically black areas are still under-resourced and disadvantaged; there are insufficient PhDs especially from blacks and women, the Department of Science and Technology (DST) has targeted a five-fold increase in PhDs over the next 10 years”. “The production of PhDs among black students and female students provides the solution to both improving the demographic profile of academic staff at the historically white institutions and providing the human resources needed to improve the quality of the historically Black institutions”.¹⁰⁰

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:

- Providing a range or multiple of accessible alternatives and choices for young people.
- Raise the university enrolments to 1 500 000 (projected at 23%) as opposed to 2011 enrolment figure of 899 120.
- 4 000 enrolments (about a 60% participation rate) in colleges or other post-school institutions, with a key focus on Further Education and Training (FET) colleges.
- Improving the quality of the FET colleges, developing innovative programmes and upgrading lecturer qualifications.
- Addressing insufficient levels of research and innovation echoing the DST Ten-Year Innovation Plan.
- Establishing an institution which will cater for the needs of out of school community.

⁹⁹ See 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 page 1.

¹⁰⁰ See Plan of Action: Improving access to free and quality basic education for all (2003) page 8, par 14.

- Establishing a South African Institute for Vocational and Continuing Education and Training (SAIVCET) as part of a long-term strategy to build institutional capacity.
- Addressing the link between the secondary, post-secondary and labour market.
- Establish institutions which will provide a link between education, training and labour market.¹⁰¹

2.7 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”.¹⁰²

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. Education empowers people to define their identity, take control of their lives, raise healthy families, take part confidently in developing a just society and play an effective role in the politics and governance of their communities.”¹⁰³ Education, training and innovation are not a solution to all problems, but society’s ability to solve problems, develop competitively, eliminate poverty and reduce inequality is severely hampered without them. The quality of schooling system impacts significantly on further education, college, higher education and society’s ability to innovate”.¹⁰⁴

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

¹⁰¹ See the Department of Higher Education and Training’s Green Paper (note 91above) page 1 par 3.

¹⁰² See the National Development Plan vision 2030 chapter 9.

¹⁰³ National Development Plan vision 2030 chapter 9, page 261 par 1.

¹⁰⁴ National Development Plan (note 102 above), page 262 par 1.

children.¹⁰⁵ The grade promotion of learners that are not ready in the primary and early secondary phase leads to substantial dropout before the standardized matric examination”.¹⁰⁶

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. Public colleges enroll an equivalent of one-third (roughly 300 000) of the learners enrolled in higher education when ideally the situation should be the other way round”.¹⁰⁷

The Department of High Education and Training provides that “success rate in Further Education and Training (FET) colleges is extremely low, and the drop-out rate in colleges is estimated to range between 13 percent and 25 percent per annum, the highest dropout levels are in level 2 of the NCV”.¹⁰⁸ This is because the students cannot afford the high rate fees for their respective studies, and the drop-out can be stopped by making their education free.

The NDP proposed that “the higher education system should be diverse so that institution can build on its strengths and expand area of specialization. This differentiation should be enabling and developmental based on a recognition that higher education has to fulfil many functions and no one institution can serve all of society’s needs. However, differentiation need to take place in a context that takes account of social justice and equity imperatives; this means that historically disadvantaged

¹⁰⁵ See the National Development Plan (note 102 above) page 269 par 6.

¹⁰⁶ See footnote 105 above.

¹⁰⁷ See the National Development Plan (note 102 above) page 270 par 4.

¹⁰⁸ See the Department of Higher Education and Training (2011) Green Paper on post-schooling. See further the National Development Plan vision 2030 chapter 9 page 270 par 5.

institution must be given adequate support and incentives to develop their own area of excellence in both research and teaching”.¹⁰⁹

It further proposed that “Universities should be welcoming and supportive environments for black and female students and researchers. They need to make significant progress in gender and racial transformation in order to reduce gender and racial disparities so that women and Africans each make up more than 50 percent of research and teaching staff”.¹¹⁰ It further proposes that “Universities are an integral part of the post-school system, but are also the apex of the education, training and innovation system. Institutions need to be efficient, characterized by higher knowledge productivity units, throughput, graduation and participation rates”. It further proposes that “by 2030, 75 percent of university academic staff should hold PhDs. PhD graduates, either as staff or post-doctoral fellow, will be the dominant drivers of new knowledge production within the higher education and science innovation system”.¹¹¹

The implementation of the above mentioned policies and legislative frameworks has contributed (although less) towards opening up doors of access to quality education. The problem is that these policies and legislative frameworks are only implemented, but not enforced. This means that a lot still has to be done in as far as enforcement is concerned.

2.8 Conclusion

In South Africa, there are sufficient legislative measures and frameworks governing the right of access to quality education. It is however imperative that the government should consider the right to education as a transformative and investment tool and to take note that a nation running without quality education is a lost one. It therefore remains significant that the right to quality education be highly protected and enforced at all costs. This is because all policies and legislative frameworks, particularly the Constitution serve as the instruments to eradicate the past educational system and

¹⁰⁹ 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.

¹¹⁰ See the National Development Plan (note 102 above) page 268 par 1.

¹¹¹ See the National Development Plan (note 102) page 267 par 3.

build a strong “society based on human dignity, equality and freedom”. It is clear that as a county we have less problems with regards to the “right of access to basic education” as compared to the “right of access to higher education” which needs special attention.

CHAPTER 3

3. INTERNATIONAL INSTRUMENTS SUPPORTING THE RIGHT TO EDUCATION

3.1 Introduction

South Africa is an active party or signatory to most if not all the international conventions or treaties 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 (particularly the socio economic rights) 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.

3.2 The Universal Declaration of Human Rights (UDHR) 1948

The “right to education” was firstly expressed internationally under the UDHR.¹¹² 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. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Parents have a prior right to choose the kind of education that shall be given to their children”.¹¹³

¹¹² See the UDHR adopted and proclaimed by the General Assembly Resolution 217A (iii) on 10 December 1948.

¹¹³ See Article 26 (1) (2) and (3) of the Universal Declaration of Human Right, as adopted and proclaimed by General Assembly Resolution 217A (III) on 10 December 1948.

South Africa is implementing the content of this declaration because the Constitution provides that “everyone has the right to education”.¹¹⁴ Nine years of schooling (grade 1 to 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.¹¹⁵

3.3 International Covenant on Economic, Social and Cultural Rights, 1966

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is an international human rights treaty of the United Nations (UN) which South Africa is a state party to. It establishes an international framework for the protection and realization, by state parties, of “socio-economic rights” such as the rights to food, housing, healthcare and education. The ICESCR provides that “the States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace”.

The ICESCR provides further that “the States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right. Primary education shall be compulsory and available free to all. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”.¹¹⁶

¹¹⁴ Section 29 (1) (a) of the Constitution of the Republic of South Africa, 1996.

¹¹⁵ 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.

