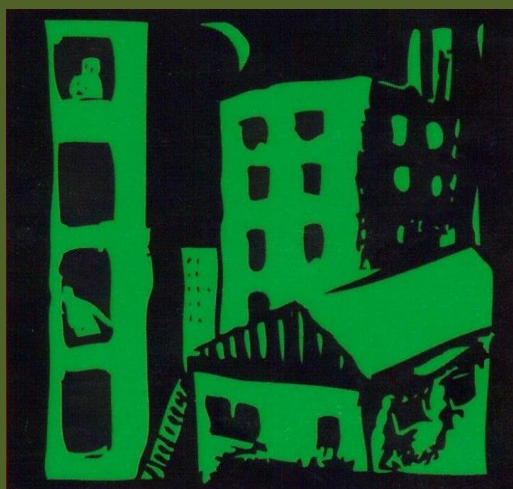


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**The South African Constitution’s empty promise of “radical transformation”: unequal access to quality education for black and/or poor learners in the public basic education system.**

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**ABSTRACT**

*The South African Constitution mandates the radical transformation of the public basic education system. To that end, the Constitution, read with the South African Schools Act, entrenches a right of equal access to quality basic education for all.*

*The substantive approach to equality, rooted in the transformative ideology of the Constitution, necessitates an acknowledgment and overcoming of the past patterns of disadvantage, based primarily on the grounds of race and socio-economic class. Locating my analysis in “quality education” in the United Nations Report, “Normative action for quality education”, I find that the definition of “quality education” involves a holistic approach which encompasses learners’ level of academic achievement, the provision of an adequate school infrastructure, a well-qualified teaching profession, and schools that embrace a substantive form of democracy. In examining each of these indicators, I find the emergence of a clear pattern: for black and/or poor South African learners in the public school domain, disadvantage manifests in an unequal access to quality education.*

**Keywords:** South African Constitution, transformation, basic education, unequal access, race , socio-economic class, black and poor, patterns of disadvantage, quality education, holistic approach.

## 1. INTRODUCTION

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

A quarter of a century after the formal abolition of apartheid, the post - 1994 public basic education system replicates distinctive patterns of inequality, predominantly on the grounds of race and class. In order to eradicate this disparity and , ultimately, achieve the transformative aims of the South African Constitution, an understanding of how these patterns manifest is required. In this article, I demonstrate that primarily for black and/or poor learners, a clear pattern of disadvantage manifests itself in unequal access to quality education despite the Constitution’s mandate of a “radical transformation” of public education.

This article is set out as follows. Part 2 provides an overview of the right of equal access to quality basic education as it is encapsulated within the current legal regime.

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<sup>1</sup> De Vos P “Basic education: democratic South Africa has failed the children”(3 December 2015) available at <https://www.dailymaverick.co.za/opinionista/2015-12-03-basic-education-democratic-south-africa-has-failed-the-children/> (accessed 8 May 2019).

Part 3 scrutinises the extent to which a pattern of unequal access to quality education for black and/or poor learners is perpetuated in post-apartheid South Africa. The meaning of *quality education* is explored within the conceptual framework developed by the former UN Special Rapporteur on the Right to Education. This framework measures quality not only in terms of the acquisition of knowledge and skills, but also with reference to the physical school environment, the quality of teaching, and the extent to which participatory democracy is instilled. Part 4 provides the conclusion.

## 2. TRANSFORMATION AND THE RIGHT OF EQUAL ACCESS TO QUALITY BASIC EDUCATION

### 2.1 The transformative Constitution

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

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

The supreme Constitution of the Republic of South Africa, 1996 (Constitution)<sup>5</sup> was adopted to respond to this particular context and was therefore, “...explicitly conceived as a legal framework for the overcoming of the injustices of the past”.<sup>6</sup> Largely hailed as a transformative document<sup>7</sup>, the Constitution is aimed at transforming the disparate

<sup>2</sup> Moyo K “The advocate, peacemaker, judge and activist: a chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence” in Bohler- Muller N, Cosser M & Pienaar G (eds) *Making the road by walking: the evolution of the South African Constitution* (University of Pretoria: PULP 2018) 78.

<sup>3</sup> Moyo (2018) 78.

<sup>4</sup> Brand D “The South African Constitutional Court and livelihood rights” in Vilhena O, Baxi U & Viljoen F (eds)

*Transformative constitutionalism: comparing the apex courts of Brazil, India and South Africa* (University of Pretoria: PULP 2013) 414.

<sup>5</sup> Section 2 of the Constitution provides: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

<sup>6</sup> Brand (2013) 414.

<sup>7</sup> Brand writes that “the South African Constitution differs from a traditional liberal model in that it is *transformative*, as it does not simply place limits on the exercise of collective power (it does that also), but requires collective power to be used to advance ideals of freedom, equality, dignity and social justice”. At a public lecture held at Wits University in 2009, former Constitutional Court Justice Kriegler described the Constitution as “...indubitably a *transformative* document”. See Brand D “Introduction to socio-economic rights in the South African Constitution” in Brand D & Heyns C (eds) *Socio- economic rights in South Africa* (University of Pretoria: PULP 2005) at 1; and Kriegler J “Can judicial independence survive transformation? – a public lecture delivered by Judge Johann Kriegler at the Wits School of Law” (18

South African society into one based on democratic values, social justice and fundamental human rights.<sup>8</sup> The South African Constitutional Court (Constitutional Court) acknowledges the transformative mandate of the Constitution.<sup>9</sup> In *Soobramoney v Minister of Health, Kwazulu-Natal (Soobramoney)*<sup>10</sup>, the Court held that “...a commitment ...to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order”.<sup>11</sup>

The Constitution, beyond the Preamble, does not provide a particular blueprint for transformation.<sup>12</sup> In other words, it does not provide a “comprehensive model for a transformed society, nor [does it articulate] the detailed processes for achieving this”.<sup>13</sup> However, Liebenberg indicates that the Constitution does present “a set of institutions, rights and values for guiding and constraining processes of social change”.<sup>14</sup> To that end, the courts have a specific, albeit limited role to play in honouring the transformative aspirations of the Constitution.<sup>15</sup> This the judiciary does, *inter alia*, through the interpretation and enforcement of the Bill of Rights in general, and socio-economic rights in particular, which are regarded as conduits for facilitating social change in South Africa.<sup>16</sup>

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August 2009) as cited in Moyo (2018) at 76. See also Klare K “Legal culture and transformative constitutionalism” (1998) 14 *South African Journal on Human Rights* at 146-188.

<sup>8</sup> Preamble of the Constitution.

<sup>9</sup> See judgements cited.

<sup>10</sup> 1998 (1) SA 765 (CC).

<sup>11</sup> *Soobramoney* at para 8. The notion of the Constitution as a transformative document has been confirmed in various other Constitutional Court judgements. See, for example, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at paras 73-74; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) at para 142; *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and others* 2010 (2) SA 415 (CC) at para 77; *Governing Body of the Juma Masjid Primary School v Essa NO* 2011 (8) BCLR 761 (CC) at para 38.

<sup>12</sup> Liebenberg S *Socio-economic rights: adjudication under a transformative constitution* (Cape Town: Juta & Co 2010) at 29 as cited in Moyo (2018) at 78-79.

<sup>13</sup> Liebenberg (2010) as cited in Moyo (2018) at 78-79.

<sup>14</sup> Liebenberg (2010) as cited in Moyo (2018) at 78-79.

<sup>15</sup> Wilson S & Dugard J “Constitutional jurisprudence: the first and second waves” in Langford M, Cousins B, Dugard J & Madlingozi T (eds) *Socio-economic rights in South Africa: symbols or substance* (Cambridge: Cambridge University Press 2014) at 35. Liebenberg writes that the judiciary is “...not the institution directly responsible for making policy or advocating for social change. Nevertheless, they have a significant role to play in inducing and supporting the kind of fundamental transformative changes envisaged by the Constitution. They are constitutionally mandated to determine whether social policies and programmes are consistent with the Bill of Rights, and to provide ‘appropriate relief’ when infringements are found [in terms of section 38 read with section 172 of the Constitution].” See Liebenberg S “Social rights and transformation in South Africa: three frames” (2015) 31(3) *South African Journal on Human Rights* 446 at 447-448.

Section 7(1) of the Constitution requires of the State to “respect, protect, promote and fulfil the rights in the Bill of Rights”. Section 8(1) of the Constitution provides: “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

<sup>16</sup> Moyo (2018) at 81. See also Brand (2005) at 3; Rosa S “Transformative constitutionalism in a democratic developmental state” in Liebenberg S & Quinot G (eds) *Law and poverty: perspectives from South Africa and beyond* Cape Town (Cape Town : Juta & Co 2012) at 102-103.

## 2.2 The right to basic education

Section 29(1) of the Constitution provides:

“Everyone has the right -

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”

In *Governing Body of the Juma Masjid Primary School and others v Essay and others NO (Juma Masjid)*<sup>17</sup>, the Constitutional Court, per Nkabinde J, confirmed that the right to basic education is indeed distinguishable from the other socio-economic rights in the Constitution.<sup>18</sup> Whereas the latter rights are qualified to the extent that their realisation are subject to the internal limitations of “progressive realisation”, “available state resources” and “reasonable legislative measures”, the Court held that the right to basic education is immediately realisable as it does not contain any of these qualifiers.<sup>19</sup>

In order to fully grasp the “significance of this distinction”, an explanation of the Court’s “reasonableness approach” applicable to the implementation of qualified socio-economic rights is warranted.<sup>20</sup> This approach involves a test of reasonableness that “focuses on the fairness or appropriateness of government action to give effect to socio-economic rights”.<sup>21</sup> The reasonableness approach rejects an inquiry into the precise goods emanating from the right itself, but merely examines whether the State’s conduct in implementing the right is reasonable or not.<sup>22</sup> The reasonableness approach was “foregrounded” in *Soobramoney* and expansively developed by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*<sup>23</sup> which considered the scope

<sup>17</sup> 2011 (8) BCLR 761 (CC).

<sup>18</sup> *Juma Masjid* at para 37.

<sup>19</sup> *Juma Masjid* at para 37.

Section 26(1) of the Constitution provides that “[e]veryone has the right to have access to adequate housing”.

Section 26(2) states: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

Section 27(1) of the Constitution provides that “[e]veryone has the right to have access to-

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance”.

Section 27(2) states: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

<sup>20</sup> *McConnachie C & Mconnachie C “Concretising the right to a basic education” (2012) 129 South African Law Journal 554 at 561.*

<sup>21</sup> *Wilson & Dugard (2014) at 38.*

<sup>22</sup> *Wilson & Dugard (2014) at 38.*

<sup>23</sup> 2001 (1) SA 46 (CC).

and content of the right of access to housing in section 26 of the Constitution.<sup>24</sup> The Court refused to interpret section 26(1) as giving rise to a minimum core content, comprising a “basket of goods and services” due to all rights holders.<sup>25</sup> Instead, the Court was resolute that section 26 (1) read with section 26(2) impose positive duties on the State “to adopt and implement a reasonable policy, within its available resources” ensuring progressive access to the right.<sup>26</sup> A similar approach was adopted by the Court in respect of the other qualified socio-economic rights in the Constitution.<sup>27</sup>

Cameron and Chris McConnachie explain the impact of the reasonableness approach on individual right bearers:

“The implication is that individuals do not have a right to the provision of these socio-economic goods, but are merely entitled to have the state take reasonable steps to provide these goods progressively, within its available resources. In simple terms, the fact that a person is homeless, has insufficient food or water, has limited access to health care or social security is not sufficient to establish a limitation of her [sections] 26 and 27 rights. A limitation of these positive rights will have occurred only if the state's programmes to provide access to these goods are found to be unreasonable.”<sup>28</sup>

Contrasting the reasonableness approach with the interpretation of the right to basic education in *Juma Masjid*, therefore puts into context the significance of Nkabinde J’s pronouncement. Section 29(1)(a) confers the right to an actual public “good”, namely “basic education”, and not merely to an “entitlement” that the State act reasonably in its adoption and implementation of the goods associated with the right.<sup>29</sup>

### 2.3 Equal access to quality basic education

In *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and others (Ermelo)*<sup>30</sup>, Moseneke DCJ (as he was then) refers to the historical and social context of the public education system:

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

<sup>24</sup> Wilson & Dugard (2014) at 39-40.

<sup>25</sup> Wilson & Dugard (2014) at 39-40.

<sup>26</sup> Wilson & Dugard (2014) at 39-40.

<sup>27</sup> See, for example, *Treatment Action Campaign v Minister of Health (No2)* 2002 (5) SA 721 (CC).

<sup>28</sup> McConnachie & McConnachie (2012) at 562.

<sup>29</sup> McConnachie & McConnachie (2012) at 564.

<sup>30</sup> 2010 (2) SA 415 (CC).

deep social disparities and resultant social inequity are still with us. (my emphasis) ”<sup>31</sup>

In response to the disparity created by the former regime’s severe marginalisation of former black schools as opposed to the preferential treatment of former white schools, the Court states that “[i]n an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular”.<sup>32</sup> The Court then refers to a “cluster of warranties” that are aimed at bringing about this transformation, including sections 29(1)(a) and 9 of the Bill of Rights.<sup>33</sup>

Section 9(1) of the Constitution states that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”. In terms of section 9(3), unfair discrimination against anyone is prohibited on a range of grounds, “including race, gender, sex, pregnancy, ethnic or social origin, colour, age, disability, religion, culture, language and birth”. In terms of section 9(2), “legislative and other measures may be taken to protect or advance categories of persons disadvantaged by unfair discrimination [in order to promote the achievement of equality]”.

