

**Paradigm Shift: Effective Implementation and Enforcement of Laws
to Radically Accelerate the Delivery of Quality Elementary and
Further Education in South Africa: Lessons from China, Finland
and Singapore**

By

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**A thesis submitted in fulfilment of the requirements for the degree of
DOCTOR OF LAWS (LLD)**

in the

FACULTY OF MANAGEMENT AND LAW

SCHOOL OF LAW

at the

UNIVERSITY OF LIMPOPO

Promoter

Prof K. O. ODEKU

2021

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Declaration by Candidate

- (i) I, **Isaiah Mmatipe Sefoka**, declare that the research reported in this thesis, except where otherwise indicated, is my original research.
- (ii) This thesis has not been submitted for any degree program or examination at this university or any other university.
- (iii) This thesis does not contain other persons' data, pictures, or other information, except where referenced material has been used, which has been specifically indicated and acknowledged as being sourced from other specified persons.
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 - a) the words have been re-written and all general information attributed to them has been clearly referenced;
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Date:

Dedication

This thesis is dedicated to my mother Mrs. Madimetja Selinah Sefoka, whose unwavering immeasurable moral, physical and spiritual support, made it possible for me to succeed in completing this work. Bathed in her parental love and respect, I learnt the most valuable lesson, that with hard work I can fly, and let the sky be my limit. I also dedicate it to my late father, Mr. Lehwidi Aleck Sefoka. Sadly, his untimely death robbed him of the opportunity to witness his son's special achievement.

Acknowledgement

I take this opportunity to thank the glorious almighty God for giving me the strength and courage to complete this study. The completion of this thesis would not have been possible had it not been for the God; the Uncreated Creator. I also acknowledge with unfathomable gratitude the support of my academic father and compass, my promoter Prof. K.O Odeku for he consistently took pains to ensure that I see the prominence of pursuing and completing a doctoral degree; advice which has now become reality. Without you, I wouldn't have taken the decision to pursue this exalted academic career and for that, I will forever be profoundly indebted to you.

My sincere appreciation is also extended to Prof. O.S Sibanda, for his endless inspiration. I also extend my deepest gratitude to Prof. C.I Tshoose, for his support and valuable time spent editing my work. It will be so *infra dig* of me not to extend my profound gratitude to Adv. L.T Nevondwe for his foresight of my potential. Through your guidance, and continued inspiration, you taught me that humility and dedication are indispensable ingredients to success. Academic life needs patience, motivation, ambition and dedication, all of which characterise what you have been to me, and what I have learned throughout this academic process.

The Library Unit Personnel of the University of Limpopo (more in particular Ms, Cathrine Mokadi) deserve special thanks for their outstanding service and assistance. The director of the School of Law Adv. M.T Rapatsa, my HoD Adv. M.J Mangammbi and the director of the Legal Aid Clinic Mr. S.I Sikhakhane, for their incalculable support. Special thanks to my fellow classmates and colleagues Mr. Nkgolodishe Phaladi, Adv. Lesiba Mosoeu for their support, encouragement and extra effort toward assisting me. Thank you for sharing ideas together. More importantly, I am grateful to my late father Mr. Aleck Lewhidi Sefoka and my mother Mrs Madimetja Selinah Sefoka for their invaluable support, and upbringing. To my family Fancy and Ignatia, thank you for the infinite support.

I acknowledge with appreciation the financial assistance from the National Institute for the Humanities and Social Sciences (NIHSS), in collaboration with the South African Humanities Deans Association (SAHUDA) towards this research. Opinions expressed and conclusions arrived at are those of the author of this research and are not necessarily to be attributed to the NIHSS and SAHUDA.

List of Acronyms

ABET - Adult Basic Education and Training

ACHPR - African Charter on Human and Peoples' Rights

ACRWC - African Charter on the Rights and Welfare of the Child

AIDS - Acquired Immune Deficiency Syndrome

AJOL - African Journals Online

ANC - African National Congress

ANZELA - Australia and New Zealand Education Law Association

AYC - African Youth Charter

BBBEE - Broad-Based Black Economic Empowerment

BBBEEA - Broad-Based Black Economic Empowerment Act

BEA - Bantu Education Act

BEEAC - Black Economic Empowerment Advisory Council

CCITPIC - Convention Concerning Indigenous and Tribal Peoples in Independent Countries

CCSA - Children's Charter of South Africa

CDC - Centre for Disease Control

CDE - Centre for Development and Enterprise

CDE - Convention against Discrimination in Education

CED - Centre for Enterprise Development

CESCR - Committee on Economic, Social and Cultural Rights

CETC - Community Education and Training Centre

CETC - Community Education and Training Colleges

CHE - Council on Higher Education

CRC – Convention on the Rights of the Child

CRPD - Convention on the Right of Persons with Disabilities

CTVE - Convention on Technical and Vocational Education

CUT - Central University of Technology

DBE - Department of Bantu Education

DHET - Department of Higher Education and Training

DRC - Declaration on the Rights of the Child

DST - Department of Science and Technology

ECCE - Early Childhood Care and Education

ECPHR - European Convention for the Protection of Human Rights

EFA - Education For All

FE - Further Education

FET - Further Education and Training

FNBE - Finnish National Board of Education

GCE - General Certificate of Education

GEC - General Education Certificate

HIV - Human Immunodeficiency Virus

HRE - Human Rights Education

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

IDASA - Institute for Democratic Alternatives in South Africa

ILO - International Labour Organisation

ITE - Institute of Technical Education

JET – Joint Education Trust

MEC - Ministry of Education and Culture

MOE - Ministry of Education

NCCC - National Coronavirus Command Council

NCFE - National Committee on Further Education

NDP - National Development Plan

NECC - National Education Co-ordinating Committee

NICD - National Institution of Communicable Diseases

NP – National Party

NPA - National Plan of Action

NQF - National Qualifications Framework

NYDA – National Youth Development Agency

OAU - Organisation of Africa Unity

OBE - Outcomes-Based Education

OECD - Organisation for Economic Co-operation and Development

OER - Open Education Resources

PGL - Persistent Generalized Lymphadenopathy

PHEIC - Public Health Emergency of International Concern

PIRLS - Progress in International Reading Literacy Study

PISA - Programme for International Student Assessment

PSLE - Primary School Leaving Examination

QLFS - Quarterly Labour Force Survey

RDP - Reconstruction and Development Programme

SAHRC -South African Human Rights Commission

SAIVCET - South African Institute for Vocational and Continuing Education and Training

SALDRU - Southern African Labour and Development Research Unit

SAQA - South African Qualifications Authority

SAQAA - South African Qualifications Authority Act

SARS - Severe Acute Respiratory Syndrome

SASA - South African Schools Act

SCA – Supreme Court of Appeal

SDA – Skills Development Act

SETA - Sector Education Training Authorities

SGB - School-Governing Body

TIMSS - Trends in International Mathematics and Science Study

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNESCO - United Nations Educational, Scientific and Cultural Organisation

UNICEF - United Nations International Children's Emergency Fund

WHO - World Health Organization

WPPSET - White Paper for Post School Education and Training

ABSTRACT

The delivery of substandard education to the learners in South African schools has become a pressing concern and needs special attention. This is so despite the advent of democracy in 1994, which brought legislative frameworks and other measures promoting access to quality education. This study seeks to highlight the importance of a radical paradigm shift in educational approach, from a single (access) to a dual system (access and delivery) in South Africa. The study examines adequacy of access to education, by evaluating the effectiveness of delivery. The study emphasizes that delivery should be strengthened in order to develop skills and capacity. The study also accentuates the need to strengthen legislative measures and compliance, in order to improve the delivery of quality education to the learners. The domestic laws such as the Constitution of the Republic of South Africa, Skills Development Act, the South African Schools Act, Further Education and Training Act and the Continuing Education and Training Act, which all cover access and full delivery of quality education, will be examined. It is pertinent to point out that the delivery of quality education and skills development, can improve the employability of learners and graduates, wherever they find themselves. Consequently, it is fundamentally important to increase interest in strengthening the implementation of the skills development legislation and policies, to drive the necessary change from access to delivery, in order to meet the developmental needs of the country. Lessons are drawn from China, Finland and Singapore, where policies and laws are utilized for the purpose of comparative studies. The rationale for such a comparative analysis is premised on the fact that these countries have very strong educational systems, which promotes the employability of learners, and also enables learners to become self-reliant and entrepreneurs.

CHAPTER 1: OVERVIEW OF THE STUDY

1.1 Introduction

1.1.1 General

Education is a basic right and an important tool that society can utilize to drive development in all sectors, and alleviate poverty.¹ The overall view is that education is both a human right, and at the same time a tool that can be used in realising other human rights, such as the right to vote, the right to freedom of expression, and the right to have access to information. These rights can be fully comprehended and meaningfully exercised, mostly by persons who have acquired a certain minimum level of education.² According to the Committee on Economic, Social and Cultural Rights (CESCR), for instance, education is an empowerment right, through which a marginalized society, or a person, can utilize to break out of destitution, and cultivate a means of survival, which includes meaningful participation in human development.³ It has also been referred to as a vital tool for liberating and unlocking the potential of every individual.⁴

The importance of education is highlighted by the Department of Education, which views education as a tool to build the foundation of life, as it instils, builds, and restores confidence in individuals, for a brighter future.⁵ It is the pillar of a democratic country seeking to develop human capital, and provide opportunities for all.⁶ The Department of Education posits further that education does not only make people more assertive about themselves and their aptitudes, it also unlocks the doors to opportunities otherwise not available, and makes people more informed on the world around them.⁷

¹ Faranaaz Veriava, *Free to Learn*, A discussion paper on the School Fee Exemption policy, the Children's Institute, University of Cape Town, December 2005 page 1.

² See Gina Bekker, *A compilation of essential documents on the rights to food and nutrition*, Centre for Human Rights, Volume 3 of Economic and Social Rights Series, 2000.

³ Committee on Economic, Social and Cultural Rights (CESCR), United Nations Economic and Social Council, Twenty-first session, 15 November-3 December 1999, Article 13 (1) para 1.

⁴ Jody Kollapen J's judgment in *Section 27 and others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114 at para 3.

⁵ Department of Education, *Education Centers Project Report*, December 2011 page 1 para 1.

⁶ Department of Education, *Plan of Action, Improving access to free and quality basic education for all*, 14 June 2003 page 4.

⁷ Department of Education, *Education Centers Project Report* (note 5).

Education as a fundamental right was first expressed internationally in the Universal Declaration of Human Rights (UDHR) in 1948.⁸ The UDHR provides in article 26 that “everyone has the right to education and that education shall be free, at least in the elementary and fundamental stages”. The understanding of elementary and fundamental education will differ from one jurisdiction to another. In South Africa, the differences, notwithstanding at least the first fifteen years of schooling, or from grade one to nine, in the case of minor children, which includes the foundational education in the case of adults, must be accessible, and attended irrespective of the person’s financial ability.⁹

Accordingly article 26 of the UDHR, provides that “elementary education shall be compulsory”.¹⁰ In South Africa, a parent, therefore, “should cause every learner whom he or she is responsible for, to attend school from as early as the first school day of the year in which such a learner reaches the age of seven years, until the last school day of the year in which the learner reaches the age of fifteen years, or the ninth grade, whichever occurs first”.¹¹ Likewise, the Government must put measures in place such as the provision of appropriate learning materials, which include but not limited to school furniture and textbooks, in schools to ensure that the right to basic or elementary education is realised, where free and/or compulsory. Other international treaties and covenants such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Dakar Framework for Action, which followed the 1948 UDHR, also address the issue of “free” and “compulsory” education.¹²

Article 13 of ICESCR, for example, provides that the provision of elementary education will be free and compulsory for everyone, whereas the provision of secondary education, including vocational and technical schooling, will be made accessible and

⁸ See the Universal Declaration of Human Rights (UDHR), Adopted and proclaimed by General Assembly Resolution 217A (III) on 10 December 1948.

⁹ See section 3 of the South African Schools Act 84 of 1996.

¹⁰ Article 26 of the UDHR (note 8 above). Further see Klaus Dieter Beiter, *The Protection of the right to education by international law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, (2005) 1-705. According to Beiter elementary and fundamental education are synonyms for primary education. Only the method of instruction differs.

¹¹ This is in terms of section 3 (1) of the South African Schools Act 84 of 1996.

¹² Lorette Arendse, *the obligation to provide free basic education in South Africa: an international law perspective*, page 98 para 2.

progressively available to everyone, through implementation of measures such as introduction of a fee-free education.¹³ The article encourages a guaranteed and intensified elementary education, particularly for those people who are completely illiterate, or those who received some education, but could not complete their period of elementary education.¹⁴ Article 13 further extends the provision of schooling to higher education by stipulating, that the provision of a higher education will equally be made available to everyone, based on capacity by means of implementing measures such as the introduction of a fee-free educational system. Moreover, the article provides that in the process, for the sustainable educational provision, educational development will be prioritized and teaching and learning skills will constantly be developed.¹⁵ Therefore, ICESCR espouses the provisions of UDHR on the basis of educational development.

In April 2000, approximately 164 states met in Dakar, Senegal with the aim of attempting to accomplish Education for All (EFA) through a forum called the World Education Forum. The Dakar Framework for Action 2000 as it is today called, has recognised six objectives to be achieved by 2015. These objectives, as itemized in the Framework, are:

- (i) ensuring that the most deprived and underprivileged children receive the improved and all-inclusive education;
- (ii) ascertain that all underprivileged school-age learners, particularly those of ethnic minority, receive fee-free compulsory education of good quality and standard by 2015;
- (iii) ensuring the equitable provision and availability of educational amenities to all learners, and equal access to learning materials and programmes;
- (iv) realizing at least 50 per cent literacy in adult basic education, particularly for women, as well as equitable continuing education by 2015;
- (v) eradicating all forms of gender inequalities in elementary and secondary education by 2005, and to realize fairness in all educational institutions;

¹³ Article 13 (2) (a) and (b) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').

¹⁴ Article 13 (2) (a) and (b) of the ICESCR.

¹⁵ Article 13(2) (c), (d) and (e) of the ICESCR.

(vi) advancing all phases of the renowned education, and safeguarding excellence, so that profound and renowned erudition outcomes are accomplished by everyone, particularly the ability to read and write, numerical competence and essential life skills.¹⁶

It is trite to bring about how far these objectives have been achieved as at 2021. This study holds a contention that most of these objectives have been realised. For example, as demonstrated by the fact that learners in underprivileged, and or deprived schools, now receive an improved and comprehensive education, such as the Outcome Based Education, as compared to the situation around year 2000. All learners of school-age are receiving a fee-free and compulsory basic education. The study further contends that all practices of gender disparity in the provision of elementary and secondary education have been abridged if not completely abolished.

Yet the desired 50 per cent literacy in adult basic education, predominately for women, which includes on-going education, has not yet been fully realised. To corroborate this, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) provides that the adult literacy rate has dropped significantly in South Africa. It further provides that literacy for all children, youth and adults remains an unfulfilled objective and an ever-moving target.

According to UNESCO, in 2015 South Africa recorded 94.37 percent adult literacy rate.¹⁷ However, around 2017, the rate was sitting at 87.05 percent, with the rate among males estimated at 87.68 percent, females at 86.46 percent, which showed a significant decrease from percentages recorded in 2015.¹⁸ Despite this assertion, UNESCO Institute for Statistics provide that the South African literacy rates for youths and adults continued to rise.¹⁹ This meant that despite the sluggish literacy rate, there was however, an improvement and or an increase in the literacy rate.

¹⁶ Article 7 (i)-(vi) of the Dakar Framework for Action, Education for All: Meeting our Collective Commitments as adopted by the World Education Forum Dakar, Senegal, 26-28 April 2000.

¹⁷ See South Africa literacy rate available at <https://countryeconomy.com/demography/literacy-rate/south-africa>- Retrieved 11-02-2021.

¹⁸ South Africa literacy rate available at <https://countryeconomy.com/demography/literacy-rate/south-africa> - Retrieved 11-02-2021.

¹⁹ South Africa literacy rate available at <https://countryeconomy.com/demography/literacy-rate/south-africa>- Retrieved 11-02-2021.

To substantiate this contention, the institute's record that women aged between 15 and 24 were making durable improvements, however they were still few as compared to men. For example, around 2011, 87 percent of female youths had basic literacy skills, whereas males stood at 92 percent. Overall, the literacy rate between 2019 and 2021 was estimated at 95 percent largely comprising of youth.²⁰ This emphasizes the promotion of high quality education from access to delivery, through measures such as capacitating educators to bring quality education and improve the learning environment. For example, to provide learners with the requisite support, and learning materials such as textbooks and appropriate school furniture, for the effective learning process.²¹ Furthermore good infrastructure should be provided at all cost, thus to enable the learners to embark on their teaching and learning activities with ease, as soon as the academic year commences. Likewise, running water and proper sanitation must be a priority at all times, to allow for the smooth running of educational institutions, in a conducive learning environment.²²

Article 6 of the Dakar Framework for Action provides that "education is a fundamental human right and a key to sustainable development, peace and stability within and between countries, thus a requisite means for meaningful contribution in the societies and economies of the twenty-first century". In this article, the emphasis is that basic learning needs must be prioritized, thus made available urgently.²³ Based on the assertion in this article, it is significant to highlight the prominence of the learners' learning needs. It is trite that the primary chore for an educator in a class is to determine and classify the learning needs of every learner. Noessel is of the view that learners' needs epitomise the gap between, what the learners need to acquire from their learning practice, and their state and level of knowledge, abilities and enthusiasm at the time of the learning process.²⁴ This study emphasizes that it is important to identify every learners' needs, to prioritize and promote them. This is significant because every learner is unique, in that they come to the learning process with their

²⁰ South Africa literacy rate available at <https://countryeconomy.com/demography/literacy-rate/south-africa> - Retrieved 11-02-2021.

²¹ *Madzodzo and others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) para17.

²² The issue of good infrastructure, running water and proper sanitation has been an issue on concern and ventilated in the case of *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bisho, case no 504/10, which is commonly referred to as the "mud schools case".

²³ Article 6 of the Dakar Framework for Action, Education for All 2000.

²⁴ Chris Noessel, Free-range learning support. Interaction Design Institute, 2003. Available at <http://www.interactionivrea.it/theses/2002-03/c.noessel/need.htm> > retrieved 12-02-2021.

individual distinct learning approaches, knowledge, past personal learning experiences and inspiration. For example, in a learner-centered teaching and learning approach, it becomes critical for an educator to reflect on the level of acquaintance and abilities acquired by each learner preceding the learning process.²⁵ According to Minderhout, the most effective approach to get this information from the learners is by asking the learners themselves.²⁶ Minderhout asserts that in determining the readiness of the learners for learning activities, the educator should decide, before the first learning session, on how to gather and utilize the information on learner needs. The process of gathering, playing back this information often elevates the level of participation, thus increases the learning interest and experience. As such, the educator can utilize the knowledge gathered during the course of the learning process, to customize teaching and learning approaches, to enable the learners to grasp shared educational objectives.²⁷

There is a need to render and deliver quality education to every learner in South Africa, to improve and develop the educational sector. Quality education is the foundation of every child's life.²⁸ Delivery of poor education inhibits the right of learners to access quality and standard education.²⁹ It is submitted that the delivery of poor and low standard education will adversely affect the learners and undergraduates, in that it will not provide them with the necessary skills and knowledge required in the workplace, thereby rendering them less effective in discharging their duties without supervision. Poor quality and low standard of education will also not adequately equip learners and undergraduates with the essential knowledge and skills to become entrepreneurs thus start their own businesses.

The provision and delivery of good quality, affordable education, helps to skill and equip learners and undergraduates for future professional work.³⁰ The challenges relating to the effective delivery of high quality education in South Africa are

²⁵ Walter Dick, Lou Carey and James Carey, *The systematic design of instruction*, 2004, Boston: Allyn & Bacon.

²⁶ Vicky Minderhout, *Identifying Learner Needs*. Available at http://www.pcrest.com/research/fgb/3_2_6.pdf > retrieved 12-02-2021.

²⁷ Minderhout, *Identifying Learner Needs*. Available at http://www.pcrest.com/research/fgb/3_2_6.pdf > retrieved 12-02-2021.

²⁸ Education Centers Project Report (note 5) at page 1, para 2 and page 7.

²⁹ Education Centers Project Report (note 5) at page 1.

³⁰ Education Centers Project Report (note 28 above).

exacerbated by other social ills, and constraints such as; poor school infrastructure, poverty, diseases, pandemics such as Human Immunodeficiency Virus (HIV), lack of properly trained educators with adequate requisite expertise in the different fields or subjects, and so on. The Centre for Enterprise Development found that, for example, there is a serious deficiency in “accountability” on the part of educators, owing to the fact that they are not properly equipped to impart knowledge and skills, thus effectively contribute to the realization of quality education.³¹ All these constraints are stand in the way of effective realization of quality education, in that an individual learning under such conditions is unlikely to perform well. In South Africa, section 29 of the Constitution of the Republic of South Africa guarantees the right to elementary education. The relevant provision states:

Everyone has the right to elementary education, which include elementary education for adults and the right to further education, which the state must make it gradually accessible and available. It is trite to indicate that the state has an obligation to provide for this education. The section further provides everyone with the right to take delivery of education in government institutions in their languages if such practice is reasonable and practicable. This section states further that in safeguarding access, execution and the feasibility of the right to basic education, the state must reflect equity, viability and the necessity to address and restore the harm caused by the apartheid educational laws and practices.³²

Although access is one of the ways to guarantee the enjoyment of the right. This study mainly focuses on access to education, with the aim of redressing past injustices and inequalities of apartheid in the educational sector, while on the other side the delivery of quality education has consistently been compromised and or neglected.³³ Despite the success in providing access to education, the country faced the problem of poor delivery of the education, which resulted in the production of graduates with lower standard skills for the labour market and creation of jobs.³⁴

³¹ Centre for Enterprise Development, a Johannesburg-based research institute, 2015 page 23. Available at www.cde.org.za-retrived 02-09-2018.

³² Section 29 (1) (a) (b), (2) (a), (b) and (c) of the Constitution of the Republic of South Africa, 1996.

³³ Some of the cases which dealt with access to education include among others *Centre for Child Law v Minister for Basic Education Eastern Cape* [2012] 4 All SA 35 (ECG); *Adam Legoale v MEC for Education, North West, North West High Court, Mafikeng*, case no 499/11, unreported; *MEC for Education, Gauteng and Others v Governing Body of the Rivonia Primary School and Others* 2013 (6) SA 582 (CC); *Mutukane and others v Laerskool Potgietersrus* 1996 (3) SA 223 (TPD) and *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB) which are discussed in details in the next chapters.

³⁴ Kalie Pauw and Morne Oosthuizen, Graduate Unemployment in the face of skills shortage: A labour market paradox, Development Policy Research Unit, DPRU Working paper 06/114, November 2006. Further, see Lorraine Greyling, Graduate unemployment in South Africa: Perspectives from the banking sector, South African Journal of Human Resource Management, 2015 page 3.

In order to address this problem, there was a need to utilize existing laws and policies such as, the Skills Development Act³⁵ and Reconstruction and Development Program.³⁶ To improve and strengthen the delivery of quality education to learners and graduates, by providing good quality education programmes designed to produce skilled individuals who can become experts in any of their chosen fields, be well-equipped to start their own enterprises, and be capable of fully participating in productive activities. Tang argues that:

To do this effort must be on capacitating educators so that they can impart the necessary skills to learners. Educators must be equipped with the indispensable skill to shape teaching and learning in order to match the future need of learners. If educators are equipped with the required skills, those learners involved in the teaching and learning process will attain work-based skills and proficiencies desirable in the near future. This is because the quality of teaching and learning depends heavily on how much value the educational process is added to the educator.³⁷

According to Somavia, training educators well and equipping them with relevant expertise needed for current and future job opportunities, serves as a prerequisite and strategic concern for the growth and development outlooks of every cohesive country.³⁸ Legislation, policies and regulations, which include among others; the Skills Development Act 97 of 1998, the South African Schools Act 84 of 1996, Further Education and Training Act 98 of 1998, the Continuing Education and Training Act 16 of 2006, and other international instruments, valued meeting committees pronouncements and laws containing effective provisions on quality delivery, should be used to improve, and strengthen educators training programmes, to enable them to deliver quality pedagogy.

³⁵ Skills Development Act 97 of 1998.

³⁶ Reconstruction and Development Programme (RDP) 1994. This is a policy adopted by the new democratically elected government in 1994, which aimed at ensuring that the country's human resources are fully developed. This policy is also aimed at promoting knowledge and skills of the people through education.

³⁷ Keow Ngang Tang, *Critical Issues of Soft Skills Development in Teaching Professional Training: Educators' Perspectives*, (2015) page 130 para 6.

³⁸ Juan Somavia, *A Skilled Workforce for Strong, Sustainable and Balanced Growth: A G20 Training Strategy*, International Labour Office – Geneva, ILO Publications 2010 page 1 para 1.

1.2 Research Methodology

The method employed in this study is a Qualitative method commonly acceptable in legal research. This study utilized a desktop analysis of secondary materials, in particular library resources, and relied heavily on scholarly legal literature, including but not limited to; national and international instruments on delivery of quality education, works from other countries, textbooks, articles, case law, legislation guidelines, and primary information from reports by relevant departments, and or ministries of education, dealing with the right of access to education, in South Africa, China, Finland and Singapore. The landscape of the problem in this study makes it necessary to consider a historical research approach. The purpose of this historical research constituent is to trace the educational system from time in memorial and space. It is argued that inequality in education has been practiced since the colonial and apartheid era, and became common across the country. However, it must be emphasised that the historical research constituent employed in this study will purely comprise of a historic overview of the South African educational system, and not a comprehensive legal historical approach.

1.2.1 Comparative Methodology

A legal Comparative method was adopted and applied, to find solutions, particularly a legal investigation into the way forward for the implementation of the right to quality education. This study establishes the development of legal rules, the interaction between laws, and projected solutions to the existing laws, based on a comparative and extensive review of relevant scholarly legal literature, laws, statutes and national and international instruments. China, Finland and Singapore were used in the comparative study, and valuable lessons from these countries were drawn to improve and strengthen South African laws and approaches. The reason why China, Finland and Singapore were chosen for the comparison, and why useful lessons were drawn from them, is that these countries have some of the best practices, aimed at providing and delivering quality education to their learners, with lessons being introduced to the learners from the elementary level.

China was considered important for comparison purposes because of its salient features relating to skills development eco-system. In China, the enterprises (private and public) also participate in skills development pedagogies such as designing a curriculum, educators training programmes, provision of training resources and apparatus in schools, and placing learners and or participants for internships and related matters.³⁹ Moreover, the labour industry gets incentives allocated to encourage and link vocational training and the labour environment, for example, the allotment of land for training at subsidized prices.⁴⁰ Today most of the skills advancement platforms in China are decentralised, run by the local governments and community cooperatives such as enterprises. These collectives were given a platform, to participate in the decision-making, related to part of the curriculum, to be offered in schools, in accordance with the community, or local needs.⁴¹

Notable about China is that its government prioritizes the robust collaboration between the educational sector and the industrial sector, through the development of a National Vocational Qualification system. This system is a distinctive vocational examination arrangement called “categorisation examination”, which assesses and mirrors the occupational, competence-based expertise and knowledge of the learner or participant.⁴² Of importance, this examination is available to every person despite the age, and level of career. Moreover, candidates such as academics, skilled workers and graduates of vocational institutions have to participate in the “Categorisation Examination” to get a “Vocational Categorisation Certificate”, which is taken as an important prerequisite for most state authorised profession.⁴³ To date, although the source of funds on the Chinese’ vocational education comes from the government, which still plays the significant role; some of the funds are privately financed.⁴⁴

³⁹ Skill Development in India, available at https://www.kas.de/c/document_library/get_file?uuid=74834418-2293-25d4-3d30-eab638a48e0b&groupId=252038 (2015) retrieved on 08-04-2020.

⁴⁰ Skill Development in India 2015 page 37.

⁴¹ Skill Development in India 2015 page 37.

⁴² See Evaluation of National Vocational Qualification 2006.

⁴³ Zhiqun Zhao *Berufsbildung in China auf dem Weg zur Professionalität*. Bielefeld: W.Bertelsmann Verlag, 2003 page 17. See further Alexander Schnarr et al. Vocational Education and Training and the Labour Market- a comparative analysis of China and Germany, Capacity Building International, Magdeburg Germany 2008 page 13.

⁴⁴ Schnarr et al. Vocational Education and Training and the Labour Market- a comparative analysis of China and Germany, Capacity Building International, Magdeburg Germany 2008 page 19.

Finland was suitable as a comparator country because its educational system enjoys worldwide recognition for its excellence and, unlike in other countries, there are no tuition fees.⁴⁵ To this end, Finland is a country with zero illiteracy, which has invested in fee-free education from the pre-school year (at age six) to tertiary level, and accessible to everyone irrespective of factors including but not limited to social status and gender.⁴⁶ For this reason, in Finland basic or elementary education is a combined responsibility of centralised and decentralised management with limited responsibility of the private sector.⁴⁷ In Finland, education is regarded as a significant fundamental right, and the Finnish educational policies and frameworks such as the University Act⁴⁸ emphasizes equal opportunities for all, by promoting the provision of a quality fee-free education. In the institution of higher learning such as the universities, the foundations for and the terms of fee-free education are encapsulated in the University Act. Section 8 of the University Act for example provide that:

Schooling preceding degree in institution of higher learning and or schooling leading to learners' admission or entrance examination in institutions of higher learning are fee-free except if the Act provides something to the contrary. However, the provision of a fee-free education does not preclude educational institutions providing such education to offer joint and double degree programmes for which foreign higher educational institutions of charge fees for their part of the programme.⁴⁹

In Singapore, good quality educators, and school front-runners, have shaped the foundation stone of the Singaporean educational structure, and are a foremost responsible for its high performance. Singapore has established an all-inclusive system for selecting, training, remunerating and advancing or developing educators, thus creating remarkable aptitude at the point of delivering quality education.⁵⁰ For example with remuneration, the ministry of education keeps a close watch on jobs commencement remunerations, and thus fine-tunes remunerations for newly appointed educators to ensure that the teaching fraternity is appreciated and as

⁴⁵ See the Ministry of Education and Culture of Finland available at <http://www.minedu.fi/OPM/Koulutus/?lang=en>. Retrieved 10-04-2020.