¹¹⁶ See Article 13 (1) (2) (a) and (b) of the International Covenant on Economic, Social and Cultural Rights. Article 14 further provides that “Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the

On 12 January 2015 the South African government ratified the ICESCR, more than twenty years after signing it. The ratification was set to enter into force on 12 April 2015. The ratification provides that “State parties that have ratified the ICESCR have a legal obligation to work towards the realisation of the socio-economic rights set out in the ICESCR”. The ratification further provides that “we, as organisations working to ensure the realisation of learners’ rights to a basic education in terms of Section 29(1) (a) of the Constitution note with deep concern South Africa’s declaration in respect of the ratification process”.¹¹⁷

This declaration states that: “The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2)(a) and Article 14, within the framework of its National Education Policy and available resources.” This means that Declarations should not limit the scope of the right to basic education and related obligations, nor limit access to education, particularly in relation to free and compulsory primary education. Accordingly, South Africa’s Constitution does not subject the right to basic education to progressive realisation.¹¹⁸

3.4 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”.¹¹⁹ The Dakar agreement provides that “this target should be achieved by 2015”. The

progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all. Articles 13 and 14 thereof are not only essential in building on the preceding provisions on education, they became a crucial reference point in the formulation of state obligations for education in subsequent instruments and jurisprudence”.

¹¹⁷ See the South African government’s declaration on education clause mars the welcome ratification of the ICESCR 12 January 2015.

¹¹⁸ See the South African government’s declaration on education clause mars the welcome ratification of the ICESCR 12 January 2015. See further Lilian Chenwi, Jackie Dugard and Ebenezer Durojaye, South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), *ESR Review*, Vol 16 No. 1 2015 page 9.

¹¹⁹ See the Dakar Framework for Action, *Education for All: Meeting our Collective Commitments*, adopted by the World Education Forum 26-28 April 2000, Dakar.

framework provides that “we are well on the way to attaining this target before 2015, and have a record that is impressive by international standards. With regard to the funding of public schools, we promulgated a pro-poor funding policy in 2000”. “We have gone further down the road of progressive, or pro-poor, school funding than any other developing country. Our current emphasis is very much on ensuring that our pro-poor funding mechanisms bring about adequate funding for all poor schools. Our objective goes beyond free education for the poor. We seek, through this plan, to achieve a schooling system that is free and of a good quality for all poor in the country”.¹²⁰

South Africa is implementing this action as it is making basic education “free and compulsory” for every child of school-going age and making sure that financial incapacity or predicaments is not a barrier for any child to access basic education.¹²¹ This is a way of combating poverty and uplifting South African people.

3.5 Convention on the Rights of the Child, 1989

Convention on the Rights of the Child is one of the International human rights treaties to which South Africa is a party, which also support the right of access to education.¹²² Article 28 provides that “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: make primary education compulsory and available free to all; encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; make higher education accessible to all on the basis of capacity by every appropriate means; make educational and vocational information and

¹²⁰ This means that the Framework also provided for the need to ensure that no child was denied an opportunity to complete a good quality education because such education was unaffordable.

¹²¹ See footnote 115 above.

¹²² See Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

guidance available and accessible to all children; take measures to encourage regular attendance at schools and the reduction of drop-out rates”.¹²³

It further provides that “States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries”.¹²⁴

South African government is promoting the content of this convention because it provides for “free and compulsory basic education” and encourages the development of “adult basic education” and other forms of further education through the Constitution.¹²⁵

3.6 Declaration on the Rights of the Child, 1959

This Declaration provides that “children are entitled to free and compulsory elementary education”. It further provides that “education should promote the child’s culture and help the child to become a useful member of society”.¹²⁶ The Declaration set out “the best interests of the child” as the guiding principle for those responsible for his or her education, and in this way further entrenched a child-oriented approach on matters affecting the child.¹²⁷ It followed the lead of the UDHR in prioritizing elementary education. The Declaration provided that “a child who ‘is physically, mentally or socially

¹²³ See Article 28 (1) (a) (b) (c) (d) and (e) of the Convention on the Rights of the Child.

¹²⁴ See Article 28 (2) and (3) of Convention on the Rights of the Child.

¹²⁵ See section 29 (1) (a) and (b) of the Constitution of the Republic of South Africa, 1996.

¹²⁶ See principle 7 of the Declaration on the Rights of the Child, 1959.

¹²⁷ See principle 2 of the Declaration on the Rights of the Child; see further P Alston, *The best interests principle: towards a reconciliation of culture and human rights* in M Freeman (ed) *Children’s rights* (2004) 184. The ‘interests of the child’ approach had previously been discussed as a criterion in the convention on the guardianship of minors in the 1902 Hague Conference on Private International Law.

handicapped shall be given the special treatment, education, and care required by his particular condition”.¹²⁸

3.7 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”.¹²⁹ 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 effect to them”. Article 2 further stipulate 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”.¹³⁰

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 obligated to make primary or basic education free and compulsory to every person without any kind of

¹²⁸ See principle 5 of the Declaration on the Rights of the Child 1959. In this way, it seems to imply that a child with disability would indeed require ‘special’ education. It is argued that the Declaration and particularly Principle 7 on the right to education depicted the child as a passive recipient of rights as opposed to a bearer of rights as used in subsequent instruments. Nevertheless, the significance of the 1959 Declaration to the subsequent developments of the rights of the child is clear. It is argued that in view of the exceptional unanimity at its adoption, more unanimous than the UDHR the 1959 Declaration had more moral authority than other soft laws. See further Lucyline Nkatha Murungi, The significance of article 24(2) of the UN Convention on the Rights of Persons with Disabilities for the right to primary education of children with disabilities: a comparative study of Kenya and South Africa, chapter 2, page 42-43, (University of Western Cape).

¹²⁹ 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.

¹³⁰ See Article 1 and 2 of the African Charter on Human and Peoples' Rights.

discrimination and to make sure that everyone is entitled to the enjoyment of every right including the right to basic education.

3.8 UNESCO, Convention against Discrimination in Education, 1960

The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention was the first international treaty to recognize a binding “right to education”.¹³¹ Article 1 provides that “this convention prohibit discrimination in education on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth”. “The prohibition is effective if the discrimination had the purpose or effect of nullifying or impairing equality of treatment in education, and particularly if such discrimination had the effect of excluding certain groups of persons from any kind of education, or of establishing separate education systems for groups of persons with the effect that the education offered in those separate schools was of an inferior quality”.¹³² As the first international binding treaty on education, article 4 of this convention further provides that “state parties to the UNESCO Convention undertook to make primary education free and compulsory, to ensure compliance by all with the obligation to attend school as prescribed by law and to establish equal standards of education in all public education institutions”.¹³³

3.9 Declarations on the Rights of Mentally Retarded Persons (1971), and on the Rights of Disabled Persons (1975)

The 1971 Declaration was adopted in the context of a growing consensus amongst non-governmental organisations that specified conventions defining the rights of disabled persons were necessary to complement the general human rights contained in the universal instruments. The Declaration targeted a specific group of people with disabilities, but it became the basis for the subsequent one which extended the

¹³¹ 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.