The South African Schools Act<sup>34</sup> (Schools Act) which gives effect to the constitutional right to education,<sup>35</sup> honours the command in section 9 (2) of the Constitution by unequivocally requiring a “...system for schools which will redress past injustices in educational provision, provide an education of progressively *high quality* for all learners... [and] combat racism and sexism and all other forms of unfair discrimination and intolerance (my emphasis)”.<sup>36</sup> In addition, section 5(1)(a) of the Schools Act provides that “[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way”. The South African Constitution, in conjunction with the Schools Act, therefore entrenches a right of equal access to quality basic education.

In *Juma Masjid*, the Constitutional Court held that section 29(1)(a) together with the Schools Act “...signify the importance of the right to basic education for the transformation of our society”.<sup>37</sup> In *Section 27 v Minister of Education*<sup>38</sup>, Kollapen J held that education is “an indispensable tool” in the larger transformation project.<sup>39</sup> Therefore, taking into account that the transformative Constitution, read together with the Schools Act, establishes a right of equal access to quality basic education, the

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<sup>31</sup> *Ermelo* at para 45.

<sup>32</sup> *Ermelo* at para 47.

<sup>33</sup> *Ermelo* at para 47.

<sup>34</sup> Act 84 of 1996.

<sup>35</sup> *Ermelo* at para 55.

<sup>36</sup> Preamble to the Schools Act.

<sup>37</sup> *Juma Masjid* at para 38.

<sup>38</sup> 2012 (3) All SA 579 (GNP).

<sup>39</sup> At para 5.

inference can be made that equal access to quality basic education is an essential requirement for the achievement of transformation in South African society.

### 3. UNEQUAL ACCESS TO QUALITY BASIC EDUCATION FOR BLACK AND/OR POOR LEARNERS

The South African Constitution endorses a substantive notion of equality as the particular conception of equality that is required for the transformation of society<sup>40</sup> (and by implication the public education system). In *Bato Star v Minister of Environmental Affairs (Bato Star)*<sup>41</sup>, former Chief Justice Ngcobo held that “[i]n this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities”.<sup>42</sup> In *Minister of Finance v Van Heerden*, the Constitutional Court affirmed:

“The substantive approach [to equality]... roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved.”<sup>43</sup>

However, race and gender are not the only characteristics on which systemic disadvantage is based. The Constitutional Court has acknowledged that “...disadvantage does not only follow the axis of race, but that racial cleavages are cross-cut with, among others, [socio-economic] class”.<sup>44</sup>

Nowhere is the above more true than in the public school domain. It is trite that a bifurcated public education system exists in South Africa today. This system is characterised by an explicit divide between former white schools (former Model C schools) and disadvantaged schools<sup>45</sup> (former black schools). In the words of Nic Spaull:

“The constituencies of these two school systems are vastly different with the historically Black schools still being racially homogenous (i.e. Black, despite the abolition of racial segregation) and largely poor; while the historically White and Indian schools serve a more racially diverse constituency, although almost all of these students are from middle and upper class backgrounds, irrespective of race.”<sup>46</sup>

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<sup>40</sup> *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) at para 142.

<sup>41</sup> 2004 (4) SA 490 (CC).

<sup>42</sup> *Bato Star* at para 74.

<sup>43</sup> *Minister of Finance v Van Heerden* at para 142.

<sup>44</sup> *Minister of Finance v Van Heerden* at para 27. See also De Vos P “The past is unpredictable: race, redress and remembrance in the South African Constitution” (2012) 129 *The South African Law Journal* 73 at 86.

<sup>45</sup> I deliberately do not refer to former black schools as “previously disadvantaged schools” as many of these schools are currently trapped in disadvantage.

<sup>46</sup> Spaull N “Schooling in South Africa: how low quality education becomes a poverty trap” in De Lannoy A, Swartz S, Lake L & Smith C (eds) *South African child gauge* 2015 (Cape Town: Children’s Institute, University of Cape Town 2015) at 37 -38.



The post-apartheid education system therefore reproduces its own patterns of inequality, predominantly on the grounds of race and class. In order to achieve the equality objectives of the transformative Constitution, the patterns of disadvantage in the public education system have to be “faced up to and overcome” per the directive of the Constitutional Court in *Minister of Finance v Van Heerden*.<sup>47</sup> However, this objective is unattainable unless there is first an understanding of how these patterns manifest. In the rest of this article, I show that for black and/or poor learners, in the main, disadvantage manifests in unequal access to quality education.

### 3.1 What is “quality education” ?

South African legal academic commentators have connected the concept of *quality education* to the meaning of *basic education* as set out in section 29(1)(a) of the Constitution.<sup>48</sup> For example, Woolman & Fleisch have contended that basic education can be understood in two possible ways: it can be conceived of as a “period of schooling” or a “standard of schooling”.<sup>49</sup> The former, in turn, is linked to the compulsory period of schooling in South Africa whilst the latter is linked to the concept of quality.

The Schools Act restricts compulsory education to the period from Grades 1 to 9 or until “a learner reaches the age of 15, whichever occurs first”.<sup>50</sup> It has been argued that the meaning of *basic* should not be derived from the number of years it takes to complete a qualification, but from the *quality* of the education that has to be provided by the State (my emphasis).<sup>51</sup> However, there are no legal instruments that define *quality education* as such (my emphasis).<sup>52</sup> In general literature the understanding of this

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<sup>47</sup> *Minister of Finance v Van Heerden* at para 142.

<sup>48</sup> My emphasis.

<sup>49</sup> Woolman S & Fleisch B *Constitution in the classroom: law and education in South Africa 1994-2008* (University of Pretoria: PULP 2009) ch 5 as cited in Mconnachie & Mconnachie (2012) at 565.

<sup>50</sup> Section 3(1) of the Schools Act provides: “Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.” However, in practice, the Department of Basic Education is accountable for education from Grade R to Grade 12, not merely from Grade 1 to Grade 9.

The Constitutional Court seems to equate basic education with compulsory education as defined in s 3(1) of the Schools Act. See para 38 of *Juma Masjid*.

<sup>51</sup> Skelton A *Strategic litigation impacts: equal access to quality education*, Report commissioned by Open Society Justice Initiative: Open Society Foundations Education Support Program (2017) at 47. For an account on the debate involving the meaning of basic education, see Van der Merwe S “How ‘basic’ is basic education as enshrined in section 29 of the Constitution of South Africa?” (2012) 27 *Southern African Public Law* at 365 -378, Skelton A “How far will the courts go in ensuring the right to a basic education?” (2012) 27 *Southern African Public Law* at 392-408.

<sup>52</sup> Skelton (2017) at 13.

concept is also by no means clear-cut, whether in South Africa or elsewhere in the world.<sup>53</sup>

Kishore Singh, the former United Nations Special Rapporteur on the (emphasis) Right to Education, contends that the quality of education is usually only assessed in terms of "...knowledge, skills and competencies".<sup>54</sup> Thus, in terms of this approach, quality is understood in a very narrow sense. Although Singh recognises that "[k]nowledge and skills in reading, mathematics and scientific literacy, predominant in quality appraisals, is no doubt crucial", he argues that they should not be regarded as the only barometer for the quality of education.<sup>55</sup> Singh, therefore, calls for a broader and more holistic approach to quality education.<sup>56</sup> Drawing on the "international normative framework"<sup>57</sup>, the "work of human rights treaty bodies"<sup>58</sup> and "international

<sup>53</sup> Carrim N "Approaches to education quality in South Africa" in Sayed Y, Kanjee A & Nkomo M (eds) *The search for quality education in post-apartheid South Africa: interventions to improve learning and teaching* (Cape Town: HSRC Press 2013) at 39.

<sup>54</sup> Singh K "Normative action for quality education" (2012) available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21_en.pdf) (accessed 6 May 2019).

<sup>55</sup> Singh (2012) at 6. The "conceptual" basis for assessing quality in terms of the acquisition of knowledge and skills is found in the "basic learning needs" "as defined in the World Declaration on Education for All (1990) and reaffirmed at the World Education Forum (2000)". Article 1(1) of the World Declaration states: "Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning."

<sup>56</sup> Singh (2012) at 6.

<sup>57</sup> In terms of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC), "education should be aimed at the full development of the human personality and the sense of its dignity". See specifically Art 26 of the UDHR, Art 13 of the ICESCR and Art 29 of the CRC.

The Convention against Discrimination in Education (1960) explicitly refers "...to the obligation to ensure quality in education". In terms of Art 1, para 2 of the Convention, "the term 'education' refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given".

Article 10(b) of the Convention on the Elimination of All Forms of Discrimination against Women states: "State parties ...have an obligation to ensure, on the basis of equality of men and women, access to education at all levels and in all its forms, including access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality."

Finally, "[t]he UNESCO-ILO Recommendation concerning the Status of Teachers (1966) provides a comprehensive normative framework on teachers' status, including their responsibilities, career advancement opportunities, security of tenure and conditions of service".

See Singh (2012) at 7-8.

<sup>58</sup> The bodies referred to by Singh are the Committee on Economic, Social and Cultural Rights (CESCR) and the CRC. Referring to the right to education in terms of Art 13 of the ICESCR, the CESCR states that "education offered must be adequate in quality, relevant to the child and must promote the realization of the child's other rights". Both "treaty bodies have expressed concern about under-resourcing of schools, class sizes and teacher/pupil ratios, proportion of untrained teachers and their impact on the quality of education received". These bodies have also accepted "...students' learning outcomes, such as low literacy rates, as indicative of limitations of the quality of education provided". See Singh (2012) at 8.

political commitments”<sup>59</sup>, he has developed a “broad conceptual” framework that measures whether quality education is in place. This framework includes “adequate infrastructure and facilities at school” as well as an environment which is conducive to active participation by parents, teachers and communities.<sup>60</sup> Of equal importance are teaching staff who are “well-qualified, motivated and well looked after”.<sup>61</sup> Singh sums up his framework for quality education as:

“(i) a minimum level of student acquisition of knowledge, values, skills and competencies; (ii) adequate school infrastructure, facilities and environment; (iii) a well-qualified teaching force; (iv) a school that is open to the participation of all, particularly students, their parents and the community.”<sup>62</sup>

Singh’s framework seems to find favour in South Africa’s education policy. *Action plan to 2019 : towards the realisation of schooling 2030*<sup>63</sup> (Action Plan (2019) ) can be regarded as the Education Ministry’s blueprint for public schooling. It sets out the various goals to be achieved by the year 2030 in order to achieve the vision of a “post-apartheid schooling system”.<sup>64</sup> The core of this vision is the establishment of an education system committed to providing “*quality schooling*” to “every young South African”.<sup>65</sup> The Action Plan (2019) lists various features that are required to attain quality schooling, including access to schools and attendance of all learners, competent teachers, learning and teaching materials “in abundance” and of “high quality” , and school buildings and facilities that are “spacious, functional, safe and well-maintained”.<sup>66</sup>

Kishore Singh’s “Normative action for quality education” is adopted as a framework for understanding “quality education” in this article.

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<sup>59</sup> Singh refers here to the World Declaration on Education for All held in Jomtien, Thailand, in 1990, which has been followed up by the “Dakar Framework for Action, adopted at the World Education Forum in Dakar, in April 2000”. Both the Declaration and Framework acknowledge “...quality of education as a crucial component in the global movement to achieve Education for All. The Dakar Framework explicitly affirms that quality is at the heart of education”. In terms of Goal 2 of the Framework, States should aim “...to provide primary education of good quality”, while Goal 6 states that all aspects of education quality should be improved “so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills”. See Singh (2012) at 7- 8.

<sup>60</sup> Singh (2012) at 6-7.

<sup>61</sup> Singh (2012) at 6-7.

<sup>62</sup> Singh (2012) at 7.

<sup>63</sup> Department of Basic Education *Action plan to 2019 : towards the realisation of schooling 2030* (2015) .

<sup>64</sup> Action Plan (2019) at 9.

<sup>65</sup> Action Plan (2019) at 9.

<sup>66</sup> Action Plan (2019) at 9-10.

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

### 3.2.1 Academic output

The first indicator of quality is “a minimum level of student acquisition of knowledge, values, skills and competencies”.<sup>67</sup>

Nic Spaull has done extensive research on learners' academic performance in South Africa.<sup>68</sup> He has analysed students' results in national and international tests and has come to the following conclusions. First, the overwhelming majority of primary school learners fall considerably below the standard literacy and numeracy requirements of the national curriculum.<sup>69</sup> Secondly, in international tests, South Africa consistently receives the lowest average score among developing countries and “when the sample is limited to only Sub-Saharan countries, performs worse than many other countries which are considerably poorer, such as Kenya, Swaziland and Tanzania”.<sup>70</sup>

<sup>67</sup> Singh (2012) at 7.