⁴⁶ Sirkku Kupiainen et al. the Finnish education system and PIS, Ministry of Education Publications, Finland 2009 page 49-50. Available at <http://www.minedu.fi/OPM/Koulutus/?lang=en>. Retrieved 10-04-2020.

⁴⁷ Kupiainen et al. the Finnish education system and PIS, Ministry of Education Publications, Finland 2009 page 49-50.

⁴⁸ The University Act 558 of 2009.

⁴⁹ Section 8 (1) of the University Act 558 of 2009.

⁵⁰ See OECD, Singapore: Rapid Improvement Followed by Strong Performance, in Lessons from PISA for the United States, OECD Publishing, 2011, page 169. Available at <https://dx.doi.org/10.1787/9789264096660-8-en> retrieved 11-04-2020.

equally attractive as other fraternities or professions, for new graduates.⁵¹ Regarding educators career development, throughout Singapore, aptitude is acknowledged and supported rather than being left to fortuitous. The implication of this is that after three years of teaching, educators get evaluated on annual basis, to determine which of the three career paths (master teacher, specialist in curriculum or research, or school leader) would best suit them.⁵²

Notable about Singapore is that its government prioritizes the provision of quality education to everyone, including the school leavers who leave the formal education system too early.⁵³ This is being achieved through, among others, the transformation of the Institute of Technical Education (ITE), which is pronounced as Singapore's success story. ITE is a post-secondary education institution, funded by the government, to focus on developing vocational and technical education. Its mission includes "creating opportunities for school leavers and adult learners to acquire skills, values, including knowledge about employability and lifelong learning". Moreover, its main goal is to train skilled personnel for jobs and careers.⁵⁴ ITE has successfully created career paths for Singaporean school leavers who are less inclined towards academic professions, by offering them apprenticeship training for jobs. This is for learners who might otherwise opt to leave the formal education prematurely.⁵⁵

Subsequently, this study seeks to show that the scholars from across the world have extensively exhausted research on the right to access education, and have potential for a multi-disciplinary study. Arguably, the component of access to education has relatively developed more than the delivery part of it. Likewise, there is quite a substantial wealth of information on numerous facets of the right to access education, which include the right to access adult basic education. On the alternative perspective, this study approaches the issue of education from the delivery viewpoint. As will be

⁵¹ OECD, Singapore: Rapid Improvement Followed by Strong Performance, in Lessons from PISA for the United States 2011 page 169.

⁵² OECD, Singapore: Rapid Improvement Followed by Strong Performance, in Lessons from PISA for the United States 2011 page 170.

⁵³ Law Song Seng, Case Study on "National Policies Linking TVET with Economic Expansion: Lessons from Singapore", Paper commissioned for the Education For All (EFA) Global Monitoring Report 2012 page 7.

⁵⁴ See Song Seng, Case Study on "National Policies Linking TVET with Economic Expansion: Lessons from Singapore" Paper commissioned for the EFA Global Monitoring Report 2012 page 7.

⁵⁵ Song Seng, Case Study on "National Policies Linking TVET with Economic Expansion: Lessons from Singapore" 2012 page 7.

shown in the study, the transition from access to delivery models of thinking, on the provision of quality education is appropriate and of seminal importance, the hallmark of the Skills Development Act (SDA).

1.2.2 Research Question

The central question in this study is whether the right to education is adequately guaranteed and provided for under the South African educational laws and policies. To this end, the following sub-questions will be addressed:

- Are the existing educational laws effectively implemented to enable South Africans to have ample access and realization of the right to education?
- What are the possible and appropriate measures that can be introduced by the South African government to ensure that everyone has ample access to educational institutions and facilities for the effective realization of quality education?
- What would be the effects and benefits of realizing good quality education in South Africa?
- What are the impediments to access and realize quality education in South Africa and how to address them?
- What are the socio-economic impacts connected to poor access to education and the provision of substandard education?
- What role does international law play in the promotion and realization of quality education?
- What steps need to be taken to improve the implementation strategies of the right to education in South Africa within the context of national, regional and international human rights standards?

1.3 Background to the problem

The colonial rulers brought with them educational systems that discriminated against all blacks in their different communities in South Africa.⁵⁶ The apartheid regime used Education as a state instrument to enrich the whites.⁵⁷ Under the colonial

⁵⁶ Aslam Fataar, Access to Schooling in a Post-Apartheid South Africa: Linking Concepts to Context, *International Review of Education* 1997.

⁵⁷ Fataar, Access to Schooling in a Post-Apartheid South Africa (note 56) above.

government's apartheid policies and laws, quality education was available to White people to the exclusion of blacks.⁵⁸ Those apartheid policies and laws were deliberately designed to promote race, class, gender and ethnic divisions, thus perpetuate segregation and hatred, as opposed to providing equality and common ground for all citizenship.⁵⁹ The justification to provide Blacks with access to education was that they were in need of civilisation.

In 1855, the then Governor of the Cape, Sir George Grey, uttered the following statement in Parliament:

“If we leave the natives beyond our border ignorant barbarians, they will remain a race of troublesome marauders. We should try to make them a part of ourselves, with a common faith and common interests, useful servants, consumers of our goods, contributors to our revenue. Therefore, I propose that we make unremitting efforts to raise the natives in Christianity and civilisation, by establishing among them missions connected with industrial schools”.⁶⁰

The democratic post-apartheid government headed by the African National Congress (ANC) dismantled all forms of racial discrimination and inequalities; and introduced various new legislative frameworks and policies. Amongst those were the South African Schools Act, the White Paper on Education and Training, the Green Paper for Post-School Education and Training and the National Development Plan, which were aimed at completely eradicating apartheid education, and accelerate the implementation of post-apartheid educational laws and policies, which sought to make available, and deliver high standard education to the people. However, it would appear that enforcement of the new laws and implementation of the policies has been poorly effected, hence some people still do not have access to quality education under the current ANC government.

1.4 Statement of the research problem

Presently in South Africa the fundamental right to education is guaranteed, provided for, and promoted by the Constitution, as well as other policies and frameworks, which

⁵⁸ Fataar, Access to Schooling in a Post-Apartheid South Africa (note 56) above.

⁵⁹ Mafu Solomon Rakometsi, The Transformation of Black School education in South Africa, 1950-1994: A Historical Perspective, Faculty of Humanities, Department of History, University of Free State, Doctor of Philosophy 2008 chapter 2 page 39 para 1.

⁶⁰ Jill Adler and Yvonne Reed, Challenges of teacher development, an investigation of take-up in South Africa, African Journal of Research in Mathematics, Science and Technology Education, Taylor & Francis publishers (2002) page 19 para 1.

are aimed at protecting the fundamental right to education. Notwithstanding this, there are still ongoing challenges with providing and delivering quality, functional education to the learners in South Africa. This problem persists because there are several obstacles hindering the provision, and physical delivery of quality education in the South African educational sector, such as among others, poverty, Human Immunodeficiency Virus (HIV), poor infrastructure, poor social-economic goods and services (such as clean water and feeding schemes), and lack of adequate capacity of educators.

In sum, the problem identified is that people appear to have access to education in South Africa, only because there is access to schools, registration, teachers and free and compulsory basic, elementary, and further education, but the delivery of efficient and effective quality education is a major concern. In most cases, it is very poor hindered by under-resourcing, under-capacity or lack of healthy school environments, which are depriving learners from enjoying their fundamental right to have adequate quality education.

Consequently, this study seeks to examine the implementation of access to quality elementary and further education at all times in all learning institutions. By implementing access to quality education, the government will be promoting the spirit and purpose of the Constitution as envisaged in section 29. Such education will empower learners and graduates, and enormously contribute towards redressing past inequalities, and setbacks in the educational sector, as well as drive economic development through skills acquisition and job creation.

Useful lessons were drawn from countries such as China, Finland and Singapore were used as key reference points in the improvement, and strengthening of the aspect of delivery of quality education in the South African educational sector. These countries are renowned for having the best practices, in terms of how they provide and deliver quality education, therefore their methods, and approaches are worth emulating, and

adopting in order to deliver good quality education, thus produce skilled individuals suitable to a job market seeking to absorb productive and skilled labours.⁶¹

For example, in China, vocational education has been a success, which developed swiftly. China's skills development pedagogy has transformed most schools in China into skills-training institutions.⁶² The skills development programmes also focus on pre-employment qualities, and an active practical industrial participation, and training, for those no longer at the normal school level.⁶³ Moreover, as per the Chinese government policy directives, every learner is required to spend one year in industrial training, for the duration of their upper secondary schooling, which prepares them for workplace function and responsibilities. Ultimately, this makes their educational system a robust built-in system, encompassing theory and work based skills.

In addition, the provision of education in Finland is free of charge. This means that there are no fees payable for the attainment of education at any educational level, except for the adult education. Adult education is the only education where those involved are responsible for their education, thus expected to pay for their tuition fees. Moreover, there is also a free provision of other educational amenities such as free transport for those residing too far away from the schools' locations, textbooks and everyday meals. On the same footing, the Finnish educational system aims to provide equitable access to education for all Finnish citizens.

This implies that all citizens must be able to access education regardless of their financial abilities, geographical area and age. Niemi substantiated this assertion by alluding that, the Finnish educational system has been developed into an all-inclusive system intended to place all learners on equal footing as regards the ability to access educational opportunities.⁶⁴ This means that educational opportunities must be

⁶¹ Their practice and approach to the provision of quality education provides learners and undergraduates with skills and capacitate them to be employable and to create employment. Their laws as well promote both access and delivery of quality education to the learners and undergraduates.

⁶² Skills Development in India, 2015 page 35 available at http://www.dget.nic.in/upload/uploadfiles/files/MX-M453N_20140829_190139.pdf. Retrieved 12-07-2020.

⁶³ Skills Development in India, 2015 page 35 available at http://www.dget.nic.in/upload/uploadfiles/files/MX-M453N_20140829_190139.pdf. Retrieved 12-07-2020.

⁶⁴ Hannele Niemi, *The Finnish Educational Ecosystem: Working for Equity and High Learning Outcomes* eds Jari Multisilta, Finnish Innovations and Technologies in Schools, A Guide towards New Ecosystems of Learning 2014 Sense Publishers page 7.

available to every citizen, without any form of discrimination. Kumpulainen and Lankinen also posit that educational equality has been a robust foundation covering the Finnish educational structure from basic education and beyond into adult education.⁶⁵

Conversely, the Singaporean educational system surpasses because much of its effort centers on factors such as effective mechanism and effective processes. An effective mechanism strives for the execution of a resilient, selective mechanism for hiring educators, so that only competent personnel are deployed as educators. It is trite that for learners to attain a good quality education, such education needs to, first be imparted to the educators. Simply put the quality of learners is a by-product of the quality of educators. In line with effective mechanisms, effective processes encourage consistent educators' training and development programs, which put more emphasis on ensuring that educators get properly developed to effectively impart knowledge, by subjecting them to regular capacity building, and development programs.⁶⁶

1.5 Aims and objectives of the study

1.5.1 Aim

This study seeks to examine the extent of implementation and delivery of the right to quality education, as guaranteed in the Constitution of South Africa and various existing national, regional as well as the international instruments and its implementation in South Africa.⁶⁷ The study also seeks to draw useful guidance from other jurisdictions such as China, Finland and Singapore, to address the South African problems on the subject matter.⁶⁸ It utilized existing laws, policies and strategies in

⁶⁵ Kristiina Kumpulainen and Timo Lankinen. Striving for educational equity and excellence: Evaluation and assessment in Finnish basic education. In Hannele Niemi, Auli Toom and Arto Kallioniemi (Eds.), *Miracle of education: The principles and practices of teaching and learning in Finnish schools*, 2012, page 69-81. Rotterdam: Sense Publishers.

⁶⁶ McKinsey & Co, 2007. Available online at: http://www.mckinsey.com/App_Media/Reports/SSO/Worlds_School_Systems_Final.pdf. Retrieved 03-11-2020.

⁶⁷ An examination of the South African legal jurisprudence with specific reference to the right to education to reinforce the actual physical delivery of quality education to the learners and undergraduates in educational institutions will help realize the stated aim. See generally, *The Constitution of the Republic of South Africa, 1996*; *The South African Schools Act 84 of 1996*; *Skills Development Act 97 of 1998* and *White Paper for Post School Education and Training (2014)*.

⁶⁸ See Article 6 of the *Compulsory Education Law of the People's Republic of China (1986)* as amended, Article 2 of the *Higher Education Institution Act of Finland 63 of 2006* and section 5 of the *Skills Future Singapore Agency Act 24 of 2016* of Singapore. These laws promote both access and delivery of quality education in these countries and as a result, they can be used to reform and strengthen South African position.

China, Finland and Singapore to improve and strengthen the South African education jurisprudence.

1.5.2 Objectives

The objective of this study is to scrutinize and to look at the prevailing jurisprudence, promoting and mainstreaming quality education in South Africa. Connected to this objective is the need to assess whether the existing laws have been able to deliver the constitutionally guaranteed right to quality education or not. To this end, the strengths and weaknesses of the current legal regime promulgated to promote good quality education will be critically examined. There is a need for imminent intervention, to learn, emulate and adopt good strategies in reforming and strengthening the implementation of quality education in the South African educational sector, hence the jurisprudence from China, Finland and Singapore become essentially imperative.

1.5.3 Rationale and justification for the study

The reason for this study originates out of the constitutional right to education given to South Africans after the advent of social equality in 1994, as further explicated in legislation, policies and other frameworks promoting the right to education. The study submits that a lot has been said and written concerning access to education, whereas less has been said about how to use existing laws to enhance and improve the delivery of quality education, which will enable and make learners and graduates to acquire the necessary expertise, which will make them employable, or become self-employed, create employment and employ others. It is submitted that consideration of the quality of education in South Africa is long overdue.

1.5.4 Hypothesis

This study is based on some fundamental assumptions. The primary assumption is that socio-economic rights as encapsulated in the 1996 Constitution (such as the right to education) are normative. This means that they are values or principles considered to be binding on the society, administering and regulating acceptable conduct in that society. Moreover, it is the assumption of this study that in contrast with the domestic, regional and the international provisions of the right to education, not everyone in South Africa as provided for enjoys this right. Furthermore, it is assumed that there

are appropriate measures which government could take to efficiently realize the right to education in South Africa. Finally, the study assume that the educational laws and policies in South Africa, China, Finland and Singapore including their constitutional provisions are comparable to establish if there exist valuable lessons which South Africa could draw and adopt from this countries in an attempt to improve its educational system.

1.6 Significance of the study

The study will make the following contributions towards the body of knowledge thus: It will assist the government to improve existing delivery strategies, by ensuring ample quality and easy access compliant with salient laws, and enforcing the law where compliance is lacking. It emphasizes the use of laws to strengthen the delivery of quality education, by employing good developmental strategies and educational mechanisms, which will educate and equip learners, and undergraduates with skills that will make them be self-centred, employable and create employment.

This study will help the government and other interested party assigned with skills development and creating employment to learn the best practices in promoting this fundamental right and to make education their priority and to invest in it.

1.7 Conceptual clarifications

It is important to look at the implications of some notions used in this study, in order to avoid misapprehension thus promote common understanding. Most of the concepts in the study are derived from the Constitution, legal articles, legislation and case laws, with emphasis on the shade of meaning appropriate to the setting within this study. However, some of the concepts are founded on independent sentiments of scholars. It is also imperative to take cognizance of the fact that defining legal terms is at all times challenging and controversial. Okunniga believed that:

Nobody, including the lawyer, has offered, nobody, including the lawyer, is offering, nobody, including the lawyer, will ever be able to offer a definition of law to end all

definition. This is not advocating pessimism. It is because the nature of law makes it very pliable when it comes to the problem of definitions.⁶⁹

In view of the fact that defining most of the legal notions is debatable and will, as a result, be subject to different meaning in the context of this study, the following are some of the relevant concepts:

1.7.1 Education

It is important to first look at the derivation of the word education to understand its meaning. The word education is derived from the Latin term “*educere*” which denotes to lead forth or to come out.⁷⁰ These denotations signify that education strives to cultivate and enhance individual abilities, thus draw out the best in every single person.⁷¹ Nevertheless, there is no single meaning of the word “education”. However, different scholars have interpreted the word education in different ways. Some scholars define it as a prescribed schooling or lifetime learning while; others refer to it as an attainment of the necessary knowledge, abilities and aptitudes. Some define education as teaching and preparation of the human mind to think in a specific way or direction, to yield to anticipated changes.⁷²

According to Thompson, education refers to the act or practice of educating or being educated; structured instruction; or development of personality or intellectual powers.⁷³ Barnhart and Barnhart define education as the improvement of knowledge, proficiency, aptitude, or personal character, by schooling or learning, constant exercise or practice, study or hands-on experience.⁷⁴ Likewise, Tulloch defines education as efficient instruction or expansion of human character and conceptual

⁶⁹ See Okunniga, Transplants and Mongrels and the Law: the Nigerian Experiment (Inaugural Lecture Series 62 delivered at University of Ife, Nigeria on 17 May 1983) page 2.

⁷⁰ Narayan Karan Reddy, *Man Education and Values*, New Delhi: B.R. Publication, 1979 page 50.

⁷¹ Narayan Karan Reddy, *Man Education and Values*, New Delhi: B.R. Publication, 1979 page 50. Further, see Parvin Sinclair, *Basics in Education*, Textbook for B. Ed. Course, First Edition, National Council of Educational Research and Training Publication Division 2014 chapter 1 page 3 para 2.

⁷² Parvin Sinclair, *Basics in Education*, Textbook for B. Ed. Course, First Edition, National Council of Educational Research and Training Publication Division 2014 chapter 1 page 3.

⁷³ See Derick Thompson. *The Concise Oxford Dictionary of Current English*. Ninth edition Oxford: Caledon 1995 page 431.

⁷⁴ Clarence Barnhart and Robert Barnhart, (Editors) 1992. *The World Book Dictionary*. Volume One, A-K. Chicago: World Book, Inc page 670.

commands and abilities.⁷⁵ Hornby is in accord with the above-mentioned definitions and asserts that education is a practice of training, educating and learning, particularly in educational institutions or colleges, aimed at advancing knowledge and developing human abilities.⁷⁶ Johan and Harlan define education as a practice of teaching and learning, to improve knowledge, and further posits that the main purpose of education is to bring human beings to enlightenment, so that they know what is right and wrong.⁷⁷ For the purposes of this study, the word education is used in a much more comprehensive sense. It embraces all the above-given definitions and shades of meaning, to the inclusion of other meanings of peculiar system of education, which promotes quality education and skills development such as the process of cultivating quality knowledge, and skills to the educators to empower them to convey the same acquired education to their learners.⁷⁸

1.7.2 Basic Education

The Constitution of South Africa makes provisions for the right to access education. Of prominence is that the provisions of section 29(1)(a)⁷⁹ provides a benchmark of education namely, “basic education”, an absolute human right that every person is entitled to, which has also been emphasized by the judiciary.⁸⁰ The difficulty this study is facing regarding the definition of the phrase “basic education” is that, although the Constitution provides that “everyone have the right to basic education”, it does not delineate the phrase. Moreover, there is no legislative document in South African jurisprudence, that defines the phrase, and the judiciary has not defined it either.⁸¹ The Jomtien World Declaration on Education for All defined the phrase to mean “basic

⁷⁵ Sara Tulloch. (Ed.) 1996. Reader s Digest. Oxford Complete Word finder. Oxford: Clarendon Press.

⁷⁶ Albert Sidney Hornby, 2000. Oxford Advanced Learner=s Dictionary of Current English. Oxford: Oxford University Press page 401.

⁷⁷ Rita Johan and Johan Harlan, Education Nowadays, International Journal of Educational Science and Research (IJESR) 2014 page 53 para 2.

⁷⁸ For a further definition of the word “education”, see Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities by Mmori Benjamin Mokhaba, Philosophiae Doctor (Public Affairs) Faculty of Economics and Management Sciences, University of Pretoria, 2004 page 13.

⁷⁹ Section 29 (1) (a) of the Constitution of the Republic of South Africa provides that “Everyone has the right to basic education, including adult education”.

⁸⁰ Nkabinde J understanding and ruling on the textual formulation of section 29(1) (a) stated that “the right to basic education is an unqualified human right which may be limited only in terms of a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” For further discussion and ruling see *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 36 to 38.

⁸¹ Chiedza Simbo, Defining the term basic education in the South African Constitution: An international law approach, Law Democracy & Development Vol 16 2012 African Journals Online (AJOL) page 163. Also available at <http://dx.doi.org/10.4314/ldd.v16i1.9> retrieved 28-04-19.

learning needs”.⁸² In defining the phrase, it indicated that the attainment of basic education is the same as the attainment of “basic learning needs”. This means that the phrase “basic education” denotes “basic learning needs”. In unfolding the “basic learning needs”, the World Declaration expounded that:

The basic learning need encompasses indispensable educational instruments (such as the ability to read and write, oral expression, numeracy, and problem solving) and the foundational learning or scholastic content (such as knowledge, skills, values, and attitudes) essential for an individual to develop their full aptitudes, to make conversant resolutions and to continue with the learning process. The parameters of the basic learning need and its accomplishment realization differs from country to the other and it changes with passage of time.⁸³

For this study, the phrase “basic education” refers to the attainment of “basic learning needs”, which comprises indispensable learning resources such as school furniture, and books, which promote the basic learning content. This explanation means that the phrase is quality-oriented.

1.7.3 Further Education

Doel opined that “there is no commonly accepted definition of Further Education (FE), with the term being used to embrace provision that ranges from foundation learning for adults, to higher apprenticeships, as well as academic and vocational education for young people from age 14 onwards”.⁸⁴ Doel contends that:

The lack of common meaning does have consequential effects regarding lack of agency for educational bodies categorized FE providers, inconsistency with state policymaking processes including the allocation of educational resources to adult education. Yet, stemming an all-inclusive meaning of the phrase in a meaningful approach may be difficult. Otherwise, the FE providers categorized to form part of the FE segment are to pronounce and define the phrase in their own different way to suit their indispensable social and educational development.⁸⁵

In terms of the Further Education and Training Act,⁸⁶ the phrase “further education” refers to “all scholastic programmes leading to qualifications from levels 2 to 4 (general

⁸² World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs. Adopted by the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand (1990).

⁸³ Article 1 (1) of the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs.

⁸⁴ Martin Doel’s presentation on “defining further education” presented 15th February 2018 Jeffery Hall, UCL Institute of Education, 20 Bedford Way, London.

⁸⁵ See Martin Doel’s presentation on “defining further education” presented 15th February 2018. Also available at <http://mediacentral.ucl.ac.uk/Player/11745> retrieved 28-04 2019.

⁸⁶ Act 98 of 1998.

and further education and training qualification sub-framework) of the National Qualifications Framework as contemplated in the South African Qualifications Authority Act,⁸⁷ which levels are above general education but below higher education”.⁸⁸ For this study, the phrase “further education” refers to post-compulsory education that is different from the higher education obtainable through institutions of higher learning such as universities. This kind of education may be at any stage beyond compulsory secondary education from basic skills training to higher occupational education. Moreover, a distinction can be made between “further education and higher education”, which the latter is education offered at an advanced level than secondary school, normally offered in different educational institutions such as universities and colleges. Usually, it includes education for people over 16 years of age. Further education is primarily taught in Further Education and Training (FET) colleges, work-based learning, adult, and community learning institutions.

1.7.4 A human right

It is of paramount importance to understand the meaning of a human right, since education is a human right.⁸⁹ The United Nations (UN) defines a human right as “a right which is inherent in our state of nature and without which we cannot live as human beings”.⁹⁰ These rights belong to everyone irrespective of the individuals’ status or the association between right-holder and the person who is granting the right.⁹¹ However, Vincent posits that human right refers to the right that everyone has by virtue of them being human beings.⁹² In the same manner, Bay defines a human right as any claim that ought to morally and legally protect to ensure realization of basic needs.⁹³ Similarly, Rajawat is of the view that a human right is a right that everyone embraces against the government or other state authority, by virtue of that person being a member of a human family. Simply put, this refers to the right one has specifically for

⁸⁷ Act 58 of 1995.

⁸⁸ See section 1 of the Further Education and Training Act 98 of 1998.

⁸⁹ George Edwin Devenish “Aspects of the Right to Education in the Constitution” 1998 2 De Jure 224-225.

⁹⁰ See Mishra, Pramod, Human Rights Global Issues. Delhi: Kalpaz Publications 2000 page 4.

⁹¹ Coicaud, Jean-Marc, Doyle, Micheal, W. and Marie, Anne (eds.) The Globalization of Human Rights. New York: United Nations University Press 2003 page 25.

⁹² Raymond John Vincent, Human Rights and International Relations. Cambridge: Cambridge University Press 1986 page 12-14.

⁹³ Jens Christian Bay as quoted by Raymond John Vincent, Human Rights and International Relations. Cambridge: Cambridge University Press 1986 page 12-14.

the reason that they are human beings.⁹⁴ In the context of this study, a human right is the right everyone human being has to live with dignity, freedom and justice. The human right should always be assured, and protected by the state, without any form of discrimination or prejudice. If this right is denied, not provided, and not protected, that constitutes a human right violation.

1.7.5 Paradigm shift

The phrase “Paradigm shift” refers to “an important change that happens when the usual way of thinking about or doing something is replaced by a new and different way”.⁹⁵ In the same manner, the Cambridge advanced learner's dictionary denotation of the word “Paradigm shift” refers to a time when the usual and accepted way of doing or thinking about something changes completely.⁹⁶ For this study, paradigm shift means a shift or change from ordinary access to education, to a robust and contemporary provision and delivery of quality and good education, coupled with extensive innovative training. This means that access to education alone is not enough; it has to be followed up with delivery of good quality education, that trains the learners to acquire a high level of skills, so they become employable, create employment, be able to acquire new knowledge and improve on the existing skills and knowledge base.

1.7.6 Educational transformation

It is imperative to first look into the meaning of the word “Transformation” before defining in particular what is meant by “Educational transformation”. The word “Transformation” in an organizational context refers to “a process of a profound and radical change that orients an organization in a new direction and takes it to a complete and entirely different level of effectiveness”.⁹⁷ Following Mbembe, Mudimbe and Zeleza’s definition, transformation means “a profound and radical change which makes for a clean and complete break with the past and energises people towards

⁹⁴ Mamta Rajawat, *Burning Issues of Human Rights*. Delhi: Kalpaz Publications, 2001 page 33-47.

⁹⁵ See Merriam-Webster's Advanced Learner's English Dictionary 2008.

⁹⁶ See Cambridge Advanced Learner's Dictionary, Fourth Edition.

⁹⁷ See Business Dictionary available at <http://www.businessdictionary.com/definition/transformation.html> retrieved 02-04-2017.

new configurations, structures and processes”.⁹⁸ Therefore, educational transformation entails that there should be a positive transformation when it comes to the delivery of quality education.

“Educational transformation” refers to an optimistic process of encouraging individuals involved in schooling to be determined for change and development.⁹⁹ This study emphasizes that educational transformation is about self-transformation, encouraging growth, acquisition of skills through education and training, as well as awareness of self-growth. This means changing and deviating from the normal way of providing education, which only focuses on access, thus implement innovative ways of providing quality education through teaching the learners and graduates relevant skills and capabilities, which will adequately equip them to create employment and empower others.

1.7.7 Delivery of Quality Education

Keeping in mind the assertions of Okunniga, that “no one, inclusive of lawyers will ever be able to offer a clear definition of law to end all definitions”,¹⁰⁰ it is more complicated to provide a proper meaning of educational delivery, since there is no common consensus as to what is to be educated, or being educated, which includes the importance of being educated. According to Berg, different people have different views, for some the importance of education is connected to better job prospects, thinking critically and being creative.¹⁰¹ Above all, for one to say they are educated there must have been educational delivery to them. However, this study defines the phrase “Educational delivery” as a mode of conveying skills, knowledge and

⁹⁸ For a detailed definition of the word “transformation” see Achille Mbembe, A. On the post-colony, studies on the history of society and culture. California: University of California Press 2001; Valentin-Yves Mudimbe. On African fault lines: Meditations on alterity politics. University of KwaZulu-Natal Press 2013 and Paul Tiyambe Zeleza, Transnational education and African universities. *Journal of Higher Education in Africa / Revue de l'enseignement supérieur en Afrique* 2005. 3(1): 1–28. Further, see Felix Maringe and Ruksana Osman, Transforming the post-School Sector in South Africa: Limits of a Skills-driven agenda, *South African Journal of Higher Education (SAJHE)* 2016 page 121.

⁹⁹ Denna Hintze Yates, Steve Beyerlein, Dan Apple and Carol Holmes, the Transformation of Education: 14 *Aspec6.7ts*, *International Journal of Process Education*, 2011 page 75. The Transformation of Education learning available at <http://www.transformation-of-education.com/> retrieved 02-04-2017.

¹⁰⁰ Okunniga, *Transplants and Mongrels and the Law: the Nigerian Experiment* (Inaugural Lecture Series 62 delivered at University of Ife, Nigeria on 17 May 1983) page 2.

¹⁰¹ See Don Berg, *Building the nurturing capacity of K-12 schools*, *Teach-Kids-Attitude-1st.com*, *Schools of Conscience* 2014 page 1.

information from and by the educators to the learners. This information, knowledge and skills must not only equip the learners and graduates to be employable, but also create employment and increase job opportunities through establishment of enterprises.