¹³² See UNESCO Convention, article 1.

¹³³ UNESCO Convention, article 4(a) & (b).

entitlements to all persons with disabilities.¹³⁴ The declaration provides that “the mentally retarded person has a right to education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential”.¹³⁵

Subsequently, the 1975 Declaration called for measures to enable persons with disabilities to be as self-reliant as possible, and specifically recognised their right to education, vocational training and rehabilitation that will make it possible for them to develop and as well as to transform their educational skills and capabilities.¹³⁶ These Declarations did not have binding force. However, they constituted moral and political persuasion to secure national policy changes in the 70s and 80s. They also greatly enhanced the visibility of persons with disabilities and their exclusion from mainstream human rights protection. Hence, soon after the 1975 Declaration, the year 1981 was designated to be the international year of Disabled Persons by the United Nations General Assembly.¹³⁷

The right to “free and compulsory education” in South Africa is also enjoyed by people with disabilities to develop their abilities and potential, to be self-reliant and to recognise their “right to education”. This means that people with disability are included to enjoy the rights in the Bill of Rights which also include the “right to education”, hence the word “everyone” as contemplated in section 29 of the Constitution.

3.10 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

¹³⁴ See the preamble of the Declaration on the Rights of Disabled Persons (1975) paragraph 3.

¹³⁵ See the Declaration on the Rights of the Mentally Retarded (1971) para 2.

¹³⁶ See the Declaration on the Rights of Disabled Persons 1975 para 6.

¹³⁷ This Proclamation was made in 1976 through UN General Assembly Resolution 31/123 of 16 December 1976. See further Lucyline Nkatha Murungi, *The significance of article 24(2) of the UN Convention on the Rights of Persons with Disabilities for the right to primary education of children with disabilities: a comparative study of Kenya and South Africa*, chapter 2, page 35-60, (University of Western Cape).

notwithstanding.¹³⁸ 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”.¹³⁹ 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.¹⁴⁰ The expanded vision would also encompass the universalisation 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.¹⁴¹

3.11 Conclusion

In light of the above mentioned international covenants or 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 supporting the right to education, international instruments which is then sufficient to make it possible for the signatory to realise this right. Hence it will be unreasonable for the signatory not to effectively realise the right and to provide its citizens with quality education while it has ample local legislative frameworks and policies coupled with international instruments supporting the “right to education”.

¹³⁸ See para 1 of the preamble of the World Declaration and Framework for Action. The conference was co-sponsored by UNDP, UNICEF, UNESCO and UNFPA which are key role players in the field of education globally.

¹³⁹ See article I (1) of the World Declaration (Jomtien Conference)

¹⁴⁰ See article II of the World Declaration (Jomtien Conference).

¹⁴¹ See article II (2) & article 3 of the Jomtien Conference.

CHAPTER 4

4. THE ROLE BEING PLAYED BY THE JUDICIARY IN PROMOTING THE RIGHT OF ACCESS TO EDUCATION

4.1 Introduction

The upbringing 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 judiciary. After the legislature has made the framework available, it is the executive's duty to ensure that the right is enforced and achieved while the judiciary must ensure that the right in question is interpreted appropriately. 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 school 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*¹⁴² 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".¹⁴³

¹⁴² *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).

¹⁴³ 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 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 a basic education in section 29(1) (a) may be limited only in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. This right is therefore distinct from the right to “further education” provided for in section 29(1) (b)”. “The state is, in terms of that right, obliged, through reasonable measures, to make further education “progressively available and accessible”.¹⁴⁴ To proclaim the “nature of the right to education”, the judgement in this case also reflected the importance of section 28 (2) of the Constitution which asserts that “a child’s best interests are of paramount importance in every matter concerning the child”.¹⁴⁵ The decision of the Court in this case was promoting the right to basic education in the sense that it was mainly concerned with fact that learners should be provided with alternative placements since the right to basic education is “immediately realisable” and does not depend on the availability of resources.

In *Section 27 v Minister of Education*¹⁴⁶ “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”. 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

¹⁴⁴ See *Juma Masjid Primary School* para 37.

¹⁴⁵ See also *Sonderup v Tondelli* 2001 1 SA 1171 (CC) par 29.

¹⁴⁶ *Section 27 v Minister of Education* 2013 2 SA 40 (GNP)

teaching”.¹⁴⁷ In this regard the court concluded that “the failure by the respondents to provide text books constitutes a violation of right to basic education”.¹⁴⁸

In his judgement Kollapen J pointed out that: “In this regard it must be abundantly clear that where a violation of rights has taken place, the remedy that is offered must be effective and meaningful. If not, it renders the vindication of rights rather hollow and a court in this regard must act in both the spirit of the Constitution as well as ensuring that when rights are vindicated, remedies are appropriate to meet the mischief which is being sought to be dealt with”.¹⁴⁹ He added that “there is no doubt that an order only for delivery of text books will not address the consequences and effects of the failure of delivery for the first half the year. The circumstances of the matter require an intervention to address both the gaps in learning as well as the quality in learning and teaching, in particular for Grade 10 learners. This is to ensure that the prejudice they invariably would have experienced on account of not having text books, is ameliorated”.¹⁵⁰ The Court’s decision in this case was protecting and promoting the right to quality basic education as it cannot be achieved without textbooks.

The Court confirmed that “the fact that the right to basic education is an immediately enforceable right, not subject to progressive realisation is of course fairly self-evident from the reading of the relevant section in the Constitution itself, and many authors have already interpreted it this way”.¹⁵¹ It was further confirmed in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*.¹⁵² “This case concerns the right to receive education in the official language of one’s choice in a public educational institution. The issue emerges from a dispute between the Head of Department of

¹⁴⁷ See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 22.

¹⁴⁸ See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 32.

¹⁴⁹ See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 35.

¹⁵⁰ See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 36. See further Nevondwe and Matotoka on Promoting and protecting the right of access to basic education in South Africa, the Thinker for thought, volume 57, November 2013, page 8-13.

¹⁵¹ 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, 2013 page 3. See further Veriava & Coomans “The Right to Education” in *Socio-Economic Rights in South Africa* (2005) (eds Brand & Heyns) 60; Woolman & Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 9.

¹⁵² *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC).

Education of the province of Mpumalanga (HoD or first applicant) and a public high school in his area of jurisdiction known as *Hoërskool Ermelo* (the school) and its governing body, cited as the first and second respondents respectively”. “The dispute arises from the school’s language policy, which stipulates Afrikaans as the only medium of instruction”.