<sup>68</sup> See for example Spaull N & Kotze J “Starting behind and staying behind in South Africa: The case of insurmountable learning deficits in mathematics” (2015) 41 *International Journal of Educational Development* at 12-24; Spaull N & Taylor S “Access to what? Creating a composite measure of educational quantity and educational quality for 11 African countries” (2015) 58(1) *Comparative Education Review* at 133-165 ; Spaull N & Taylor S “Measuring access to learning over a period of increased access to schooling: The case of Southern and Eastern Africa since 2000” (2015) 41 *International Journal of Educational Development* at 47 - 59; Spaull N “Poverty & privilege: Primary school inequality in South Africa” (2013) 33 *International Journal of Educational Development* at 436 - 447. See also SAHRC & UNICEF *Poverty traps and social exclusion among children in South Africa Report* (2014) to which Spaull was a contributor.

<sup>69</sup> Spaull N *Education quality in South Africa and sub-saharan Africa: an economic approach* (unpublished PhD thesis (Economics), University of Stellenbosch, 2014) at 23.

<sup>70</sup> In 2016, 50 countries, including South Africa, participated in the *Progress in International Reading Literacy Study (PIRLS)*. This study, “conducted every five years, assesses the reading achievement of young students in their fourth year of schooling - an important transition point in their development as readers”. South Africa's performance has been dismal, to say the least. South African Grade 4 learners have performed the worst out of all the countries participating in the study : an astounding 78% of the learners are unable to read for meaning.

Russia and Singapore scored the highest in the assessment. Countries with a similar socio-economic background to South Africa, such as, Brazil and India, selected not to enrol their learners for the assessment. However, Chile, a middle-income country (and therefore comparable to South Africa, to some extent), outperformed South Africa by far with only 13% of its children unable to read for meaning.

See TIMSS & PIRLS International Study Center, Lynch School of Education, Boston College & International Association for the Evaluation of Educational Achievement (IEA) *PIRLS International Results in Reading* xi, 55 available at <http://pirls2016.org/download-center/> (accessed 10 October 2018).

South African learners have participated in numerous national and international assessments focusing on literacy and numeracy. Besides PIRLS in 2016, 2011 and 2006, South African learners have also participated in the following international assessments: *Southern and Eastern African Consortium for Monitoring Educational Quality (SACMEQ)* in 2000 and 2007 for grade 6, and *Trends in International Mathematics and Science Study (TIMSS)* in 2003 and 2011 for grades 8 and 9. Locally, the most significant assessments include the *Systemic Evaluations* in 2001 and 2007 for grade 3; *the National School Effectiveness Study (NSES)* from 2007 to 2009 for grades 3-5, and the *Annual National Assessments (ANA)* from 2011 to 2014 for grades 1 to 6 and grade 9. See Spaull (2014) at 22-33. On 24 May 2017, during a media briefing, the Minister of Basic Education, Angie Motshekga, announced that the ANA would be replaced by the National Integrated Assessment Framework (NIAF). See Gerber J “National assessments to be replaced – Motshekga” (2017) available at

However, upon closer analysis of these tests, a clear trend emerges: a minority of learners (amounting to approximately 25%) perform sufficiently well in these local and international assessments while the majority of students (more or less 75%) perform extremely poorly.<sup>71</sup> The latter group of learners are from historically black schools while the former group are from historically advantaged schools.<sup>72</sup>

Graeme Bloch does not agree entirely with Spaul's statistics. He argues that roughly 20% of South African learners perform well, of whom 10% are from former Model C schools and 10% from excellent historically disadvantaged schools.<sup>73</sup> However, this does not detract from the fact that it is mostly black learners that perform poorly academically.<sup>74</sup>

### 3.2.2 Education provisioning

Singh refers to "adequate school infrastructure, facilities and the school environment" as an indicator of quality education.<sup>75</sup> This description is rather broad and could therefore encompass education provisioning as a whole. Education provisioning refers to "provisioning for the various educational inputs..." that is required for the realisation of a quality education.<sup>76</sup> Provisioning is categorised as follows:

"(i)infrastructural provisioning, which includes the building of schools, classrooms and the provisioning of water, sanitation and services; (ii) personnel expenditure, which includes educator salaries; and (iii) non-personnel recurrent expenditure, which includes capital equipment and consumables used inside schools for schools to function properly, such as textbooks, stationery and computers."<sup>77</sup>

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<https://www.news24.com/SouthAfrica/News/national-assessments-to-be-replaced-motshekga-20170524> (accessed 6 May 2019).

<sup>71</sup> Fleisch B *Primary education in crisis: why South African schoolchildren underachieve in reading and mathematics* (2008) as cited in Spaul (2014) at 26. "[The] wealthiest quartile (25%) of students seems to attend vastly differing schools than the remaining three quartiles (75%). In top quartile schools students are far more likely to have their own textbook, receive homework frequently, experience less teacher absenteeism, repeat fewer grades, live in urban areas, speak English more frequently at home, and have more educated parents. All of these factors are likely to contribute to the better performance of this school sub-system....[T]he poorest three quartiles all have similar levels of grade repetition, teacher absenteeism, and textbook access."

<sup>72</sup> Spaul (2014) at 26 -28.

<sup>73</sup> Bloch G *The toxic mix: what's wrong with South African schools and how to fix it* (Cape Town: Tafelberg 2009) at 59. Bloch does not make it clear how he has reached this specific conclusion. In the foreword he indicates that the data in this book relies heavily on certain studies, including Bloch G, Fleisch B, Chisholm L & Mabizela M (eds) *Investment choices for South African education* (Johannesburg: Wits University Press 2008).

<sup>74</sup> Spaul (2014) at 26-28

<sup>75</sup> Singh (2012) at 7.

<sup>76</sup> Veriava F "Basic education provisioning" in Veriava F, Thom A & Fish Hodgson T (eds) *Basic education rights handbook: education rights in South Africa* (Johannesburg: Section 27 2017) at 220.

<sup>77</sup> Veriava (2017) at 227.

Scholar transport, in certain circumstances, can also be required as an essential input that is necessary for the achievement of quality education.<sup>78</sup> Educator salaries will not be discussed under education provisioning, but will be addressed under the third indicator of educational quality, namely, a “well-qualified, motivated and well looked after teaching force”.<sup>79</sup>

### 3.2.2.1 Infrastructure

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

“The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation, even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.”<sup>80</sup>

In *Madzodzo and others v Minister of Basic Education and others (Madzodzo)*<sup>81</sup>, the Court held that the State’s obligation to provide basic education encompasses more than the mere placement of learners at schools.<sup>82</sup> It includes the provision of the necessary resources, including “schools, classrooms, teachers, teaching materials and appropriate facilities for learners”.<sup>83</sup> Although progress in addressing infrastructural problems has been made by the State<sup>84</sup>, there are still numerous schools in South Africa without basic facilities. The latest NEIMS report<sup>85</sup>, for example, indicates that more than 80% of ordinary operational schools lack laboratories<sup>86</sup> and more than 70% of schools are without libraries.<sup>87</sup> On closer inspection, a clear pattern is revealed, namely, that the worst problems related to infrastructure are recorded in the former Bantustans.<sup>88</sup> For instance, in Limpopo, 93% of schools lack libraries as opposed to 44% in the Western Cape.<sup>89</sup> The Eastern Cape (consisting of two former Bantustans, Ciskei and Transkei) is home to the majority of mud schools in South Africa.<sup>90</sup> These schools are literally

<sup>78</sup> Joseph S & Carpenter J “Scholar transport” in Veriava et al (2017) at 274-291.

<sup>79</sup> Singh (2012) at 7.

<sup>80</sup> *Juma Masjid* at para 42.

<sup>81</sup> (2014) 2 All SA 339 (ECM).

<sup>82</sup> *Madzodzo* at para 20.

<sup>83</sup> *Madzodzo* at para 20.

<sup>84</sup> Department of Basic Education *Annual Report* (2016/2017) at 11.

<sup>85</sup> Department of Basic Education *National Education Infrastructure Management System Report* (January 2018) (NEIMS 2018 Report).

<sup>86</sup> Table 8 of NEIMS 2018 Report.

<sup>87</sup> Table 7 of NEIMS 2018 Report.

<sup>88</sup> Draga L “Infrastructure and equipment” in Veriava et al (2017) at 238.

<sup>89</sup> Table 7 of NEIMS 2018 Report.

<sup>90</sup> Abdoll C & Barberton C “Mud to bricks: a review of school infrastructure spending and delivery” (2014) as cited in Skelton (2017) at 53.

constructed from mud and have been at the centre of the so-called “mud schools case”.<sup>91</sup> Ann Skelton explains the perniciousness of mud schools:

“Mud schools are, quite literally, schools in which the buildings are made of mud. They may consist of clusters of round mud huts, or in some cases are rectangular classrooms. While mud may not be the worst form of building material, the problem is that the mud schools are old and dilapidated. The roofs, often constructed from corrugated iron, have holes that have rusted through, causing children and classroom equipment to get wet when it rains. Books cannot be left in the classrooms, and when it rains, children simply cannot attend school. Mud schools also lack electricity, running water and sanitation, and most have old and insufficient classroom furniture.”<sup>92</sup>

Litigation in the “mud schools case” was pursued after it became known that a significant portion of the provincial budget reserved for building schools was not being expended and that all programs to replace unsafe school structures had been discontinued.<sup>93</sup> The case was settled out of court in February 2011. The settlement agreement was a resounding success as the State agreed to provide “temporary and permanent infrastructure relief” to the affected schools in terms of stipulated time frames.<sup>94</sup> The State also made the significant commitment to eradicate roughly 445 unsuitable “school structures” within a three year period, coupled with an investment of R8 billion and “a plan of action.”<sup>95</sup> The settlement has since morphed into a government program, the Accelerated Schools Infrastructure Delivery Initiative (ASIDI).<sup>96</sup> The Department of Basic Education (DBE) describes the objective of the ASIDI as “[eradicating] the Basic Safety Norms backlog in schools without water, sanitation and electricity and to replace those schools constructed from inappropriate material... to contribute towards levels of optimum learning and teaching”.<sup>97</sup>

Although progress has been made in terms of the ASIDI, it has been slow.<sup>98</sup> The DBE has cited various reasons for the tardy progress, including foul weather, “the rural nature of the sites and poor roads, recruitment of contractors [that] has to be done according to rigid procurement procedures, problems with contractors, profiteering and shortages of building materials”.<sup>99</sup> However, according to Abdoll and Barberton the

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<sup>91</sup> *Centre for Child Law v Government of the Eastern Cape Province* (Eastern Cape High Court, Bhisho) unreported case no 504/10 as referred to in Skelton (2017) 53.

<sup>92</sup> See Skelton A “Leveraging funds for school infrastructure: The South African ‘mud schools’ case study” *UKFIET International Conference on Education and Development – Education & Development Post 2015: Reflecting, Reviewing, Revisioning* (Oxford, 10-12 September 2013).

<sup>93</sup> Skelton (2017) at 53.

<sup>94</sup> Skelton (2017) at 53.

<sup>95</sup> Skelton (2017) at 53.

<sup>96</sup> Skelton (2017) at 53.

<sup>97</sup> Available at <https://www.education.gov.za/Programmes/ASIDI.aspx> (accessed 1 October 2018).

<sup>98</sup> Skelton (2013).

<sup>99</sup> Skelton (2013).



State has underspent the School Infrastructure Backlog Grant.<sup>100</sup> The reason for this, they argue, is poor competence on the part of the Department to manage an infrastructural programme of this magnitude.<sup>101</sup>

The backlog in school infrastructure was recently acknowledged by the Minister of Basic Education, Angie Motshekga, in the 2018 case of *Equal Education and another v Minister of Basic Education and others (Equal Education)*.<sup>102</sup> She admitted that “...significant numbers of schools still lack the most basic of resources, [including] water, sanitation and electricity”.<sup>103</sup>

In this case, Equal Education (the applicant) disputed the validity of various provisions of the “Norms and Standards for Infrastructure”, promulgated in 2013.<sup>104</sup> These Regulations indicate various standards related to infrastructure that must be in place at public schools, and stipulate deadlines as to when the State must provide schools with the required infrastructure.<sup>105</sup>

The judgment is significant in the light of its pronouncements on school infrastructure, the nature and limitation of the right to basic education, and the State’s accountability in respect of section 29(1)(a) of the Constitution.

The Court stressed the cardinal importance of infrastructure for the delivery of basic education.<sup>106</sup> The Court rejected the Minister’s argument that the implementation of the Norms and Standards can be subject to budgetary constraints and to the co-operation of other State entities.<sup>107</sup> Such a claim, in the Court’s reasoning, flies in the face of the immediate nature of section 29(1)(a).<sup>108</sup>

The Court held that the Minister’s claim that she was hamstrung to allocate resources for infrastructure, should have been justified in terms of section 36 or section 172(1)(a) of the Constitution, which she failed to do.<sup>109</sup> This means that the Minister’s contention that she was unable to discharge her obligations in terms of the right to basic education should have been vindicated in terms of the limitation enquiry set out in section 36 or section 172(1)(a) of the Constitution. The Court did not elaborate on how section 172(1)(a) was applicable. I assume, however, that the Court actually meant to refer to section 172(1)(b) of the Constitution which provides that “[w]hen deciding a constitutional matter within its power, ...a court may make any order that is just and equitable”. To that end, the Minister could have then argued that an order requiring her

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<sup>100</sup> Abdoll C & Barberton C “School infrastructure spending and delivery” *Cornerstone Economics* ( May 2013) 42 as cited in Skelton (2013).