1.7.8 Quality education

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

- Learners who are in good physical shape, fed, prepared to take part in the learning process and supported by those who live with them;
- Educational institutions that are harmless, defensive, promote gender equality and make available ample educational amenities and resources;
- Curricula, materials and programmes comprising applicable and necessary basic skills (such as literacy) and the acquaintance of relevant information regarding the core social aspects such as gender, health, nutrition, and HIV/AIDS prevention;
- Practices whereby educators implement child-centred teaching and learning methodologies in a manageable teaching space and educational institutions where inequalities are diminished;
- Results that incorporate the necessary knowledge, skills and assertiveness concomitant to the optimistic contribution in the society and advancing the national objectives of education.¹⁰²

The study posits that it is significant for learners to be of good health, have enough food, and receive maximum support from their parents, guardians or those who are responsible for them. This would enable learners to be physically ready to take part in the learning process, and to bring teaching and learning to fruition. Besides, it is important for the educational process to be delivered in a conducive environment fortified with adequate educational amenities, and socio-economic services. This study emphasizes that it is without a shadow of doubt that learners who are not well

¹⁰² See Defining Quality in Education, A paper presented by UNICEF at the meeting of the International Working Group on Education Florence, Italy June 2000 page 3.

nourished, and supported, cannot attain good quality education. For learners to acquire quality education they need exposure to programmes, which are all encompassing, of indispensable basic abilities for human survival. On the part of educators, this means that they need to adopt learner-centred teaching and learning approaches, which must take place in a school, well equipped with adequate school facilities, for smooth running of educational pedagogies, free from any form of segregation. This type of education has high expectation of outcomes that integrate knowledge, abilities needed for human advancement.

1.7.9 Universal access

According to Nevin universal access to education “is the ability of all people to have equivalent educational opportunities, irrespective of their social class, gender, ethnicity background or physical and mental disabilities”. Nevin emphasizes that “this encourages a variety of pedagogical approaches to accomplish the dissemination of knowledge across the diversity of social, political, cultural, economic, national and biological backgrounds”.¹⁰³ Therefore, this study submits that every learner should have access to education, and educators should be well trained to come up with innovative pedagogical approaches, designed to impart knowledge, and equip every participant in education.

1.8 Literature review

1.8.1 The contributions of the scholarly legal revisionists

Nasson and Samuel indicated that, “education can be used as a tool to maintain the existing social order and also to promote varying kinds of change or mobility”.¹⁰⁴ Nasson and Samuel also assert that, “as a question of social change, education must be seen as an important participating force, but not as an arbitrating one”.¹⁰⁵ This study indicates that education must be utilized as an instrument to bring about profound societal change in ethics and customs, and advancement of people’s lives. According

¹⁰³ See Anita Nevin, Universal Access on Prezi, also available at <https://prezi.com/dkxxlusmz9ql/universal-access/> retrieved 25 -03-2015.

¹⁰⁴ Bill Nasson and John Samuel, Education, from Poverty to Liberty: Report for the Second Carnegie Inquiry into Poverty and Development in Southern Africa, David Philip Publishers (Cape Town) 1990 page 1.

¹⁰⁵ Nasson and Samuel, Education, from Poverty to Liberty: Report for the Second Carnegie Inquiry into Poverty and Development in Southern Africa 1990 page 1.

to Nasson and Samuel, society cannot be transformed without empowering its people with education.¹⁰⁶ This study, therefore, postulates that the attainment of quality education must be encouraged to empower the people, and hence be utilized as a vital tool to transform society. It further emphasizes that educational transformation does not only mean access to education, but access coupled with the delivery of quality education to the learners and graduates.

Modisaotsile asserts that, “quality education ensures sustainable human development, which includes economic and political development systems, which are socially responsible”. Modisaotsile also opined that, “every society should use education to build and structure its future”.¹⁰⁷ This study emphasizes that it is by means of the attainment of quality education, that a society can, with passage of time, develop itself and contribute enormously to the advancement of its people. This means a society which gives its people the best education has a variety of ideas on how such a society can be organized, presently and in the future, in as far as development is concerned, by broadening their people’s chances of securing a better job, or creating jobs, and contributing to a progressive economic development.

Tomasevski is of the view that “quality education, if acquired is the starting point for every individual to understand and enjoy other fundamental rights such as the right to vote, freedom of expression, freedom of information and freedom of association and also to empower such individual to participate meaningfully in the society”.¹⁰⁸ Tomasevski posits that, “quality education contributes immensely towards the fulfillment of other socio-economic rights, and also increases the individual's chances of securing better employment, which as a result secures access to food, housing as well as health care services”.¹⁰⁹ This means that a person who attained a certain level of education has better chances of obtaining decent employment, as compared to someone who is uneducated. It is a requirement that all persons have a certain minimum level of education, before they can be considered, or deemed suitable for

¹⁰⁶ Nasson and Samuel, (note 105) page 103.

¹⁰⁷ See Brenda Matshidiso Modisaotsile, The failing standard of basic education in South Africa. Africa Institute of South Africa Policy Brief no 72, March 2012 page 1-7. Also available at <http://ai.org.za/publications/titles-published-20102011/policy-briefs-> retrieved 07-03-17.

¹⁰⁸ See Katarina Tomaševski, Human Rights Obligations in Education: The 4-A Scheme, Wolf Legal Publishers (WLP) 2006 page 47.

¹⁰⁹ Tomaševski, Human Rights Obligations in Education: The 4-A Scheme, (note 108 above).

particular jobs. When educated persons secure jobs they are able to sustain them, because they will have the right skills and qualities required when performing their duties, as opposed to those who are not well educated. However, this study seeks to demonstrate that access to education on its own is not sufficient; it should be coupled with delivery of quality education, that can yield prominent expertise and aptitudes, to empower and equip learners, as well as enable them to perform and or create jobs.

Nevondwe and Matotoka, however, opined that, “the right to education as envisaged in the 1996 Constitution can be regarded as a hybrid right for the fact that it is a socio-economic right, which compels the government to make education accessible and available to every individual”.¹¹⁰ Nevondwe and Matotoka further assert that, “educational rights are also civil and political rights because they afford people the opportunity to choose the language of their choice in schools and to establish and maintain independent institutions where applicable”.¹¹¹ The study seeks to highlight that, the right to education as contemplated in section 29 of the Constitution, is one of the seminal fundamental socio-economic rights that must be accessed, realized and enjoyed by the people, without any form of hindrance or restrictions, in order to build a progressive and developed nation.

It further shows that, in order to receive quality education, the state must utilize the promulgated laws to uphold delivery of quality education, by teaching necessary expertise, knowledge and information to learners and graduates, which will make the delivery more effective. The state must ensure effective utilization and enforcement of the promulgated laws, policies and guidelines, aimed at upholding the right to education, and regularly monitoring full compliance to them for best results. Furthermore, it would be important to establish monitoring and enforcement agencies and or bodies, tasked with reporting all progress directly to the state.

Devenish asserts that, “education is of seminal importance as far as human rights are concerned since it liberates people from the bondage of ignorance, superstition and

¹¹⁰ See Lufuno Nevondwe and Mothlatlego Matotoka, Promoting and protecting the right of access to basic education in South Africa, *The thinkers for thought leaders*, Volume 57 November 2013 page 11.

¹¹¹ Nevondwe and Matotoka, Promoting and protecting the right of access to basic education in South Africa (note 110 above).

fear”.¹¹² Devenish further opined that, “education is of cardinal importance if acquired as it enables a person to fully participate with understanding and function effectively in a particular society. It is also a basic right on which the realization of many other rights depend hence it gives people dignity and self-confidence”.¹¹³ This study seeks to highlight that, quality education empowers learners, makes them self-reliant, improves their level of understanding, and helps them realize other human rights in order to advance their living standards.

This study avers that, the right to education is simply a human right, to be extended to every individual unconditionally. This means that quality education must be accessible to every learner, irrespective of social status. Bekker is of the view that “the right to education, more in particular the right to basic education, which includes adult basic education, is not attached to the principle of progressive realization and the availability of the state’s resources, which distinguishes it from other socio-economic rights”.¹¹⁴ The judiciary has also construed the right to elementary education as immediately realizable and must be provided irrespective of the state’s budgetary allocations and be prioritised.¹¹⁵

For example, in the case of *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*¹¹⁶ the court held that:

It is pertinent to have a clear picture of the meaning of the right to basic education as encapsulated in section 29(1) (a) of the Constitution. The right as condensed in this section is immediately realizable which right is dissimilar to other socio-economic

¹¹² See George Edwin Devenish “Aspects of the Right to Education in the Constitution” 1998 2 De Jure 224-225. Also see Bukola Ruth Akinbola, The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities, African Human Rights Law Journal, Vol 10 2010 page 457-477.

¹¹³ Devenish, Aspects of the Right to Education in the Constitution (note 112 above).

¹¹⁴ See Bekker, A compilation of essential documents on the rights to food and nutrition, Centre for Human Rights, Volume 3 of Economic and Social Rights Series 2000.

¹¹⁵ Bekker, A compilation of essential documents on the rights to food and nutrition, (note 114 above). See further *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC) para 37 where the court held that It is important to understand the nature of the right to basic education under section 29(1) (a). Unlike some of the other socio-economic rights, this right is immediately realisable. Which means there is no internal limitation requiring that the right is "progressively realised" within the states' available resources subject to reasonable legislative measures. The judgement in this matter also reflected the importance of section 28 (2) of the Constitution, which asserts that "a child's best interests are of paramount importance in every matter concerning the child". For further articulation on this section see *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

¹¹⁶ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).

rights. This means that the realization of this right is not subject to the availability of state resources and as such, it must be abruptly realised.¹¹⁷

Bekker also asserts that, “other fundamental rights such as the right to vote, freedom of expression, freedom of information, freedom of association, labour rights and the right to take part in the cultural life of one’s community are connected and interwoven to the right to education”. Bekker avers that, “the enjoyment and exercise of these rights can only be meaningful in the context of a certain minimum level of education having been attained”.¹¹⁸ This means, without a certain minimum level of education, it may prove to be difficult for a person to exercise these rights, as they may not fully comprehend the nurture, purport, and implications of such a right. This effectively means, a lack of education would have a negative impact on an individual, as this ultimately reduces chances of securing lucrative employment, due to lack of skills, hence limit any meaningful contribution towards the economic development of their country.

Veriava asserts that, “the most significant requirement for the realization of quality education is to ensure that learners are intensively trained which will result in learners receiving a quality education and becoming competitive in all respects”.¹¹⁹ Veriava also added that, “the quality of education should ensure that learners can develop to their full potential and to compete on equal terms with each other for jobs and access to institutions of higher learning”.¹²⁰ Therefore, a robust training of learners and graduates will not only empower them to attain competitive skills required to help them effectively compete on equal footing with each other, for better employment opportunities, but also give them the right skills base to create employment, be self-employed as a measure to defeat destitution, and unemployment in South Africa. The study further suggests the introduction of good and sustainable training programmes for learners, designed to provide quality education, and equip them with relevant skills in a bid to make them competent, self-sufficient, employable, effectively compete for employment, and create employment.

¹¹⁷ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC) para 37.

¹¹⁸ Bekker, A compilation of essential documents on the rights to food and nutrition, Centre for Human Rights, Volume 3 of Economic and Social Rights Series 2000.

¹¹⁹ See Faranaaz Veriava, *Free to Learn*, A discussion paper on the School Fee Exemption policy, the Children’s Institute, University of Cape Town, December 2005.

¹²⁰ Veriava, *Free to Learn*, (note 112 above) page 3.

Dwane asserts that, “quality education is a bridge, which a disadvantaged and marginalised society can utilize to cross over from poverty to a better life and to uplift themselves”.¹²¹ However, Van Leeve is of the view that, “education which is of low quality and standard and fragmented by under-resourced, unsafe and unhealthy environment deprive students of exercising and enjoying their right to quality education”.¹²² This study reveals that access to education on its own, without effective delivery, in the form of robust and rigorous training programmes, may not provide learners with the necessary education tools to transform their lives to a better standard of living. Instead, it negates the learning, thus reduces the prospect of attaining the necessary expertise for empowering them to be self-sufficient, competitive and innovative in the work place. Therefore, an abrupt intrusion and effective application of the prevailing frameworks, aimed at upholding the delivery of quality education, must be executed to empower learners and graduates, equip them with the right skills to make them employable and create employment.

It is suggested that, the state must implement the training programs, and enforce compliance with the promulgated laws, such as Skills and Development Act and Further Education and Training Act, aimed at promoting abilities, and personal advancement, to help learners and graduates attain the necessary skills to perform jobs in the work place. The state can achieve this by constantly monitoring, and financing of existing skills development and training institutions, to make sure that learners and graduates are properly trained, and imparted with the necessary expertise, to make them self-sufficient, without any fiscal strains. Sustainable subsidies and patronage arrangements should also be established and advanced, used and stretched to cover universities, and colleges, for the realization of quality education.

According to the White Paper on Education and Training of 1995 “education is the cornerstone of any modern democratic society that aims to give all citizens a fair start

¹²¹ See Yoliswa Dwane an Equal Education (EE)’s head of policy, communications and research report delivered on 24 April 2012. Also available at www.groundup.org.za-retrived 09-03-2017.

¹²² See Van Leeve, Childhood social anxiety and social support-seeking: Distinctive links with perceived support from teachers, *European Journal of Psychology of Education* 2014 page 29.

in life and equal opportunities as adults”.¹²³ The CESCR asserts that, “education must be ensured, accessed and guaranteed without any discriminatory basis”.¹²⁴ The CESCR also stated that, education is a fundamental human right, that, when attained, could be utilized in the realization of other rights. It is a right that enables and endows individuals, thus can be used by a marginalised society, to revitalise themselves, defeat destitution, and obtain the means to meaningfully take part in social engagements.¹²⁵ Therefore, quality education should be the foundation of government programmes, to realize sustainable, socio-economic progression in the country, by developing learners’ skills and aptitudes.

Bengu commented about the right of access to education on blueprint policy introduced by the Department of Education that:

It is critical for this country to shape its educational system in a manner that it will serve the need and interest of the society. Such system must promote equality and diminishes discrimination in educational arena. It must have admiration to diversity, it must respect innovative teaching and learning methodologies and strive for excellence, it must be preserved and cared for by those it serves, and it must use all the resources available to it in the most effective manner possible.¹²⁶

This study asserts that, based on this background, education be upheld at all cost, and use it as an innovative tool, to provide for the interests of underprivileged community members. Undoubtedly, in South Africa, adequate legislative frameworks have been enacted, designed to accelerate the delivery of quality education, and as for that reason, it is a necessity to assess their efficacy level, in order to determine to what extent they have met the desired purposes. Some of South Africa’s frameworks and guidelines, on the right to education, are discussed below:

¹²³ See The White Paper on Education and Training, Department of Education, Parliament of the Republic of South Africa, Notice 196 of 1995, 15 March 1995.

¹²⁴ See Committee on Economic, Social and Cultural Rights (CESCR), United Nations Economic and Social Council, Twenty-first session, 15 November-3 December 1999, Article 13.

¹²⁵ See Committee on Economic, Social and Cultural Rights (CESCR) (note 124) Article 1.

¹²⁶ See Sibusiso Bengu’s comment on the White Paper on Education and Training by the Department of Education, Notice 196 of 1995, page 3, para 11.

1.8.2 Constitution and Legislation on Quality Education

1.8.2.1 The Constitution of the Republic of South Africa, 1996

With the advent of democracy in 1994, the newly elected democratic government of South Africa, under the African National Congress (ANC), adopted the 1996 Constitution. Formerly pronounced, it remains the ultimate law of the country, to this end, any commitment imposed by it must be satisfied, and any law or conduct found to be conflict with it, is invalid to the extent of its inconsistency.¹²⁷ Purposely promulgated it was aimed at developing the value of life for all the people, free the potential of every individual through the introduction, promotion and realization of the rights enshrined in the Bill of Rights, which include the right to education.¹²⁸

It provides that, “everyone has the right to basic education, including adult education; and to further education, which the state, through reasonable measures, must make progressively available and accessible”. The Constitution further provides that, “everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable”.¹²⁹ The study asserts that, the spirit and purport of this Constitution should be promoted, and protected, to empower learners and graduates, equip them with skills that will capacitate them for employment, and create own employment, to realise the objectives of the Constitution.

According to Nevondwe and Matotoka, in the case of *Juma Masjid*¹³⁰, the Court’s construal of section 29 of the Constitution is a clear indication that the right to education must be prioritized at all cost, in all the state’s monetary allocations, and to the extent that it has never been so prioritised.¹³¹ Similarly, Bekker describes the right to education as enshrined in section 29 of the Constitution as a resilient positive right,

¹²⁷ Section 2 of the Constitution of the Republic of South Africa, 1996.

¹²⁸ See the preamble of the Constitution of the Republic of South Africa, 1996.

¹²⁹ Section 29 (1) (a) and (b) of the Constitution, 1996.

¹³⁰ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).

¹³¹ Nevondwe and Matotoka, Promoting and protecting the right of access to basic education in South Africa, November 2013, page 11. See the case of *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* where the Court stated that “It is important, for the purposes of this judgment, to understand the nature of the right to ‘a basic education’ under section 29(1) (a). Unlike some of the other socio-economic rights, this right is immediately realisable.

which means that it has to be provided for, regardless of the state's budgetary imperatives. Bekker further asserts that, this right is not contingent upon the availability of resources, and as such, the resource constraints would not be relevant in shaping the content, and provision of the right to education.¹³² For this reason, Seleoane argued that, the state's commitment to provide for basic education, including adult basic education, is unconditional, and therefore its provision should not be subject to the availability of state resources.¹³³ This study submits that, any question of whether the state has resources available to cater for the effective realization of this right, belongs to a different superfluous debate, and as such, its emphasis contravenes the purported objective of the Constitution. Therefore, when interpreting this right there should not be any reference to the existence, or non-existence of the state's financial state of affairs.

1.8.2.2 South African Qualifications Authority (SAQA) Act, 1995

The South African Qualifications Authority Act (SAQAA)¹³⁴ was enacted to certify quality in education and training. This Act led to the formation of the National Qualifications Framework (NQF), with the aim of creating a cohesive national framework for learning accomplishments, and expediting access to, mobility and progress within education, training and occupational paths.¹³⁵ Section 2 of SAQAA provides for the promotion of quality education and training; to create good employment opportunities, create own enterprises, thereby contributing immensely to the personal development of every learner, and overall economic development of the country.¹³⁶ The Act led to the formation of a body called the South African Qualifications Authority (SAQA), which seeks to aid government intervention, in ensuring that those taking part in education and training activities, acquire quality education and the necessary skills. SAQA is empowered in terms of section 5 of SAQAA, to perform functions; which include among others, overseeing the development of quality education; enacting and publishing policies, strategies and

¹³² See Bekker, A compilation of essential documents on the rights to food and nutrition, Centre for Human Rights, Volume 3 of Economic and Social Rights Series 2000.

¹³³ Mandla Seleoane, The right to education: Lessons from Grootboom, Law, Democracy and Development 7 (1) (2003).

¹³⁴ Act 58 of 1995.

¹³⁵ See Section 2 of the South African Qualifications Authority Act 58 of 1995.

¹³⁶ Section 2 (d) and (e) of Act 58 of 1995.

measures, for the registration of organizations responsible for the establishment of quality education and training, and be responsible for the implementation of the NQF.¹³⁷ The Authority is liable for the realization of the objectives of the NQF, including the execution of the functions of the Authority.¹³⁸

In the premise and in pursuance of the realization of the objective of the South African Qualifications Authority Act, Adams posits that, “the assurance of quality in education is a wide notion with no single explanation that has identified the precise meaning of quality due to its complex nature”.¹³⁹ In addition, Glasser is of the view that, “the definition of quality in terms of the SAQAA should always be flexible for change to be in line with educational evolution and its continuous progress hence; quality is influenced by various factors such as culture and economy”.¹⁴⁰ According to Madani, the Education For All (EFA) Global Monitoring Report, 2005 used two ideologies in an attempt to define the meaning of educational quality. The first ideology recognised the intellectual development of learners as the central objective of all educational systems, while the second highlighted the role of education in upholding the values and attitudes of the learners, and in fostering their creative and emotional development.¹⁴¹ Madani asserts that, the 2005 report devoted its focus on the improvement of educational quality, geared to alleviating poverty. Madani concludes by alluding that, quality of education should aim at ensuring excellence in all educational aspects, particularly in the literacy, numeracy and life skills.¹⁴²

1.8.2.3 National Qualifications Framework (NQF)

It is also pertinent to note that, the major purpose of SAQA is to provide for the development and application of a NQF.¹⁴³ For a clearer understanding of the NQF,

¹³⁷ Section 5 of the South African Qualifications Authority Act 58 of 1995.

¹³⁸ Mmori Benjamin Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities*, chapter 2 page 75.

¹³⁹ Don Adams, *Defining educational quality, Improving Educational Quality*, Project Publication# 1: Biennial Report. Arlington, VA: Institute for International Research 1993.

¹⁴⁰ William Glasser, *The quality school: Managing students without coercion*. Harper and Row Publishers, Inc., 10 East 53rd Street, New York, NY 10022, 1990. Further see Rehaf A. Madan, *Analysis of Educational Quality, a Goal of Education for All Policy*, Canadian Center of Science and Education, 2019 page 101.

¹⁴¹ Madani, *Analysis of Educational Quality, a Goal of Education for All Policy* 2019 page 101.

¹⁴² Madani, *Analysis of Educational Quality, a Goal of Education for All Policy* 2019 page 101 para 3.

¹⁴³ Megan T. Louw and Leon Du Toit, *The viability of outcomes-based education (OBE) as a model for education in South Africa*. Vital (Vista Learning and Teaching) 2000 page 14.

and its concomitant objectives, it is pertinent to clarify the concept, “qualifications framework” first. According to Musker, the concept “qualifications framework” in the context of education and training, refers to “the requirements for obtaining qualifications, with outlined stipulated rules and procedures, for assessment, which may also include descriptions of standards, course credits, and course offerings and prescribe learning pathways and indicate learning providers”.¹⁴⁴ NQF aims to provide standardisation, and resultant portability of credits and qualifications, and prescribe the learning outcomes.¹⁴⁵ According to Mokhaba, South Africa adopted the NQF coupled with an Outcomes-Based Education (OBE) system, to effect educational transformation through the establishment of the SAQA, which it aims to ensure the effective change in education through the NQF.¹⁴⁶

OBE is also an important curriculum introduced under SAQA. William defines OBE as, “a process of focusing and organizing everything in an educational system around what is essential for all students to be able to do successfully at the end of their learning experiences”.¹⁴⁷ In substantiating the above assertion, William affirmed that, “this means starting with a clear picture of what is important for students to be able to do, then organizing curriculum, instruction, and assessment to make sure such learning ultimately happens”.¹⁴⁸ William asserts further that, the key objective of OBE should be to establish the settings and opportunities within the system, which empower and inspire all learners to accomplish those needed outcomes.¹⁴⁹ Mokhaba describes OBE as, a learner-centred, result-oriented approach to education, and training, based on the perception that, every learner needs to, and can accomplish their full potential.¹⁵⁰ According to the Department of Education, the critical effects of

¹⁴⁴ Paul Musker, *Outcomes-based education: theory into practice. An Introductory Guide*. Braamfontein: Nolwazi Educational. 1997 page 87. Further see Mmori Benjamin Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities*, Philosophiae Doctor (Public Affairs) Faculty of Economics and Management Sciences, University of Pretoria, 2004 chapter 2 page 69.

¹⁴⁵ Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities*, chapter 2 page 69 para 3.

¹⁴⁶ Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities*, chapter 2 page 70.

¹⁴⁷ Spady William, *Outcome-Based Education: Critical Issues and Answers*. American Association of School Administrators, Arlington, Va. 1994 page 12.

¹⁴⁸ William, *Outcome-Based Education: Critical Issues and Answers*. American Association of School Administrators, Arlington, Va. 1994 page 12.

¹⁴⁹ William, *Outcome-Based Education: Critical Issues and Answers*. American Association of School Administrators, Arlington, Va. 1994 page 13.

¹⁵⁰ Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities*, chapter 2 page 50.

OBE are proclaimed among others to be; the skills to identify and resolve problems, and make informative conclusions using analytical and creative thinking.¹⁵¹

According to William, outcomes are clear learning results, that educators want learners to exhibit at the end of a learning process. They are not principles, beliefs, attitudes, or intellectual states of mind. Instead, outcomes are what learners can do with what they what they have learned and are acquainted with. Outcomes are the tangible presentation of what learners have had exposure to, and what they know.¹⁵² This study defines outcome as, a learners' performance, which reflects learners' skills, capacity and competence, by successfully using the acquired ideas and information to bring change in the society. The study submits that, such critical and creative thinking be instilled in learners, to transform them through education, and enable them to successfully create employment opportunities, hence outcomes involve actual doing, rather than just knowing.

1.8.2.4. Skills Development Act (1998)

The Skills Development Act (SDA)¹⁵³ ensures training delivery. This Act is aimed at advancing the skills, or expertise of the South African labour force, by encouraging self-employment, and augmenting the levels of education and training mechanisms and programmes, in the labour market. The SDA aims to provide labour forces with opportunities, to attain necessary skills, and encourage employers, to use the workplace as an active learning environment.¹⁵⁴ Effective implementation of SDA assists in accelerating the delivery of quality education in workplaces, at the same time can be a platform for developing and promoting quality education, and skill, for equipping the working force, to be more competitive and productive.

However, it is pertinent to point out it is important that workplaces not be viewed as platforms for income generation only, but also places for skills development, and

¹⁵¹ See the Gauteng department of education, Guidebook 1. Assessing Performance Johannesburg: Gauteng Institute for Curriculum Development, 2001 page 17. Further, see Mokhaba, Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities, chapter 2 page 62.

¹⁵² William, Outcome-Based Education: Critical Issues and Answers. American Association of School Administrators, Arlington, Va. 1994 page 13.

¹⁵³ Act 97 of 1998 as amended.

¹⁵⁴ See Section 2 (1) (a) (iii) (b) and (c) (i) and (ii) of the Skills Development Act 97 of 1998.

acquisition of knowledge. The implication of this is that the workforce will acquire skills relevant to their job, which makes them sustain them, thereby become more productive, and contribute to the overall economy. Hence, Greyling opined that, the workforces ought to benefit from the implementation of their institution or organisation's Workplace Skills Plan (WPSP), which denotes that employees should use their work as a dynamic learning field.¹⁵⁵

Haasbroek informs that, following the promulgation of the SDA, skills development through training has now become the most powerful asset for improving individual opportunities, as well as institutional competitiveness.¹⁵⁶ Haasbroek maintains that, nowadays government and employers recognize the significant role of a skilled and well-informed labour force, in safeguarding competitive opportunities in the labour environment.¹⁵⁷ Likewise, Grawitzky asserts that, “the SDA came about as a realization of section 23 of the 1996 Constitution, which provides a framework to devise and implement national, sector and workplace strategies, to develop and improve the skills of the South African workforce”.¹⁵⁸

¹⁵⁵ Lorraine Greyling, Skills development: a strategic perspective. South African Journal of Higher Education, 2001 page 37.

¹⁵⁶ Deon Haasbroek, “National level skills development issues”. In Human Resources Management, Oxford University Press, Southern Africa 2004. Further, see Clinton Aigbavboa and Ayodeji Emmanuel Oke, Implementation of Skill Development Act in the South African construction industry, The Scientific Journal for Theory and Practice of Socio-economic Development 2016 page 55.

¹⁵⁷ Haasbroek “National level skills development issues”. In Human Resources Management, Oxford University Press, Southern Africa 2004.

¹⁵⁸ Renee Grawitzky, "Sector Education Training Authorities (SETAs) – A vehicle for the skills revolution?" Research Paper of Development Policy Research Unit, University of Cape Town 2007. Further, see Aigbavboa and Oke, Implementation of Skill Development Act in the South African construction industry, 2016 page 56. Section 23 of the Constitution provides that “(1) Everyone has the right to fair labour practices. (2) Every worker has the right— (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike. (3) Every employer has the right— (a) to form and join an employers’ organisation; and (b) to participate in the activities and programmes of an employers’ organisation. (4) Every trade union and every employers’ organisation has the right— (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1). (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)”.

1.8.2.5 Further Education and Training Act (1998)

The Further Education and Training Act¹⁵⁹ aims to transform public and private training institutions, for high-quality delivery. The main purpose of this Act is “to establish a national co-ordinated further education and training system, which encourages co-operative governance and delivers programme-based further education and training”.¹⁶⁰ The promotion of quality education is not limited to public schools, but private training institutions too, also expected to meet the required standards.

Badat is of the view that, further education and training promotes knowledge proficiency, and expertise, empowers those taking part to contribute immensely towards fiscal development, given development facilitates good initiatives, promoting social equality and social development.¹⁶¹ Similarly, Nussbaum posits that, quality further education and training closely links to the notion of self-governing citizenship, and the cultivation of humanity.¹⁶² Nussbaum further opined that, there are three essential elements, and or capacities for the cultivation of humanity, and the establishment of a national co-ordinated quality further education and training system, in terms of the Further Education and Training Act;

In the first place, this involves an analysis of personal aptitudes and beliefs. Therefore, when in the process of attaining the aptitudes one must cultivate the ability to reason logically, consisting of the assessment to evaluate how and what a person reads, writes and says in relation to consistency in their reasoning, correctness of fact and accuracy of judgement.¹⁶³ In addition, the students must be destined to understand that they must have knowledge about diverse races, genders, their cultures and sexuality.¹⁶⁴ Lastly, to appreciate the feeling of being in the position of another person either than themselves. This include the ability to appreciate the feelings, the aspirations and desires that somebody in that position might be going through.¹⁶⁵

This study emphasizes that, further education and training is the bedrock for the realization of identified goals and interests. This means that by the time the learner

¹⁵⁹ Act 98 of 1998.