“The school challenged the decisions of the HoD in the North Gauteng High Court, Pretoria. A full bench of the High Court upheld the decisions of the HoD on the grounds that, in terms of the Schools Act, he had the authority to withdraw the power of the school governing body to determine language policy and to appoint an interim committee to perform the function and that he was confronted by an urgent need to find schooling places for grade 8 learners who wanted to be taught in English. The Supreme Court of Appeal reversed this decision”. In this Court, the HoD argued that “the decisions taken in January 2007 were lawful; that all negotiations with the school to find a solution to the problem had been unsuccessful and that he acted reasonably in withdrawing the function to determine language policy in order to alleviate an urgent situation and to give effect to the constitutional right to basic education”.

The Court held that “the Schools Act does give the HoD the power to withdraw on reasonable grounds the function of the governing body to determine the school’s language policy. This power derives from section 29(2) of the Constitution read together with section 22 of the Schools Act. Once the HoD has properly withdrawn the function, it vests in him or her and the function may be exercised for a specified remedial purpose. However, the Court found it unnecessary to determine whether the HoD in this case acted reasonably or not, because the exercise of his power to withdraw the function to determine language was tainted by his simultaneous decision to appoint in terms of section 25 of the Schools Act an interim committee to determine the schools language policy”. The Court further held that “the HoD failed to distinguish the power given to him under section 22 from the power given to him under section 25. Hence his exercise of the power was contaminated by his incorrect reliance on section 25. In short, in appointing the committee to determine the school language policy, the HoD acted

without the necessary legal power to do so. Consequently, the withdrawal of the function, the appointment of the committee and the subsequent alteration of the schools language policy were unlawful and were set aside”.

In his judgement Moseneke DCJ stated that “the power to decide on language policy in schools must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress”.¹⁵³

In *Madzodzo and Others v Minister of Basic Education and Others*¹⁵⁴ 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 its judgment commences by confirming 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.”¹⁵⁵ 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

¹⁵³ *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 61.

¹⁵⁴ *Madzodzo and others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

¹⁵⁵ See *Madzodzo* (note 154 above) para 17.

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 constituted an ongoing 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".¹⁵⁶ This was also a way of protecting and promoting the right to quality education as it cannot be achieved without the delivery of said furniture in the respective 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*,¹⁵⁷ "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".¹⁵⁸

"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.

¹⁵⁶ 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.

¹⁵⁷ *Adam Legoale v MEC for Education, North West*, North West High Court, Mafikeng, case no 499/11, unreported.

¹⁵⁸ In the Affidavit filed on behalf of the Centre it was pointed out that the closure of public schools is regulated by section 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.

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 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”.¹⁵⁹

The Constitutional Court also handed down judgment in *MEC for Education in Gauteng v The Governing Body of Rivonia Primary School*.¹⁶⁰ 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

¹⁵⁹ 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.

¹⁶⁰ *MEC for Education, Gauteng and Others v Governing Body of the Rivonia Primary School and Others* 2013 (6) SA 582 (CC).

improve their living conditions”,¹⁶¹ and relate this to the General Comment 13.¹⁶² The Court also emphasised the fact that “the importance of meaningful engagement between all role-players in education to ensure that the best interests of learners are promoted at all times. This case was the third in a set of Constitutional Court judgments regarding the interaction of powers between provincial Education Departments and school governing bodies”.¹⁶³

In *Mtukane and Others v Laerskool Potgietersrus*¹⁶⁴ “the applicants were the parents who had unsuccessfully applied to have their children admitted as pupils in the English-medium stream of Laerskool Potgietersrus, the respondent in this case and an executive council member of the then Northern Province responsible for Education, Arts, Culture and Sport, who joined the other applicants in his official capacity to represent the interest of parents who would like to send their children to the school and also in the public interest”.

The applicants contended that “black children had been refused admission to the school because of the respondent school’s policy which refused admission on racial grounds. The first applicant, Mr. Matukane, a black resident of Potgietersrus, spoke to the principal on 11 January 1996 as to the possibility of getting his children enrolled in the school. The principal informed him to wait until 25 January 1996 for a determination as to whether there would be space available at the school to enrol his three children”. “Not convinced that any such delay was warranted, the first applicant approached the Provincial Department of Education which informed him that his children could be enrolled at the school. On the strength of this information, Mr. Matukane went to the

¹⁶¹ *MEC for Education* (note 160 above) Para 26.1.

¹⁶² 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”.

¹⁶³ See also: *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2011 4 SA 531 (FB); *Head of Department, Department of Education, Free State Province v Harmony High School and Another*, 2014 (2) SA 228 (CC); *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*, 2010 (2) SA 415 (CC). All these three judgments have emphasised the need for consultation and co-operation to ensure full realisation of all learners’ right to basic education.

¹⁶⁴ *Mtukane and others v Laerskool Potgietersrus* 996 (3) SA 223 (TPD).

school on 22 January, completed the necessary application forms and bought the school uniforms for his children". "When he returned the following day to the school with his children for their first day at school, the entrance of the school was blocked by a group of white parents who refused to allow him and his children to enter the school. The following day, the children were again denied access to the school".

It was established at the hearing that "at least 55 black children had been refused admission to the school in the same manner and that no black child had ever been admitted to the school while none appeared on the waiting list. After Mr. Matukane's experience, a group of black parents approached the High Court for an order requiring the Laerskool Potgietersrus to admit their children". At the High Court, the School argued that "it was unable to accommodate more children and that it did not reject the children on racial grounds.¹⁶⁵ The school expressed concern that if it admitted those children it would be swamped by English-speaking children which would destroy the Afrikaans ethos of the school". The school contended further that "section 32(c) of the Interim Constitution protected the right to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race." It was also argued that "the school was entitled to adopt admission requirements designed to maintain the existing culture and ethos of the school". Furthermore, it was submitted that "a Department of Education directive gave the school governing body the sole power to determine its criteria for admission".

Spoelstra J held *inter alia* that: "I am satisfied that discrimination has been *prima facie* proved. I say this for the following reasons: The fact that no pupils of colour have ever been admitted to the school notwithstanding the number of applications received by the respondent, not only for this year but also for the previous year, is a strong indication in this direction". The court held further that "the respondent failed to establish that there was no unfair discrimination against the black children. Even if their applications had

¹⁶⁵ However at the time of hearing of the case, the school had 580 Afrikaans-speaking students and 89 English-speaking students.

been rejected because they had elected to receive their schooling through the medium of English, it would still constitute unfair discrimination”.

A further case which deals with accessibility was a matter concerning the exclusion of pregnant learners from their respective schools. The case of *Welkom High School v Head, Department of Education, Free State Province*¹⁶⁶ “pertains two cases which were brought separately to the Bloemfontein High Court, but joined due to their similarities. In both cases the girls were instructed to stay away from school due to their pregnancies”. “The decision to deny these girls access to education was based on the “pregnant learner policy” adopted by the school governing body of each school”. “These policies were in turn based on a National Department of Basic Education policy dated 2007 entitled Measures for the prevention and management of learner pregnancies”.¹⁶⁷ “The Provincial Department had, in response to complaints by the parents of the learners, replaced the schools’ decisions with their own, and reinstated the learners”. Reliance was on a Circular sent out in 2010 which clearly stipulated that “a pregnant learner should return to school as soon as possible”.