<sup>101</sup> Abdoll & Barberton (2013) 42 as cited in Skelton (2013).

<sup>102</sup> (2018) ZAECBHC 6.

<sup>103</sup> *Equal Education* at para 48. See NEIMS 2018 Report.

<sup>104</sup> South African Schools Act: Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure in GG 37081 GN R920 of 29 November 2013. See *Equal Education* at paras 35- 45.

<sup>105</sup> *Equal Education* at paras 35- 45.

<sup>106</sup> *Equal Education* at para 170.

<sup>107</sup> *Equal Education* at paras 180-185.

<sup>108</sup> *Equal Education* at para 185.

<sup>109</sup> *Equal Education* at para 185.



to comply with the obligations of section 29(1)(a) in full, would not have been “just and equitable”.<sup>110</sup>

A further criticism of the Norms and Standards was that it did not clarify what was “meant by ‘prioritisation’ of schools built *entirely* from mud or materials such as asbestos, metal and wood...”.<sup>111</sup> To put it another way, the vague phrasing of the Regulations created the danger that schools that were built *partially* from mud, metal, asbestos and wood would not be prioritised by the DBE in terms of infrastructural repairs and replacement.

In a similar vein, Equal Education criticised the ambiguous meaning of *prioritise* as it applied to the Norms and Standards’ requirement that the Department *prioritise* schools with no access to sanitation, electricity and water.<sup>112</sup> In response, the Court rebuffed the Minister’s contention that it was within her discretion to decide which schools are prioritised, and held that schools that are partially built from these inappropriate materials presented the same dangers as schools built entirely from these materials.<sup>113</sup> The Court did not mince its words pertaining to this issue:

“The crude and naked facts staring [at] us, are that each day the parents of these children send them to school as they are compelled to, they expose these children to danger which could lead to certain death. This is [a] fate that also stares the educators and other caregivers in the schools in the face.”<sup>114</sup>

The Court subsequently amended the Norms and Standards to the effect that they now prioritise the replacement of *all* “classrooms built entirely or substantially” from mud, wood, asbestos or metal.<sup>115</sup> The Court similarly obliged the State to ensure the provision of a power supply, sanitation and water to *all* schools with no access to these services.<sup>116</sup>

Additionally, the judgment upheld the constitutional value of accountability by amending the Regulations to the extent that they now provide that the Minister makes public the plans and reports specifying government’s progress in implementing the

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<sup>110</sup> The *amicus curiae* in this case, Basic Education for All (BEFA), argued that “...to the extent that the respondent is unable to discharge the right to basic education in full and immediately, it must justify such failure through the mechanism of section 36 of the Constitution. Also it could argue that an order compelling it to discharge the right in full and immediately would not be just and equitable”. See *Equal Education* at para 89.

<sup>111</sup> *Equal Education* at para 119.

<sup>112</sup> *Equal Education* at para 137.

<sup>113</sup> *Equal Education* at paras 180-193.

<sup>114</sup> *Equal Education* at para 194.

<sup>115</sup> *Equal Education* at para 209.

<sup>116</sup> *Equal Education* at para 209. The Court ordered that the replacements and improvements should occur within a period of three years from the date of publication of the Regulations. Since the Norms and Standards had already been promulgated on 29 November 2013, the Court’s order in effect meant that compliance with the Regulations should have taken place by 29 November 2016, all the more stressing the urgency with which the State has to comply with its obligations in terms of s 29(1)(a) of the Constitution.

Norms and Standards, thereby curing the defect in the original Regulations that provided no accountability mechanism.<sup>117</sup>

### 3.2.2.2 Textbooks

The lack of textbooks is another concern in the provision of quality education.<sup>118</sup> In *Minister of Basic Education and others v Basic Education for All (Basic Education for All)*<sup>119</sup>, the Supreme Court of Appeal confirmed that the right to education includes the right of every learner to a textbook in each learning area.<sup>120</sup> The Court emphasised the significance of textbooks as not only ensuring that cognitive development of learners take place but also as guaranteeing “that constitutional values are instilled”.<sup>121</sup> In *Tripartite Steering Committee v Minister of Basic Education (Tripartite Steering Committee)*<sup>122</sup>, the Court held that the right to education “...is meaningless without ...textbooks from which to learn...”.<sup>123</sup> Furthermore, the DBE has classified textbooks as “central to teaching the curriculum”.<sup>124</sup>

However, the post-apartheid education landscape has been plagued by a range of textbook related problems in disadvantaged schools. In *Basic Education for All* the affected parties were from “poor communities and...overwhelmingly, if not exclusively, black learners” who sought legal recourse for the State’s failure to deliver textbooks to their schools.<sup>125</sup>

A lack of textbooks creates multiple challenges in a school. Teachers are forced to borrow textbooks from neighboring schools and write content on a blackboard.<sup>126</sup> Logically, it is impossible to copy all the relevant content on a blackboard and this becomes an “unduly burdensome” task for teachers.<sup>127</sup> Some learners are also unable to see the writing on a blackboard and are denied the benefit of reading the actual content

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<sup>117</sup> *Equal Education* at para 209 available at <https://equaleducation.org.za/2018/07/19/statement-victory-for-ee-and-sas-learners-as-court-orders-government-must-fix-the-norms/> (accessed 1 August 2018).

<sup>118</sup> The Department of Basic Education categorises textbooks as part of the broader Learner Teacher Support Materials (LTSM). The Department’s *Draft National Policy for the Provision and Management of Learning and Teaching Support Material* (2014) (Draft LTSM Policy (2014)) at 3 distinguishes between core LTSM and supplementary LTSM. The core LTSM “refers to the category of LTSM that is central to teaching the entire curriculum of a subject for a Grade. Generally, this would comprise a textbook/learner book, workbook and teacher guide”. Supplementary LTSM “refers to LTSM in addition to the Core LTSM [and] is generally used to enhance a specific part of the curriculum. Examples include a geography atlas, dictionaries, Science, Technology, Mathematics, Biology apparatus, electronic/technical equipment, etc”.

<sup>119</sup> (2016) 4 SA 63 (SCA).

<sup>120</sup> At para 50.

<sup>121</sup> *Basic Education for All* at para 2.

<sup>122</sup> (2015) 5 SA 107 (ECG).

<sup>123</sup> At para 18.

<sup>124</sup> Draft LTSM Policy (2014) at 3.

<sup>125</sup> *Basic Education for All* at para 3.

<sup>126</sup> *Basic Education for All* at para 19.

<sup>127</sup> *Basic Education for All* at para 19.

in their own textbook.<sup>128</sup> Furthermore, learners are unable to take textbooks home which means they are unable to “complete their homework, prepare for lessons or consolidate what they learn in class”.<sup>129</sup>

Nikki Stein explains how school infrastructure is interconnected with learners’ inability to enjoy their right to a textbook.<sup>130</sup> She maintains that textbook procurement, delivery and storage are all affected by school infrastructure.<sup>131</sup> Many schools in rural areas are not accessible because of the poor condition of roads leading to them, and as a result trucks may not be able to deliver textbooks.<sup>132</sup> Furthermore, schools lacking the necessary infrastructure often use makeshift structures to store textbooks.<sup>133</sup> In Limpopo, for example, a significant amount of textbooks stored in such structures was destroyed by floods in 2013.<sup>134</sup>

Another factor to be taken into consideration is the method required by the DBE for reporting shortages of textbooks which requires that schools call a hotline or fax or email forms to the department to indicate shortages.<sup>135</sup> Many historically disadvantaged schools in Limpopo, for example, lack these basic communication structures and are therefore unable to report shortages.<sup>136</sup>

### 3.2.2.3 Scholar Transport

Scholar transport is an important factor in assessing the provision of quality education. In *Juma Masjid*, the Constitutional Court held that access to school is an important component of the right to education.<sup>137</sup> In *Tripartite Steering Committee v Minister of Basic Education*, Plasket J held that “the right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, text books from which to learn, and *transport to and from school at state expense in appropriate cases*” (my emphasis).<sup>138</sup>

However, millions of South African learners have no choice but to walk long distances to and from school each day.<sup>139</sup> In Kwazulu - Natal, the province with the highest amount of learners who walk to school, more than two million learners walked

<sup>128</sup> *Basic Education for All* at para 19.

<sup>129</sup> *Basic Education for All* at para 19.

<sup>130</sup> Stein N “Textbooks” in Veriava (2017) at 272.

<sup>131</sup> Stein (2017) at 272.

<sup>132</sup> Stein (2017) at 272.

<sup>133</sup> Stein (2017) at 272.

<sup>134</sup> Stein (2017) at 272.

<sup>135</sup> Stein (2017) at 272.

<sup>136</sup> Stein (2017) at 272. According to the latest NEIMS Report, 23 schools in Limpopo, 73 schools in the Eastern Cape and 52 schools in Kwazulu-Natal are without communication systems. See Table 11 of NEIMS 2018 Report.

<sup>137</sup> *Juma Masjid* at para 43.

<sup>138</sup> *Tripartite Steering Committee* at para 18.

<sup>139</sup> Joseph & Carpenter (2017) at 276.

the entire distance to school.<sup>140</sup> Approximately 210 000 learners from the latter group “walk for more than an hour in one direction, and 659 000 walk for between 30 minutes and an hour each way”.<sup>141</sup> Many of these learners are exposed to physical assault, rape, dangerous weather conditions and “long, tiring treks” to school, all of which may have a detrimental impact on their academic performance.<sup>142</sup>

Recently, learners in the Western Cape town of Worcester protested against the lack of transport for rural learners.<sup>143</sup> Some of the learners stay as much as 40 km away from the nearest school and are forced to hitch-hike to attend school.<sup>144</sup> These learners are mostly the children of impoverished (black) farmworkers who are unable to afford private transport.<sup>145</sup> As a result, many learners eventually drop out of school because of the burdensome emotional, financial and physical toll that is placed on them to access school.<sup>146</sup>

One of the roots of the scholar transport problem is found in apartheid spatial planning which had the effect of positioning black South Africans in remote areas where they had “the least access to resources”.<sup>147</sup> Samaai puts it succinctly:

“The spatial organisation of the apartheid city was such that blacks, at the periphery of the city had the least access to resources, whilst White people, at the centre of the city not only had access to the city’s resources, but also controlled them. As a result, blacks were far from job opportunities, schools and hospitals, and would often have to commute long distances in order to access these resources.”<sup>148</sup>

Today, many learners still encounter enormous difficulty to access schools due to the long distances they have to travel to the classroom.<sup>149</sup> In 2015, the National Learner Transport Policy was promulgated by the Department of Transport.<sup>150</sup> In terms of the Policy, the principal of a school, after consultation with the School Governing Body, has the duty to identify learners who will benefit from subsidised scholar transport services in accordance with the following conditions :

- “Beneficiaries must be needy learners from grade R to 12 ‘as prescribed’;

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<sup>140</sup> Joseph & Carpenter (2017) at 276.

<sup>141</sup> Joseph & Carpenter (2017) at 276.

<sup>142</sup> Joseph & Carpenter (2017) at 276-279.

<sup>143</sup> Maregele B “Learners march in Worcester demanding scholar transport” (5 October 2018) available at <https://www.groundup.org.za/article/children-farms-struggle-get-school/> (accessed 5 May 2019).

<sup>144</sup> Maregele (2018).

<sup>145</sup> Maregele (2018).

<sup>146</sup> Maregele (2018).

<sup>147</sup> Samaai S “Constitutional Court farm eviction ruling reinforces apartheid spatial violence” (2017) available at <https://www.dailymaverick.co.za/opinionista/2017-07-26-constitutional-court-farm-eviction-ruling-reinforces-apartheid-spatial-violence/#.WyEAasfBZ-U>. (accessed 20 August 2018).

<sup>148</sup> Samaai (2017).

<sup>149</sup> Rogan MJ *Dilemmas in learner transport: an impact evaluation of a school transport intervention in the Ilembe district, KwaZulu-Natal* (unpublished Master of Development Studies dissertation, University of KwaZulu-Natal, 2006) at 50-84.

<sup>150</sup> Available at <https://pmg.org.za/committee-meeting/25934/> (accessed 30 August 2018).