¹⁶⁰ See Section 2 of the Further Education and Training Act 98 of 1998.

¹⁶¹ Saleem Badat, The challenges of transformation in higher education and training institutions in South Africa, Development Bank of Southern Africa 2010 page 16.

¹⁶² Martha Nussbaum, Education for Democratic Citizenship. Institute of Social Studies Public Lecture Series 2006, No.1. The Hague: Institute of Social Studies 2006.

¹⁶³ Nussbaum, Education for Democratic Citizenship 2006 page 5.

¹⁶⁴ Nussbaum, Education for Democratic Citizenship 2006 page 6.

¹⁶⁵ Nussbaum, Education for Democratic Citizenship 2006 page 6-7. For further discussion on the essential capacities for the cultivation of humanity, see Badat, The challenges of transformation in higher education and training institutions in South Africa, Development Bank of Southern Africa 2010 page 17.

enrols for further education and training, they would have identified their capabilities, and where their interest lies. This is education where learners can pursue their goals as informed by their fields of interest. The study stresses that further education and training must aim to impart the necessary information and proficiencies, to those taking part, in order to improve and accelerate their social development. The study further asserts that, acquisition of this education be tested and examined by the manner in which those who participated in it approach social problems, such as poverty and unemployment. It is trite to emphasize that such participants must have attained the necessary competencies and expertise, become employable, and be able to create self-employment to reduce social ills such as poverty and unemployment.

1.8.2.6. Broad-Based Black Economic Empowerment Act (2003) as amended

This Broad-Based Black Economic Empowerment Act (BBBEEA) was enacted to ensure just and equitable training free from any ethnic segregation. The main objective of this Act was to empower black people, by increasing opportunities available to them to access economic activities and skills training programmes.¹⁶⁶ It also aims to remedy the disparities set by apartheid, as race was the tool used to control access to skills. The primary focus of the BBBEEA has consequently been on race, and to a lesser extent on gender affirmation.

The Act led to the establishment of Broad-Based Black Economic Empowerment (BBBEE), as introduced by the South African government, as a practice designed to promote economic capacity among the black majority. Mparadzi and Kalula argue that, BBBEE seeks to address and remedy the economic imbalances between Black and White people, perpetuated by the apartheid policies.¹⁶⁷ Its objective is to disseminate the country's fortune across all the previously disadvantaged South African society.¹⁶⁸ Osode postulates that, the BBBEE is a process aimed at transforming the South African economy by, among others, disseminating equity holdings, to include previously marginalised South Africans, restructuring managerial structures, and

¹⁶⁶ Section 2 (c) of the Broad-Based Black Economic Empowerment Act 53 of 2003 as amended.

¹⁶⁷ Andrea Mparadzi and Evance Kalula, "Black economic empowerment in South Africa: A critical appraisal", Institute of Development and Labour Law, University of Cape Town, Monograph No. 1 2007. page 1, 7-12, 14-16, 18-20.

¹⁶⁸ Mparadzi and Kalula, (2007), "Black economic empowerment in South Africa: A critical appraisal" 2007.

ensuring full participation of the black majority in the economy, to realize economic impartiality.¹⁶⁹ The objective of this Act is the implementation of relevant provisions of this Act, such as section 2, which provides for the empowerment of communities and workers, by increasing their access to skills development and training programs and facilities.

It is without a shadow of doubt that the objective of the BBBEE is to address the economic imbalances and disparities fuelled by the colonial and apartheid strategies. With those disparities, the emphasis was largely on race other than gender, thus race determined access into skills development facilities, to be able to attain the necessary expertise. It is without hesitation that good quality education will accelerate the process of addressing the imbalance, and promotion of economic empowerment. The attainment of quality education will also assist the previously disadvantaged, to participate in caring for, and sustainably manage the distribution of economic wealth in line with the objective of the Act.¹⁷⁰

1.9 Scope and chapter layout of the study

In order to realize the aim and achieve research result, the study comprises of nine chapters. Chapter One is the introductory chapter, which lays down the foundation and setting of the study, including the purpose, aims and projected objectives. This chapter also identifies the research problem, as well as the rationale, and methodology used in conducting the study. The chapter also outlines the definitions and explains terminologies, and concepts used in this study, including scholarly insight of the legal and educational pragmatists.

Chapter Two is devoted to the historical perspective of the development of the South African educational system. This chapter analyses, and evaluates the South African educational system, from separation to inclusivity. This means a full analysis of the South African educational arena from the apartheid period to post-apartheid.

¹⁶⁹ Patrick Osode, “The New Broad-Based Economic Empowerment Act: A Critical Evaluation”, *Speculum Juris*, No. 18 No 1 2004 page 114.

¹⁷⁰ Mparadzi and Kalula, (2007), “Black economic empowerment in South Africa: A critical appraisal” 2007.

Chapter Three discusses the normative framework, aimed at realizing the right to education in the international arena, including the African Human Rights. This chapter also covers issues involving regional and international instruments, protecting the right to education.

Chapter Four outlines national laws, policies, and legislative interventions, relating to the right to education. It examines both the South African Constitution, other national legislation interventions, including the national education policies, which guarantee the right to education.

Chapter Five spells out the constitutional right, and perspective to have an education in South Africa. This chapter examines the concept of access, and the right to quality education in terms of the 1996 Constitution. This chapter also scrutinizes the responsibility to promote and implement the right to quality education in South Africa. It identifies the role of educators, and the role of learners, in improving the educational outcomes.

Chapter Six focuses on the active role played by the judiciary, in administering and enforcing the right to quality education. This chapter dissects the judicial administration, and enforcement of the right to access quality education in South Africa, and in the international arena. Here selected case laws dealing with the right and access to quality education are examined. The chapter also emphasizes the core elements of the right to education.

Chapter Seven is devoted to issues and challenges hindering the delivery of quality education in South Africa. This chapter is limited to the social ills and challenges perceived to be important, and relevant, to the study. It examines the social realities and barriers facing the educational system in South Africa.

Chapter Eight is a comparative study of China, Finland and Singapore, and discusses the lessons learnt from those countries. This chapter looks at the way these countries protect and promote the right to quality education, by examining their Constitutions. The chapter further evaluates if there could be valuable lessons to be drawn from these countries in an attempt to strengthen the South African educational approach.

Chapter Nine outlines the conclusions drawn from the whole study. It discusses reforms and recommendations, to improve the right to quality education in South Africa. Possible methodologies for escalating and strengthening access and delivery of quality education, coverage to the deprived, or underprivileged learners, mostly those staying and attending schools in remote rural areas, are espoused in this chapter. It further acknowledges the central role of the South African government, in the educational sector, and challenges brought by an inactive financial cooperation, and poor educational facilities in the educational domain. In effect, the study argues *inter alia* that, until the problems with the South African socio-economic amenities, and schools' infrastructure, are fully addressed, the delivery of quality education remains a far fetched objective to achieve.

1.10 Conclusion

This chapter identifies existing problems in the South African educational system. It lays a foundation of what constitutes education, to be educated, as well as the importance of acquiring quality functional education. The chapter also discussed the significant legislative frameworks, where the right to education stemmed from, and other important provisions, relating to the promotion of the right to education. The chapter concludes that the delivery of education under the apartheid system was predisposed by the era and events of apartheid laws of that time. For instance, the Bantu Education System, it was designed to strengthen the unification of Afrikaners. Through the National Party (NP), the then policymaking structures only served and protected the interests of the White minority, and commanded the educational policy position of the ruling party (NP) based on racial prejudice.

The moving up of the NP into power persuaded the promulgation of racially motivated legislation and policies. This was aimed at developing the general opinion that White minority were destined to lead the Black community in South Africa. The NP thought that by implementing racial discrimination initiatives riddled with separation of population groups, would create peace and harmony in South Africa. Ironically, this turned to be have the opposite effect, as the country experienced intermittent resistance to separate educational development.

This followed as an upshot of Blacks seeking the same educational and life opportunities as the other South Africans or their counterparts. In the same vein, the chapter also highlights the transition from apartheid to democracy, and the promulgation of laws aimed at eradicating the apartheid systems, to make South Africa an equal opportunity country. In this chapter, the study posits that, despite the advent of democracy and the legislative interventions, there are still some dissatisfactions in the educational arena which fact warranted scholarly deliberation on the subject matter as discussed in the chapter.

CHAPTER 2: A HISTORICAL ACCOUNT OF THE DEVELOPMENT OF THE SOUTH AFRICAN EDUCATION SYSTEM - FROM SEGREGATION TO INCLUSIVITY

2.1 Introduction

The legacy of our past is not only that of difficulty and despair, but South Africa can build on this past to get things done today.¹⁷¹ According to Slabbert, history conveys crucial experiences for the present, and also affords the greatest level of comfort for individuals who aspire to escape the present in the past.¹⁷² Slabbert posits that, doing history means constructing causal links between the historical and the contemporary insight, and as a result contrasting the two.¹⁷³ Rossouw and Carabine posited that, insight at times draws lessons from the past for direction in the future.¹⁷⁴ Davis asserts that, “any set of provisions, including socio-economic rights, cannot be analyzed outside the context of the document of which they form a part and outside the particular history in which that document is located”.¹⁷⁵ Likewise, it is important to look into the history of the South African educational system.

In this chapter the argument is that by appreciating the historical development of the educational system, and by assessing certain aspects of it, an improved account on the future of the subject matter is provided. It is significant to keep in mind this reality when ventilating contemporary developments in the educational arena. Therefore, this chapter discusses educational development from apartheid and colonial eras, by looking into the background of quality of education in South Africa, or the lack thereof.

¹⁷¹ Pravin Gordhan Budget Speech by the then Minister of Finance of the Republic of South Africa, Cape Town, 22 February 2012 available at <http://www.info.gov.za/speeches/2010/10021715051004.htm> retrieved 09-12-2019. Also see Clarence Itumeleng Tshoose Social Assistance: Legal Reforms to improve coverage and Quality of life for the poor people in South Africa, Doctor of Laws University of South Africa 2016 page 39.

¹⁷² Melodie Nöthling Slabbert ‘Memory, history and guilt in Bernhard Schlink’s Der Vorleser’ (2009) 15-2 Fundamina 154-155; Frederik van Zyl Slabbert The other side of history - An anecdotal reflection on political transition in South Africa (Johannesburg & Cape Town, Jonathan Ball Publishers, 2006) 1-175.

¹⁷³ Slabbert ‘Memory, history and guilt in Bernhard Schlink’s Der Vorleser’ (2009) 15-2 Fundamina 154-155.

¹⁷⁴ Gedeon Rossouw and Deirdre Carabine Introduction in fraud and the African renaissance (Uganda, Martyrs University Press 1999).

¹⁷⁵ Dennis Davis ‘Socio-economic rights: Do they deliver the goods’ (2008) Vol.6 International Journal of Constitutional Law 690-691.

2.2 Events and periods shaping the educational system in South Africa

South Africa gained its independence in 1994, after about three centuries of apartheid and colonialism.¹⁷⁶ The colonial era brought a devastating impact on the educational system, and the lives of South Africans.¹⁷⁷ In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,¹⁷⁸ the court explained the effect of colonialism as follows:

Racial segregation was the fundamental, penetrating and inevitable yardstick for people to engage and or to take part in all facets of life such as social, economic and political.¹⁷⁹

This study posits that, under apartheid and colonialism, race was the instrument utilized, to minimize, and limit educational opportunities for Blacks, in order to diminish chances to study beyond matric level. This means that under the apartheid system and laws, such as the Bantu Education Act, Blacks needed the bare minimal level of education, which allowed them to only occupy, and be absorbed in inferior positions.¹⁸⁰ The implications of this is that the system was designed in a way that restricted Blacks to study beyond matric, so that at no time they would end up absorbed in higher occupations as medical doctors, engineers and lawyers.

For purposes of analysing the impact of apartheid and colonialism on the South African educational system, it is prudent to highlight its origin. After the National Party won the national elections in 1948, the then South African government introduced apartheid

¹⁷⁶ John Dugard Human rights and the South African legal order (Princeton, Princeton University Press 1978) 73.

¹⁷⁷ Steven Friedman 'Apartheid still shapes us – But it is not an excuse' Business Day (17 April 2013); Neville Alexander, *An ordinary country: Issues in the transition from apartheid to democracy* (Pietermaritzburg, University of Natal Press, 2002); Chris Alden, *Apartheid's last stand: The rise and fall of the South African security state* (New York, Martin's Press 1996).

¹⁷⁸ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

¹⁷⁹ *Ex Parte Chairperson of the Constitutional Assembly* (note 4 above) para 7; see further Robert Wood Johnson 'Education: Keystone of apartheid' (1982) Vol.13 (3) *Anthropology & Education Quarterly*, African Education and Social Stratification 214-233.

¹⁸⁰ Fhulu Nekhuwevha "Transformation education: The education crisis and suggested solutions", a paper delivered to the Association for Sociology in Southern Africa in June- July 1987 at the Conference held in the Western Cape (1987) at page 15.

policies and guidelines.¹⁸¹ The apartheid policies epitomized a strict structure of enforced educational segregation, racial segregation, educational disparities and political oppression.¹⁸² During this period, educational segregation was legal. “Separate development”¹⁸³ was the main reason behind the apartheid arrangement, and it was aimed at ensuring unequal allocation of educational opportunities amongst Blacks in South Africa.¹⁸⁴ For the purposes of attaining education, there was a partition regarding the allotment of educational resources, which were divided according to four racial classes, namely, Blacks, Indians, Coloureds and Whites. Each of these racial classes governed by different legislation, had its own curriculum.¹⁸⁵ The educational inequitable laws included the Coloured Persons Act, the Indian Education Act and the Bantu Education Act, which regulated education for the South Africans of African origin, often referred to as Natives.¹⁸⁶

Natives were mostly of African origin and comprised the majority, were the most in crises, and the worst disadvantaged. The Bantu Education Act (BEA) regulated their education. The BEA had two objectives, it ended all missionary educational arrangements for Blacks, and it also legalized a special, and substandard form of education for Blacks in South Africa, which was different from the educational system provided for the White minority.¹⁸⁷ In support of these objectives, the then Minister of Bantu Education Hendrik Verwoerd in addressing the parliament said:

The natives have narrow prospects in South Africa and as such, they ought to have marginal level of education, as they would at no time be absorbed in certain occupations such as doctors, engineers and lawyers.¹⁸⁸

¹⁸¹ Nekhuwevha “Transformation education: The education crisis and suggested solutions”, a paper delivered to the Association for Sociology in Southern Africa in June- July 1987 at the Conference held in the Western Cape (1987) at 15.

¹⁸² Marius Smit Fundamentals of human rights and democracy in education-A South African perspective (2011) at page 47.

¹⁸³ Neil Robertson and Barbara Robertson, Education in South Africa, Cape Town: Delta Kappa Publishers, 1977 at page 6.

¹⁸⁴ Pam Christie, The rights to learn (1991) at page 56-57.

¹⁸⁵ Donald Frank Molteno “The historical foundations of the schooling of Black South Africans” in Peter Kallway Apartheid and education: Education of Black South Africans (1984) at page 88-89.

¹⁸⁶ Molteno, 1984 at page 88-89. The said apartheid laws include included the Coloured Persons Act 47 of 1963, the Indian Education Act 61 of 1965 and the Bantu Education Act 43 of 1953.

¹⁸⁷ Chose Ka Choeu “The right to education: An elusive quest for the youth in South Africa” (1991) 38(3) Africa Today at page 75.

¹⁸⁸ Nekhuwevha, Transformation education: The education crisis and suggested solutions (1987) at page 10 - 11.

Around 1970s while the system of apartheid was at its peak, government's expenditure in educational institutions for White learners was way more than that in educational institutions for Black learners.¹⁸⁹ Educational institutions for Blacks; had no proficient educators, no open and well-resourced classrooms, were underfunded, quite overcrowded, and black educators were underpaid.¹⁹⁰ Meantime White learners had and enjoyed their own well-resourced educational institutions, manned with well-trained and well-paid educators. White learners had their own superior curricula, whilst Blacks had inferior and substandard curricula, which made it difficult, if not almost impossible for Black learners to study beyond matric, or meet the requirements for admission into any institution of higher learning.¹⁹¹

2.2.1 Educational system under Apartheid and Colonialism

In this chapter, the study submits that the adverse impact of colonization on the South African educational system is important for the following reason: it provides a basis on which the current educational settings prevailing in South Africa can be assessed, simply put; it highlights the developments achieved since the democratic dispensation in 1994. Subsequently, it does not only encourage the South African economic and political advancement, but also the educational structure.¹⁹²

The first colonial conquest by the Dutch East India Company in mid-seventeenth century, can serve as a point of departure in tracing the origin of schooling in South Africa.¹⁹³ In 1815, the British conquered the Cape Colony. Education for the indigenous people was under the Dutch following the apartheid laws such as the Coloured Persons Education Act, the Indian Education Act and the Bantu Education Act, but more generously under the British, it was through a number of missionary

¹⁸⁹ South Africa Education- Country Studies.” Available at <http://countrystudies.us/south-africa/56.htm> (retrieved 12-04 2020).

¹⁹⁰ Mandla Mncwabe, Post-Apartheid education: Towards non-racial, unitary and democratic socialisation in the new South Africa (1993) at page 27.

¹⁹¹ Rupert Taylor “The narrow ground: Critical intellectual work on South Africa under Apartheid” (1991) 5(4) Critical Arts page 31. Available at <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/Critical%20Arts/cajv5n4/caj005004004.pdf> retrieved 12-04-2020.

¹⁹² Tshoose Social Assistance: Legal Reforms to improve coverage and Quality of life for the poor people in South Africa 2016 page 42.

¹⁹³ Aslam Fataar, Access to Schooling in a Post-Apartheid South Africa: Linking Concepts to Context, International Review of Education 1997 page 338.

establishments.¹⁹⁴ The educational system under the British missionaries intended to cultivate the British language and British culture, amongst blacks thus serve as a means and mechanism for social control.¹⁹⁵ It was not meant to equip indigenous black people with any of the requisite skills that could empower them to become employable, or create jobs; instead, it made them more dependent on their White counterparts, for job opportunities.¹⁹⁶ From that time, education for blacks continued along race, class, and geographical lines. Ordinarily, the best education went to urban White classes, whereas rural Whites (generally Afrikaners) received religious schooling for their children.¹⁹⁷ This perpetuated even after the formation of two Afrikaner sovereign states (Transvaal and the Orange Free State), in the North of South Africa, during the eighteenth century.

In 1855, the then Governor of the Cape, Sir George Grey, made the following statement in Parliament:

The black majority are hoodlums and the government must ensure that they are not totally ignored, as they will persistently be a race of troublesome looters. They must be encouraged to take part with faith and collectively by being our servants, depend on us by buying our goods and chattels and as such contribute to our revenue. Hence, I recommend the continuous establishment of missionary schools associated with industrial schools for blacks, which will assist us to raise them in Christianity.¹⁹⁸

The study emphasizes based on this assertion, the then government only wanted to bring blacks closer to the White minority, so that the blacks would perpetually remain dependent on Whites for all social amenities. This meant that blacks were to serve the Whites, and buy their necessities and goods from them. One of the approaches used was continued determination to keep blacks in missionaries, by establishing missionary schools associated with industrial schools. This led to the establishment of missionary schools aimed at providing blacks with marginal education.

Starting from that time onwards, few Africans had access to the restricted and poor education, which focused mainly on the basics, such as reading and writing connected

¹⁹⁴ Fataar, Access to Schooling in a Post-Apartheid South Africa (note 194) page 338 para 2.

¹⁹⁵ Fataar, Access to Schooling in a Post-Apartheid South Africa (note 195).

¹⁹⁶ Fataar, Access to Schooling in a Post-Apartheid South Africa (note 194) page 338 para 3.

¹⁹⁷ Fataar, Access to Schooling in a Post-Apartheid South Africa (note 197).

¹⁹⁸ Jill Adler and Yvonne Reed, Challenges of teacher development, an investigation of take-up in South Africa, African Journal of Research in Mathematics, Science and Technology Education, Taylor & Francis publishers (2002) page 19 para 1.

with industrial work.¹⁹⁹ Blacks could not access education that could equip and qualify them to occupy positions such as doctors, lawyers, engineers and accountants. Only low quality education was available, and trained them to become, among others, security guards, domestic workers, and gardeners. Other blacks received training to become priests, court interpreters, clerks and black school educators.²⁰⁰ This had a negative impact on the black community, since it restricted them from acquiring quality education, and as a result, could not choose other professions such as doctors, engineers and lawyers.²⁰¹

An educational philosophy, Christian National Education, based on the Afrikaner exclusivity, started to emerge.²⁰² It was that philosophy, which started the apartheid educational system, when the Afrikaner-dominated NP turned out as the ruling party in 1948.²⁰³ Only few Blacks attended the missionary schools, while most had no education at all.²⁰⁴ Schools conducted under British missionaries devoted their attention to basic reading, writing and industrial skills.²⁰⁵ This type of education was significant to the apartheid government, as it was mainly geared to providing Blacks with a knowledge of the Afrikaans language so that they could be easily governed, and work under their supervision. Many missionary trained Blacks became priests, court interpreters, clerks and teachers.²⁰⁶ They became the advocates of innovation in carrying “civilisation” to the indigenous and impoverished people who were illiterate. Slowly, they managed to influence them to deviate from their day-to-day traditional way of doing things, and started emulating the Afrikaner ways, abandoning their ancestral beliefs and becoming staunch Christians.²⁰⁷ This contributed to the destruction of the traditional, indigenous way of doing things, their approach to life, and alienation of Blacks from their ancestral practices.²⁰⁸

¹⁹⁹ Fataar, *Access to Schooling in a Post-Apartheid South Africa* (note 192) page 338 para 4.

²⁰⁰ Fataar, (note 200 above).

²⁰¹ Aslam Fataar, *Access to Schooling in a Post-Apartheid South Africa: Linking Concepts to Context*, *International Review of Education* 1997 page 338.

²⁰² Fataar, *Access to Schooling in a Post-Apartheid South Africa* 1997 (note 202).

²⁰³ Fataar, *Access to Schooling in a Post-Apartheid South Africa* 1997 (note 202).

²⁰⁴ Fataar, (note 202) page 338 para 3.

²⁰⁵ Fataar, (note 202) page 338 para 4.

²⁰⁶ Fataar, (note 202).

²⁰⁷ Fataar, *Access to Schooling in a Post-Apartheid South Africa* 1997 (note 202).

²⁰⁸ Fataar, (note 202) page 338-339.

While White education expanded swiftly, education for Blacks, Coloureds and Indians progressed at a very slow pace.²⁰⁹ Education for the natives was the most mistreated sector, as they did not have their own favourable educational systems, or compulsory schooling, like the Whites had, only continuing to rely on missionaries.²¹⁰ Educational arrangement under the mission schools persisted for a long time as the dominating form of schooling for Blacks. However from the 1920s, missionary schooling started to encounter crises, because of a growing demand for schooling, and missionary societies progressively were incapable to financing the schools.²¹¹ Contrary to that, there was a fee-free and compulsory elementary education for Whites, while education for Blacks was neither fee-free, nor compulsory.²¹² Worse still, there were no keen education institutions for Black educators.²¹³ This meant no higher training institutions such as colleges, or universities for the purpose of training teachers who would teach at the Blacks, Coloureds and Indian schools.²¹⁴ Secondary schooling was the highest black teacher's education, which meant that a person, who attended secondary education, or school, became eligible to teach at a black school, but not a White school. However, during the same period educators' education for Whites was available in post-matriculation institutions such as colleges or universities.²¹⁵

There existed, therefore, ethnically segregated streams of educators's training for Black and White learners, at diverse educational levels, only White teacher's education consisted of professional practice, to the exclusion of black teacher's education.²¹⁶ Even when eventually training institutions such as colleges, were set up for black teacher education, the duration of study was not the same for the two groups. For instance, there were three and four-year qualifications for White teachers, and two and three-year qualifications for black teachers.²¹⁷ The system was informed by

²⁰⁹ Fataar, (note 202) page 339 para 4.

²¹⁰ Fataar, (note 202 above).

²¹¹ Fataar, (note 202 above) para 5.

²¹² Jill Adler and Yvonne Reed, Challenges of teacher development, an investigation of take-up in South Africa (2002) page 19 para 3.

²¹³ Adler and Reed 2002 (note 213) page 19 para 4.

²¹⁴ Adler and Reed, Challenges of teacher development, an investigation of take-up in South Africa 2002 page 19.

²¹⁵ Adler and Reed 2002, (note 213). Further see Kema Irogbe, Transformation in South Africa: A Study of Education and Land, International Third World Studies Journal and Review, Volume XIV 2003 page 11.

²¹⁶ Adler and Reed, Challenges of teacher development, an investigation of take-up in South Africa 2002 (note 214 above).

²¹⁷ Jill Adler and Yvonne Reed, Challenges of teacher development, an investigation of take-up in South Africa, 2002.

apartheid laws like the Population and Registration Act,²¹⁸ which permitted racial discrimination, and allowed the apartheid government to implement, and design distinctive ways of providing education to Whites, Blacks Indians and Coloureds.²¹⁹ This legislation, and all other pieces of legislation of that time, including legislation supporting segregation and classification of racial groups, such as the Group Areas Act, were all crafted in a way that promoted separate educational development.²²⁰

During the interim, there was student unrest by the missionary (black, Indians and coloureds) students, because of the inferior school conditions, which characterised the missionary schools until the 1940s.²²¹ The unrest was a result of the dissatisfaction by Blacks, Indians and Coloureds with the inferior kind of education provided to them by the apartheid government.²²² The missionary school system as a whole recorded few successes, and as time went by, it began to collapse.²²³ The school system collapsed as students lost interest in participating in an education that did not put their interest at the forefront, but that of the apartheid government.²²⁴ This was because the apartheid government did not allow black students to study in their fields of choice, but forced them to study what the government wanted, irrespective of the learners' ability and aspiration.²²⁵

In 1953, the then government promulgated the Bantu Education Act (BEA), which contradicted people's needs of accessing quality education without any form of discrimination. The Act ensured that black children learnt only what the government wanted, and not what they desired to learn. For instance, basic education that enabled them to work in factories.²²⁶ The black children were therefore, not provided the same

²¹⁸ Population and Registration Act 30 of 1950.

²¹⁹ Mafu Solomon Rakometsi collection. Interview with Mr John Pampallis, a former teacher at Solomon Mahlangu Freedom College (SOMAFCO) and the director of centre of education policy development, Braamfontein 21 August 2008.

²²⁰ Mafu Solomon Rakometsi, *The Transformation of Black School education in South Africa, 1950-1994: A Historical Perspective*, Faculty of Humanities, Department of History, University of Free State, Doctor of Philosophy 2008 chapter 2 page 39 para 1. The segregation of racial groups was fuelled by the Group Areas Act 41 of 1950.

²²¹ Fataar, (note 33 above).

²²² Aslam Fataar, *Access to Schooling in a Post-Apartheid South Africa: Linking Concepts to Context*, *International Review of Education*, 1997.

²²³ Fataar, (note 223 above).

²²⁴ Fataar, (note 223 above).

²²⁵ Fataar, (note 223 above).

²²⁶ Fataar, (note 223 above).

school curricula as White children.²²⁷ For black children school was attended in two shifts per day, first shift in the morning, the second one in the afternoon, with each shift lasting only three hours.²²⁸ This ensured that a large number of black children received the minimum level of education without the government spending a lot on their education.²²⁹ This adversely affected black children because it restricted access to education, and resulted in poor delivery of the education. In essence, this type of education deprived black children the opportunity of receiving quality education, acquire skills and capacity in order to become self-sufficient and create employment. Limiting the duration of daily classes compromised the quality of the education. Black children spent less time on education, despite having the government dictate what to learn, as opposed to what they wanted.

The BEA was one of apartheid's legislation that entrenched inequality, racism and nepotism in the educational sector through racist laws.²³⁰ The BEA brought the educational system for all blacks under the oppressive control of the apartheid government, and as such advanced the apartheid system into black schools.²³¹ Before BEA, missionaries ran the majority of black schools with the assistance of the state.²³² However, Bantu education took away the privileges and relative independence enjoyed by the missionary schools. The Department of Bantu Education (DBE) managed the government's subsidy of black schools, which was conditional and founded on racially and segregatory curriculum. It authorised the Minister of education to suspend, reduce or withdraw financial assistance of black schools, at its discretion. Section 6 of the BEA entrusted the minister with the powers to diminish, interrupt or completely discontinue any support, financial or otherwise granted to any Bantu school.²³³ Most missionary schools for blacks opted not to promote the apartheid education system, but rather closed the schools.²³⁴ The mission schools also closed

²²⁷ Frances Baard and Barbie Schreiner, *My Spirit is not Banned*. Harare: Zimbabwe Publishing House, 1986, part 1-4. Also available at <http://www.sahistory.org.za/pages/library-resources/online%20books/baard/>, retrieved 28 March 2015.

²²⁸ Baard and Schreiner, *My Spirit Is Not Banned* part 2 2012 para 1.

²²⁹ Baard and Schreiner, *My Spirit is Not Banned* (note 228 above).

²³⁰ Klaus Dieter Beiter, *Protection of the Right to Education* (note 228) above.

²³¹ Baard and Schreiner, *My Spirit is Not Banned* (note 228) above.

²³² Klaus Dieter Beiter, *Protection of the Right to Education* (note 09). See further Baard and Schreiner, *My Spirit is Not Banned*, (note 225) Part 2, 2012 para 2.

²³³ Section 6 (2) of the Bantu Education Act 43 of 1953.