The Human Rights Commission and the Centre for Child Law¹⁶⁸ argued that “the Court should rule on the appropriateness of the policy, or at least direct the schools and the departments to redraft their policy in line with the Constitution”. The Court resisted doing so, and noted that “it could find no legal avenue to address the questions of constitutionality”. This decision was appealed by the HoD of Education in Free State. “The judgment of the SCA focuses entirely on the exercise of administrative power and the principle of legality, and declines to make any findings regarding the constitutionality or lawfulness of the policy”.¹⁶⁹ It is worth noting Rampai J’s remarks that “there are two groups of children affected by these decisions, the teenage mothers and their babies”.

¹⁶⁶ *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB).

¹⁶⁷ In particular, both schools pointed to measure 22 which reads: “However, it is the view of the Department of Education that learners as parents should exercise full responsibility of parenting, and that a period of absence of up to two years may be necessary for this purpose. No learner should be readmitted in the same year that they left school due to a pregnancy”.

¹⁶⁸ As the amici *curiae* in this case.

¹⁶⁹ See *Head, Department of Education, Free State Province v Welkom High School* 2012 6 SA 525 (SCA).

Rampai J further said that “Perhaps the best gift that can be given to the two little babies of the two schoolgirls is to ensure that their mothers continue to learn, so that they can become better parents”.¹⁷⁰

4.4 Adaptability of the right

Adaptability shows that “the State has a responsibility to ensure that educational policies, frameworks and practices are inclusive and applicable to all children”. Skelton asserts that “adaptability raises the question as to whether South Africa’s education laws and policies are sufficiently flexible to respond to the needs of all learners, including those with disabilities. Therefore, adaptability encompasses educational access for children with special needs”.¹⁷¹

The case of *Western Cape Forum of Intellectuals Disability v Government of the Republic of South Africa*¹⁷² was an important case dealing with the protection of “rights of children” with profound or severe intellectual disabilities. “In this case the Forum provides schools, centres and other services for children with intellectual disabilities in the Western Cape, but receives no support or funding from the Department of Education. After years of attempting to engage with government about this, the Forum, represented by the Legal Resources Centre, decided to take their case to the courts and joined the national as well as the provincial government”. The state argued that “it provided education for children with moderate to mild intellectual disability but did not bear the responsibility to immediately provide education for profoundly intellectually impaired children, and furthermore argued that such children could not benefit from education. The applicants demonstrated that such children do indeed benefit from education”.

¹⁷⁰ See *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB) par 80.

¹⁷¹ 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 21.

¹⁷² *Western Cape Forum of Intellectuals Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).

The court held that “the identified group of children had been marginalised and ignored, denied their right to basic education and had had their dignity infringed. The Court then made a supervisory order which directed the government to provide sufficient funds to organisations that provide services to these children to provide education, and to report on actions taken and to be taken in compliance with the ruling”.

The case of *Minister of Education v Harris*¹⁷³ was also decided on the issue of non-discrimination on account of age. In this case the Minister of Education published a notice under section 3 (4) of the National Education Policy Act ¹⁷⁴ stating that “a learner should not be enrolled in grade one in an independent school if he or she did not reach the age of seven in the same calendar year. Talya Harris was part of a group of children who had enrolled at the age of three in King David Pre-Primary School, and had spent three years being prepared for the entry to the primary school in year 2001. Her sixth birth day was due to fall on 11 January 2001, a short while before the school year would begin”.

“Challenging the validity of the notice, her parents sought an order of court permitting her to be enrolled in Grade 1 in the year she turned six”. The Court declared that “the notice be unconstitutional and invalid, and authorized King David Primary School to admit Talya to Grade 1”.

The court held, *inter alia*, that “the Minister’s action was unjustifiable as it discriminated unfairly on the ground of age against Talya and similarly situated children, and accordingly the directive violated the right to equality guaranteed by section 9 of the Constitution”. It held further that “by requiring Talya and other children to sit at home waiting for the year to pass, the Minister’s action unjustifiably violated section 28(2) of the Constitution, which provides that a child’s best interests are of paramount

¹⁷³ *Minister of Education v Harris* 2001 (4) SA 1297 (CC).

¹⁷⁴ Act 27 of 1996.

importance in every matter concerning the child”.¹⁷⁵ The Constitutional Court confirmed the unconstitutionality of the notice.

4.5 International Case Law Promoting the Right to Education

The right to education was also recognised and supported by the international courts. This was proved in the case of *Velev v Bulgaria*.¹⁷⁶ In this case the applicant was a Bulgarian national who was born and lives in Stara Zagora (Bulgaria). He was arrested on suspicion of unlawful possession of firearms and detained on remand in Stara Zagora Prison for 29 months. His requests to be allowed to attend the school operating inside the prison so that he could complete his secondary education were refused, first by the prison authorities and ultimately by the Supreme Administrative Court. The national authorities gave a variety of reasons to justify refusing to enrol the applicant in the school, notably it was not allowed to mix prisoners who had no prior convictions with those who had, like the applicant and the right to education was only applicable to those deprived of their liberty as a result of a final conviction and not to those detained on remand.

The Government provided neither practical reasons, for example based on lack of resources at the school, nor a clear explanation as to the legal grounds for refusing to enrol the applicant in the prison school. In these circumstances, on the evidence before it, the Court found that “the refusal to enrol the applicant in the Stara Zagora Prison School had not been sufficiently foreseeable, had not pursued a legitimate aim and had not been proportionate to that aim”. The European Court of Human Rights held that “there had been a violation of Article 2 of Protocol No.1 (right to education) of the European Convention on Human Rights (ECHR)”.¹⁷⁷

¹⁷⁵ See also *Sonderup v Tondelli* 2001 1 SA 1171 (CC) par 29 and *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) par 17.

¹⁷⁶ *Velev v Bulgaria* (application no. 16032/07).

¹⁷⁷ Article 2 of Protocol No.1 (right to education) of the European Convention on Human Rights (ECHR) provides that “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. The decision of the court can also be found on www.echr.coe.int.

In the case of *Brown v Board of Education of Topeka*¹⁷⁸ “a legal representative on behalf of the minors of the Negro race, seek the assistance of the courts of law in obtaining admission to the public schools of their community on a non-segregated basis”. “They had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the applicants of the equal protection of the laws under the Fourteenth Amendment”. In this case the court firstly denied relief to the applicant on the so-called “separate but equal” doctrine announced by the Court in *Plessy v Ferguson*.¹⁷⁹ Under that doctrine, “equality of treatment is accorded when the races are provided with substantially equal facilities, even though these facilities are separate”. The Court then ordered that “the applicants be admitted to the white schools because of their superiority to the Negro schools”.¹⁸⁰

4.6 Conclusion

In light of the local and international case laws as discussed in this chapter, it is apparent that the judiciary has contributed more than enough in enforcing and realising education as a right and also making it clear to the government and its people that “the right to education is an empowerment right that enables people to realise their potential and improve their living conditions”. As provided above, a distinction has been made between the “right to basic education” (section 29 (1) (a)) and the “right to further education” (section 29 (1) (b)) as contemplated in the Constitution. It is said that the right to basic education be understood, as it is “immediately realisable” unlike other “socio economic rights”. This right “may only be limited in terms of a law of general application which is reasonable and justifiable, unlike the right to further education

¹⁷⁸ *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).