- Learner transport will be subsidised to the nearest appropriate school only, and not to a school of parental choice (parental choice means when parents prefer to enrol their child at a school other than the nearest suitable school);
- Priority must be given to learners with disabilities, taking into considering the nature of the disability;
- Priority must be given to primary school learners who walk long distances to schools;
- Existing learner transport services must be taken into account when identifying beneficiaries, as no learner transport services will be provided in areas where public transport is available in order to avoid duplication of services and resources.”<sup>151</sup>

Joseph and Carpenter commend the State for making learners with disabilities and primary school learners who have to walk long distances to school a priority in terms of the National Learner Transport Policy.<sup>152</sup> However, they do point to several shortcomings of the Policy. First, the criteria stipulate that beneficiaries must be “needy learners”. However, “needy” is not defined in the Policy.<sup>153</sup> Secondly, the Policy makes it clear that learner transport will not be provided where public transport is available. This is shortsighted in view of the fact that learners may come from families for whom public transport is an unaffordable expense.<sup>154</sup> Thirdly, Equal Education reports that while many principals apply for scholar transport, the DBE does not respond accordingly.<sup>155</sup> In fact, in some cases, the applications from principals are not even acknowledged by the Department.<sup>156</sup>

### 3.2.3 A well-qualified, motivated and well looked after teaching force

The third indicator of educational quality is a “well-qualified, motivated and well looked after teaching force”.<sup>157</sup>

#### 3.2.3.1 Teacher qualifications

The first democratic regime inherited an unequal teaching system skewed along racial lines.<sup>158</sup> The lion’s share of educators (predominantly black teachers) were trained at

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<sup>151</sup> Department of Basic Education & Department of Transport *National Learner Transport Policy* as cited in Joseph & Carpenter (2017) at 281.

<sup>152</sup> Joseph & Carpenter (2017) at 281.

<sup>153</sup> Joseph & Carpenter (2017) at 283.

<sup>154</sup> Joseph & Carpenter (2017) at 281.

<sup>155</sup> Joseph & Carpenter (2017) at 281.

<sup>156</sup> Joseph & Carpenter (2017) at 281.

<sup>157</sup> Singh (2012 at) 6-7.

<sup>158</sup> Schäfer M & Wilmot S “Teacher education in post-apartheid South Africa: navigating a way through competing state and global imperatives for change”(2012) 42 *Prospects* at 41-46.

State-owned teacher colleges whereas the “minority” of educators (predominantly white teachers) were educated at universities.<sup>159</sup> Wilmot and Schäfer write that the training of white and black teachers differed significantly in terms of its nature and quality to the extent that white teachers received an education which “emphasised a robust discipline knowledge base and academic skills” whereas training for black teachers was focused on the “development of professional skills and teaching practices”.<sup>160</sup>

The post-apartheid State adopted various interventions to improve the quality of teacher qualifications and to transform the higher education sector as a whole.<sup>161</sup> The period between 1994 and 1999 was characterised by three programs aimed at securing properly qualified teachers.<sup>162</sup> The first initiative did not focus on the training of new teachers, but rather on the rationalisation, redeployment and redistribution of teachers in the system.<sup>163</sup> A good amount of qualified teachers, in particular, were not keen to be redeployed and chose to rather leave the teaching profession.<sup>164</sup> The second initiative focused on teacher training. The government, taking into account international developments and the inadequate standard of training at “teacher training colleges” under apartheid, adopted the procedure of incorporating the education of teachers under the auspices of “higher education”.<sup>165</sup> All teacher colleges were incorporated into the higher education sector which meant that “universities became the custodians and drivers of all teacher education in South Africa”.<sup>166</sup> This resulted in the closing down of various teacher colleges around the country.<sup>167</sup>

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Schäfer & Wilmot, at 46 , describe the racially fragmented educator system inherited by the post-apartheid government:

“When the new government took over in 1994, it faced an enormous task: dismantling an inequitable, structurally inefficient, and geographically and racially fragmented apartheid teacher education system which consisted of over 281 institutions providing various forms of teacher training. It included more than 100 colleges of education. Within South Africa, 18 of these were for Whites, 16 for Coloureds, 2 for Indians, and 13 for Blacks. A further 77 colleges were for Blacks residing in the nine ‘homelands’ or ‘Bantustans’ created by the apartheid government. Alongside the various colleges of education, 36 universities also offered teacher training which was mostly discipline-based and post-graduate, focused on producing secondary school teachers; many also offered a four-year integrated undergraduate degree such as a Bachelor of Primary Education or Bachelor of Pedagogics. Whereas universities were mainly responsible for producing secondary school teachers, colleges of education were responsible for producing primary school teachers.”

<sup>159</sup> Schäfer & Wilmot (2012) at 42.

<sup>160</sup> Schäfer & Wilmot (2012) at 46-47.

<sup>161</sup> Schäfer & Wilmot (2012) at 47.

<sup>162</sup> Chisholm L “Apartheid education legacies and new directions in post-apartheid South Africa” (2012) 8 *Storia del donne* at 93.

<sup>163</sup> Chisholm (2012) at 93.

<sup>164</sup> Jansen J & Taylor N “Educational change in South Africa 1994-2003: case studies in large-scale education reform” (2003) 2(1) *Country Studies, Education Reform and Management Publication Series* at 29-35.

<sup>165</sup> Chisholm (2012) at 93.

<sup>166</sup> Schäfer & Wilmot (2012) at 47.

<sup>167</sup> Chisholm (2012) at 93.

Although the cutback in higher education institutions was viewed as a prerequisite to streamline the system, various commentators argue that it led to a “compromised status” for education faculties in universities.<sup>168</sup> Teacher education was now viewed as the “step-child of higher education rather than a high priority academic field in its own right”.<sup>169</sup>

The third program shifted the emphasis to the implementation of bursaries to make the teaching profession more attractive to “new, young” educators.<sup>170</sup> At present, the Fundza Lushaka government bursary scheme is available to students, enabling them to obtain a qualification in teaching.<sup>171</sup> Holders of the bursary are obliged to teach at a public school for a number of years equal to that for which they were sponsored by the bursary scheme, and are unable to select a particular school of their choice.<sup>172</sup>

Under the previous dispensation, the majority of teaching students could obtain a teacher qualification by completing a “two or three year diploma” ; currently students are required to obtain a “four year Bachelor of Education degree” or “top up” an “appropriate bachelor’s degree with a one-year Postgraduate Certificate in Education (PGCE) in order to” qualify as teachers.<sup>173</sup> Setting a bachelor’s degree as a “minimum entry requirement” for the educator profession is meant to resolve qualitative concerns.<sup>174</sup>

However, the poor quality of learner performance in recent standardised international and national tests<sup>175</sup> calls into question the “...subject and pedagogical content knowledge” of teachers.<sup>176</sup> A logical deduction from the latter observation is that the training of teachers poses some challenges. A review by the Council on Higher Education (CHE) of teacher qualifications has, for instance, found that there is a great difference in the quality of PGCE programmes across the several higher education institutions (HEIs) in the country. The PGCE programmes predominantly at all the historically advantaged universities received full accreditation after the review. However, institutions that were served with either a notice of withdrawal or de-accreditation were mainly historically disadvantaged HEIs or universities of technology.<sup>177</sup> The CHE reports that “this variance in quality is largely a reflection of

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<sup>168</sup> Schäfer & Wilmot (2012) at 47.

<sup>169</sup> Council on Higher Education (CHE) *Report on the national review of academic and professional programmes in education* (2010) (CHE Report) at 14.

<sup>170</sup> Chisholm (2012) at 93; Schäfer & Wilmot (2012) at 47-48.

<sup>171</sup> Available at <http://www.funzalushaka.doe.gov.za> (accessed 7 May 2019).

<sup>172</sup> Available at <http://www.funzalushaka.doe.gov.za> (accessed 7 May 2019).

<sup>173</sup> Schäfer & Wilmot (2012) at 48.

<sup>174</sup> Schäfer & Wilmot (2012) at 48.

<sup>175</sup> See part 3.2.1 above.

<sup>176</sup> Chisholm (2012) at 93-94.

<sup>177</sup> However, some historically disadvantaged universities, such as the University of the Western Cape (UWC), received full accreditation. See CHE Report at 51-67.

South Africa's history in the sense that inequalities of the apartheid era continue to be reproduced in teacher education programmes of the present".<sup>178</sup>

### 3.2.3.2 *An inappropriate culture of teaching and learning*

Both Spaul and Jansen suggest that an appropriate culture of teaching and learning is absent in many former black schools.<sup>179</sup> Spaul refers to "ongoing informal institutions of disorder, distrust, rebellion, and lack of cooperation" that have, for the most part, remained intact in former black schools.<sup>180</sup> According to Jansen, this stems from the "political resistance" against "colonial and apartheid" education.<sup>181</sup> The struggle commenced in the late 1970s, maintained its momentum in the 1980s, and is still manifesting itself today.<sup>182</sup> In particular, the 1976 revolt against State education was a turning point in the relationship between the government and public schools.<sup>183</sup> At that time, school inspectors were driven out of schools by teachers who distrusted them and perceived them to be "...extensions of the surveillance systems brought to bear on activist students and educators [by the former regime]".<sup>184</sup> Teachers detested the inspection of their work by these agents of the apartheid State.<sup>185</sup>

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<sup>178</sup> CHE Report at 65.

The CHE Report also found challenges with the B Ed programme, including an "unevenness of quality of B Ed programmes" across the country and that "[t]he graduate output of B Ed programmes, in terms of phase and subject specialisation, language competence, and the supply of teachers for all sectors of the school system with its diverse range of social and educational contexts, is haphazard and conditioned more by institutional histories than by employer needs".

Mention should also be made of the ACE (Advanced Certificate in Education) Programmes. By the late 1990s, approximately 67 000 teachers were still underqualified. In an effort to address this, the Department launched the ACE which provides teachers with the opportunity "to upgrade and convert their three-year qualification into the required four-year qualification". Schäfer and Wilmot describe the challenges with the ACE programme as follows: "First, the Norms and Standards policy [for Educators, 2000] did not provide sufficient guidelines on what the areas of specialisation for the ACE programme should be: this opened the door to a proliferation of ACE qualifications across the country. When the ACE programme was reviewed in 2006–2008, there were 69 different ACEs in the country and over 290 specialisations being offered. Second, the review found that universities were struggling to meet the conceptual demands of the ACE programme and that few institutions had found an appropriate balance between developing teachers' pedagogic skills on the one hand, and their discipline knowledge skills on the other." See CHE Report at 102-103; Schäfer & Wilmot (2012) at 49.

<sup>179</sup> Spaul (2014) at 21; Jansen J "Personal reflections on policy and school quality in South Africa: when the politics of disgust meet the politics of distrust" in Sayed et al (2013) at 81-95.

<sup>180</sup> Spaul (2014) at 21. The ANC in 1994 observed as follows: "Apartheid education and its aftermath of resistance has destroyed the culture of learning within large sections of our communities, leading in the worst-affected areas to a virtual breakdown of schooling and conditions of anarchy in relations between students, teachers, principals, and the education authorities." See ANC *A policy framework for education and training* (1994).

<sup>181</sup> Jansen (2013) at 86.

<sup>182</sup> Jansen (2013) at 86.

<sup>183</sup> Jansen (2013) at 86.

<sup>184</sup> Jansen (2013) at 86.

<sup>185</sup> Jansen (2013) at 87.



This relationship of distrust and culture of opposition to State interference “transferred” seamlessly to the post-apartheid State.<sup>186</sup> The belief that teachers would allow the new legitimate democratic State back into their classrooms to conduct educator evaluation was completely wrong because the “culture of resistance” was too deeply rooted.<sup>187</sup>

An important role player in sustaining this adversarial relationship between the State and historically disadvantaged schools has been the South African Democratic Teachers Union (SADTU).<sup>188</sup> The Union has been very successful in retaining and mobilising the ingrained “adversarial cultures” emanating from the “anti-apartheid struggle”.<sup>189</sup> Each time the State attempted to introduce new policies on teacher appraisal or the development of schools, SADTU would contest them.<sup>190</sup> Where policies were endorsed and finally implemented, another challenge would emerge.<sup>191</sup> Some schools and districts would physically stop government officials at the school gate with the purpose of preventing the intended evaluation.<sup>192</sup>

Over the years, SADTU has evolved from a teacher’s union into a “major political” role player that becomes involved in issues beyond teaching and education.<sup>193</sup> For instance, SADTU, as a member of the Congress of South African Trade Unions (COSATU), urged its members to leave the classroom and join the nationwide COSATU protests against rising food, electricity and fuel prices in 2008.<sup>194</sup>

Demonstrations about “service delivery” have resulted in regular disruptions in schools located in historically disadvantaged communities, as was the case in Vuwani, Limpopo, in 2016.<sup>195</sup> The South African Human Rights Commission (SAHRC), after

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<sup>186</sup> Jansen (2013) at 87.

<sup>187</sup> Jansen (2013) at 87.

<sup>188</sup> Jansen (2013) at 87-88.

<sup>189</sup> Jansen (2013) at 87-88.

<sup>190</sup> Jansen (2013) at 87-88.

<sup>191</sup> Jansen (2013) at 87-88.

<sup>192</sup> Jansen (2013) at 87-88.

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

<sup>193</sup> Jansen (2013) at 87-88.

<sup>194</sup> Staff reporter “Cosatu to mobilise millions for price protest” (2008) available at <https://mg.co.za/article/2008-08-05-cosatu-to-mobilise-millions-for-price-protest> (accessed 7 May 2019).