²³⁴ Baard and Schreiner, *My Spirit is Not Banned*, 2012 (note 228) Part 2 para 2.

because of students' unrest, caused by lack of school facilities, dissatisfaction with food, and or feeding schemes, poor school furniture, and overall dilapidated infrastructure in the schools, due to the lack of financial support from government.²³⁵

Apartheid regime did not only negate and withhold adequate access to education, but also deprived blacks the opportunity to learn without restrictions, and subjected them to learn under an unequal educational system, for example, having to attend school for only three hours a day unlike their White counterparts.²³⁶ What blacks strongly opposed was the huge disparities in the educational system for blacks and Whites, instead of a single public educational system for all South Africans.²³⁷ The White minority government openly professed that the Bantu educational system was deliberately introduced to make African learners hewers of wood, and drawers of water for the White society, regardless of the black learners' ability and aspirations.²³⁸ Government was reluctant to promote black learners, in that it did not allow them to learn any relevant skills, which could equip them with the capabilities to hold higher or managerial positions in the workplaces, like their White counterparts. Instead, it suppressed black learners by providing them with low quality and substandard education, that only enabled them to become factory workers, domestic helpers, gardeners and security guards, among others.

In explaining the consequences of apartheid and its legacy in South Africa, the court in *Brink v Kitshoff* alluded that:

Apartheid system segregated blacks in all facets of life. For example, they were precluded to own properties or to reside in areas that were classified White covering almost 90 percent of the South African landmass. Moreover, blacks were denied access to recognised schools and institutions of higher learning such as universities. Moreover, blacks were denied access to public facilities such as parks, libraries and shops. Instead, blacks were provided with different and sub-standard social facilities. The deep marks of this appalling programme are still visible in our society.²³⁹

²³⁵ Susan Michelle Du Rand, *From Mission School to Bantu Education: A History of Adams College*, Masters of Arts dissertation, Department of History, University of Natal, Durban, 1990 Part iii page 120 para 2.

²³⁶ Frances Baard and Barbie Schreiner, (note 225 above) Part 2 2012 para 3.

²³⁷ Frances Baard and Barbie Schreiner (note 225), further see *South Africa: overcoming apartheid building democracy*.

²³⁸ See *South Africa: overcoming apartheid building democracy*, Frances Baard and Barbie Schreiner, *My Spirit is Not Banned*, Part 2, and 2012 para 3, Kema Irogbe, *Transformation in South Africa: A Study of Education and Land and the African Research Group*, *Race to Power: The Struggle for Southern Africa* (New York: Anchor Books, 1974) page 14–15.

²³⁹ *Brink v Kitshoff No* (1996) (4) SA 197 (CC) at 217 A-C.

This study asserts that, blacks were oppressed, denied access to basic needs of life, and social facilities, to improve their well-being. During this era their White counterparts were free to own properties, including land, occupy senior and managerial positions, reside in well-resourced areas, have access to superior and well-established educational institutions. The Black majority endured grave injustice, and inequalities, with poor education, in under resourced schools. This ensured that blacks remained inferior in every aspect of life, and depended on their White counterparts for survival, the hallmark of the apartheid and colonial laws, such as the Bantu Education Act.

In 1993, the South African Interim Constitution, clause 32 stipulated the right to elementary education. The clause provides that, “every person shall have the right (a) to basic education and equal access to educational institutions; (b) to instruction in the language of his or her choice where this is reasonably practicable; and (c) to establish, where practicable, educational institutions based on a common culture, language or religion provided that there shall be no discrimination on the ground of race”.²⁴⁰ The provisions of the interim Constitution set out to realize an educational system that is free from any form of discrimination, to provide every learner with access to elementary education, including educational institutions, in order to acquire knowledge, improve their capacity, and equip them with skills.

2.2.2 Education under Democracy

After the 1994 transition to democracy, a transformation of systems such as the social welfare, and educational system took place in South Africa.²⁴¹ The central objective of this transition was to eliminate all forms of racial segregation, promulgate good policies and programmes, and deliver quality social services to all South Africans.²⁴² In the educational arena, the key objectives of educational policies, and programmes, were to redress the past imbalances, such as educational segregation between blacks and Whites, perpetrated by apartheid and colonialism, to develop and promote equity, and

²⁴⁰ Chapter 1, clause 32 of the interim Constitution of the Republic of South African 1993 as amended in 1994.

²⁴¹ James Ferguson ‘Formalities of poverty: Thinking about social assistance in neoliberal South Africa’ (2007) Vol.50 (2) African Studies Review 77.

²⁴² Geoffrey Schneider ‘Neoliberalism and economic justice in South Africa: Revisiting the debate on economic apartheid’ (2003) Vol.61 (1) Review of Social Economy 24.

provide quality education.²⁴³ An interim Constitution guided the transition to democracy, which led to promulgation of the final Constitution. The final Constitution ensured that everyone in South Africa had equal protection, inclusive of legal benefits, and equality before the law.²⁴⁴ It is therefore imperative to outline the laws, policies, programmes and approaches, adopted by the first constitutionally elected government, regarding the provision of education in South Africa.

In perpetuation of the objectives of the autonomous government, some appreciation in promoting the right to education were adopted from the pre-democratic government policies and committee documents, such as the Freedom Charter, and the National Education Co-ordinating Committee (NECC), because of their relevance. These instruments highlighted the significance of having a fee-free, compulsory and equal education in South Africa. The instruments were relevant as they promoted the provision of equal, free and compulsory education in line with the 1996 Constitution. Therefore, for this study, it is important to pinpoint what these instruments provide, in relation to the Constitution, and relevant to the study.

In 1955, the Freedom Charter recognized the right of access to elementary education.²⁴⁵ The African National Congress (ANC)'s Freedom Charter (adopted from the Congress of the People) stipulates that, "the doors of learning shall be opened to all. The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace. Education shall be free, compulsory, universal and equal for all children".²⁴⁶ In 1989, the NECC adopted a declaration pronouncing that, "education is a basic human right. Schooling should be free and compulsory for all children".²⁴⁷ The ANC Freedom Charter, and the NECC declaration, advocated for the provision of free and compulsory education for all children, wherein financial incapacity should not hinder learners to achieve their educational wishes and aspiration. They also advocated for an equal education for everyone regardless of race, colour or background. This type of all-inclusive education not only instils confidence in learners, but also equips them with the relevant skills,

²⁴³ Among other provisions is section 29 (2) (c) of the Constitution of the Republic of South Africa, 1996.

²⁴⁴ See section 9 (1) and (2) of the Constitution.

²⁴⁵ The African National Congress Freedom Charter 1955.

²⁴⁶ The African National Congress Freedom Charter (note 246).

²⁴⁷ See National Education Co-ordinating Committee 1989.

which make them more competent and productive, in their respective chosen fields of work.

The 1996 Constitution also espoused the right to education. It affords everyone the right to elementary education, which includes adult elementary education. It also affords everyone the right to further education, makes it necessary for the state to make further education accessible, and available. In pursuance of the provision of the right to elementary education, and where feasible, the Constitution affords every person the right to receive basic education in their language of choice, in public schools. In ensuring actual access, execution and fulfilment of this right, the state is obligated to consider all other educational possibilities, including one standard educational institution. In doing so, the state must consider fairness, feasibility, and the need to redress the past inequalities caused by the apartheid segregative laws and practices.²⁴⁸

Despite the right to education for all as enshrined in the democratic Constitution of 1996, the government is still struggling to deliver adequately quality education to all.²⁴⁹ This is because, the existing laws and policies such as, the Skills Development Act, Further Education and Training Act, the Continuing Education and Training Act, the Green Paper on Further Education and Training of 1998, and the Green Paper for Post-School Education and Training of 2012, aimed at accelerating the delivery, and providing quality education, are being poorly implemented. The implementation of these laws has been proven to be very poor and needs to be strengthened, to enable learners and graduates to acquire relevant and competitive skills, thus become employable, able to work with minimal supervision, or no supervision at all, become entrepreneurs, and employers of labour themselves. Poor implementation of these laws and policies derives from the absence of a forum, or body tasked with the responsibility of enforcing these laws. Therefore, it is imperative to establish an independent body, tasked with the responsibility to ensure that all the educational laws and policies are enforced, and that the body regularly reports to the government on compliance and progress. This will contribute to a reduction of unskilled labour,

²⁴⁸ Section 29 (1) (a) and (b); (2) (a), (b) and (c) of the Constitution of the Republic of South Africa, 1996.

²⁴⁹ The South African Human Rights Commission 3rd Economic and Social Rights Report 1998-1999, Chapter 3 page 79 para 1.

increase the numbers and improve the quality of skilled workers required by industries, and other sectors, thereby contributing to the overall development and growth of the economy.

In 1995, the Department of Education introduced a blueprint policy called the White Paper on Education and Training, which provides guidelines on how the South African educational system must be organised, and delivered to all the people of South Africa.²⁵⁰ The White Paper provides that:

Education and training remains the fundamental human right. The state is compelled to develop and to safeguard these rights in order to afford each person a chance to advance their abilities and to have a positive impact into the society without discrimination on the basis of age, gender, class or race.²⁵¹ It further affords parents and caregivers an absolute right to choose the best education for their children or those they are responsible for, particularly those of school going age. Parents and caregivers are accountable for their children's education and the education of those they are responsible for and they have the right to be consulted by the state regarding educational issues including the form that the educational system should take and its governance.²⁵²

The then Minister of Education, Sibusiso Bengu remarked on the preamble of the policy that: It is indispensable for South Africa to form an educational system that the people shall recognise, as it serves their interest and desires. Such an educational system must be fair and impartial, diversified, respect teaching and learning, and do its utmost best to achieve academic excellence. The people it serves must care for it, and as such own it. Finally, that all the resources attached to the provision of this educational system be used as effectively as possible.²⁵³

This means, as a country, there is need to have education and training of high quality standard, which equips every learner with the requisite knowledge and skills, without any form of discrimination. This study emphasizes the significance of prioritising education and training, and posits that, a national forum be established to foster effective enforcement of laws and policies, aimed at reconstruction and development of education, and training. This study asserts that, quality education be identified and

²⁵⁰ The White Paper on Education and Training by the Department of Education, Notice 196 of 1995.

²⁵¹ The White Paper on Education and Training 1995 Chapter 4 page 21 para 1 and 2.

²⁵² The White Paper on Education and Training 1995 Chapter 4 page 21 para 3.

²⁵³ The White Paper on Education and Training by the Department of Education, Notice 196 of 1995 page 3 para 11.

used as a value added principle, to drive the national policies responsible for reconstruction and development of education and training.

In 1996, the Constitution explicitly guaranteed the right to education, and mandated the state to provide basic essential services, such as building classrooms, electrifying schools, provide water, and stationery to realize the right to education.²⁵⁴ Inadequate supply of educational infrastructure, and resources, has been a major impediment to the enjoyment and realization of the right to education, as enshrined in the South African Constitution.

In the case of *Section 27 v Minister of Education*²⁵⁵, an urgent application brought to the court sought relief following failure by the Department of Basic education, to provide textbooks in various schools in Limpopo Province. Children in the affected schools spent some months without textbooks. Section 27 sought a declaratory order to compel the Department of Basic education to deliver the books in question urgently. The court held that “failure by the Department of basic education to provide such books was a violation of the right to basic education, equality and dignity”.²⁵⁶ The court emphasized that it is clear that, when there is violation of a basic right, the relief sought must be effective, and meaningful, and in realising this, the court must act in both the spirit of the Constitution, as well as ensure that the rights of the vindicated, and affected, are given appropriate remedies.²⁵⁷ The court further pointed out that, “quality education is critical in both freeing and unlocking the potential of each person and it also emphasised that textbooks are an essential component of quality teaching and learning”.²⁵⁸

Similarly, in the case of *Madzodzo and Others v Minister of Basic Education and Others*²⁵⁹, the court compelled the Eastern Cape Provincial and the National Departments of Education, to deliver school furniture to schools across the Eastern Cape Province, following an application brought against the two departments. In this

²⁵⁴ Section 29 of the Constitution of the Republic of South Africa, 1996.

²⁵⁵ *Section 27 v Minister of Education* 2013 2 SA 40 (GNP).

²⁵⁶ *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 32.

²⁵⁷ *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 35.

²⁵⁸ *Section 27 v Minister of Education* (note 256 above) para 22.

²⁵⁹ *Madzodzo and others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

case, the applicants, Madzodzo and others were parents whose children were attending public schools across the Eastern Cape Province. Initially the application brought before court involved three public schools, and the children attending in those schools. However, other parents eventually joined the proceedings, and the relief sought was ultimately in respect of the whole Province. The Eastern Cape provincial and the National departments of education had failed to deliver school furniture to some schools across the province resulting in the applicants bringing an application before court compelling the departments to deliver such school furniture.

The two departments of education argued that, the procurement and allocation of salient resources, such as furniture, would only take place after the completion of the audit of furniture shortages across the Province. The court rejected the argument and emphasised that, “school furniture is an integral element of the right to quality elementary education as stipulated in section 29 (1) (a) of the Constitution, and that the state is obligated to take realistic processes to realize the right abruptly”.²⁶⁰ The court held that “the two departments were in breach of the learners’ constitutional right as provided for in section 29 of the Constitution, by failing to provide adequate, age-and-grade-appropriate furniture that would enable each learner to have his or her own reading and writing space thereby compromising the right to quality education”.²⁶¹

In light of *Section 27* and *Madzodzo* case,²⁶² this study asserts that, courts in their pronouncements also emphasized the prominence of realizing the right to education. The courts also pronounced that, educational amenities, such as school furniture, books and good infrastructures were essential elements in realizing quality education, and therefore must be available. This study posits that, a clear inference can be drawn that, the right to quality education does not merely mean access, but access coupled with ample educational amenities, such as good school infrastructure, books and furniture, to create a pleasant teaching and learning environment, and to meet the needs of learners.

²⁶⁰ *Madzodzo and others v Minister of Basic Education and Others* (note 259 above) para 17.

²⁶¹ *Madzodzo and others v Minister of Basic Education and Others* (note 260 above). See further Lucy Jamieson (Children’s Institute, University of Cape Town), Nikki Stein (Section 27), and Samantha Waterhouse (Community Law Centre, University of the Western Cape), *South African Child Gauge 2014*, part one: Children and law reform page 15.

²⁶² *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) and *Madzodzo and others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

In 2003, the government, with the intention of achieving improved “access to free and quality basic education” to all South Africans, adopted the National Plan of Action on education. It declared that “it is well on the way to attaining the provision of basic education that is compulsory for all children of school-going age, that is of good quality and in which financial capacity is not a barrier for any child before 2015”.²⁶³ This plan of action sought to achieve the provision and development of access and delivery of free elementary and compulsory quality education, to enable learners to acquire the required skills. It is clear that access and or the provision of compulsory elementary education is well attained and or realized hence every learner attends school free of charge. However, what still remains as a setback is the low quality of the education and standard, which renders learners incompetent, due to the fact that there is a lack of the resources necessary to deliver quality education, learners rely on their counterparts for job opportunities yet they had access to education. There is a need to improve and strengthen the provision of quality education to learners and graduates, in order to empower and equip them with relevant skills, which make them to be employable and be able to create own employment.

In 2010, the National Planning Commission published the National Development Plan (NDP) 2030,²⁶⁴ which provides that:

The provision of education, training and innovation remains South Africa’s long-term improvement goal. They are the bedrock of equal society and the primary components for poverty alleviation and the reduction of social inequalities. Education enable people to express their character, be responsible for their day-to-day lives, raise a nourished family, and develop their society by playing a pivotal role in the governance and social activities of their communities.²⁶⁵

According to the NDP, “education, training and innovation are not the solution to all problems, but society’s ability to solve problems, develop competitively, eliminate poverty and reduce inequality is severely hampered without them”. The NDP further affirms that, “the quality of schooling system impacts significantly on further education, college, higher education and society’s ability to innovate”.²⁶⁶

²⁶³ Plan of Action: Improving access to free and quality basic education for all (2003) para 6.

²⁶⁴ The National Development Plan vision for 2030 (11 November 2011).

²⁶⁵ See the National Development Plan vision for 2030, (11 November 2011) Chapter 9 page 261 para 1.

²⁶⁶ See the National Development Plan (note 265), Chapter 9 page 262 para 1.

The NDP shows that, the provision and access to quality education, particularly higher education, drives the skills and knowledge system, which links to the development and growth of the economy. It also shows that, the training institutions like universities and colleges, are key in developing and improving the society, in that they train and educate the people to acquire higher level skills thus become employable, create self-employment, produce new innovative ideas, and improve knowledge. The NDP seeks to achieve the establishment of an innovative society, well educated and trained, to drive economic change and improvement.

While years of apartheid left substantial imbalances in education, and the entire educational arena, lately, the autonomous government aggravated the problem by employing and deploying teachers with capacity challenges, to deliver quality education to learners.²⁶⁷ This is having a regressive impact on teaching and learning, and the learners are most affected.²⁶⁸ The above existing pieces of legislation, policies and instruments play a significant role as the central driving force for the educational development programmes and or strategies, by improving the provision of quality education. This is being effected by adopting and employing some education, training and innovation strategies from other countries, to assist in redressing the past educational inequalities, by reforming and transforming the educational sector. However, failure to employ good quality education, training and innovation strategies hinders development, and as a result fails to eradicate poverty, thereby defeating the objectives of the NDP.²⁶⁹ Furthermore, the slow pace of implementation and enforcement of laws, policies and instruments aiming to promote the provision of quality education, have become obstacles yet to be overcome. Consequently, this aggravates unemployment, exacerbates poverty levels, hunger and starvation among South Africans.

²⁶⁷ Bekisizwe Ndimande, School choice and inequalities in post-apartheid South Africa. *Global Education Review*, 3 (2) (2016) 33-49. Further see Pam Christie and Colin Collins, (1984). *Bantu Education: Apartheid ideology and labour reproduction 2015*, Taylor & Francis Ltd 59-75. In Peter Kallaway (Ed.), *Apartheid and education: The education of black South Africans* (pp. 160-183). Johannesburg, South Africa: Ravan Press.

²⁶⁸ See Ndimande, School choice and inequalities in post-apartheid South Africa. *Global Education Review*, 3 (2) (2016) 33-49.

²⁶⁹ One of the objectives of the NDP is to improve education, training and innovation as they are the central components to South Africa's long term development and they are the core elements in eliminating poverty and reducing inequality and they are the foundations of an equal society. See NDP (note 266 and 267 above).

2.3 Conclusion

In this chapter, the study submits that, during the colonial period, the educational inequality was not considered wrong, particularly by the White minority. The provision of education of low quality and standard, to blacks was permitted and acceptable as a legitimate practice, hence, the laws of that time promoted the educational segregation.²⁷⁰ Consequently, perpetrators were not held accountable, there was no law and or regulations prohibiting educational segregation, instead the laws and customs of that time promoted segregation. For this reason, it will be an understatement to say that the White minority acted with impunity, educational segregation was a normal. However, after the advent of democracy in 1994, various progressive developments towards the eradication of apartheid, colonialism, educational segregation, as well as the development of quality education, occurred through promulgation of laws and policies in South Africa. Various international human rights instruments promoting equity and the provision of quality education also supported those laws and policies.

Moreover, there has been a judicial intervention aimed at interpreting the meaning and application of the right to education. Through their pronouncements, the courts emphasized the importance of having educational amenities and resources, for the purposes of bringing the right to education to fruition. This means that the provisions of social and educational amenities, such as textbooks, school furniture, and other infrastructural necessities, are a priority, to promote educational equity and denounce educational exclusions.

Although there has been universal condemnation and prohibition of educational segregation, differences in quality, and the level of allocation of resources between schools still exists. It is evident that, the ideology of Bantu education no longer exists, but the truth is, schools are still under segregation. Hence, Ocampo posits that, "Whites have mostly relocated to private schools, and suburban schools have a majority of Coloured students, while township schools are overwhelmingly Black, and

²⁷⁰ For example, the Bantu Education Act 43 of 1953. The main aim of this Act was to ensure that black children only learn things that the government of that time wanted and not what they wanted to learn.

rural schools tend to have Black and few Coloured students”.²⁷¹ According to the 2003 political risk yearbook,²⁷² one third of the budgetary allocations will be required for the next decade, in order to elevate black education to be at par with education for Whites.

²⁷¹ Maria Lizet Ocampo ‘A brief history of educational inequality from Apartheid to the present’ 19 September 2004 available at www.stanford.edu/Inequity.html retrieved 17-01-2020; See also Mail & Guardian dated 15 November 2006, ‘Apartheid legacy haunts SA's schools’ available at www.mg.co.za. retrieved 17-01-2020.

²⁷² South Africa Yearbook 2003/04, 540-552.

CHAPTER 3: NORMATIVE FRAMEWORK FOR THE REALIZATION OF THE RIGHT TO EDUCATION UNDER INTERNATIONAL LAW

3.1 Introduction

The 1996 Constitution promotes the reflection of international law, as well as foreign law by the judiciary, tribunal or forum, when construing any right in the Bill of Rights.²⁷³ Section 39 provides the courts with the opportunity to consider international and foreign laws, and apply it when a need arises, and where it is appropriate. It provides that, “when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law”.²⁷⁴ Mbazira is of the view that, “in order for the right to education to be fulfilled and realised, it is significant to consider international law”.²⁷⁵

The Constitution provides every person with the right to basic education, which incorporates the right to adult elementary education. Section 29 of the Constitution provides every person with the right to further education, and obligates the state to make it gradually, and sustainably available, and accessible to every person, by implementing reasonable measures to realise this right.²⁷⁶ Section 29 further provides every person with the right to decide on the language/s used as medium of instruction in state educational institutions, provided such education is reasonable and practicable.²⁷⁷ The state is further obligated in terms of section 29 (2) to, “consider all reasonable educational alternatives which include, *inter alia*, a single medium institutions in ensuring the effective access and in doing so, attention must be paid to equity, practicability and remedying harm caused by the past racially discriminatory laws and practices”.²⁷⁸

²⁷³ Section 39 (1) (b) and (c) of the Constitution of the Republic of South Africa, 1996.

²⁷⁴ Section 39 (1) (b) and (c) of the Constitution.

²⁷⁵ Christopher Mbazira, litigating socio-economic rights in South Africa. A choice between corrective and distributive justice, Pretoria University Law press (PULP) 2009.

²⁷⁶ Section 29 (1) (a) and (b) of the Constitution of the Republic of South Africa, 1996. Following Doel’s opinion that there is no commonly accepted definition of the phrase “further education”, with the term being used to embrace provision that ranges from foundation learning for adults to higher apprenticeships, as well as academic and vocational education for young people from age 14 onwards, it is submitted that the phrase “further education” refers to post-compulsory education that is distinct from the higher education offered in universities. This kind of education may be at any level above compulsory secondary education from basic skills training to higher vocational education.

²⁷⁷ Section 29 (2) of the Constitution.

²⁷⁸ Section 29 (2) (a) (b) and (c) of the Constitution.

International and regional human rights instruments, such as the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Dakar Framework for Action, recognise the right to quality education, and protect the right of every person to access quality educational services.²⁷⁹ These instruments place the obligation on signatory member states, to ensure compliance, that the right is adequately provided, and protected. South Africa is a signatory to most international conventions or treaties, for example, the Dakar Framework for Action, and the Declaration on the Rights of Children (DRC), which support and promote the right to education. Moreover, the right to education as a fundamental human right, was discussed, promoted and upheld in various treaties, and covenants such as the UDHR, the ICESCR, the Jomtien Conference and the Convention against Discrimination in Education held across the world.

These conventions recognize the right to elementary education²⁸⁰, as a cornerstone to every individual right (more in particular the socio-economic rights), and therefore signatories are required to ensure free and compulsory access to elementary education. It is also worth to note that Europe affirmed the right to education around 1952, through the European Convention for the Protection of Human Rights (ECPHR). Article 2 of Additional Protocol 1 of the ECPHR provides that, “no person shall be denied the right to education”.²⁸¹ The ECPHR further provided that “further education must also be made available and accessible”.²⁸²

²⁷⁹ Lorette Arendse, The obligation to provide free basic education in South Africa: An international law perspective, Potchefstroom Electronic Law Journal (PER) Vol 14, 2011, page 97 98-99. Further, see Frans Viljoen “The African Charter on the Rights and Welfare of the Child” in Trynie Boezaart (ed) Child Law in South Africa (2009) page 339.

²⁸⁰ Since the Constitution does not define the phrase “basic education” the study will use definition from the Jomtien World Declaration on Education for All which defines the phrase to mean basic learning needs. In defining the phrase and describing basic learning needs Article 1 (1) of the Declaration provides that: “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. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time”.

²⁸¹ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no 11, Paris 20 III 1952 European Treaty Series-no 009.

²⁸² Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no 11, Paris 20 III 1952 European Treaty Series-no 009. For a further definition of the phrase further education see Martin Doel’s presentation on “defining further education” presented 15th February 2018. Also available at <http://mediacentral.ucl.ac.uk/Player/11745> retrieved 28-04 2019.

This implies that the right to education in general is internationally recognised. It is noteworthy to mention that, since this fundamental right was first expressed internationally, through instruments such as UDHR and the ICESCR, subsequently the establishment of the United Nations (UN), which was the most vibrant in the negotiation of new international instruments on human rights. This study submits that, the right be looked into from the international perspective.

3.2 The connection between the South African law and international law

It is important to note the connection between South African law, and international law. South Africa is a democratic country that marks international law as a pillar of its democracy.²⁸³ Treaties and conventions, as sources of international law become part of the national law, by ratification.²⁸⁴ According to the UN High Commission for Human Rights 1996-2007, “all sources of international law are internationally recognised instruments, which are useful in guiding signatory states pertaining to their conduct and provide sizeable guidance in interpreting section 29 of the Constitution”.²⁸⁵

As a way of regulating the interpretation of human rights, the UN High Commission for Human Rights makes it obligatory to reflect on international law, in construing the Bill of Rights.²⁸⁶ In this regard, the Constitution makes international customary law part of the South African law, except when it contradicts the constitutional provisions or legislation.²⁸⁷ It further provides that, “when interpreting any legislation the approach that is consistent with international law is more preferable to that which contradicts the Constitution”.²⁸⁸ Consequently, it is clear that the Constitution accords high consideration to international law, and appreciates direction from it in the process of construing the Bill of Rights.

²⁸³ John Dugard “International Law and the South African Constitution” Kaleidoscope at 1 Available at <http://www.ejil.org/pdfs/8/1/1426.pdf> retrieved 01-02-2020.

²⁸⁴ See “The role of international law in South African health law and policy-making” at 131 Available at <http://www.section27.org.za/wp-content/uploads/2010/04/Chapter5.pdf> retrieved 01-02-2020. Other sources of international law include customary international law and soft law.

²⁸⁵ See Office of the United Nations High Commission for Human Rights 1996-2007, “International Law”, at 1. Available at <http://www2.ohchr.org/english/law/> retrieved 01-02-2020.

²⁸⁶ See section 39 of the Constitution of the Republic of South Africa, 1996.

²⁸⁷ See section 232 of the Constitution, 1996.

²⁸⁸ See section 233 of the Constitution, 1996.

It is significant to note that treaties and conventions turn out to be part of the national law by way of ratification. In line with this statement, Simbo opined that, one might not understand the use of treaties and covenants not yet ratified by South Africa, including the non-binding international law when interpreting the Bill of Rights. In clarifying this issue, the Court in *State v Makwanyane*²⁸⁹ stated that, “the international law that must be considered in interpreting the Bill of Rights refers to both binding and non-binding international laws”.²⁹⁰ The Court further emphasized, “international treaties and conventions are important and should be considered in interpreting the Bill of Rights because they make available a framework in which the Bill of Rights can be understood”.²⁹¹

The Court also pointed out that even though South Africa has this principle of recognising and considering international law, the effect of such law and the ideologies recognised, will vary from case to case.²⁹² This study submits that; although the judiciary must reflect international law when construing the Bill of Rights, it need not follow, and apply its rules, if it feels the rules are not relevant to a South African situation. Therefore, for this reason international law whether binding or non-binding, is valuable to understand the right to education, as contemplated in section 29 of the Constitution.

It is therefore important to look into the right to education from an international perspective, for a clear interpretation and meaning of the right in the international arena. For purposes of this study, some of the instruments such as the UDHR, the ICESCR, the DRC, the Jomtien Conference and the Convention against Discrimination in Education, and their ostensible relevance to the right to quality education, are singled out, and discussed as follow:

3.2.1 The Universal Declaration of Human Rights (UDHR), 1948 - binding

Although a number of covenants and treaties aim at promoting the right to education, the basic formula for promoting this fundamental right stems from the UDHR. It

²⁸⁹ *S v Makwanyane* 1995 (3) SA 391 (CC).

²⁹⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

²⁹¹ *S v Makwanyane* 1995 para 35.

²⁹² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 para 26.

guaranteed a range of rights,²⁹³ included in the range is a right to education. This is the first international instrument to give expression and recognition to the right to education.²⁹⁴ Article 26 provides that:

Every person has the right to compulsory and fee-free education particularly in the elementary phases. The provision of professional and technical education shall be made available whereas every person shall have the right to access higher education based on merits. The main objective of education shall be to develop the human character and to reinforce and strengthen respect for human rights and fundamental freedoms. It shall cause common understanding, tolerance and create friendship amongst ethnic or religious groups and all nations which fact shall promote the activities of the United Nation for sustaining peace. Parents or caregivers have the autonomous right to choose the type of education suitable for their children or those they are responsible and care for.²⁹⁵

Flowing from the provisions of Article 26, of the UDHR, Beiter posits that, in terms of this Article, “everyone has the right to education and elementary and fundamental education shall be free and compulsory and while elementary education refers to formal schooling for children of primary school age, fundamental education means education for children, youth and adults who did not have the opportunity to undergo or complete primary education, and is offered outside the regular primary education system”.²⁹⁶ Beiter further asserts that, in terms of Article 26, of the UDHR, “technical and professional education must be made generally available and this type of education refers to education which involves, in addition to acquiring general knowledge, the study of technologies and acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life”.²⁹⁷

Beiter further submits that, Article 26(1) of the UDHR, reflects on the social aspects of the right to education, it expects the States to attend positively to the realization of the various levels of education.²⁹⁸ Article 26(2) of the UDHR sets out the aims of education as, “the full development of human personality; the strengthening of respect for human rights and fundamental freedoms”, hence Beiter submits that, “the full development of

²⁹³ The UDHR guaranteed the inalienable and inviolable civil and political rights as well as social, economic and cultural rights to which all people everywhere are entitled.