¹⁷⁹ *Plessy v Ferguson*, 163 U. S. 537.

¹⁸⁰ The Court stressed the importance of education in these words: “Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.”

which the state is in terms of this right only obliged through reasonable measures to make it (further education) progressively available and accessible”.

CHAPTER 5

5. COMPARATIVE ANALYSIS

5.1 Introduction

As alluded above, education as a right was first recognised internationally after the end of World War I.¹⁸¹ This took place through the treaties adopted for the protection of certain minorities in Europe in the aftermath of the war. Thereafter, a Declaration on the Rights of the Child was adopted.¹⁸² This Declaration stressed social and economic needs over the traditional civil and political rights of the child. Though this Declaration did not expressly refer to a child's educational right, one of its Principles required that the child be placed in a situation where he/she will be able to earn a livelihood.¹⁸³ This means that educating children is implicit in enabling them to earn a livelihood. After this declaration other declarations follow which recognised the right to education.¹⁸⁴

5.2 AUSTRALIA

5.2.1 A Brief Background of the Australian Government's Position on the Right to Access of Quality Education

Australia is a federation of six States.¹⁸⁵ In each state there is a separate constitution which divides the government of each state into the legislature, executive, and judiciary as the federal government.¹⁸⁶ The parliament of each state is given limited power to pass laws that are not controlled by the Commonwealth under Section 51 of the Australian Constitution.¹⁸⁷ All the powers over state matters are vested in the governor

¹⁸¹ See UNESCO, A Human Rights-Based Approach to Education for All, A framework for the realization of children's right to education and rights within education, 2007 page 7.

¹⁸² The Geneva Declaration of the Rights of the Child, 1924.

¹⁸³ See the Geneva Declaration of the Rights of the Child, 26 September 1924 League of Nations. The Declaration was an aspirational document and the basis for the Declaration of the Rights of the Child of 1959. The Declaration is also significant because it marks the beginning of a specific focus on the child as a bearer of rights.

¹⁸⁴ See chapter 3 above.

¹⁸⁵ These states are New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.

¹⁸⁶ These states are under the national or central government, usually called the Federal Government or the Commonwealth Government.

¹⁸⁷ Refer to section 51 of the Australian Constitution for matters that are controlled by the Commonwealth.

of each state. Each state government is headed by the premier. Among others, there are also ten territories situated outside the state borders.¹⁸⁸ In these territories, a variety of governmental matters are in the hands of a locally-elected parliament. Some of these territories, for example the Australian Capital Territory (ACT) and the Northern Territory are often considered to be states. Both the states and the territories are under the national or central government, usually called the Federal Government or the Commonwealth Government (Parliament of Australia) which is responsible for the enactment of the Commonwealth legislation (Acts of Parliament / statutes).¹⁸⁹

South Africa is a constitutional democratic country with nine provinces and three spheres of government and an independent judiciary.¹⁹⁰ Although judiciary is also defined as “part of government, they are however independent so that courts can protect citizens without being influenced or pressurised by government”.¹⁹¹ All the three spheres or levels of government in the country have legislative and executive authority of their own and are defined by the Constitution as "distinctive, interdependent and interrelated". All these authorities must be in line with the Constitution, laws and policies enacted by the National Parliament.

Since 2009, the National Department of Education was divided into two departments namely, “Basic Education, and Higher Education and Training”. Each Department is therefore responsible for its level of education from the four corners of the country, while each province has its own Department of Education.¹⁹² The Department of Basic Education focuses on primary and secondary education, as well as early childhood development centres.¹⁹³ The Department of Higher Education and Training is

¹⁸⁸ These territories are the Australian Capital Territory (ACT), Northern Territory, Norfolk Island, Ashmore and Cartier Islands, Australian Antarctic Territory, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Jervis Bay Territory and Territory of Heard Island and McDonald Islands.

¹⁸⁹ See www.australia.gov.au, retrieved on 18 July 2015.

¹⁹⁰ See the Structure and functions of the South African Government at www.gov.za >retrieved 18-08-2015.

¹⁹¹ See the spheres of government at www.etu.org.za > retrieved 18-08-2015

¹⁹² See <http://www.southafrica.info/about/education/education.htm#bands#ixzz3j6rXAZRb> >retrieved 18-08-2015.

¹⁹³ See <http://www.southafrica.info/about/education/education.htm#bands#ixzz3j6rDSU1l> >retrieved 18-08-2015.

responsible for tertiary education up to postgraduate level, technical, vocational training as well as Adult basic Education and Training.¹⁹⁴

5.2.2 Legislative Frameworks and the Right to Education in Australia

5.2.2.1 Australian Domestic Laws Related to the Right to Education

In Australia the states and territories governments are responsible for variety of educational aspects and financial assistance thereof. Most of the Australian legislative frameworks make compulsory school attendance from the age of six (6) to 15 or 16. In Australia, there is no Commonwealth statute explicitly containing the “right to education” as an individual right like in the South African context. However there are laws or legislation dealing with the “right to education” which is relevant to the responsibilities of the Commonwealth.

5.2.2.2 Australian Constitution

Australia has a written Constitution which has no Bill of Rights to protect human rights in a single document. The Australian Constitution is largely concerned with pragmatism rather than ideology.¹⁹⁵ This means that it says very little about what it is to be Australian. It says practically nothing about how Australians finds themselves there. It says nothing of how they should behave towards each other as human beings and as Australians.¹⁹⁶ The “right to education” is not incorporated in the Australian Constitution as an individual right, nevertheless, there are five explicit individual rights in the Constitution, namely the right to a trial by jury, the right to vote, freedom of religion, protection against acquisition of property on unjust terms and prohibition of discrimination on the basis of State of residency.¹⁹⁷

¹⁹⁴ See <http://www.southafrica.info/about/education/education.htm#bands#ixzz3j6qCLLBO>>retrieved 18-08-2015.

¹⁹⁵ Chief Justice Murray Gleeson, "Boyer Lectures, Four Aspects of the Constitution", ABC Radio National, 10 December 2000.

¹⁹⁶ See Lois O'Donoghue and Frank Brennan, *Securing Bountiful Place for Aborigines and Torres Strait Islanders in a Modern Free and Tolerant Australia*, Constitutional Centenary Foundation, 1994, page 18; also cited in George Williams, *Human Rights in the Australian Constitution*, Oxford University Press, Melbourne, 1999, page 16.

¹⁹⁷ See section 80, Section 41, Section 116, Section 51 (xxxi) and Section 117 of the Commonwealth of Australia Constitution Act of 2010.