<sup>195</sup> South African Human Rights Commission “National investigative hearing into the impact of protest-related action on the right to a basic education in South Africa” (2017) 1-3. (“SAHRC Report on protest action”).

launching an investigation into the impact of protest action on the right to basic education, found that protests mostly arise for reasons that are not related to the delivery of basic education.<sup>196</sup> Causes of protest action range from a lack of access to water in Zeerust (North West) to the State's failure to tar roads in the John Taolo Gaetsewe District in the Northern Cape<sup>197</sup>. These protests resulted in various detrimental consequences for learners, including being barred physical access to school, being denied access to the school nutrition programme, and being prohibited to write final year exams.<sup>198</sup>

The SAHRC Report reveals that schools are targetted for various reasons, including the fact that they are viewed as government property and not as an essential component of the community structure.<sup>199</sup> There is therefore no sense of ownership by the community in relation to the schools in their area.<sup>200</sup> Also, and more devastatingly, "[a] sense of apathy and despair" exists in these communities where "parents, often frustrated, unemployed and caught in a vicious cycle of poverty, fail to see how education can guarantee a brighter future for their children".<sup>201</sup>

It is clear that historically disadvantaged schools are therefore plagued by an internal problematic culture of teaching and learning as indicated above, as well as an external culture of protest, driven in part by the poverty and inequality of the community surrounding the school. The former culture has led to scant policy reform in former black schools which were "unwilling and/or unable" to reap the benefits from teacher and school evaluations as well as "monitoring interventions".<sup>202</sup> In contrast, former white schools have been able to implement State policies without causing any harm to existing practices of "teaching, learning and managing schools".<sup>203</sup> Furthermore, the external culture of protest, so prevalent in many South African black communities today, contributes to a further deterioration of quality education for black and poor learners.

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See also Skelton A & Nsibirwa M "Criminal justice responses to protests that impede the right to basic education" (2017) 63 *SA Crime Quarterly* at 39-50.

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

<sup>196</sup> SAHRC Report on protest action (2017) at 30-36.

<sup>197</sup> SAHRC Report on protest action (2017) at 2-3.

<sup>198</sup> SAHRC Report on protest action (2017) at 2-3.

<sup>199</sup> SAHRC Report on protest action (2017) at 31.

<sup>200</sup> SAHRC Report on protest action (2017) at 31.

<sup>201</sup> SAHRC Report on protest action (2017) at 31.

<sup>202</sup> Jansen (2013) at 87-88.

<sup>203</sup> Jansen (2013) at 87-88.

### 3.2.3.3 Post provisioning

“Post provisioning” is a reference to the procedure regulating the assignment of educators to South African schools.<sup>204</sup> Although the courts have confirmed that teaching and non-teaching posts are core entitlements of the right to basic education<sup>205</sup>, several schools in South Africa, especially in the Eastern Cape, are suffering from teacher shortages.<sup>206</sup>

The provisioning of teacher posts is administered by a range of legislation and policies, including the Employment Educators Act (EEA)<sup>207</sup>, the Schools Act, and the Labour Relations Act (LRA)<sup>208</sup>, as well as the “Post Distribution Model for the Allocation of Educator Posts to Schools” (Post Distribution Model).<sup>209</sup> The latter policy sets out a formula that is supposed to guide the Head of Department (HOD) of a provincial department in the allocation of posts to specific schools after the Member of the Executive Council (MEC) has determined the post establishment for the province.<sup>210</sup> This formula determines that the post distribution must be proportional to the actual needs of the school and takes into account the “maximum ideal class size applicable to a specific learning area or phase”, “the period load” of teachers, the “need to promote a learning area”, the “number of grades”, whether there is “more than one medium of instruction”; “disabilities of learners”; “access to the curriculum”, “poverty” (more teachers are supposed to be placed at poor schools), as well as the amount of “funding” from the department.<sup>211</sup>

Although the formula is needs-based, Sephton argues that it actually favours the wealthier schools.<sup>212</sup> Such schools, for example, have the means to detect “learners with special needs” and they are in a position to present “more subjects” because the School Governing Body is able to remunerate additional teachers.<sup>213</sup> Conversely, historically disadvantaged schools are only able to present “core” subjects because of dwindling “learner numbers” and a “shortage of teachers funded by the provincial education department”.<sup>214</sup>

<sup>204</sup> Sephton S “Post provisioning” in Veriava et al (2017) at 249.

<sup>205</sup> See for example *Centre for Child Law v Minister of Basic Education* 2012 (4) All SA 35 (ECG) and *Linkside and others v Minister of Basic Education and others* (ZAECGHC) unreported case number 3844/2013) (26 January 2015).

<sup>206</sup> Sephton (2017) at 249.

<sup>207</sup> Act 76 of 1998.

<sup>208</sup> Act 66 of 1995.

<sup>209</sup> Sephton (2017) at 249-250.

<sup>210</sup> Sephton (2017) at 251. Section 5(1)(b) of the EEA provides: “Notwithstanding anything to the contrary contained in any law but subject to the norms prescribed for the provisioning of posts, the educator establishment of a provincial department of education shall consist of the posts created by the Member of the Executive Council.”

<sup>211</sup> Sephton (2017) at 251. Section 3 of the Post Distribution Model.

<sup>212</sup> Sephton (2017) at 251.

<sup>213</sup> Sephton (2017) at 251.

<sup>214</sup> Sephton (2017) at 251.

The application of the Post Distribution Model therefore results in a skewed learner -to - teacher ratio across schools. In some schools, teachers are able to comfortably teach classes numbering less than the preferred departmental learner - to - teacher ratio<sup>215</sup> ,whereas in other (mostly historically black) schools, teachers are confronted with class sizes far greater than the recommended learner - to - educator proportion.<sup>216</sup>

Overcrowding leads to a host of challenges experienced by both learner and teacher in the classroom.<sup>217</sup> For instance, teachers are unable to pay attention to all learners<sup>218</sup> and are instead forced to spend the majority of their teaching time maintaining discipline.<sup>219</sup> Teachers therefore “lose valuable lesson time” while attempting to manage large classes that are more prone to noise, “pushing”, and “hitting”.<sup>220</sup> The conclusion can therefore be drawn that overcrowding in classrooms detrimentally impacts on the morale of teachers.<sup>221</sup>

Learners that are exposed to overcrowding tend to perform poorer academically than their counterparts in classrooms with lower teacher-to-learner ratios.<sup>222</sup> Overcrowded classrooms amount to “unsupportive learning environments” which detrimentally impact on the quality of teaching and learning.<sup>223</sup>

The morale of teachers is further affected by the fact that a department may make an appointment, but fail to pay teachers.<sup>224</sup> The failure to remunerate teachers has been particularly prevalent in the Eastern Cape.<sup>225</sup> The Centre for Child Law and the Legal Resources Centre have been at the forefront in using strategic litigation to ensure the filling of vacant posts and the payment of teachers in the province.<sup>226</sup>

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<sup>215</sup> Sephton (2017) at 251. The Department of Basic Education recommends a learner-educator ration of 40:1 for primary schools and 35:1 for secondary schools. See <https://www.education.gov.za>. (accessed 1 September 2018).

<sup>216</sup> Marais P “We can’t believe what we see : overcrowded classrooms through the eyes of student teachers” (2016) 36(2) *South African Journal of Education* at 2. Marais reports that some schools in the Eastern Cape have up to 130 learners crammed into one classroom.

<sup>217</sup> Marais (2016) at 2-3.

<sup>218</sup> Imtiaz S “Exploring strategies for English language teaching of Pakistani students in public sector colleges” (2014) 2(2) *Research Journal of English Language and Literature* as cited in Marais (2016) at 2-4.

<sup>219</sup> Mustafa H M, Mahmoud S, Assaf I H, Al-Hamadi A & Abdulhamid Z M “Comparative approach of overcrowded effects in classrooms versus solving ‘cocktail party problem’ (neural networks approach)” (2014) 3(2) *International Journal of Engineering Science and Innovative Technology* at 178 as cited in Marais (2016) at 2-4.

<sup>220</sup> Mustafa *et al* (2014) as cited in Marais (2016) at 2-4.

<sup>221</sup> Marais (2016) at 3.

<sup>222</sup> Marais (2016) at 3.

<sup>223</sup> Khumalo B & Mji A “Exploring educators’ perceptions of the impact of poor infrastructure on learning and teaching in rural South African schools” (2014) 5(20) *Mediterranean Journal of Social Sciences* as cited in Marais (2016) at 3.

<sup>224</sup> Sephton (2017) at 260.

<sup>225</sup> Sephton (2017) at 260.

<sup>226</sup> Sephton (2017) at 256-257. These cases include *Centre for Child Law v Minister of Basic Education* and *Linkside and others v Minister of Basic Education and others*.

### 3.2.4 Participatory democracy

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

#### 3.2.4.1 The development of a decentralised form of school governance

The 1995 *White Paper on Education*<sup>227</sup> (*White Paper 1*) was the post-apartheid regime's first policy declaration that supported the establishment of School Governing Bodies (SGBs) in the public schooling system.<sup>228</sup> However, it was the second *White Paper on Education*<sup>229</sup> (*White Paper 2*), preceding the enactment of the Schools Act, that was much more explicit in its recommendation for a decentralised form of school governance. For example, it states unequivocally that "the new organisation and governance system....involve a *radical decentralisation* of management and governance responsibilities to local schools and communities (my emphasis)".<sup>230</sup> It also confirmed the planned establishment of SGBs in the entire public school system as well as the nature of their powers, namely, that SGBs would have "substantial decision-making powers" pertaining to "policy determination".<sup>231</sup>

History provides us with conflicting accounts as to why the South African government settled on a decentralised form of school governance after 1994.<sup>232</sup> A widely embraced narrative recalls how the former National Party, in the "dying days" of apartheid fought for the decentralisation of the public education system in order to maintain white privilege in former Model C schools.<sup>233</sup> This explanation highlights

<sup>227</sup> *White Paper on Education and Training* (March 1995).

<sup>228</sup> *White Paper 1* at Ch 12.

<sup>229</sup> *Education White Paper 2: The Organisation, Governance and Funding of Schools* (February 1996) ("*White Paper 2*").

<sup>230</sup> *White Paper 2* at para 4.2.

<sup>231</sup> *White Paper 2* at paras 3.1 and 3.7.

<sup>232</sup> Woolman & Fleisch (2009) at 3-8.

<sup>233</sup> Pampallis J "The nature of educational decentralisation in South Africa" paper presented to the Decentralisation and Education Conference 11-14 June 2001 in Johannesburg, as cited in Woolman & Fleisch (2009) at 3-4.

In 1990, white public schools were given the option by the Minister of (white) Education to alter their status as from the start of 1991. They were provided with three different school models: selecting Model A would lead to the school becoming privatised; choosing Model B would mean that the school retains its status as a State school, but would be allowed to allocate 50 percent of its total placements to black learners; a Model C school would be partially subsidised by the State and would therefore be responsible for balancing its budget through school fees and donations. All three models had to comply with the following conditions:

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

Although the majority of the 1 983 white State schools initially selected to retain their old status, the State, in 1993, made two announcements that resulted in 96 percent of all former white schools inadvertently becoming Model C schools. First, parents were informed that unless they vote by a two-

“...how the fragility of the ANC-led government in 1994 required it to cede authority to multiple groups in order to avoid concentrating power in a group that might contest the government’s new agenda”.<sup>234</sup> However, Woolman and Fleisch call the latter account “radically incomplete” and argue that assuaging the privileged Afrikaner constituency is only a “minor part of the story”.<sup>235</sup> They suggest that the autonomy granted to SGBs was primarily as a result of the ANC’s “democratic” allegiance to “grassroots politics”.<sup>236</sup> Sayed considers the particular context in which the ANC’s commitment to the idea of local community control was formed:

“The notion of grassroots community participation was constituted in the context of a state which was oppressive and where the state itself was the primary apparatus of oppression. Thus, grassroots community control was the antithesis of state control. Power to the people as opposed to that of the state

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thirds majority to retain the *status quo* or to become Model B schools, all previously white schools were to become Model C schools. Secondly, the State decided to cut State subsidies to all school models.

Model C schools became State - aided schools managed by a principal and a management committee. The State paid the salaries of a set number of teachers whilst the rest of the costs at these schools became the responsibility of the parents. The management committee had the power to appoint teachers, determine admission policy, and impose fees.

Although, in theory, white schools could admit black pupils as from October 1990, the majority of black learners were barred access to these schools due to high school fees and the inability to meet certain selection criteria which, in fact, disguised explicit racism. See Tikly L & Mabogoane T “Marketisation as a strategy for desegregation and redress: the case of historically white schools in South Africa” (1997) 43 *International Review of Education* at 161-162; South African Human Rights Commission Report on racism, “racial integration” and desegregation in South African public secondary schools (1999) 10.

<sup>234</sup> Woolman & Fleisch (2009) 3.

<sup>235</sup> Woolman & Fleisch (2009) 4. I doubt whether Woolman and Fleisch are correct in their claim that appeasing the white minority was but a “minor” part of the story. In my view, the ANC compromised extensively in assuaging the privileged constituency. The “reconciliation/rainbow nation politics” of the transition period played an important role in the ANC-led government’s decision to appease the white constituency. Badat and Sayed write: “The ability of the new government to address the apartheid legacy was conditioned by the changes that occurred between 1990 and 1994. On the one hand, the ruling National Party began the process of transferring control of schools previously reserved for whites to school governing bodies, effectively privatising them. On the other hand, the post-1994 state was, as an outcome of the pre-1994 negotiations, a Government of National Unity (GNU) in which the majority party (African National Congress), in a coalition led by President Nelson Mandela, emphasised reconciliation. The GNU was reluctant to act decisively to transform the educational system. This result was partly a consequence of the negotiated settlement itself, which created a federalist state and established powerful provincial interest groups that shared concurrent responsibilities for schooling. Implementing redress as a national strategy was thus constrained by relatively autonomous provinces coupled with strong governing bodies in previously white-only schools...”