²⁹⁴ See the UDHR (note 8 above).

²⁹⁵ Article 26 (1), (2) and (3) of the UDHR.

²⁹⁶ Beiter, *The Protection of the Right to Education by International Law* page 90.

²⁹⁷ Beiter, *The Protection of the Right to Education by International Law* page 90 and 91.

²⁹⁸ Beiter, *The Protection of the Right to Education by International Law* page 91.

the human personality constitutes the general ethical aim of education”.²⁹⁹ Moreover, Taiwo opined that, Article 26(3), of the UDHR, assures the right of parents, and or guardians’ to decide on the kind of education appropriate for their children. This article mirrors the freedom feature of the right to education.³⁰⁰ This means that the state must appreciate and value parents or guardians’ convictions, relating to the type of education that their children ought to receive. According to Taiwo, this means that parents and or guardians’ opinions concerning the education to be delivered to their children, and regarding educational approaches to be used, must be appreciated.³⁰¹

The UDHR provides that, “everyone is entitled to the right to education which means that government has a responsibility to ensure access to education irrespective of sex hence, the purpose of education is to promote an outright development of an individual that which will provide him or her with better opportunities to demand and realise other human rights”.³⁰² The preamble of the UDHR reiterates the commitment of the signatories in protecting, promoting and respecting all the rights, including the right to education. It provides that:

According to the United Nations, its people have through the Charter, drastically expressed their devotion and determination in promoting the fundamental human rights for everyone and to uphold social development and to enhance their living standard. In collaboration with the United Nations, signatories are committed to advance common respect for and observe all human rights including fundamental freedoms. However, for the realization of the objectives of these rights and freedoms, it is important for people to firstly understand the human rights and freedoms themselves.³⁰³

This declaration proclaims that all people, and nations shall, through teaching and education, strive to encourage, respect, the rights enshrined in this declaration (including the right to education), to secure effective recognition, observance, and realization of all the rights, through implementation of progressive measures.³⁰⁴

²⁹⁹ Beiter, *The Protection of the Right to Education by International Law* page 92.

³⁰⁰ Elijah Adewale Taiwo, *Implementation of the Right to Education in South Africa and Nigeria*, chapter 2 page 43 para 2.

³⁰¹ Taiwo, *Implementation of the Right to Education in South Africa and Nigeria*, chapter 2 page 43 para 2.

³⁰² See UDHR, thus the right to education is fundamental in empowering the individual to claim and enjoy not only socio and economic rights but also civil and political rights.

³⁰³ See paragraph 2, 3 and 4 of the preamble of the UDHR at page 2.

³⁰⁴ See the proclamation of the United Nations General Assembly at page 3 of the UDHR.

Education is therefore of seminal importance for all people, and nations, as an asset that aids them to accomplish their full potential.³⁰⁵ Article 26(1), of the UDHR, provides that, children are the focal recipients of education, but international law does not only focus on the rights of children, but also the rights of parents, and caregivers, with regards to control of their children's education. They have the obligation to be fully involved in their children's educational life, by ensuring that their children receive education of high quality, and standard.³⁰⁶ South Africa is a participant to, and member of the UN, it adopted the UDHR since November 1945. Since the UDHR is not a treaty, it was adopted for the purpose of enforcing the UN Charter, it is binding on all signatories, and thus for that reason remains a constructive UN document, for the provisions of the UDHR including the equal right to education that morally bind South Africa.³⁰⁷

South Africa is implementing the objectives of the UDHR as the Constitution provides everyone with the right to education.³⁰⁸ This is also substantiated by the fact that nine years of schooling (grade 1 to 7) is fee-free, and compulsory as provided by section 3 of the South African Schools Act (SASA), and that the state makes education "progressively available and accessible through reasonable measures" to everyone.³⁰⁹

It is pertinent to stress that the UDHR is not the only legally binding convention at the international level that deals exclusively with the protection and promotion of the right to education. Most human rights conventions, at the domestic, regional and global levels, such as the ICESCR, DRC, the Jomtien Conference, the Convention against Discrimination in Education, the Convention on the Rights of the Child (CRC), the African Youth Charter (AYC), and the Charter of the Organisation of Africa Unity, address the issue of access and development of the right to education. In an attempt to protect the right, South Africa has promulgated legislation aimed at promoting the right, such as SASA, it is also a signatory to conventions at the domestic, regional and

³⁰⁵ Faranaaz Veriava, Free to Learn, A discussion paper on the School Fee Exemption policy, the Children's Institute, University of Cape Town December 2005.

³⁰⁶ Article 26 (3) of the UDHR, see also Geraldine Van Bueren, The international law on the rights of the child (1995) 232.

³⁰⁷ See the Right to Information Reports on Human Rights in South Africa, available at <http://www.human-rights-online.org/Human-Rights-in-Africa/Human-Rights-in-South-Africa/> > retrieved on 12-05-2018.

³⁰⁸ Section 29 (1) (a) of the Constitution of the Republic of South Africa, 1996.

³⁰⁹ See section 3 (1) of the South African Schools Act 84 of 1996 and Section 29 (1) (b) of the Constitution of the Republic of South Africa, 1996.

international arena. Selected instruments that obligate state signatories to take specific measures in protecting this right are discussed below:

3.2.2 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 - binding

The International Covenant on Economic, Social and Cultural Rights (ICESCR), is an international human rights treaty of the UN, which South Africa is a state party to one of the two treaties, conscripted in an attempt to turn the ideologies of the UDHR into a binding instrument.³¹⁰ Its objective is to uphold human rights, and reminds people of its obligation to strive for the promotion and obedience of the human rights. It creates an international framework for the protection and realization, by member states of “socio-economic rights” such as the rights to food, housing, healthcare and education. Article 13(1) of the ICESCR affirms that:

Signatories to this Covenant appreciate every person’s right to education. As per the agreement by the state parties, the aim of education shall be to develop the individuals’ character and to reinforce respect or appreciation for human rights and fundamental freedoms. The state parties further agreed that in furtherance of the United Nations activities intending to maintain peace, education should strive to enable every person to efficiently take part in an autonomous society, encourage tolerance and create friendship amongst all diverse nations.³¹¹

The ICESCR also provides in Article 13(2) that, signatories to this Covenant appreciate the idea of realizing the right to education. The provision of elementary education shall be compulsory and fee-free for all. Furthermore, the provision of secondary education, in its diverse arrangements, shall be accessible and available to all, by implementing appropriate measures, including the introduction of a fee-free education.³¹² It further provides that, adult basic education shall be encouraged and strengthened at all cost, particularly for those who have not received elementary education at all, or those who received but failed to complete their elementary education. Moreover, the improvement of schools and the educational system at all

³¹⁰ The other one is the International Covenant on Civil and Political Rights (ICCPR) 1966.

³¹¹ Article 13 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

³¹² See Article 13 (1) (2) (a), (b) and (c) of the International Covenant on Economic, Social and Cultural Rights. Article 14 further provides that “Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all. Articles 13 and 14 thereof are not only essential in building on the preceding provisions on education, they became a crucial reference point in the formulation of state obligations for education in subsequent instruments and jurisprudence”.

levels shall be adopted, keen partnership employed, and the central conditions of educators regularly developed.³¹³

The provision of Article 13(1) set out the aims of education, by referring to education as, “the development tool of human character and the sense of its dignity and that education should enable all persons to participate effectively in a free society”. In this regard, Beiter posits that, “the reference to human dignity in Article 13(1) means that the attained education must enable those taking part to be mindful of their worth and the human rights accrues to them”.³¹⁴ This means that, education should not only be theoretical, but also include life skills to satisfy practical life needs.³¹⁵

On 12 January 2015, South Africa ratified the ICESCR, more than twenty years after signing it. The ratification entered into force on 12 April 2015. The ratification provides that, “State parties that have ratified the ICESCR have a legal obligation to work towards the realization of the socio-economic rights set out in the ICESCR”. The 2015 ratification further provides that, “we, as organisations working to ensure the realization of learners’ rights to a basic education in terms of Section 29(1) (a) of the Constitution note with deep concern South Africa’s declaration in respect of the ratification process”.³¹⁶

The ICESCR states that: state parties shall, within its available means and guided by its national educational policies, give effect to the right to education, following the provisions of Article 13(2) (a). This denotes that, the “Declarations should not limit the scope of the right to basic education and related obligations, nor limit access to education, particularly in relation to free and compulsory primary education”. Accordingly, the Constitution does not subject the right to basic education to progressive realization.³¹⁷ Meaning that the right to basic education must be provided for immediately, irrespective of whether the state has resources available, or not.

³¹³ Article 13 (2) (d) and (e) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

³¹⁴ Beiter, *The Protection of the Right to Education* page 95. Further see Taiwo, *Implementation of the Right to Education in South Africa and Nigeria*, chapter 2 page 45 para 3.

³¹⁵ Beiter, *The Protection of the Right to Education* page 95.

³¹⁶ See the South African government’s declaration on education clause mars the welcome ratification of the ICESCR 12 January 2015.

³¹⁷ See the South African government’s declaration on education clause mars the welcome ratification of the ICESCR 12 January 2015. See further Lilian Chenwi, Jackie Dugard and Ebenezer Durojaye, *South Africa*

The ICESCR places a duty on signatories to, “provide quality elementary and further education and sets out at least seven (7) years of the provision of free primary education which include the first school day of the year in which a 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”.³¹⁸ This is the progressive implementation of aspects regarding the right to education. Accordingly, Van Bueren posits that, signatories therefore, be obligated to constantly improve their educational system to a better one, to the scope of their available funds, and it is of paramount importance to consider the best welfare of the children, taking cognizance when allocating limited resources.³¹⁹

It is pertinent to point out that the ICESCR also set out the meaning and content of the right to education, in a detailed manner, as opposed to any of the preceding instruments, which include distinguishing commitments on the part of the signatories, consistent to each of the levels of education. The ICESCR defines the right to education, as the right to access the necessary teaching and learning, and to attain the necessary knowledge to develop a learner as an individual, and as a citizen.³²⁰ According to the ICESCR, the right to education implies a right of access to educational facilities, and educational institutions existing at a particular given time, and the ability to draw benefit from the education attained, which means, the right to obtain official recognition of the studies accomplished.³²¹ These assertions are profoundly supported by Ssenyonjo’s argument that, article 13 is the most well-articulated, and all-inclusive article on educational rights, in international law.³²²

ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), ESR Review, Vol 16 No. 1 2015 page 9.

³¹⁸ This is provided for in section 3 (1) of the South African Schools Act (SASA) 84 of 1996.

³¹⁹ Geraldine Van Bueren, *The International Law on the rights of the child* (Martinus Nijhoff Dordrecht 1995). Also see Chrizzell Churr, *A Child’s Right to a Basic Education: A Comparative Study*, University of South Africa, Doctor of Laws, 2012 page 144.

³²⁰ See Article 13 of the ICESCR. Further see Fons Coomans, *Clarifying the Core Elements of the Right to Education*, 1998 page 1 also available at aihr-resourcescenter.org/administrator/upload/documents/core.pdf.

³²¹ See Article 13 of the ICESCR. Further see Fons Coomans, *Clarifying the Core Elements of the Right to Education*, 1998 page 1 also available at aihr-resourcescenter.org/administrator/upload/documents/core.pdf.

³²² Manisuli Ssenyonjo, *Economic, social and cultural rights in international law*, Hart Publishing: Oxford & Portland 2009 page 366.

3.2.3 Declaration on the Rights of the Child (DRC), 1959 – non-binding

Beiter posits that, children are the most susceptible in the society, they are in the weakest position owing to their age and inexperience, hence without assistance are incapable of effectively exercising the rights accrued to them, and to enforce them where compliance is failing, and they further lack the ability to promote their human rights.³²³ It is for this reason that the UN adopted the DRC in 1959 and the CRC in 1989 respectively.³²⁴ It is worth stating that the right to quality education is enshrined in both the DRC and the CRC.

The DRC provides that, “children are entitled to free and compulsory elementary education”. It further provides that, “education should promote the child’s culture and help the child to become a useful member of society”.³²⁵ The DRC encompasses a wide-ranging set of provisions with regard to the right to education in its article 7, and provides that:

At least at their elementary educational stage, learners are eligible to receive a compulsory and fee-free education. Such a learners ought to receive the quality type of education that will uphold their culture, and enable them to improve their capabilities, their decision making and their ethical responsibilities on equitable basis and to a valuable citizen.³²⁶

The Declaration sets out, “the best interests of the child” meaning essential needs; helping the child grow and develop, as well as achieve their capabilities, as the guiding principle for those responsible for the education, and in this way further entrench a child-oriented approach on other matters affecting the child, such as the educational upbringing of the child.³²⁷ This study submits that, such essential needs refers to, and are the nutriments or conditions essential to a child’s growth, and integrity, which includes the child’s educational life. The DRC followed the lead of the UDHR, in prioritizing elementary education, by providing that, “the child shall have the

³²³ Klaus Dieter Beiter, *The Protection of the right to education by international law* (Martinus Nijhoff Leiden 2006) page 113-114.

³²⁴ Beiter, *The Protection of the right to education by international law* (Martinus Nijhoff Leiden 2006) page 113-114. Also see Eugène Verhellen, *Convention on the Rights of the Child* (1994).

³²⁵ See principle 7 of the Declaration on the Rights of the Child 1959.

³²⁶ Principle 7 of the DRC 1959.

³²⁷ See principle 2 of the Declaration on the Rights of the Child; see further P Alston, *The best interests principle: towards a reconciliation of culture and human rights* in M Freeman (ed) *Children’s rights* (2004) 184. The ‘interests of the child’ approach had previously been discussed as a criterion in the convention on the guardianship of minors in the 1902 Hague Conference on Private International Law.

outright opportunity for recreation, which should be directed at promoting education, and society and the public authorities shall endeavour to promote the enjoyment of this right”.³²⁸ The Declaration stresses that, a child who is disabled or impaired in any way, shall be given a distinct education and care, necessitated by the child’s personal disability or impairment.³²⁹

Arguably, the Declaration, more in particular Principle 7 on the right to education, depicts that children are the passive recipients of the rights, as opposed to bearers of rights as indicated in the subsequent instrument.³³⁰ Thus, the right to elementary education must be conferred to every child, and realization of such education be prioritised. This was strengthened by Verhellen’s argument that, “the Declaration regards the children as legal subjects, but without competencies to exercise their rights independently”. Hence, it dwells more on protective rights, the idea being to protect the welfare of the child as a separate entity.³³¹

3.2.4 Convention on the Rights of the Child (CRC), 1989 - binding

According to Beiter, generally children are the most vulnerable group of people in the society, by virtue of their age they need protection. It is against this backdrop that the UN made a determination in dealing with the distinct application of human rights for children. In making that determination, the UN adopted the Convention on the Rights of the Child (CRC) in 1989.³³² This Convention defines a child as anyone eighteen years of age, or below, save for those who attained the age of majority earlier under any law or regulation applicable to that child.³³³ According to Van Wyk and Dugard, the CRC protects children against discrimination of any nature, and emphasizes their

³²⁸ Principle 7 of the Declaration on the Rights of the Child.

³²⁹ See principle 5 of the Declaration on the Rights of the Child 1959. In this way, it seems to imply that a child with disability would indeed require ‘special’ education. It is argued that the Declaration and particularly Principle 7 on the right to education depicted the child as a passive recipient of rights as opposed to a bearer of rights as used in subsequent instruments. Nevertheless, the significance of the 1959 Declaration to the subsequent developments of the rights of the child is clear. It is argued that in view of the exceptional unanimity at its adoption, more unanimous than the UDHR the 1959 Declaration had more moral authority than other soft laws. See further Lucyline Nkatha Murungi, *The significance of article 24(2) of the UN Convention on the Rights of Persons with Disabilities for the right to primary education of children with disabilities: a comparative study of Kenya and South Africa*, chapter 2, page 42-43, (University of Western Cape).

³³⁰ Beiter, *The Protection of the right to education by international law* (Martinus Nijhoff Leiden 2006) page 114.

³³¹ Eugène Verhellen, *Convention on the Rights of the Child* (1994) page 61.

³³² Beiter, *The Protection of the Right to Education*, 2006 page 114.

³³³ Article 1 of the Convention on the Rights of the Child (CRC) 1989.

civil, political, economic, social, and cultural rights.³³⁴ It is worth noting that this Convention is one of the International agreements to which South Africa is party to, which also supports the right of access to education.³³⁵ Although this Convention is not automatically binding, it is promoted in terms of the 1996 constitutional provision, that courts must promote any reasonable interpretation of legislation that is consistent with international law.³³⁶

The CRC has the potential of realizing the right to quality education hence Article 28 provides that:

Signatories acknowledge the child's right to education. In an attempt to realize this right on equitable basis, signatories shall take measures to make elementary education compulsory and available free to every child. They shall promote the growth and improvement of secondary education at its diverse classifications that include general and vocational education by making it accessible and available to every child. In realizing the accessibility and availability of secondary education, signatories must employ appropriate measures such as introducing a fee-free educational system coupled by financial support in cases of needy learners. In the same vein, signatories must make higher education accessible based on merits; make educational and vocational institutions, information and guidance accessible and available to every child; and take measures that will ensure consistent attendance at schools and to reduce the dropout rates.³³⁷

The Article further provides that signatories shall implement measures to ensure proper administration of school disciplines, adhere to the child's dignity, in consideration of the values of this Convention. Signatories shall encourage collaboration with other international countries, regarding educational matters, with the idea of doing away with educational ignorance and illiteracy across the world, and the facilitation of scientific and technical knowledge, and the adoption of contemporary teaching and learning methodologies. In this regard, special emphasis shall be given to the needs and necessities of developing countries.³³⁸

³³⁴ See David Van Wyk, John Dugard, Bertus de Villiers, and Dennis Davis, *Rights and Constitutionalism: The New South African Legal Order* (1994) Juta & Company Ltd page 180. Van Wyk and Dugard further asserts that the CRC sets out the rights of the child in a comprehensive manner hence Article 2 deals with the principle of non-discrimination; Article 3 on the best interest of the child; Article 6 on the right to life, survival and development, and Article 12 on the right to express views and have them taken into account.

³³⁵ See Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

³³⁶ Section 233 of the 1996 Constitution.

³³⁷ See Article 28 (1) (a) (b) (c) (d) and (e) of the Convention on the Rights of the Child.

³³⁸ See Article 28 (2) and (3) of Convention on the Rights of the Child.

Therefore, this study postulates that comparing Article 28(1)(a),(b), and (c) of the CRC and Article 13(2)(a)-(c) of the ICESCR, it appears that Article 28(1)(a),(b) and (c) of the CRC is framed in lower standards, hence, the use of the word “make” in it, which seems to introduce the notion of progressiveness to the obligation, and constitutes a step backward from those of the ICESCR, with regard to the provision of primary, higher education, including vocational education. Following Article 13(2) (a) of the ICESCR, primary education shall be free and compulsory to all, and it also allots time limits regarding its implementation, and effectively restricts the extent to which the concept of progressive realization applies to the obligatory provision of primary, higher education and vocational education under the ICESCR.³³⁹ This study contends that, the CRC accords lower priority to the progressive introduction of compulsory and free secondary and higher education, by only mentioning it as a possible measure, and further disregarding secondary education as higher education, while the ICESCR mandates the progressive introduction of free secondary and higher education.³⁴⁰

Article 29 stipulates that, “the signatories agree that the provision of quality education to the child shall be aimed and directed at empowering and developing the child’s personality, talents, mental and physical abilities to their fullest potential”.³⁴¹ This study submits that the acquisition of quality education fully prepares a child for a responsible life, to be a responsible citizen in a free society, in a spirit of understanding their positive contribution to the economic upbringing and development of the country.³⁴² The Committee on the Right of the Child under the CRC emphasizes that, “these aims are meant to promote, develop and support the CRC’s recognition of a child’s human dignity, their equal and inalienable fundamental human rights including their special developmental needs and abilities”.³⁴³ In addition to the provision of quality education as stipulated in article 28 and 29 respectively, the Committee highlights that education should be used to empower a child through the advancement of their skills, learning and capacity building in order to build in them self-esteem and self-confidence.³⁴⁴

³³⁹ Beiter, *The Protection of the Right to Education* 116-117.

³⁴⁰ See Article 28(1)(b) & (c) of the CRC. Also see Taiwo, *Implementation of the Right to Education in South Africa and Nigeria* chapter 2 page 53-54.

³⁴¹ Article 29 (1) (a) of the Convention on the Rights of the Child.

³⁴² Article 29 (1) (d) of the Convention on the Rights of the Child.

³⁴³ Committee on the Right of the Child “General Comment 1: The aims of education” (2001) (General Comment 1) para 1.

³⁴⁴ Committee on the Right of the Child “General Comment 1: The aims of education” (2001) (General Comment 1) para 2.

It is in this regard that Hodgkin and Newell asserted emphatically that:

Education process and the teaching and learning methodology should adopt and turn out to be student centred approach since the central objective of taking part in the educational system is to concede that students are different and every individual student have their own interests, aptitudes and learning needs.³⁴⁵ Hodgkin and Newell observes that the student centred approach methodology must aim at ensuring that the education provided is of high quality and standard that will develop learners' expertise and capabilities for the present and future needs.³⁴⁶

It is for this reason that this study emphasizes that, the right to education should not only be promoted through the introduction of new curricula and development such as, the Outcome Based Education (OBE), but also through the introduction and development of new teaching techniques such as, individual and student approaches, and conducive educational environments. Such new teaching methods and conducive environments ensure that students are imparted with the requisite life skills, and knowledge necessary to become employable and effectively confront life challenges.

In similar wording as the UDHR, all signatories to the CRC acknowledge that the promotion of education be directed to children's development, their preparation for a responsible life in a free society.³⁴⁷ It is worth mentioning that the ratification of this convention by the South African government has effectively made it binding domestically.³⁴⁸ The government upholds this convention since it provides for "fee-free and compulsory basic education" in public schools and institutions, and it encourages the development of "adult basic education" and other forms of further education through the Constitution.³⁴⁹

3.2.5 The Dakar Framework for Action, 2000 - binding

South Africa is a participant to the Dakar Framework for Action,³⁵⁰ where it commits itself to "combating poverty and uplifting its people through the provision of quality

³⁴⁵ Rachel Hodgkin and Peter Newell, Implementation Handbook for the Convention of the Right of the Child (2007) page 439.

³⁴⁶ Hodgkin and Newell Implementation Handbook for the Convention of the Right of the Child (2007) page 439.

³⁴⁷ Article 28 (1) (e) of the CRC (1989).

³⁴⁸ South Africa ratified this convention in June 1995.

³⁴⁹ See section 29 (1) (a) and (b) of the Constitution.

³⁵⁰ Also refers to as the World Declaration and Framework for Action.

basic education that is free and compulsory for all children of school-going age that is of good quality and in which financial capacity is not a barrier to access for any child”.³⁵¹ The goal of this framework was to achieve the right and realise it by 2015. This study argues that the objective of this framework was partially achieved, in that all children of school-going age have access to free and compulsory basic education, however, the quality aspect of the education is still compromised. The framework provides that:

All the member states must endeavour to uphold the objectives and accomplish the goal in order to have a remarkable record by international standards.³⁵² Regarding the subsidy for public school, the member states has adopted a funding policy and have prioritised the progressive and sustainable school funding that any other developing country. Its emphasis is mainly on ensuring that the funding mechanism bring change in poor schools by allocating ample funding to those schools. The funding policy extends its objectives beyond the provision of fee-free education for the poor. The objective of the policy is to ensure that every poor student access and realize the educational system that is of high quality and standard free of charge.³⁵³

It is worth noting that the Dakar Framework devoted much of its attention and focus on quality elementary education in general, and the targets thereof. It should be emphasized that South Africa is striving to implement the objectives of this action, as it is making basic education “free and compulsory” for every child of school-going age, and ensuring that financial incapacity or predicaments are not a barrier for any child to access this education, hence there is no more school fees in public schools.³⁵⁴ This is a way of promoting education and uplifting South African people through access to education.

3.2.6 The Jomtien Conference, 1990 - binding

This Conference was held in Thailand (Jomtien) in 1990, against the backdrop of on-going exclusion of a substantial percentage of both child and adult populations from education, the UDHR’s proclamation of a right to education for everyone

³⁵¹ See the Dakar Framework for Action, Education for All: Meeting our Collective Commitments, adopted by the World Education Forum 26-28 April 2000 Dakar.

³⁵² The Dakar Framework for Action, preamble para 18 (d).

³⁵³ The Dakar Framework for Action, para 37. This means that the Framework also provided for the need to ensure that no child was denied an opportunity to complete a good quality education because such education was unaffordable.

³⁵⁴ See section 3 (1) of the South African Schools Act 84 of 1996 and Section 29 (1) (b) of the Constitution.

notwithstanding.³⁵⁵ The conference adopted a “Declaration on Education for All and a Framework for Action to Meet Basic Learning Needs”. This Declaration emphasized the right of every person to “benefit from educational opportunities designed to meet their basic learning needs”.³⁵⁶ It recognised the necessity to evaluate the meaning and scope of basic education, to incorporate an extended vision that entails, *inter alia*, wider resource levels and institutional structures.³⁵⁷ The extended vision also encompassed the universalisation of access and upholding equity, it entailed development of measures and equal opportunity for all children to accomplish and uphold a standard level of education.³⁵⁸

It also noted the need to provide equal access to quality education to every class of people, including the disabled as an essential part of the educational system.³⁵⁹ In the same vein, it calls for international cooperation aimed at financing educational areas of main concern, predominantly in developing countries, which encompass educational programmes intended to meet basic learning needs of the marginalised and underprivileged groups of people such as adults who are illiterate, and disabled persons.³⁶⁰ Thus, the study asserted that, state should finance the provision of quality education through financing skills development centres, and educational institutions providing adult education. This will aid in imparting knowledge and necessary skills to the participants despite their financial incapacities, ultimately leading to an ability to become employable, and create employment, and consequently contributing positively to the growth of the country’s economy.

3.3 Other instruments of the United Nations Specialized Agencies protecting the right to education

This part examines the protection of the right to education as per the instruments espoused by the two UN Specialised Agencies namely, the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and the International

³⁵⁵ See para 1 of the preamble of the World Declaration and Framework for Action. The conference was co-sponsored by UNDP, UNICEF, UNESCO and UNFPA which are key role players in the field of education globally.

³⁵⁶ See article I (1) of the World Declaration (Jomtien Conference)

³⁵⁷ See article II of the World Declaration (Jomtien Conference).

³⁵⁸ See article II (2) & article 3 of the Jomtien Conference.

³⁵⁹ Article 3 (4) and (5) of the Jomtien Conference.

³⁶⁰ See World Declaration and Framework for Action, preamble para 18 (d).

Labour Organisation (ILO). For this study, emphasis will only be on the legal mechanisms by UNESCO, in executing its mandate in relation to the provision of education, and primarily, consideration will be on the Convention against Discrimination in Education (CDE) of 1960. In the same manner, ILO has instruments relevant to the right to education. Of relevance are those instruments aimed at safeguarding everyone's educational right and interest. It is worth noting that the term "instrument" as used in this chapter does not only refer to conventions, but also treaties, charters and soft law documents and agreements, in the form of declarations and recommendations.

3.3.1 UNESCO, Convention against Discrimination in Education (CDE), 1960 - binding

UNESCO was formed on 4 November 1946, and in December 1946 was introduced to the UN as a specialised agency.³⁶¹ Its main objective is to encourage the creation of peace and security, by upholding co-operation among nations through education.³⁶² Amongst its core functions is the promotion, transfer and sharing of knowledge and skills.³⁶³ Beiter postulates that, amongst UNESCO's priorities in education are combating illiteracy, securing elementary education for all, development of higher education, technical and vocational education, including adult education, assistance in training and skillfully equipping educators, educational developers and administrators, as well as contributing to building and equipping school.³⁶⁴ UNESCO adopted numerous international frameworks, instruments and recommendations, which provide for the rights of people which in fact, are not relevant for the purposes of this study. Of relevance is UNESCO's CDE adopted in 1960. The CDE was the first international agreement to recognize the "right to education" as binding.³⁶⁵ In accordance with the UDHR, UNESCO provides that discrimination of any form in the provision of education is a violation of the rights as contemplated in the UDHR. The

³⁶¹ See UNESCO as effected by the United Nations General Assembly (UNGA) Resolution 50(I) of 1946.

³⁶² See Article 1(1) of the UNESCO Constitution which provides that "the main objective of the UNESCO is to contribute to peace and security by promoting collaboration among nations through education, science, culture, and communication in furtherance of, among other things, the rule of law, human rights, and fundamental freedoms.

³⁶³ See Article 1(2) of the UNESCO Constitution. Further see Rhona Smith, Textbook on International Human Rights 2 ed (2005) Oxford University Press, Oxford page 151.

³⁶⁴ Beiter, The Protection of the Right to Education 228-229.

³⁶⁵ The UNESCO Convention against Discrimination in Education (UNESCO Convention), adopted by the General Conference at its 11th Session in Paris, 14 December 1960. Membership of UNESCO is concurrent with membership of the United Nations, and is therefore near universal.

UDHR adopted a non-discrimination principle in education, which asserts that “every person has the right to education”.³⁶⁶ Its main objective is to severely hamper discrimination of any form in education or the educational arena, and encourage equal opportunity and treatment for all.