5.2.2.3 The Education Act

The right to education in Australia is provided for in Education Act.¹⁹⁸ Section 7 (1) of the Education Act provides that “Everyone involved in the administration of this Act, or in the school or home education of children in the ACT, is to apply the principle that every child has a right to receive a high-quality education”. Section 8 provides that “the main objects of this Act are to state the responsibilities of parents and the government in relation to education and the principles and values on which government and non-government school education and home education are based; and to promote compulsory education by ensuring that children complete year 10; and children participate in education until they are 17 years old or complete year 12 (whichever happens first), with the opportunity to participate in training or employment after year 10”.¹⁹⁹ The Act further provides that “a child is of compulsory education age if the child is at least 6 years old and under the age that the first of the following happens: the child is 17 years old and/or the child completes year 12”.²⁰⁰

5.2.2.4 Other Legislation Promoting the Right to Education

There are also pieces of legislation dealing with the “right to education” which is relevant to the responsibilities of the Commonwealth in a way of funding. For example the Schools Assistance Act²⁰¹ “provides for financial assistance to the states and territories for non-government primary and secondary education”.²⁰² Under the Disability

¹⁹⁸ Education Act 2004. Republication No 21, effective: 10 June 2015.

¹⁹⁹ See section 8 (a) and (b) (i) (ii) of the Education Act 2004.

²⁰⁰ See section 9 of the Education Act 2004.

²⁰¹ Act 153 of 2008

²⁰² Section 5 of the Schools Assistance Act provides that “(1) In this Act: a student receives primary education or secondary education (as the case may be) at a non-government school (or at a school campus of a non-government school) only if: (a) the student attends, on a daily basis, the school (or campus) at a location approved for the school, for that level of education, under this Act; or (b) the Minister determines that the student is to be treated (because of special circumstances) as so attending the school (or campus). Distance education (2) In this Act: receives: a student receives primary distance education or secondary distance education (as the case may be) at a non-government school (or at a school campus of a non-government school) located in a State only if: (a) the student resides in the State; and (b) the State provides funding for the school (otherwise than as a result of the operation of this Act), for that level of education, for students enrolled at the school who receive distance education (however described) from the school; and (c) the student is not approved as a home education student (however described) in accordance with the law of the State in which the student resides”.

Discrimination Act,²⁰³ “the Attorney-General may make disability standards to specify rights and responsibilities about equal access and opportunity for people with disability, in more detail and with more certainty than the Act itself provides. A standard has been made under the Act in relation to education, which sets out the right to comparable access, services and facilities, and the right to participate in education and training without discrimination for students with disabilities”.²⁰⁴ The Higher Education Funding Act “provides for funding for certain institutions of higher education and for the Higher Education Contribution Scheme (HECS) and other forms of financial assistance for students at higher education institutions”. The Indigenous Education (Targeted Assistance) Act²⁰⁵ “provides targeted financial assistance which is intended to advance the education of Indigenous persons”.²⁰⁶

5.3 CANADA

5.3.1 A Brief Background of the Canadian Educational System

Canada is a federation made of thirteen jurisdictions, being ten (10) provinces and three territories.²⁰⁷ Responsibility for education in Canada therefore rests with this provinces and territories. All this educational jurisdictions are aimed at eliminating all sorts of discrimination in education at all levels. The legislative frameworks in each jurisdiction provide information on who is to attend school. Despite the fact that these frameworks differs, they however have a common principle which is consistence. All children have the right to attend a public school if they meet the age and residency requirements. No tuition is to be paid by the student or his/ her parent for this education.

As stipulated in the federal laws the three territories has comparable responsibility for education. In these thirteen jurisdictions, “departments or ministries of education are responsible for the organization, delivery, and assessment of education at the

²⁰³ Act 135 of 1992 as amended.

²⁰⁴ See section 22 of the Disability Discrimination Act as amended.

²⁰⁵ Act 147 of 2000.

²⁰⁶ See section 10 and 11 of the Indigenous Education (Targeted Assistance) Act. See further the Indigenous Education (Targeted Assistance) Act 2000: Program Guidelines 2013 page 3-8. For further information refer to www.deewr.gov.au

²⁰⁷ The territories are Nunavut, Northwest Territories, and Yukon.

elementary and secondary levels”. “The ministers responsible for education in the provinces and territories come together at the Council of Ministers of Education, Canada to discuss matters of mutual interest, undertake educational initiatives cooperatively, and represent the interests of the provinces and territories nationally and internationally”.

5.3.2 Federal Legislative Frameworks Promoting Education in Canada

The governments of Canada has established a robust legal frameworks that intend to put together laws and policies which stand against discrimination on the grounds of race, colour, sex, language, religion etc. The right to education is also a significant human right in Canada that is guaranteed in federal, provincial, and territorial legislations.

5.3.2.1 The Canadian Human Rights Act

The Canadian Human Rights Act²⁰⁸ was passed to uphold the principle that “all individuals should have equal opportunities”. This Act provides that “discrimination is prohibited on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted”.²⁰⁹ In defining discriminatory practices, the Act states that “it is illegal, for any of the reasons listed above, to deny, or deny access to, any good, service, facility, or accommodation to any individual or to differentiate adversely in relation to any individual. Access to education is included in this prohibition”.²¹⁰

5.3.2.2 The Canadian Citizenship Act

The Canadian Citizenship Act²¹¹ provides that “all Canadians, whether by birth or by choice, are entitled to the same rights, powers, and privileges and are subject to the same obligations, duties, and liabilities”.²¹²

²⁰⁸ The Canadian Human Rights Act, 1985.

²⁰⁹ See section 3 (1) of the Canadian Human Rights Act.

²¹⁰ See also Canadian Commission for UNESCO, Promoting Equality of Educational Opportunity page 11.

²¹¹ Act 108 of 1985.

²¹² See section 6 of the Canadian Citizenship Act.

5.3.2.3 The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms ²¹³ provides that “every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability”. It further ensures that “this guarantee of rights does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability”.²¹⁴

5.3.2.4 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

In November 2010, Canada joined other countries in supporting the UNDRIP as a reaffirmation of its commitment to promoting and protecting the rights of Indigenous peoples in Canada and around the world. The declaration sets out the individual and collective rights of Indigenous peoples, as well as their rights to culture, identity, language, employment, health, education, and other needs.²¹⁵ The ratification provides that “the Government of Canada, with the support of all the provinces and territories, ratified the Convention on the Rights of Persons with Disabilities; an international human rights instrument of the United Nations intended to protect the rights and dignity of persons with disabilities”. The core obligations of this ratification relate to “non-discrimination and reasonable accommodation, with specific provisions for education”.²¹⁶

5.3.3 Territorial and Provincial Legislations Promoting Education

Every province and territory has its own legislative frameworks and procedures and human right commission or equivalent to guard against discrimination and foster human

²¹³ The Canadian Charter of Rights and Freedoms 1982.