Jonathan Jansen states that “[p]olicies of early transition consciously attempted to reconcile white and middle class elements of post-apartheid society with government reform. The missive to ‘consult as widely as possible’ ... and the allowance of unlimited fee-generation within former white schools were part of a political agenda of ‘toenadering’ (rapprochement) which found similar expression in other spheres of politics, the *Rugby World Cup* being perhaps the most dramatic example.”

See Badat S & Sayed Y “Post 1994 South African education: the challenge of social justice” (2014) *The Annals of the American Academy* at 130; Jansen J “Political symbolism as policy craft: explaining non-reform in South African education after apartheid” (2002) 17(2) *Journal of Education Policy* at 199-215.

<sup>236</sup> Woolman & Fleisch (2009) at 4-5.

reflected a strong commitment to participatory democracy and the decentralisation of control.”<sup>237</sup>

Thus, the ANC’s commitment to grassroots politics was shaped by a liberation movement in the throes of fighting a repressive regime. The idea of transferring power to local communities, in which the majority had been rendered powerless by the apartheid regime, was therefore a response of the time.<sup>238</sup>

Grant Lewis and Motala expand on the above accounts . They claim that the rise of SGBs as channels for the “decentralisation of power to schools” was, in part, due to the conflict between the “old and new orders in the education policy process”.<sup>239</sup> On the one hand, as former black schools became increasingly dissatisfied with the apartheid education system during the late 1980s, the ANC’s National Education Crisis Committee (NECC) made an appeal for the creation of Parent Teacher Student Associations (PTSAs) in these schools.<sup>240</sup> The PTSAs were to be broadly representative of teachers, parents and learners<sup>241</sup> and were viewed as alternatives to the education governance structures of the time which were widely regarded as pawns of the apartheid State.<sup>242</sup> Subsequently, the NECC compiled the National Education Policy Investigation Report in which its vision for school governance remained loyal to the idea of local involvement in the governance of schools.<sup>243</sup>

On the other hand, the former National Party, in its Education Renewal Strategy (ERS), supported the idea of decentralisation as an effective “management solution”.<sup>244</sup> The ERS suggested the establishment of management councils in all schools and in terms of which parents were to enjoy more power than educators.<sup>245</sup> This strategy found realisation in the establishment of Model C schools in the early 1990s, which

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<sup>237</sup> Sayed Y “Discourses of the policy of educational decentralisation in South Africa since 1994: an examination of the South African Schools Act” (1999) 29 *Compare : A Journal of Comparative and International Education* at 141-152.

<sup>238</sup> This suggests that the ANC is not necessarily committed to a decentralised form of school governance indefinitely. The context in which the ANC approved of the latter system of school governance has changed since the transition period. The governing party is not a liberation movement anymore and its contested relationship with school governing bodies primarily in former Model C schools may have spurred the ruling party to revise the current system of school governance. The content of the draft Basic Education Law Amendment Bill, for example, seems to point to a curtailment of the powers of school governing bodies. See Department of Basic Education *Invitation to comment on the Draft Basic Education Laws Amendment Bill* (GN 1101 GG 4117813 of October 2017); Van Leeve Y “Executive heavy handedness and the right to basic education: a reply to Sandra Fredman” (2016) 10 *Constitutional Court Review* at 202.

<sup>239</sup> Grant Lewis S & Motala S “Educational de/centralisation and the quest for equity, democracy and quality” in Chisholm L (ed) *Changing class: education and social change in post-apartheid South Africa* (Cape Town : HSRC Press 2004) at 117 .

<sup>240</sup> Grant Lewis & Motala (2004) at 117.

<sup>241</sup> Grant Lewis & Motala (2004) at 117.

<sup>242</sup> Karlsson J “The role of democratic governing bodies in South African schools’ (2002) 38(3) *Comparative Education* at 328.

<sup>243</sup> Grant Lewis & Motala (2004) at 117.

<sup>244</sup> Grant Lewis & Motala (2004) at 117.

<sup>245</sup> Grant Lewis & Motala (2004) at 117.

were granted substantial autonomy and became legally empowered to adopt policies on a range of issues, including language, admissions and fees.<sup>246</sup>

The ANC's leaning towards decentralisation was not only formed by their ideological stance on grassroots politics, but was influenced by the economic environment of the time. The first democratic government inherited an economic order which required it to restructure the vastly (inherited) unequal education system within an environment of severe financial restraint.<sup>247</sup> The government therefore decided on leveraging private money from affluent parents in order to supplement existing public funds. These parents, therefore, had to be prevented from removing their children from the public school system and enrolling them in private schools.<sup>248</sup> One way of ensuring this was to provide parents and SGBs with the autonomy to make decisions with regard to "raising revenue" and "[financing] expenditure beyond what would be afforded from the provincial education department's allocation".<sup>249</sup> By allowing parents and SGBs at (mostly) former Model C schools the freedom to decide on the amount of school fees they wished to pay and the quality of education they wished to acquire for their children, the State could focus "time, resources and effort" on its redress efforts in historically disadvantaged schools.<sup>250</sup>

In sum, the decentralised model of school governance in the post- 1994 South African State did not emerge in a vacuum. The political, social and economic environment in which the first democratic government was conceived, greatly influenced its decisions on educational policy, including the current school governance system, which is discussed next.

#### 3.2.4.2 *The overarching role of school governing bodies*

The South African Schools Act establishes a uniform system for the "governance, funding and organisation" of schools.<sup>251</sup> The current legislative framework creates a multiple approach to school governance. The nature of this "statutory partnership" is summarised concisely in *Ermelo*:

"An overarching design of the [Schools Act] is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. *Parents of the learners and members of the community in which the school is located are represented in the*

<sup>246</sup> Grant Lewis & Motala (2004) at 117-118.

<sup>247</sup> Chisholm (2012) at 90.

<sup>248</sup> Karlsson (2002) at 328.

<sup>249</sup> Woolman & Fleisch (2009) at 24.

<sup>250</sup> Woolman & Fleisch (2009) at 24.

<sup>251</sup> Preamble of the Schools Act.



*school governing body which exercises defined autonomy over some of the domestic affairs of the school.”*<sup>252</sup> (Footnotes omitted, my emphasis)

The Schools Act provides that the governance of every public school is vested in its governing body.<sup>253</sup> The SGBs are organs of State tasked with the overarching obligation to ensure the provision of the right to education to learners at a school.<sup>254</sup> In *Welkom*, Khampepe J referred to a SGB as analogous to a “legislative authority ...responsible for the formulation of certain policies and regulations...[and securing] an appropriate environment for the realisation of the right to education”.<sup>255</sup>

The governing body stands in a position of trust towards the school<sup>256</sup> which entails that “[it] is expected to act in good faith, to carry out its duties and functions on behalf of the school and to be accountable for its actions”.<sup>257</sup> The primary function of the governing body is therefore to look after the interests of the school and its learners.<sup>258</sup>

### 3.2.4.3 Structure and powers of school governing bodies

In terms of the Schools Act, the SGB consists of elected members, co-opted members and the principal of a school.<sup>259</sup> The elected members comprise parent representatives, teachers, non-teaching personnel and in the case of secondary schools, the learners.<sup>260</sup>

Irrespective of the size of the school, parents are always in the majority on governing bodies.<sup>261</sup> Parents must at all times have a majority by means of a “50% plus one member representation”.<sup>262</sup> This means that “there must always be one more parent on the governing body than the combined total of the other members with voting rights”.<sup>263</sup> In addition, a parent must always fill the role of chairperson of the governing body.<sup>264</sup> The reason for the preferential position of parents is explained by government by the fact that “[p]arents have most at stake in the education of their children, and this should be reflected in the composition of the governing body, where this is practically

<sup>252</sup> *Ermelo* at para 56. See also *Head of Department, Department of Education, Free State Province v Welkom High School and another*; *Head of Department, Department of Education, Free State Province v Harmony High School and another* 2014 (2) SA 228 (CC) at para 49 (*Welkom*).

<sup>253</sup> Section 16(1) of the Schools Act.

<sup>254</sup> *Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2009 (10) BCLR 1040 (CC) at para 3. The Constitutional Court has specifically stated that “SGB’s are part of the state apparatus designed to secure the provision of the right to education under the Bill of Rights”. See *Welkom* at para 141.

<sup>255</sup> *Welkom* at para 63.

<sup>256</sup> Section 16 (2) of the Schools Act.

<sup>257</sup> Dibete K *The role of the school governing bodies in managing finances in no-fee schools in the Maraba circuit of Limpopo province* ( unpublished M Ed dissertation, University of South Africa, 2015) at 17.

<sup>258</sup>Section 20(1)(a) of the Schools Act states that “...the governing body of a public school must promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school”.

<sup>259</sup> Section 23(1) of the Schools Act.

<sup>260</sup> Section 23(2) of the Schools Act.

<sup>261</sup> Karlsson (2002) at 329.

<sup>262</sup> Dibete (2015) at 19.

<sup>263</sup> Dibete (2015) at 19.

<sup>264</sup> Karlsson (2002) at 329.

possible".<sup>265</sup> Karlsson agrees with the South African government as she argues that the justification for parents' majority status on SGBs is that they are primarily invested in the school's "development" and the "quality" of education being provided to their children.<sup>266</sup>

The SGBs have a wide range of powers. Some of the pivotal functions include : "the development and adoption of a constitution and mission statement for a school, the adoption of a code of conduct for learners, the establishment of admission policies, the development of a school budget, the levying of school fees"<sup>267</sup>, and recommending to the Head of the provincial education department whom to appoint as teachers.<sup>268</sup>

The SGBs may also apply to the HOD to be granted additional functions. Some of these functions include the "power to select subject options, buy textbooks and determine the extra-curricular program for the school".<sup>269</sup>

Although SGBs enjoy a high degree of autonomy, it does not mean that they have unlimited power. The Constitutional Court has confirmed that the powers of SGBs are subject to the Constitution, the Schools Act and to applicable provincial legislation.<sup>270</sup> The Court has held that "any powers of the governing body 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".<sup>271</sup> Therefore, although the primary role of SGBs is to look after the specific local school and its interests, it does not mean that they can operate in isolation, detached from the larger community in which a particular school is located. In *Ermelo*, the Constitutional Court held :

"The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution."<sup>272</sup>

Although this dictum of Moseneke DCJ (as he was then) is well-intended, it is naïve to assume, in the light of South Africa's divisive history, that SGBs will always be inclined to exercise their functions in the democratic nature suggested by the Court. It seems that "the court uncritically assumes the democratic character of the school governing body....".<sup>273</sup>

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<sup>265</sup> *White Paper* 1 at 70.

<sup>266</sup> Karlsson (2002) at 329.

<sup>267</sup> Sections 39(1) and 39(2) of the Schools Act.

<sup>268</sup> See ss 20(1) and 21(1) of the Schools Act for a full account of the functions of SGBs.

<sup>269</sup> Section 21(1) of the Schools Act.

<sup>270</sup> *Ermelo* at para 61 and *MEC for Education in Gauteng Province and other v Governing Body of Rivonia Primary School and others* 2013(1) SA 582 (CC) at para 41.

<sup>271</sup> *Ermelo* at para 61.

<sup>272</sup> *Ermelo* at para 80.

<sup>273</sup> Van Leeve (2016) at 210.

I will expand more on The challenging nature of democracy in school governance is expanded upon in the next part.

#### 3.2.4.4 General principles of democracy

Democracy is one of the fundamental values of the South African Constitution.<sup>274</sup> The Constitution itself was adopted to establish a society based on *democratic values*, social justice and fundamental human rights (my emphasis).<sup>275</sup> In *Doctors for Life International v Speaker of the National Assembly (Doctors for Life)*<sup>276</sup>, the Constitutional Court held that the representative and participatory elements of democracy espoused in the Constitution<sup>277</sup> are not in tension, but are mutually supportive.<sup>278</sup> The Court found :

“General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people.”<sup>279</sup>

The conceptualisation of democracy in the Constitution therefore entails a democracy that functions through formal State institutions that represent the people, but it also permits, and in fact necessitates, participation of citizens in decision-making outside of these formal institutions, namely, “outside of regular general elections and the representative institutions that result from them”.<sup>280</sup> O’Regan J in *Mazibuko v City of Johannesburg*<sup>281</sup>, puts it aptly that the Constitution calls for “a form of...democracy that holds government accountable and requires it to account between elections over specific aspects of government policy”.<sup>282</sup>

<sup>274</sup> Preamble of the Constitution.

<sup>275</sup> Preamble of the Constitution.

<sup>276</sup> 2006 (6) SA 416 (CC).

<sup>277</sup> Brand D “Judicial deference and democracy in socio-economic rights cases in South Africa” in Liebenberg S & Quinot G (eds) *Law and poverty : perspectives from South Africa beyond* (Cape Town : Juta 2012) at 180.

<sup>278</sup> *Doctors for Life* at para 115.