The CDE defines discrimination to include: any differentiation, segregation, restriction or inclination, with a purpose or consequence, of abolishing or weakening equality of treatment in the educational sector, based on any grounds,³⁶⁷ and particularly:

- (a) Denying or prohibiting someone to access schooling of any kind and at any stage;
- (b) Of subjecting someone to a substandard education;
- (c) Of creating and conserving distinct educational institutions or systems for different groups or race; or
- (d) Of imposing ill-assorted educational conditions to a person or group of persons.³⁶⁸

For purposes of this study, equality of opportunities and equal treatment for all in education must be understood to mean that, the right to quality education should not only be recognised in principle, but every person ought to have a fair chance, and adequate resources, to access and attain, or make use of the educational opportunities presented to them.³⁶⁹ Article 1 of the CDE provides that:

This convention forbid discrimination of any form in the educational sector. The exclusion becomes operative if the discrimination has the purpose or consequence of abolishing or weakening equality of treatment in the educational sector. Moreover, the exclusion becomes operative were the discrimination has an influence of segregating some persons or certain groups of persons from any form of educational opportunities. In addition, the discrimination has an influence of creating distinct educational structure for different persons or group of persons with the outcome that the education provided in those separate educational institutions is of inferior quality and low standard.³⁷⁰

³⁶⁶ UNESCO Convention against Discrimination in Education.

³⁶⁷ These grounds include race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth.

³⁶⁸ Article 1 (a),(b),(c) and (d) of the United Nations Educational, Scientific and Cultural Organisation (UNESCO)’s Convention against Discrimination in Education (CDE) of 1960.

³⁶⁹ Christian-Aime Chofofor Che, Educational opportunities for the girl child in Africa: A necessary revisit of the discrimination factor with reference to Egypt, South Africa and Cameroon, Masters of Laws, University of Pretoria, 2003. Also at <http://repository.up.ac.za/bitstream/handle/2263/985/chofor%20chec1.pdf?sequence=1> >retrieved on 20-05-2018.

³⁷⁰ See Article 1 (1) (a) and (b) of the UNESCO Convention.

This Convention defines the term “education” as referring to all categories and levels of learning, including access to education, educational institutions, the quality and standard of education provided, and the condition under which such education is provided.³⁷¹ Article 4 of the CDE further provides that:

Signatories to the UNESCO Convention (CDE) embarked on making elementary education compulsory and fee-free to those entrusted with the obligation to attend school and to ensure compliance by all signatories and to create equivalent educational standards in all public educational institutions.³⁷²

The study posits that, the fundamental right to quality education be provided for as early as elementary level, including adult elementary education. The education provided must be of a high quality and standard, in order to impart necessary skills and knowledge to learners, and to build and develop their capacities. Government should continue to fund the provision of such education so that financial incapacity does not factor as a barrier to the effective realization of this fundamental right.

3.3.2 Charter of the Organisation of Africa Unity /African Union, 1963 - binding

The Organisation of African Unity (OAU) was established in 1963 by newly sovereign African countries, with an aim to pursue a collective regional integration programme including educational collaboration.³⁷³ The OAU adopted declarations such as the Declaration on the Rights and Welfare of the African Child.³⁷⁴ This Charter, as an organisational document, did not provide an in-depth denotation of the right to education in general or elementary education; instead, it recognized the protection of human rights as one of its objectives and foundational principles.³⁷⁵ It is important to highlight that this Charter urged the signatories to implement programs in the educational arena, with the objective of making quality education accessible to all children, and prioritizing the most disadvantaged, and paying specific attention to the destitute.³⁷⁶ Moreover, it urged the creation of alternatives and conventional schooling systems commensurate with skills and capacity building, at the states’ expense and resources.³⁷⁷ It is based on these assertions that this study profoundly accentuates

³⁷¹ Article 1 (2) of the UNESCO Convention.

³⁷² UNESCO Convention, article 4(a) and (b).

³⁷³ Article II of the Treaty of the Organization of African Unity 1963.

³⁷⁴ Organization of African Unity, Declaration of the Rights and Welfare of the African Child, OAU Doc AHG/st.4 (XIV) Rev.1 (1979). The declaration is discussed below.

³⁷⁵ Articles 3(h) and 4(m) of the Constitutive Act of the African Union (2000).

³⁷⁶ Declaration on the Rights and Welfare of the African Child 1979 para 6(a) and (b).

³⁷⁷ Declaration on the Rights and Welfare of the African Child 1979 para 7.

that government should sustainably fund skills development institutions, in order to empower and impart knowledge and necessary skills to the people, to make them employable and help them create employment.

3.3.3 African (Banjul) Charter on Human and Peoples' Rights (ACHPR), 1981 - binding

The African Charter on Human and Peoples' Rights (ACHPR) was adopted by the Organisation for African Unity (OAU), and stands as one of the pivotal fundamental human rights instruments on the African continent, which recognizes peoples' rights including socio-economic rights.³⁷⁸ One of its objectives is to outright prohibit discrimination of any kind, promote the enjoyment of human rights and freedoms, such as the Human Right to quality education.³⁷⁹ South Africa is a state party to the ACHPR. The ACHPR provides that, "states have an obligation to make primary education compulsory and free of charge". Article 17 precisely provides that, "everyone shall have the right to education that includes access to the educational institutions".³⁸⁰ In support of the right to education, as postulated in article 17, article 1 provides that, "the Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".³⁸¹

This study emphasizes that the phrase "other measures" in the context of the study, refers to the introduction and implementation of sustainable educators' capacity building workshops, aimed at capacitating educators, so that they are able to deliver education of good quality and high standard. Article 2 further stipulates that, "everyone shall be entitled to full exercise and enjoyment of the rights and freedoms documented in this Charter without discrimination of any kind".³⁸²

³⁷⁸ Christof Heyns and Magnus Killander, *Compendium of key Human Rights Documents of the African Union* (2007) page 29.

³⁷⁹ Article 2 of the African Charter on Human and Peoples' Rights (ACHPR).

³⁸⁰ Article 17 (1) of the African Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

³⁸¹ Article 1 of the African Charter on Human and Peoples' Rights.

³⁸² See Article 1 and 2 of the African Charter on Human and Peoples' Rights. The grounds of discrimination under this Articles include race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

South Africa is upholding the contents of the ACHPR, as it embarks on the adoption of statutory frameworks, and other policies, such as SASA and SAQA, to give effect to the “right to basic education”. This confirms the state’s commitment to ensure that primary education is free and compulsory to every person, without any form of segregation, and ensure that every person is entitled to enjoy every right in the Bill of Rights, inclusive of the right to basic education.

3.3.4 UNESCO Convention on Technical and Vocational Education (CTVE), 1989 -binding

The Convention on Technical and Vocational Education (CTVE) is one of the imperative agreements adopted by UNESCO in the field of education, in 1989. This convention was held in Paris, its objective was to promote and develop practical and occupational education, for purposes of preserving peace, and economic betterment of signatories.³⁸³ The CTVE recognises that, technical and vocational education should meet the universal objective of development, and that the provision of practical and occupational education, which includes access to technical and vocational educational institutions, be provide for equally to everyone without any form of discrimination.³⁸⁴

It provides that, “the contracting signatories shall ensure that no individual who has achieved the educational level for admission into technical and vocational institution shall be discriminated against based on any ground, and the signatories shall strive to work towards the right to equal access to technical and vocational education including educational institutions and towards equality of opportunities to study throughout the educational process”.³⁸⁵ Article 2(4) of the CTVE provides that, the participating signatories shall pay the necessary attention, and respond appropriately to the learners with special needs, including the handicapped and other underprivileged and marginalised groups, to benefit from provided technical and vocational education.³⁸⁶

³⁸³ See the preamble of the UNESCO Convention on Technical and Vocational Education (CTVE) 1989.

³⁸⁴ Article 2 (1), (2) (a),(b),(c) and (d), (3) and (4) of the UNESCO Convention on Technical and Vocational Education (CTVE) 1989.

³⁸⁵ Article 2 (3) of the UNESCO Convention on Technical and Vocational Education (CTVE) 1989.

³⁸⁶ Article 2 (4) of the UNESCO Convention on Technical and Vocational Education (CTVE) 1989.

3.3.5 International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), 1989 –non-binding

The Paris Peace Conference under Part XIII of the Treaty of Versailles created the International Labour Organisation Convention (ILO) in 1919, and ultimately in December 1946. The ILO formed a relationship with the UN as a specialised agency.³⁸⁷ According to Article 1 of this Convention, the main purpose of the ILO is to develop labour conditions within its signatories. However, the ILO established legal frameworks relevant to the right to education, and the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (CCITPIC). Convention No. 169 of 1989 is one of those frameworks.³⁸⁸ Article 29 of this Convention provides that, the main aim of attaining education and educating people is to impart the necessary knowledge and expertise to persons, to enable them to take part in the community's activities on equal footing.³⁸⁹

In the same manner, Article 27 provides for, “the participation of members of indigenous groups in the development of teaching and learning programmes and the right of the indigenous peoples to establish their own educational institutions with the state financial aid”.³⁹⁰ It is against this assertion that, this study postulates the acquisition of skills and knowledge resultant from quality education is of cardinal importance, and forms the building blocks of a developed nation, for the development and growth of the country's economy.

³⁸⁷ This was effected by United Nations General Assembly (UNGA) Resolution 50(I) of 1946.

³⁸⁸ A number of other legal instruments adopted by the ILO which are relevant to the right to education but are for the purposes of this study neither relevant nor discussed are; The Convention concerning Minimum Age for Admission to Employment 1973 and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999. Others include the Discrimination (Employment and Occupation) Convention No. 111 (1958) (supplemented by Recommendation No. 111); the Paid Educational Leave Convention No. 140 (1974) (supplemented by Recommendation No. 148); the Human Resources Development Convention No. 142 (1975) (supplemented by Recommendation No. 195); and the Vocational Rehabilitation and Employment (Disabled Persons) Convention No. 159 (1983) (supplemented by Recommendation No. 168).

³⁸⁹ Article 29 of the International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), 1989.

³⁹⁰ Article 27(1)-(3) of the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (CCITPIC), Convention No. 169 of 1989.

3.3.6 African Charter on the Rights and Welfare of the Child (ACRWC), 1990 - binding

The Organisation of Africa Unity (OAU) adopted the African Charter on the Rights and Welfare of the Child (ACRWC), also referred to as the Children's Charter in 1990, entered into force in 1999.³⁹¹ The ACRWC adopted soon after the CRC had similar terms to the CRC, it was aimed at promoting the rights of the child, including the right to quality education, and obligated government to ensure access to actual physical and industrial training training to prepare learners for employment.³⁹² The ACRWC makes provisions to ensure and guarantee the right to quality education to every child. It also enjoins State Parties to take the necessary measures with the intent and purpose of realising the right, and obligates State Parties to implement special processes in respect of talented and deprived, rich and destitute children, to ensure equal access to education for all levels and divisions of the community.³⁹³

Accordingly, Article 11 precisely sets out the purposes of the provision of quality education as being: "to promote and develop the child's personality, skills, talents and mental and physical abilities to the fullest potential; to foster respect and understanding for human rights and fundamental freedoms set out in regional and international instruments; to promote the child's understanding of primary healthcare and to preserve and strengthen positive African morals, traditional values and cultures".³⁹⁴ Article 11 provides further that:

Signatories shall take reasonable actions in an attempt to realize this right and shall instigate the improvement of secondary education in its diverse forms and to make it accessible and available to all with time; take every reasonable measure to make

³⁹¹ See the African Charter on the Rights and Welfare of the Child (ACRWC), 1990. This Charter entered into force on 29 November 1999.

³⁹² Frans Viljoen, *International human rights law in Africa* (2012) page 392. Viljoen refers to both political and legal grounds underlying the adoption of the African Children's Charter within a year of the CRC. One of the legal reasons identified in this regard was that the CRC did not address the socio-economic conditions of children such as illiteracy and poor sanitary conditions that pose specific problems to the survival of children in Africa. The grounds were put forward by Lee Gacuiga Muthoga, 'Introducing the African Charter on the Rights and Welfare of the African Child and the Convention on the Rights of the Child' in a paper delivered at the International Conference on the Rights of the Child organized by the Community Law Centre, University of the Western Cape, (1992), and SA Wako, 'Towards an African Charter on the Rights of the Child', paper delivered at a workshop on the Draft Convention on the Rights of the Child, Nairobi (9 – 11 May 1988).

³⁹³ Article 11 (1) of the African Charter on the Rights and Welfare of the Child (ACRWC), 1990.

³⁹⁴ Article 11 (2) of the African Charter on the Rights and Welfare of the Child (ACRWC), 1990.

higher education available to everyone based on merits; take appropriate measures to encourage systematic school attendance and to reduce dropout rates.³⁹⁵

It is worth without a shadow of doubt that the first two purposes of imparting quality education, necessary skills, and knowledge to the child, as outlined in the ACRWC, are quite similar to those outlined in the CRC, and therefore salient. Nevertheless, the latter two purposes, as stated in the ACRWC, are specifically for this Charter, and their inclusion sets out the special objective of the ACRWC, being to uphold and realise the right to quality education in a unique and different manner, as provided in the African context.

Apart from Article 11, there are other provisions promoting the right to education in this Charter. For example, Article 13 provides that:

State parties shall ensure that persons living with disabilities or any impairment has actual access to education and training favourable to the person to accomplish social integration, personal developments and the person's cultural and moral development.³⁹⁶ Concerning the parental responsibility, Article 20 provides that state parties are obligated to assist parents and caregivers in need with educational support programmes especially with regards to nutrition, health, and education.³⁹⁷

3.3.7 African Youth Charter (AYC), 2006 -binding

The Africa Youth Charter (AYC) was adopted in July 2006, in Banjul, Gambia.³⁹⁸ Similar to the ACRWC, the AYC spirit was that Africa's greatest resource lies with its youth, whose active role and full inputs has the prospect of enabling its people to overcome the difficulties in providing quality education without any form of discrimination and hindrance.³⁹⁹ Unlike the ACRWC, it augments more value to the promotion and protection of the right to quality education, as it promotes skills acquisition and development amongst youth. Article 13 provides that, "every youth shall have the right to education of good quality and standard; education of young people shall be directed to the promotion and holistic development of young person's

³⁹⁵ Article 11 (3) (a), (b), (c) and (d) of the African Charter on the Rights and Welfare of the Child (ACRWC), 1990.

³⁹⁶ Article 13(2) of the ACRWC 1990.

³⁹⁷ Article 20(2)(a) of the ACRWC 1990.

³⁹⁸ Christof Heyns and Magnus Killander, *Compendium of key Human Rights Documents of the African Union* (2007) page 94.

³⁹⁹ Christof Heyns and Magnus Killander, *Compendium of key Human Rights Documents of the African Union* (2007) page 94.

creative, cognitive and emotional abilities to their full potential”.⁴⁰⁰ It provides further that, “state parties shall take all reasonable and appropriate measures with a view to achieve full realization of the right to quality education and shall take the necessary steps to encourage regular school attendance and reduce dropout rates”.⁴⁰¹

It is significant to stress that regarding the provision of the right to quality education, it is neither necessary nor enough to have all the universal and regional appraisals or frameworks in place, without their implementation and enforcement, to realise this fundamental right. Most significantly, member states to those instruments must take relevant actions to guarantee their actual implementation and realization, by monitoring them and adopting capacity-building measures, to build and improve the educators’ skills.

3.3.8 Declarations on the Rights of Mentally Retarded Persons (1971), and on the Rights of Disabled Persons (1975) - non-binding

The 1971 Declaration was adopted with a goal of reaching an agreement that amongst non-governmental organisations, it is necessary for the identified conventions construing the rights of the physically impaired persons to complement the human rights embraced in the universal instruments.⁴⁰² The Declaration directed its focus on a particular group of people with physical impairments; however, it became the basis for the subsequent one extending the privileges to all the people living with physical impairments.⁴⁰³ The declaration provides that, “persons with mental impairment have the right to education with special supervision as education will empower them and advance their mental capacity and maximise their potential”.⁴⁰⁴

Consequently, the 1975 Declaration called for measures to empower people with physical impairments to be as self-sufficient as possible, and specifically recognised their educational right, including occupational or job-related training, and reintegration to enable self-development, to transform their educational expertise and proficiencies.⁴⁰⁵ These Declarations did not have a binding force. Yet, they established

⁴⁰⁰ Article 13 of the African Youth Charter (AYC) 2006.

⁴⁰¹ Article 13 (4) of the AYC, 2006.

⁴⁰² Douglas Hodgson The human right to education (1998) page 156.

⁴⁰³ See the preamble of the Declaration on the Rights of Disabled Persons (1975) paragraph 3.

⁴⁰⁴ See the Declaration on the Rights of the Mentally Retarded (1971) para 2.

⁴⁰⁵ See the Declaration on the Rights of Disabled Persons 1975 para 6.

ethical and political persuasion to protect national framework changes in the 70s and 80s. The declarations raised the prominence of people living with physical impairments, and their exclusion from mainstream human rights protection. Hence, shortly after the adoption of the 1975 Declaration, the General Assembly nominated the year 1981 to be the universal year of physically impaired persons.⁴⁰⁶

This study posits that, people with physical impairments should improve their capacities and prospects, be self-sufficient, and aware of their “right to education”, as they enjoy the right to quality “free and compulsory education” in South Africa. This denotes that people living with physical impairments are also entitled to enjoy the rights in the Bill of Rights, including the “right to education”, hence the word “everyone” as envisaged in section 29 of the 1996 Constitution.

3.3.9 The United Nations Convention on the Right of Persons with Disabilities (CRPD), 2006 - binding

Unlike other conventions, the United Nations Convention on the Right of Persons with Disabilities (CRPD) devoted its focus on the provision of the right to quality education to persons with disabilities. The CRPD affirms that, persons living with physical impairments, like all other people; deserve inherent human dignity, to be treated with impartiality, and not discriminated against.⁴⁰⁷ It is worth noting that persons with physical impairments ought to be treated with courtesy, in a manner that is inclusive and promotes their full interaction and involvement in society, and as persons whose aptitudes are well progressing. This can be achieved through recognizing and realising their right to quality education. These assertions are profoundly supported by Article 24 of the CRPD, which provides that, “the right to education must be realised on a non-discrimination basis and equal opportunity, and inclusive educational system must be ensured at all levels at all cost”.⁴⁰⁸

⁴⁰⁶ This Proclamation was made in 1976 through UN General Assembly Resolution 31/123 of 16 December 1976. See further Lucyline Nkatha Murungi, *The significance of article 24(2) of the UN Convention on the Rights of Persons with Disabilities for the right to primary education of children with disabilities: a comparative study of Kenya and South Africa*, chapter 2, page 35-60, (University of Western Cape).

⁴⁰⁷ The United Nations Convention on the Right of Persons with Disabilities (CRPD), 2006. Further, see Zita Hansungule, *A case for the Socio-Economic Rights of children with disabilities in South Africa: Protection of the Right to basic education and the Right to social services*, LLM dissertation Faculty of Law University of Pretoria 2016 chapter 3 page 62.

⁴⁰⁸ Article 24 (1) of the United Nations Convention on the Right of Persons with Disabilities (CRPD).

It is pertinent to indicate that, the CRPD's inclusion of inclusive education and provision of equal opportunities in education in an article focusing on access to education (Article 24), must be highly applauded. It should be noted that the CRPD exists because of more expressions of the protection of persons, more in particular for children living with physical impairments, the right to quality education, which must be protected, and the means by which this must be accomplished through the CRC and the ACRWC.⁴⁰⁹ However, this is not negative criticism of the CRC or the ACRWC, but CRPD's recognition and acknowledgement of the historical and prevalent combat and barriers that persons with disabilities had faced in their attempt to access quality education. The ostensible focus on inclusive education and equal opportunities for all, is among the useful mechanisms used by the CRPD to combat the barriers.⁴¹⁰

The CRPD provides that the aim of education includes, among others:

To advance human potential and self-respect, self-esteem including the reinforcement of respect for human rights and freedoms. Moreover, it include the development of persons living with disability or impairment by improving their personalities, aptitudes and creativeness as well as their mental abilities and empowering them to efficiently take part in a free society.⁴¹¹

Like other conventions, the CRPD obligates states' signatories or parties, to take relevant measures in ensuring the right to education is fully realised, and to achieve productive educational and social development, effective and ongoing individual support measures be provided.⁴¹² This convention also set out relevant measures for signatories to empower persons who are physically impaired, help them learn life and social development skills, and capabilities, to impart knowledge and equip them for full and equal participation in their respective communities.⁴¹³ According to Article 24 these measures include mobility skills training, facilitation of peer support and

⁴⁰⁹ The United Nations Convention on the Right of Persons with Disabilities (CRPD), 2006. Further, see Zita Hansungule, A case for the Socio-Economic Rights of children with disabilities in South Africa: Protection of the Right to basic education and the Right to social services, LLM dissertation Faculty of Law University of Pretoria 2016 chapter 3 page 62.

⁴¹⁰ Zita Hansungule, A case for the Socio-Economic Rights of children with disabilities in South Africa: Protection of the Right to basic education and the Right to social services, LLM dissertation Faculty of Law University of Pretoria 2016 chapter 3 page 63.

⁴¹¹ Article 24 (1) (a) (b) and (c) of the CRPD.

⁴¹² Article 24 (2) of the CRPD. This article stretches further that "persons with disabilities should not be excluded from receiving education on the basis of their disability and children with disabilities are not to be excluded from receiving free and compulsory elementary education". This is similar to article 28 (1) of the CRC and article 11 (3) of the ACRCW which also provide for free and compulsory elementary education. It further states that "inclusive quality and free education should be accessed by persons with disabilities on the basis of equality with others and individual requirements should be reasonably accommodated and support must be provided in the general education system in order to facilitate effective education".

⁴¹³ Article 24 (3) of the CRPD.

mentoring, ensuring that, the education meant for those living with physical impairments, is delivered to the appropriate, and conducive environments, for them to make the most of their educational and social development, which transforms them into better persons.⁴¹⁴

3.3.10 The Children's Charter of South Africa, 1992 - binding

Apart from the regional and global level, the right to education is also assured and provided for at the domestic level. South Africa has wide-ranging provisions on the right to education. Among others is the Children's Charter of South Africa (CCSA), adopted at the South African Children's summit on the Rights of Children held in Cape Town, in June 1992.⁴¹⁵ Although there is not much about the provision of education in this Charter, it is significant to outline some important aspects of this Charter, related to the right to education. This Charter can be read with the 1996 Constitution, as it showcases the importance of providing free, equal, and compulsory education, without any form of discrimination.⁴¹⁶ It provides that "all children have the right to free and equal education, as education is a right not a privilege".⁴¹⁷

Arguably, the Charter can be read with section 3(1) of SASA, which provides that, "every parent must cause every learner for whom he or she is responsible to attend school from the first school day until the last school day of the free and compulsory learner's school days".⁴¹⁸ In the same vein, this Charter provides that parents have an obligation to be fully involved in their children's educational and developmental life, both at school and at home.⁴¹⁹ It is also pertinent to point out from the above assertions that, the CCSA and the 1996 Constitution, have common goals and purposes, hence, every child should enjoy the right to elementary education, as it is of tremendous value

⁴¹⁴ Article 24 (3) (a) (b) and (c) of the CRPD.

⁴¹⁵ The Charter was drafted by 200 children from 20 different regions, "marking a turning point in realising a culture of children's participation in issues that affect them". See in general, http://www.unicef.org/southafrica/SAF_publications_soulbuddiez.pdf, retrieved 26-05-2018.

⁴¹⁶ This Charter and the 1996 Constitution has common aims and objectives in that they both promote the provision of free, equal and compulsory education free from any form of discrimination on the base of race, sex or any other form as contemplated is section 29 of the Constitution and article 8 of the Children's Charter of South Africa respectively.

⁴¹⁷ Article 8 (1) of the Children's Charter of South Africa.

⁴¹⁸ Section 3 (1) of SASA.

⁴¹⁹ Article 8 (4) of the Children's Charter of South Africa. Similarly, reference can also be made to section 3 (1) of SASA which provides that "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".

regarding the development and upbringing of the child. It is also imperative to highlight that parents, including educators have a legal obligation to see to it that their children receive quality education, owing to the articulations as contemplated in CCSA and SASA accordingly.

3.4 Conclusion

This chapter dissected the legal instruments ensuring and promoting the right to education internationally, nationally and regionally. It pointed out that the right to education receives adequate appreciation at the national, regional and the global arena. This chapter revealed that based on jurisprudential analysis there is a broad range of international instruments and laws, regional and domestic levels included, aimed at promoting the right to education. Accordingly, apart from promoting the right to education, these instruments also devoted their focus on the reconstruction and transformation of education, and ultimately presented education as a salient global key and tool, which paves paths for individuals and communities, and promotes sustainable development. It should also be pointed out that instruments, laws, declarations, and policy documents, reviewed in this chapter were subjected to a variety of influences that impact on them including; social and economic changes, nationally and internationally, an important fact because, for a policy or law to be relevant and meaningful, it must be aligned with, and reflect socio economic developments. It is therefore indispensable to highlight the importance of protecting, and promoting the right to education, hence, as this right is interrelated to sustainable development.⁴²⁰

Furthermore, the study submits that, although the judiciary must be mindful of international law rules when construing any statutory provisions, particularly the Constitution, they need not apply such rules if they feel that they are not relevant to a South African context. Therefore, applicable international law rules, whether binding or non-binding, are useful to construe and understand the right to education, as envisaged in section 29 of the 1996 Constitution.

⁴²⁰ See http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf, retrieved 27-05-2018.

CHAPTER 4: THE LEGISLATIVE AND POLICY CONSIDERATIONS PROMOTING THE RIGHT OF ACCESS TO EDUCATION

4.1 Introduction

The democratic dispensation in South Africa restructured the educational sector in accordance with the provisions of the Constitution, legislation and policies, in order to redress past injustices and inequalities, to provide its people with education of high quality and standard. In realizing the fundamental right to education, post-apartheid South Africa revised its educational position, introduced quite a number of legislation and policies, to transform education thus foster flexibility, empowerment, skills acquisition, capacity-building programmes, relevant to the 21st century demands. These policies and legislative frameworks called for an urgent necessity to invest in education by way of skills development and capacity building, to give people quality education and opportunities to become employable, perform and become fruitful in their own post-education activities.

The laws and policies geared towards positive transformation of the educational system, by providing relevant training to learners, to equip them with essential skills, make them proficient, and improve their capacities. These laws and policies also aimed at positively transforming the educational system, confront racial, gender and any other form of disparity in the educational arena, by ensuring that every learner accessed the provision of quality education and training, without any form of discrimination. The interventions also stood against the unfair discrimination, and intolerance of any kind, and contributed towards radical socio-economic transformation, to address the challenges of poverty and inequality. These considerations also aimed at contributing to the betterment of humankind, in providing them with education and training, thereby equipping them with the requisite skills and capacity enable them to be absorbed as workforce, and contribute to the overall improvement of the economy.

Since 1994, South Africa promulgated various legislation and policies with the purpose of promoting access to education, accelerating delivery of quality education, and promotion of skills development, and training programs. However, when it comes to implementation this study emphasizes the need to scrutinize their effectiveness in achieving their respective objectives. It is worth noting that the right of education is not

only guaranteed, and provided for at international and global levels, but at the national levels too, through legislation such as, the 1996 Constitution, and SASA. Thus, the salient laws, strategies, measures and initiatives, including the 1996 Constitution, SASA, and other programs, are examined in this chapter.

4.2 The Constitution of the Republic of South Africa, 1996

The Constitution was adopted in 1996, by the first democratic government of South Africa, after the advent of democracy, in 1994. Section 2 of the Constitution provides that, “this is the supreme law of the country, any obligation imposed by it must be fulfilled, and any law or conduct inconsistent with it is invalid to the extent of its inconsistency”.⁴²¹ It was promulgated *inter alia*, to contribute to the betterment of and to develop the quality of life of all citizens, and allow the potential of every individual to flourish, through upholding all the rights encapsulated in the Bill of Rights.⁴²²

It provides every person with the right to rudimentary education, which encompasses the right to adult rudimentary education. It also provides everyone with the right to further education, and obligates the state to ensure that further education is, with time, made sustainably available and accessible by the implementation of practical processes.⁴²³ The Constitution provides every person with the right to select their language(s) of choice, to be used as the medium of instruction in public educational institutions, on condition such education is practical, and feasible. The state is further required to reflect on all practical educational alternatives, including *inter alia*, a single medium language of instruction, to ensure actual access, and in doing so, must pay devotion to impartiality, feasibility and redressing injury, caused by the past racially inequitable laws and practices, such as the Bantu education system.⁴²⁴

These obligations were also emphasised in the case of *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*.⁴²⁵ The case concerned learners enrolled and attending *Juma Masjid School*, a government school situated on private property. The *Juma Masjid Trust*, the owner of the private property,

⁴²¹ Section 2 of the Constitution of the Republic of South Africa, 1996.

⁴²² See the preamble of the Constitution, 1996.

⁴²³ Section 29 (1) (a) and (b) of the Constitution, 1996.

⁴²⁴ Section 29 (2) (a), (b) and (c) of the Constitution, 1996.

⁴²⁵ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).

successfully obtained an eviction order in the High Court to evict the state, and the learners attending that school. The state together with the School Governing Body (SGB), appealed the High Court decision in the Supreme Court of Appeal, however they were unsuccessful, and ultimately approached the Constitutional Court for relief. In adjudicating over this matter, the main concern of the Constitutional Court was that, the learners not be without alternative placements.⁴²⁶ The court held that, “it is salient to understand the nature and meaning of the right to ‘basic education’ under section 29(1) (a) of the Constitution”. The court explained, “this is because the right is distinct from other socio-economic rights as contained in the Bill of Rights since it is immediately realizable”. According to the court, “this means that the right does not depend on the availability of state resources for its realization and it may only be limited in terms of a reasonable and justifiable law of general application”.⁴²⁷ Other legislation and policies enacted, give effect to the right to access adequate quality education, as espoused in the Bill of rights.