²¹⁴ See section 15 of the Canadian Charter of Rights and Freedoms 1982.

²¹⁵ See resolution 61/295 of the United Nations Declaration on the Rights of Indigenous Peoples adopted by the General Assembly.

²¹⁶ See also <http://www.ccdonline.ca/en/international/un/canada/crpd-pressrelease-11March2010>, retrived 23-07-2015.

rights. The commissions promote and educate people about human rights and anti-discrimination laws, as well as to do away with any sort of discrimination amongst the community. Education is integrated in each human right legislation and policies as a right subject to the provisions of the law.²¹⁷ The Canadian Association of Statutory Human Rights Agencies (CASHRA) is the Canadian's national association of 12 statutory agencies responsible for the administration of federal, provincial, and territorial human right legislation. The human rights acts or codes provide protection from discrimination or denial of service, with variations by jurisdictions.²¹⁸

Within the framework of this legislation and policy, the rights of students to be free from discrimination encompass not only "access to education", but also the "quality" of the educational experience itself. Educational jurisdictions in Canada are reaching beyond the idea of anti-discrimination to the concept of truly inclusive education. In inclusive education, educational "values and beliefs" are centred on the "best interests" of the students, promoting social cohesion, belonging, equal opportunities for success, and active participation in learning.²¹⁹

5.4 Australia as a Model of South Africa in Promoting the Right to Education

Compulsory education should be implemented and enforced until the child is in a position where it is presumable that he/she is capable of making decisions on his/her own rather than in his early ages. In terms of SASA, compulsory education in South Africa is only the first nine (9) years of schooling or until the child is fifteen(15) years of age which is presumably too soon for such a child to make sound decisions. Whereas in Australia compulsory education under the Education Act requires a child to participate in education until a child is seventeen (17) years of age or has completed year twelve (12) (whichever happens first). This means that the child is of compulsory age if he/she is six

²¹⁷ See the Canadian Commission for UNESCO, Promoting Equality of Educational Opportunity page 12.

²¹⁸ This is for such reasons as age; colour; race; ethnic or national origin; criminal conviction; political belief; sexual orientation; association; creed or religion; family and marital status; physical and mental disability, including addiction; and source of income.

²¹⁹ See The Development of Education: Report for Canada. Report Two: Inclusive Education in Canada: The Way of the Future [http://www.cmec.ca/Publications/Lists/Publications/Attachments/122/ICE2008-reports canada.en.pdf](http://www.cmec.ca/Publications/Lists/Publications/Attachments/122/ICE2008-reports%20canada.en.pdf). retrieved 23-07-2015

(6) years old and up until he/she is seventeen (17) years and/or the child completes year 12 which is grade 12 in our case.²²⁰ South Africa should therefore learn and adopt Australian compulsory educational system and change its own system.

²²⁰ See section 9 of the Education Act 2004.

CHAPTER 6

6. CONCLUSION AND RECOMMENDATIONS

South Africa as a country has strong and sufficient legislative and other instruments protecting and promoting the right of access to quality education. Moreover, these measures are supported by both national and international instruments. Despite this, there are continuing challenges taking place in the educational sector which bring along poor realization of the right, particularly in rural areas. It is clear in as far as this study is concerned that as a country we have less difficulties or problems with regards to the realization of “the right to basic education” as compared to that of further education. It is also clear that “the right to basic education” is being realized and enjoyed in this country because learners are attending schools without paying school fees in both primary and secondary schools. However the “realization” and “enjoyment” of the right to further education is still a problem because the reverse is the case in as far as the tuition fees is concern.

Although the government is trying at all costs to make the right realizable by providing free and compulsory basic education, building schools, erecting running water and sanitation at schools, electrifying those schools, providing feeding schemes and doing other activities, there are still some pitfalls that need to be eradicated. The challenge is that all these programs are very slow, and if they operate they don't operate all through the year in rural areas which as a result become hindrances to the enjoyment of the “right to quality education”. As a matter of fact a learner cannot perform well if his/her living conditions are adversely affected.

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

- Government should no longer separate education as basic and further education but treat it as one in as far as realization is concerned.
- Education and schools in “urban” and “rural” areas be treated the same in terms of resources and services. It must be ensured that every school more in

particular those in rural areas have a library, laboratory, computer labs and any other relevant facilities which will make the learning process to be easier.

- Increase the compulsory school attendance from grade 1 to 7 and make it compulsory from grade 1 to grade 12. This is because a person who is in grade 7 does not have a clear and sound capacity to can face the world and its challenges independently and cannot make rational decisions and choices as to what is it that he/she want, and in most cases he/she is still under the control and auspices of his/her parents. A person who is in grade 12 is in a better position to fully understand the choices he/she make and the repercussions that will follow and therefore can make choices independently.
- Make education completely free from the primary to the tertiary or university level. This will help people who are ambitious and eager to study further, because there are quite a number of people who have passed grade 12 but are unable to study further because of financial predicaments. There are also those who are already within the four walls of institutions of higher learning but cannot finish their respective studies because of high fee rate and they end up sitting at home despite their ambition and eagerness.
- While in the process of making education completely free, increase the budget of National Student Financial Aid Scheme (NSFAS) and other states financial aids and also stringent their rules and selection criteria of selecting who is to be funded to preclude the misuse of the funds.
- Increase the budget of bursaries such as Funza Lushaka and to create others in order to draw the attention of young people to participate in the teaching fraternity and became expert in their fields.
- Provides sufficient funding for postgraduates to meet the NDP's vision of having 75 percent of PhDs among university staff in 2030 in order to improve the research and innovation capacity. This vision must not be made for 2030 only but rather be made perpetual and ongoing.
- Retain highly motivated and ambitious teachers and pay them enough to produce high quality education. Young people have since lost interest in the teaching fraternity and no longer take it serious and as a profession. This is as a

result of the low salary that teachers receive while they are doing a great job of creating all these professions. It should be kept in mind that for every profession to come into existence or for one to be a professional, he/she must have went through school or to put it differently, through the hands of a teacher. It is therefore important for government to draw the attention of the youth in this profession and make them not to look the other way.

- Increase the incentives or remunerations for teachers working in under-resourced rural areas to boost their confidence for working under unfavorable conditions and to prevent them from migrating to urban areas.
- A good mutual co-operation should be created between teachers, parents, members of the School Governing Bodies (SGBs) learners and other support staff in schools. All this parties must be committed to avail themselves in their respective schools the first working day of the academic year and be ready to start with lessons. If the contrary is the case, harsher punishment should be imposed to them.
- Adequate inductions or/and training should be provided to the appointed members of the SGBs to ensure that they fully understand their duties. In addition, their appointment should not be based on political affiliation or powers but rather on the level of understanding and qualifications. If members have a certain level of literacy it would make induction and training more effective and they will also be productive.
- Every individual learner or student must take their studies very serious as the future of this country lies in their hands.

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