<sup>279</sup> *Doctors for Life* at para 115. See also *Matatiele Municipality v President of the Republic of South Africa* (1) 2006 (5) BCLR 622 (CC); *Matatiele Municipality v President of the Republic of South Africa* (2) 2007 (1) BCLR 47 (CC); *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2013 (1) BCLR 14 (CC).

<sup>280</sup> Brand (2012) at 180-181.

<sup>281</sup> *Mazibuko v City of Johannesburg* 2013 (6) SA 249 (CC) (*Mazibuko*).

<sup>282</sup> *Mazibuko* at para 161.

In *Welkom*, the Constitutional Court held that the Constitution demands the “substantive involvement and engagement of people in decisions that may affect their lives”.<sup>283</sup> The Court, in this regard, seems to echo Brand’s support for a substantive conceptualisation of democracy. This means that democracy is not merely about process, namely, guaranteeing that the procedures and structures for participation are in place, but also about ensuring that people are empowered to participate in decision-making.<sup>284</sup> In other words, the delivery of the structures through which democracy operates (for example elections) does not secure democracy.<sup>285</sup> What is needed, is a culture of democracy or the substantive practice of democracy within its structures.<sup>286</sup>

I echo Brand’s conceptualisation of democracy. In my view, democracy must enable people to participate in decision-making. It also fosters an environment that embraces a diversity of voices and does not regard one opinion as more important than another in the process of decision-making. Therefore all voices should be given the opportunity to be heard and considered *meaningfully* before a particular decision is reached.<sup>287</sup> In short, a substantive understanding of democracy does not promote the “othering” of voices.

#### 3.2.4.5 Democracy in school governing bodies

The South African government regards school governance as part of the country’s system of “democratic governance”.<sup>288</sup> In other words, schools are supposed to be run according to the same principles of democracy that are espoused in the South African Constitution. In *Ermelo*, the Court held that SGBs are democratically constituted<sup>289</sup> and are supposed to function democratically.<sup>290</sup> Moseneke states that “[a school governing body] is meant to be a beacon of grassroots democracy in the local affairs of the school”.<sup>291</sup>

An implication of democratic school governance is that all the role players on the SGB, in theory have a voice in the decision-making process.<sup>292</sup> In terms of *White Paper 2*, the “governance policy for public schools is based on the core values of democracy” which are identified as “representation of all stakeholder groups, participation, tolerance, rational discussion and collective decision-making”.<sup>293</sup> In practical terms, this would mean that the views of all SGB representatives are taken into account in the formulation of school policy. Furthermore, in terms of a substantive conceptualisation

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<sup>283</sup> *Welkom* at para 139.

<sup>284</sup> Brand (2012) at 181.

<sup>285</sup> Brand (2012) at 181.

<sup>286</sup> Brand (2012) at 181.

<sup>287</sup> My emphasis.

<sup>288</sup> *White Paper 2* at para 3.17.

<sup>289</sup> See ss 23(1) and 23(2) of the Schools Act.

<sup>290</sup> *Ermelo* at para 57.

<sup>291</sup> *Ermelo* at para 57.

<sup>292</sup> Mncube V “The perceptions of parents of their role in the democratic governance of schools in South Africa: are they on board?” 2009 (29) *South African Journal of Education* at 86.

<sup>293</sup> *White Paper 2* at 16.

of democracy, as described above, all the representatives on the SGB must also be enabled to participate in the decision-making process and a culture must be provided for their voices to be engaged with meaningfully. However, this is not the case predominantly in former black schools, as will be shown in the next part.

#### *3.2.4.6 The silencing of parental voices in former black schools*

The realisation of a democratic school governance system is one of the core reasons for the decentralisation model chosen by the current government.<sup>294</sup> However, decentralisation by itself is not a guarantee of school democracy.<sup>295</sup> To put it differently: the mere fact that the State has devolved significant decision-making power to SGBs, and in particular to parents (by virtue of their majority role on SGBs), does not mean that substantive democracy is in operation at schools.

Van Leeve argues that school governance in township and rural schools occupied predominantly by learners from poor, working class black families are weakened by a range of factors, including the low level of education among parents with limited knowledge of the functioning of SGBs.<sup>296</sup> In these circumstances, the principal of the school tends to take over the running of the SGB and alienates less informed and experienced parents.<sup>297</sup> Xaba, who has undertaken an in-depth study of the governance challenges facing historically disadvantaged schools, asserts that most principals see their main function on the SGB as educating parents as well as mediating disputes between parents and educators.<sup>298</sup> The latter group blames the low level of education among the parent community as the reason for their inability to make decisions on SGBs.<sup>299</sup>

Although workshops are available to train parents in understanding the school governance system, many do not attend them because of a fear that their illiteracy will be exposed.<sup>300</sup> There is therefore a tense relationship between educators and parents: educators see parents as illiterate, and parents feel sidelined and undermined by educators.<sup>301</sup> What happens inevitably, is that the principal and the educators take the lead role in decision-making on various issues, including “policy formulation, development and implementation”.<sup>302</sup> The parents merely “rubber stamp” the process.<sup>303</sup>

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<sup>294</sup> *White paper 2* at para 3.12

<sup>295</sup> Mncube (2009) at 32.

<sup>296</sup> Van Leeve (2016) at 202-203.

<sup>297</sup> Van Leeve (2016) at 202-203.

<sup>298</sup> Xaba M “The possible cause of school governance challenges in South Africa” (2011) 31 *South African Journal of Education* at 205.

<sup>299</sup> Xaba (2011) at 205-206.

<sup>300</sup> Xaba (2011) at 205-206.

<sup>301</sup> Xaba (2011) at 205-206.

<sup>302</sup> Xaba (2011) at 205-206.

<sup>303</sup> Xaba (2011) at 205-206.

This is in contradiction to the roles that the Schools Act sets out for the different role players on SGBs. The Act clearly vests the governance of schools in the SGB, and the “professional management” of schools in the principal, who exercises her role under the authority of the HOD of the province’s education department.<sup>304</sup>

In *Welkom*, the Constitutional Court contrasted the terms “governance” and “professional management” and attempted to explain the difference between the two concepts.<sup>305</sup> The Court held that the “professional management of a public school consists largely of the running of the daily affairs of a school by directing teachers, support staff and the use of learning materials, as well as the implementation of relevant programmes, policies and laws”.<sup>306</sup> The governing body, on the other hand, is “...responsible for the formulation of certain policies and regulations.”<sup>307</sup> The Court went further by adding that “a principal’s authority is more executive and administrative in nature, being responsible for the implementation of applicable policies... and the running of the school on a day-to-day basis”.<sup>308</sup>

At this juncture it is also important to note that the principal is an employee of the HOD of the local provincial education department. Section 16(3) of the Schools Act requires the principal to undertake “the professional management of a public school . . . under the authority of the Head of Department”. Section 16A(1)(a) states that “[t]he principal of a public school represents the Head of Department in the governing body...”.<sup>309</sup> In the minority judgment in *Welkom*, Zondo J concisely demarcated the role of the principal in the affairs of a SGB:

“On the one hand, [section 16A(3) of the Schools Act] obliges him or her to ‘assist the governing body in the performance of its functions and responsibilities’, but, on the other, it makes it clear that such assistance or participation in any responsibilities or functions of the governing body ‘may not be in conflict with instructions of the Head of Department’, ‘legislation or policy’ or ‘an obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister’.<sup>310</sup>

The role of the principal is therefore to assist and inform the governing body, but never to take decisions for it.<sup>311</sup> Furthermore, the principal as an employee of the State, when taking decisions for the SGB, acts beyond the powers conferred upon her by the Schools Act. However, the violation of the Schools Act is but one aspect of the situation. The relegating of parental power in former black schools also leads to an infringement of substantive democracy.

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<sup>304</sup> Sections 16(1) and 16(3) of the Schools Act. The principal’s functions are set out in s 16A of the Act.

<sup>305</sup> *Welkom* at paras 61-63.

<sup>306</sup> *Welkom* at para 62.

<sup>307</sup> *Welkom* at para 63.

<sup>308</sup> *Welkom* at para 63.

<sup>309</sup> My emphasis.

<sup>310</sup> *Welkom* at para 199.

<sup>311</sup> See for example s 16A: “The principal must – ‘(f) inform the governing body about policy and legislation’ and ‘(h) assist the governing body with the management of the school’s funds’...”

### 3.2.4.7 *The violation of substantive democracy in former black schools*<sup>312</sup>

One of the main goals of decentralisation is “greater democracy” in schools.<sup>313</sup> Grant Lewis and Motala argue that the latter goal has however not been met, except in “resource rich contexts” , such as former Model C schools.<sup>314</sup>

As indicated above, poor and illiterate parents, predominantly from former black schools, are barred from engaging in the decision-making processes of the SGBs that represent them. Therefore, it is logical to reason that former Model C schools, shored up by an “educated and skilled parent force”, have an improved level and quality of participation in SGBs.<sup>315</sup> Whether this amounts to “greater democracy” in these schools, depends on how you define democracy. At the least, though, it does mean that the process of decision-making is more robust in these schools than in former black schools, where decisions tend to be taken by the principal and rubber-stamped by the parent constituency.

As I have shown above, the socio-economic status and illiteracy of parents from primarily former black schools, prevent them from participating in the SGB decision-making processes. The current practice of “democratic” governance in former black schools therefore leads to the “othering”<sup>316</sup> and exclusion of the black parents’ voice. However, in terms of a substantive conception of democracy, these qualifiers for participation ,namely, literacy and socio-economic status, would not be a bar to participation. Instead, participation and engagement would be enabled *despite* these factors.<sup>317</sup>

In sum, parents, irrespective of their race, socio-economic class or literacy, have been awarded majority representation status on SGBs by the State. It has been stated elsewhere in this article that parents enjoy this position because they have the most at stake when it comes to the education of their children. The power parents hold in SGBs entitles them to take part in decisions that ultimately have an impact on the quality of the education provided to their children. These decisions can range from the adoption of a beneficial school policy to the choice of holding the principal and teachers to account for the delivery of a good standard of education. However, this can only occur if a substantive culture of democracy is fostered at a school. Therefore, an environment which enables such a form of democracy ultimately contributes to the realisation of quality education.

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<sup>312</sup> The violation of substantive democracy may happen in former white schools as well. However, this claim falls beyond the scope of this article and will not be addressed .

<sup>313</sup> Grant Lewis & Motala (2004) at 123-126.

<sup>314</sup> Grant Lewis & Motala (2004) at 123-126.

<sup>315</sup> Van Leeve (2016) at203.

<sup>316</sup> Grant Lewis &Motala (2004) at 121.

<sup>317</sup> My emphasis.

#### 4. CONCLUSION

The transformation of the South African public basic education system is not attainable without an acknowledgment (and overcoming) of the patterns of disadvantage that continue to plague it. In this article I have shown that primarily for black and/or poor learners a distinctive pattern of disadvantage manifests in unequal access to quality education despite a progressive rights framework entrenching the right of equal access to quality basic education for all.

Situating my analysis within Kishor Singh's UN report "Normative action for quality education", I have found that quality education encompasses more than the level of learners' academic achievement. A holistic approach to quality, as advanced by Singh, incorporates

"a minimum level of student acquisition of knowledge, values, skills and competencies; (ii) adequate school infrastructure, facilities and environment; (iii) a well-qualified [motivated and well looked after] teaching force; (iv) a school that is open to the participation of all, particularly students, their parents and the community".<sup>318</sup>

A clear pattern has emerged in my analysis of each barometer of quality: Black and /or poor learners are denied equal access to quality education in post-apartheid South Africa. I come to this conclusion for the following reasons. First, an analysis of local and international standardised assessments indicate that black and /or poor learners perform significantly worse than their white and/or more socio-economically advanced black counterparts. Secondly, many historically disadvantaged schools (especially those located in the former Bantustan territories) still suffer from inadequate infrastructure and facilities in the form of poor provision, or complete lack, of school buildings, school furniture, libraries, laboratories, textbooks and scholar transport.

Thirdly, the educator profession in South Africa faces various obstacles. To begin with, a disparity in the quality of the training of teachers from historically white and historically black HEIs seems to indicate that teachers from former white institutions receive a "better" qualification than their counterparts at former black institutions (the majority of whom go on to teach in historically black schools). Next, an inappropriate culture of teaching and learning in former black schools, emanating from an entrenched culture of opposition to the apartheid State, has transferred to the post-apartheid dispensation. Furthermore, former black schools are located in communities plagued by service delivery protests which, according to the SAHRC, has resulted in the violation of the right to education of these learners. Additionally, the morale of teachers at former black schools is low due to overcrowding in their classes, the dismal physical conditions under which some of them are forced to teach, and the failure of the State, in some instances, to remunerate these teachers.

The last barometer of quality focuses on the practice of participatory democracy in schools. In this article, I have found that in former white schools the high education

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<sup>318</sup> Singh (2012) at 7.



level and socio-economic status of the parent constituency are some of the currencies that secure participation in the decision-making processes of SGBs. However, in former black schools, the illiteracy, poverty and lack of confidence of black parents bar them from making decisions on their children's education. In the latter instance, principals and teachers tend to make decisions for these parents, resulting in a clear violation of the Schools Act and the principle of substantive participatory democracy.

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