4.3 Reconstruction and Development Programme (RDP) 1994

The Reconstruction and Development Programme (RDP), is a policy implemented in 1994, aimed at ensuring the development of the country’s human resources. This policy’s goal and objectives promote, and encourage people to attain knowledge and skills, through teaching and learning programmes. It provides that, “the democratic government has the ultimate responsibility for ensuring that our human resources are developed”.⁴²⁸ This study therefore submits that it is not only the obligation of the state, but also that of individuals like entrepreneurs, in providing learning opportunities, such as offering a subsidy to their people, to develop knowledge and skills. This means that the responsibility for creating and developing the skills and talents of South Africa's diverse communities does not lie exclusively with the government. The entrepreneurs are persons with the ability to convert ideas into action. Their actions encompass creativity, innovation, and capability to plan, and direct action towards the accomplishment of goals. These are qualities required to support everyday life in education, and in other social activities, such as the work environment. Therefore,

⁴²⁶ See *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* para 74 and 78.

⁴²⁷ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* para 37.

⁴²⁸ Reconstruction and Development Programme (RDP) 1994 page 63 para 2.

entrepreneurs' support is necessary, to provide funding, augment learners' responsiveness to their education, and assist them to seize opportunities.⁴²⁹

Therefore, a range of community empowerment forums and foundations which include; community organisations, and private sector agencies, such like Joint Education Trust (JET), Youth Development Forum (YDF), National Youth Development Agency (NYDA), and Sector Education and Training Authorities (SETAs) aimed at facilitation of learning; develop the quality and standard of education, and the cooperation between education, skills development and the world of work, and tackle challenges faced by the nation's youth, become partners and active role players of the state, in delivering quality education, skills and capacity building. These agencies must work together with the state, the skills development institutions, international development agencies and educational institutions, to promote quality skills and capacity building.

The RDP provides that:

This country must develop a cohesive educational system and training that will afford equitable educational opportunities to everyone regardless of race, colour or geographical location. That system must advance the development of expertise and knowledge to be used to yield superior goods and facilities that will enable us to improve our society and our economy.⁴³⁰ It further provides that the attainment of education must focus on the improvement of an individual and communities, to reinforce respect for human rights and promote the principles contained in the Bill of Rights.⁴³¹

This policy provides that, to build a successful quality education and training, it would depend on creating effective and responsive educational institutions, to manage change in the educational sector. It further provides that, "the education and training bureaucracy must be restructured nationally through the establishment of industry-based education and training".⁴³² This implies that there is need for an establishment and development of industry-based learning and training institutions, such as vocational schools to improve and uphold teaching and learning, and as such equip learners with relevant skills that enable them to become productive in their own chosen fields of work. It is for this reason that Tang argued that concentrating on the rearrangement and the development of education and training, incorporating

⁴²⁹Finland- Education and entrepreneurship available at http://www.cautionnement.lu/Finland/Entrepreneurship_Education_in_Finland.pdf. Retrieved 04-01-2021.

⁴³⁰ RDP 1994 page 62 para 4.

⁴³¹ RDP 1994 page 62 para 5.

⁴³² RDP 1994 page 63 para 3.

innovation, teaching strategies, assists the country in elevating its capacity for knowledge, aptitudes, creativity and innovation, which are central elements in the context of globalization.⁴³³ Somavia maintains that, the realization of quality education, and attainment of skills, are the bedrock of decent work, various countries have adopted and used knowledge and expertise attained through education and training to respond to the employment challenges.⁴³⁴ Hence, this study seeks to highlight and display the importance of ensuring that learners and undergraduates receive education of good quality and high standard, to enable them to become employable and create employment.

4.4 The South African Schools Act (SASA) 1996

SASA was passed in 1996, with the aim of remedying past apartheid disparities in the provision of education, previously founded on racial discrimination, and educational segregation. It also aimed at providing learners an education of high quality, therefore laying a robust foundation for the improvement of people's skills, aptitudes and proficiencies, to advance, and accelerate the transformation of society.⁴³⁵ The Act seeks to invest in communities and their educational institutions, to transform societies by establishing amongst them, frameworks that enable easy access to quality education.⁴³⁶

⁴³³ Keow Ngang Tang, Critical Issues of Soft Skills Development in Teaching Professional Training: Educators' Perspectives, 6th World conference on Psychology Counseling and Guidance 14 - 16 May 2015 Elsevier Ltd page 128 para 1.

⁴³⁴ Juan Somavia, A Skilled Workforce for Strong, Sustainable and Balanced Growth: A G20 Training Strategy, International Labour Office – Geneva, ILO Publications 2010 page 1 para 1.

⁴³⁵ The preamble of the South African Schools Act provides that “this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organization, governance and funding of schools in partnership with the State”.

⁴³⁶ SASA's framework includes: Making nine years of schooling compulsory (grade 1 to 7), Localizing power in school community. As a result governing bodies could develop their own admissions policy, language policy (subject to the constitution), code of conduct for learners (excludes corporal punishment) and determine fees. At the same time the Act prevented schools from excluding learners on the basis of entrance tests and being unable to afford the set fee. Offering greater powers to schools that applied for and were accepted for section 21 status. This meant that these schools could purchase their own textbooks or pay for services.

SASA assists government in realising access to quality education, in terms of section 29, of the Constitution, by making parents take added responsibility to ensure that their children attend school. It provides that:

It is the responsibility of every parent or guardian to ensure that every learner of school-going age that they are responsible for, enrol and attend their basic education from the time the learners begins until the time they complete it.⁴³⁷

This denotes that, it is not only the state's obligation to ensure that every learner attends and receives elementary education, but also that of the parents concerned. The Act further provides that, "the State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision".⁴³⁸ The government should fund public schools and skills development organisations, to provide learners with the required skills, thus empower them to be proficient, and enable them to become productive in the workplaces, and create employment for others. By so doing, the state will be contributing to empower the historically deprived and redress of the past inequalities as well as to contribute to the economic development.

4.5 The White Paper on Education and Training (1995)

In 1995, the Department of Education issued a White Paper on education and training, which provides guidelines on the South African educational structure, and the education delivery to the citizens.⁴³⁹ This White Paper was the initial paper to address issues informing the provision of education and training by the democratically elected government of South Africa.⁴⁴⁰ The then Minister of Education, Sibusiso Bengu remarked on the preface of this paper in 1995 that:

It is indispensable for our country to embrace an education and training system that will be recognised by everyone hence it will be advancing their needs and their wellbeing. Such system must promote equality, diversity and academic excellence and forbid any form of discrimination in the educational arena. It must effectively preserve all the resources put in place for the furtherance of attaining quality education and be cared for by those it serves. Bengu further commented that as per the title of the policy,

⁴³⁷ See section 3 (1) of the South African Schools Act 84 of 1996.

⁴³⁸ See section 34 (1) of Act 84 of 1996.

⁴³⁹ The White Paper on Education and Training by the Department of Education, General Notice 196 of 1995.

⁴⁴⁰ The White Paper on Education and Training by the Department of Education, Notice 196 of 1995 page 3 para 7.

it characterises the initial phase of improving the educational system my hope is that it blazes the trail of opportunity and self-fulfilment for all our citizens.⁴⁴¹

In 1995, the then Deputy Minister of Education Renier Schoeman also remarked on the White Paper that:

I am genuinely confident that South Africans will put behind them every educational aspect of adverse in nature and focus on the opportunities presented by this White paper in pursuit of their educational interest as well as the interest of the country. It present a perfect prospect for a new beginning in the educational sector and it ought to be used to the benefit of the country.⁴⁴²

The White Paper provides that, “for the first time in South Africa's history, a government has the mandate to plan the development of the education and training system for the benefit of the country as a whole and its entire people”. The White Paper further states that, some of the educational dares faced by the government include, creating an educational system that opens the doors to learning for all.⁴⁴³ This White Paper proposed provision of a fair and reasonable educational system, which gives all learners in South Africa an education of good quality and standard. This remains the government’s main concern in an ongoing attempt to address educational inequalities as outlined under the Reconstruction and Development Programme (RDP).

It is important to note that the main objective of the RDP is, to ensure that the country’s human resources are fully advanced. This White Paper emphasizes that, “quality education and training can be used as a strong tool to empower people and to encourage them to participate actively in all process involving the democratic society, which is free from any other form of discrimination”.⁴⁴⁴ The inference drawn from this policy is that innovative education and training centres, directed toward providing quality education, must be established, and improved to increase learning opportunities and skills development, for every learner. It seeks to achieve humankind empowerment by, introducing the provision of quality education and training, as a tool to embolden meaningful participation in every practice involving the society. Hence, Salazar maintains that:

⁴⁴¹ See the White Paper on Education and Training (note 437 above); page 3 para 6 and 7.

⁴⁴² The White Paper on Education and Training (note 437 above) page 4 para 5.

⁴⁴³ The White Paper on Education and Training (nota 437 above), chapter 3 page 11 para 1.

⁴⁴⁴ See The White Paper on Education and Training (note 437 above) para 2.

The attainment of good quality education, job-related training and lifelong learning are the dominant pillars enabling those taking part to be employable and establish viable enterprises and consequently contribute to the realization of the development goals to reduce unemployment and poverty.⁴⁴⁵

4.6 The Green Paper on Further Education and Training (1998)

The Green Paper on Further Education and Training (FET), was introduced in 1998, by the department of education, following an extensive process of research and consultation, piloted by the National Committee on Further Education (NCFE), under the direction of the then Minister Sibusiso Bengu. The committee's brief was to scrutinize the FET sector, and provide detailed advice on all facets of post-compulsory education and training, including evaluation of the level of education, training and skills acquired prior to entry into higher education, and or work place.⁴⁴⁶ In 1998, the then minister commented on this policy that:

This Green Paper is the first step in the formulation of policy for FET and follows consultations within the Department as well as the Steering Committee, made up of my Department and the Department of Labour. The policies developed in this Green Paper are complementary to the Skills Development Strategy of the Department of Labour in that both are intended to set in motion lifelong learning, employability and increased productivity in our country.⁴⁴⁷

This Green Paper proposes a number of significant changes in formal schooling in general, which includes the employment of an outcomes-based approach to education and training, as well as the shift in teaching and learning frameworks, from content-driven to programme-oriented models.⁴⁴⁸ The Green Paper aimed at linking, education and training, theory and practice, thus forge a closer link of learners to their needs of higher and lifelong learning, and to work and career development.⁴⁴⁹ The Green Paper provides that:

The Department of Education has launched Outcomes Based Curriculum aimed at providing and widening occupational opportunities for learners, by equipping them with appropriate and necessary expertise to be able to respond to the occupational

⁴⁴⁵ José Manuel Salazar, Conclusions on skills for improved productivity, employment growth and development, International Labour Conference held at the International Labour Office Geneva 2008 page 1 para 3.

⁴⁴⁶ Green Paper on Further Education and Training, Preparing for the Twenty-First Century through Education, Training and Work by the Department of Education 1998 page 3.

⁴⁴⁷ Green Paper (note 444 above) page 3 para 2 and 4.

⁴⁴⁸ Green Paper (note 444 above) page 12 para 8. Beatrice Tucker defines Outcomes based education as “a process that involves the restructuring of curriculum, assessment and reporting practices in education to reflect the achievement of high order learning and mastery rather than the accumulation of course credits”.

⁴⁴⁹ Green Paper (note 444 above) page 13 para 2.

prospects and other opportunities that exist beyond Further Education and Training (FET) and Higher Education (HE).⁴⁵⁰

The Green Paper further states that colleges must endeavour to establish collaboration with employers, or the industrial world, and other FET institutions, for purposes of increasing and developing learning opportunities they make available, and the occupational paths to which they provide access.⁴⁵¹ It further provides that:

colleges must draw their attention and emphasis on establishing self- centred programmes that will be relevant to empower their local communities where they are based whereas others may focus on delivering intermediate to high-level of expertise and qualities relevant to compete with the outside world.⁴⁵²

This study emphasizes that, colleges and FETs offer education which is poor and of low quality and standard, due to lack of sustainable funding, despite being at the focal points of information and skills acquisitions, which must contribute enormously to cultivating, developing and equipping learners with appropriate skills, to empower them to become employable and to create jobs for others.⁴⁵³ In many instances, the lack of sustainable funding in colleges and FETs, leads to inadequately qualified educators, deficiencies in industry-linked platforms, and restricted programme qualifications, lack of programmes relevant to the local societies and industries they serve, which hinders the smooth provision of quality education.⁴⁵⁴

Therefore, it is important to call on the experiences of countries like China, Finland and Singapore, draw on and employ approaches and useful lessons, such as sustainable subsidizing of skills development institutes, and efficient educators' training, to realise the objective of this Green Paper, develop and improve sustainable employability of South African graduates. The real test of the success of skills development institutions is the employability of its graduates, and personal development. Moreover, the measure of effectiveness and responsiveness of a

⁴⁵⁰ Green Paper (note 447 above) para 3.

⁴⁵¹ Green Paper (note 447 above) para 4.

⁴⁵² Green Paper (note 447 above) para 6.

⁴⁵³ Charles Sheppard and Lydia Ntenga, 2014. Funding of the South African Further Education and Training sector for an equitable sharing of national revenue page 249. Available:<https://www.google.co.za/search?q=Sheppard+and+Ntenga+2014&oq=Sheppard+and+Ntenga+2014&aqs-retrieved 24-09-2018>.

⁴⁵⁴ Charles Sheppard and Lydia Ntenga, 2014. Funding of the South African Further Education and Training Sector for an Equitable Sharing of National Revenue.

system of an institution lies on its impact on the social and economic empowerment of the community it serves.⁴⁵⁵

4.7 Education White Paper 4 (1998)

In 1998, the Department of Education introduced a White Paper, which promised to establish FET systems in response to the people's needs. with the objective of realizing enormous contribution towards a better life for all, through, teaching of relevant skills, such as; entrepreneurial skills, how to establish sustainable businesses and so on, skills necessary to be competitive, employable and create employment. The then Minister Sibusiso Bengu commented on this policy that:

The introduction of a newly developed FET system will deliver education and training of high quality and standard that will provide different learners with inclusive learning opportunities. These learners include school-going young people, out-of-school youth, young adults and the larger adult population. A prosperous FET system will make available an educational programme delivering knowledge, expertise, assertiveness and ethics required by South Africans to become economically productive members of society. It will afford vibrant middle to higher-level expertise and capabilities South Africa need to plan its own approach to compete with the world in the 21st century.⁴⁵⁶

There are quite a reasonable number of FETs in South Africa,⁴⁵⁷ offering diverse programs, such as arts and culture, business studies, building construction, manufacturing and technology, management and so on, which shows that there is enough access. However, the actual delivery of good quality education is still poor, in that the graduates from these FETs have proved incompetent in the labour market, in their respective fields of work.⁴⁵⁸ They perform their responsibilities under maximum supervision, demonstrating their level of incompetency, and lack prerequisite skills.⁴⁵⁹ This shows the inadequacy of the provision and delivery of quality education by educators, which as a result produces incompetent graduates. Hence, Hofmeyr and Draper asserted that, the fact that a person is a qualified educator, does not automatically mean that they are a good educator, and not every qualified educator

⁴⁵⁵ Law Song Seng, Vocational technical education and economic development: The Singapore experience. ITE Paper No 9, 2007. Institute of Technical Education, Singapore.

⁴⁵⁶ See message from the then Minister of Education Sibusiso Bengu commending on the Education White Paper 4- A Programme for the Transformation of Further Education and Training, 1998.

⁴⁵⁷ For a list of FETs in South Africa, see <https://www.education.gov.za/FurtherStudies/FETColleges.aspx>. Retrieved 08-1-2021.

⁴⁵⁸ Centre for Enterprise Development, a Johannesburg-based research institute, 2015 page 23. Available at www.cde.org.za-retrived 02-09-2018.

⁴⁵⁹ Centre for Enterprise Development, Available at www.cde.org.za-retrived 02-09-2018.

is capable of delivering the required standard of quality teaching, and learning, or yielding competent learners.⁴⁶⁰

Hofmeyr and Draper further asserts that:

It is clear that most educational programmes lacks quality and the reason for that is because most of the educators has been inadequately taught, trained and imparted with the expertise to impart the indispensable skills and information to the learners.⁴⁶¹

Hofmeyr and Draper conclude by submitting that:

Urgent educational system that will develop educators' capacities is necessary. The provision and escalation of access without actual delivery of quality education will yield incompetent educators with insufficient subject content and pedagogic knowledge and restricted teaching skills, which leaves them ill prepared for the educational dares of classroom teaching and pedagogic innovations.⁴⁶²

This study avers that, access to education on its own is not enough; it must be accompanied by diligent actual delivery that empowers the learners to perform their duties independently, or create and operate projects without supervision. The study further stresses that prioritising the capacitation of educators in the educational sector, is the key point and a stepping-stone for the realization of quality education. Hence, Adedeji and Olaniyan asserted that, competent educators are a most indispensable asset a country can have, and utilize in the realization of sustainably developed, and value-added educational system.⁴⁶³ Adedeji and Olaniyan further argue that:

Any socio-economic approach to improve the educational institutions and to develop communities must reflect on regular educator's development programs and again, a country that need to develop its educational system must adopt effective pedagogic strategies that will advance the capabilities and conditions of educators and their teaching pedagogies in educational institutions.⁴⁶⁴

⁴⁶⁰ Jane Hofmeyr and Kim Draper, Teachers in South Africa, supply and demand 2013-2025, the executive summary, The Centre for Development and Enterprise (CDE) 2015 page 1. The full report, as well as the CDE Technical Report: Teacher supply and demand 2013-2025, are available on the CDE website www.cde.org.za. Retrieved 29-09-2018.

⁴⁶¹ Jane Hofmeyr and Kim Draper, Teachers in South Africa, supply and demand 2013-2025, The Centre for Development and Enterprise (CDE) 2015 page 1.

⁴⁶² Jane Hofmeyr and Kim Draper, Teachers in South Africa, supply and demand 2013-2025, The Centre for Development and Enterprise (CDE) 2015 page 8.

⁴⁶³ Segun Olugbenga Adedeji and Olanrewaju Olaniyan, Fundamentals of teacher education development; improving the conditions of teachers and teaching in rural schools across African countries, United Nations Educational, Scientific and Cultural Organization (UNESCO), International Institute for Capacity Building in Africa (IICBA) Addis Ababa 2011 chapter 4 page 73.

⁴⁶⁴ Adedeji and Olaniyan, Fundamentals of teacher education development; improving the conditions of teachers and teaching in rural schools across African countries page 74 and 76.

4.8 The National Plan of Action (NPA) 2003

In 2003, the Department of Education adopted the National Plan of Action (NPA), which strives for the, “improved access to free and quality basic education for all”. The plan provides that, it is in the process of realizing the delivery of an elementary educational system of good quality, and high standard, for all learners, that financial incapacity will not be a hindrance to accessing this education.⁴⁶⁵ This plan provides that it is necessary for the state to provide a fee-free good quality education for all. This means that -

- Ample educational subsidies to fund learners’ education in public schools, must be made available to cover the expenses, to realize quality education;
- The quality education will provide learners with the indispensable expertise and knowledge, to keenly take participate in the economy of the country; and
- All learners of school-age must be able to attend elementary education without any form of impediment.⁴⁶⁶

This study submits that to date the government has achieved some of the aims and objectives of this plan, for instance, in public schools no elementary learners are required to pay school fees.⁴⁶⁷ This in itself is an immense contribution toward accelerating, and promoting, full access to education at the elementary level. Despite the ready access to education, the quality of the education is remains compromised, as learners are still not receiving the right exposure to the occupational training, which equips them with the required knowledge and skills.⁴⁶⁸ The study submits that government must fund educators, not only for access to educational institutions, but sustainable industry-related training to acquire quality education.

The attained education prepares and trains educators, and provides them with the necessary expertise to be able to impart knowledge, and equip learners with relevant

⁴⁶⁵ National Plan of Action (note 264 above).

⁴⁶⁶ See Plan of Action: (note 261 above) page 8 para 14.

⁴⁶⁷ Section 3 (1) of the South African Schools Act 84 of 1996 and Section 29 (1) (b) of the Constitution of the Republic of South Africa, 1996.

⁴⁶⁸ Hofmeyr and Draper, Teachers in South Africa, supply and demand 2013-2025, (CDE) 2015 page 8.

skills and knowledge. Attendance and active participation must be compulsory, regularly monitored by the state, for compliance. Furthermore, external funders such as private companies, and stakeholders, entrusted with skills development, must assist with funding for educating and training educators, in order to provide quality education to learners and graduates, for the purposes of equipping them with relevant quality skills and knowledge.

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

The Department of Higher Education and Training (DHET) issued a Green Paper intended to improve the South African educational system.⁴⁶⁹ The Green Paper provides that, the current educational system is still has educational disparities, allocation of resources is still distributed along race, class and gender lines. The Green Paper was published with the aim of increasing job opportunities, thus build sustainable livelihoods. It was also a consideration to ensure that mostly the work force possessed the necessary qualifications and were therefore competent. The Green Paper presents a summary of how educational structure can be organized, enhanced and advanced, in a democratic country, for effective promotion of the lives of the public.⁴⁷⁰

The paper further states that, schools located in marginalized and historically black areas, are still under-resourced and deprived; there are inadequate numbers of PhDs from blacks, both men and women, hence, the initiative by the Department of Science and Technology (DST), to target a five-fold escalation for the attainment of PhDs over the next 10 years. This paper highlighted the significance of empowering and building capacity, amongst previously underprivileged groups, by providing them with access to education, coupled with actual delivery of good quality education, geared to empower them, gain skills and become proficient. The paper further provides that:

the completion of PhDs by and amongst blacks and female scholars will offer solutions to both increasing the demographic shape of black and female academic staff at the

⁴⁶⁹ See the National Development Plan vision 2030 chapter 9 page 276. See also the Department of Higher Education and Training's Green Paper for Post-School Education and Training, Summary prepared by Yuven Gounden for the National Science and Technology Forum (NSTF) March 2012.

⁴⁷⁰ See the Department of Higher Education and Training's Green Paper for Post-School Education and Training, summary prepared by Yuven Gounden for the National Science and Technology Forum (NSTF) March 2012 page 1.

historically White schools and provide the human resource required to develop the quality of the historically Black institutions.⁴⁷¹

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

- Provide a variety of access alternative and career choices for youths.
- Increase the enrolment rate of students in the institutions of higher learning, such as universities to 1 500 000 (projected at 23%) as opposed to around 2011 enrolment figure of 899 120.
- Increase the enrolment rate of students in colleges or other post-school institutions at about a 60% participation rate, with a key focus on FET colleges.
- Refine the quality of the educational system in FET colleges by adopting and improving inventive programmes and upgrading educators’ pedagogic skills and qualifications.
- Address the inadequacy of the level of research and innovation echoing the DST Ten-Year Innovation Plan.
- Establish an educational institution responsible for catering to educational necessities of adults and out of school community.
- Establish a South African Institute for Vocational and Continuing Education and Training (SAIVCET) as part of a long-term strategy to build institutional capacity.
- Emphasize the significance of establishing a connection between secondary, post-secondary and labour markets.
- Establish institutions that will build a sustainable relationship between education, training and labour market.⁴⁷²

This study emphasized that, access is no longer a concern, that the major problem is now the provision of quality education, to flow from adequate access. Offering access to educational institutions, without provision of quality education, is not good for the learners, and society as a whole. Mass enrolments in the institutions of higher learning, wherein there is no proper training is also irrelevant, as it fails to equip learners and

⁴⁷¹ See National Plan of Action: (note 264 above).

⁴⁷² See the Department of Higher Education and Training’s Green Paper (note 470 above) page 1 para 3.

graduates with the necessary skills required for the workplace. All these must be coupled with extensive innovation and training of learners, in order to capacitate them. However, it is of vital importance to point out that, good quality education to the learners is rooted in the availability of skilled educators, empowered with capacity and competency. Empowering educators enables them to impart their knowledge to the learners. Hence, Adedeji and Olaniyan opined that, “for the improvement of educational institutions and the development of human capacity to flourish in a country, continuous educators’ development programs must be considered and for that country to have the best quality education, it must provide sustainable pedagogical innovative strategies that will improve the capacity and conditions of educators and teaching in schools”.⁴⁷³

4.10 The White Paper for Post School Education and Training (WPPSET) 2014

In 2014, the DHET published a White Paper for Post School Education and Training. This White Paper sought to set out relevant plans to develop the delivery of quality education, and training in South Africa, to advance its quality, and set out approaches and techniques, through which employers in both private and public sectors can play a substantial role in creating a highly skilled workforce.⁴⁷⁴ The Paper intended to outline a structure that explains the Department’s focus and priorities, in creating a strong development strategy for a period up to 2030.⁴⁷⁵ The Paper’s focal objectives were *inter alia*, to establish and develop:

- A post-school educational arrangement that will build and encourage a just, equitable, non-racial, non-sexist and autonomous South Africa;
- One synchronised post-school education and training system;
- The provision of quality education riddled with ample access, improve quality and standard and augmented diversity;
- A strong collaboration between education and training institutions such as FETs and colleges, and the workplace;

⁴⁷³ Adedeji and Olaniyan, Fundamentals of teacher education development; improving the conditions of teachers and teaching in rural schools across African countries page 74 and 76.

⁴⁷⁴ White Paper for Post School Education and Training, Building an Expanded, Effective and Integrated Post-School System by the Department of Higher Education and Training 2014 page 1 para 1.

⁴⁷⁵ See the Minister of Higher Education and Training Blade Nzimande’s preface on the White Paper for Post School Education and Training page vii para 4.

- Education and training system that will respond to the educational necessities of learners and undergraduates, workforce in both public and private sectors, as well as the society as a whole.

Moreover, the WPPSET stresses that, “these objectives are of paramount importance in the development of the South African educational system, however, they have not been implemented yet and as such it adversely contributes to the poor educational system whereas if implemented it will positively contribute to the upbringing and provision of good quality education”.⁴⁷⁶ It provides that:

The education and training arrangement must be able to cater for the educational need of all the people, adults and youth who are without a job, poorly educated and not studying. The increase in institutions providing education such as universities and colleges structures will make a difference; however, it will not be adequate to meet all the educational needs. An innovative type of educational institution has to be established and reinforced; one that can provide a variety of possibilities and opportunities to people for whom vocational and technical colleges and universities are not possible.⁴⁷⁷

It is based on these strategies that, the study stresses that there must be ample access and provision of extensive education, which articulates quality as part of access in order to realize the delivery of good quality education. Adults who are poorly educated, and or those completely illiterate, are not exempted. They too should be equipped with skills in the respective areas of their vocations, such as farming, and or agriculture, to improve their productivity, and living conditions in the farming communities.

In 2015, Nzimande remarked on the preamble of this policy that:

This White Paper remains a driving force to drive and deepen transformation of the post-school sector. It will provide a framework to reflect on the accomplishments of our democratic government post 1994. It is on the reflection of these accomplishments that we anticipate to confront many educational challenges that still lie ahead. The White Paper will empower us as we endeavour to build a post-school education system and training system that is able to contribute to eliminating the past educational inequalities and destroying the legacy of apartheid. It will assist us to build a successful educational system characterised by progressive narrowing of the gap between the rich and the poor. Access to quality post-school education is a main driving force in combating poverty and inequality in any society.⁴⁷⁸ The Minister further alluded that: the education and training system should not only afford learners with knowledge and abilities necessitated by the economy. It should also contribute to create and develop thinking

⁴⁷⁶ National Policy on Community Education and Training Colleges by the Department of Higher Education and Training 2015 page 5 para 3.

⁴⁷⁷ National Policy on Community Education and Training Colleges by the Department of Higher Education and Training 2015 page 5 para 3 and 4.

⁴⁷⁸ White Paper for Post School Education and Training (note 475) viii para 4.

citizens, who can function efficiently, innovatively and ethically as part of a democratic society. They should understand their society, and be able to take part fully in the society's political, social and cultural life.⁴⁷⁹

According to Manana, “the White Paper for Post School Education and Training is now a cornerstone for the transformation of the educational system. This is aimed at positively transforming the system and use it to confront all forms of inequalities and to push back the challenges of poverty and unemployment”. Manana further pointed out that:

This policy is in line with the National Development Plan because its objective is to establish a range of competent and highly qualified and knowledgeable society that would play an important role of developing the evolving sector of our economy thus creating a considerable number of employment opportunities for youth.⁴⁸⁰

The study also submits that the objectives of this policy are beneficial, and thus must be employed in order to be realised. If these objectives are employed the learners will gain high levels of expertise, knowledge and capability, be employable and be able to create employment for others, thereby contributing to the overall economic growth.

These assertions are supported by Zimbo's articulations that:

Education is an indispensable component for the development of socio-economic amenities because educated persons have the capacity and great chance to secure both the basic necessities for survival and other important goods necessary for flourishing such as a good and sustainable employment, which improves personal income and the ability to escape poverty.⁴⁸¹

4.11 A Work Place-Based Learning Policy (2015)

In 2015, the DHET published a Work Place-Based Learning (WPBL) Policy, which promised to create deep-seated and or radical transition from teaching and learning to work in order to augment employability. The DHET through this policy defines workplace-based learning as, a learning method whereby a person adopts knowledge, gains insight and attains the necessary skills and proficiencies, through exposure to a work place, to achieve specific outcomes relevant to employment.⁴⁸² This policy

⁴⁷⁹ White Paper for Post School Education and Training (note 475) para 3.

⁴⁸⁰ See message from the then Deputy Minister of Higher Education and Training Mduzuzi Manana commending on the Department of Higher Education and Training 2014/15 annual report page 11 para 1 and 2.

⁴⁸¹ Chiedza Zimbo, The right to basic education, the South Africa constitution and the *Juma Masjid* case: an unqualified human right and a minimum core standard, *Law Democracy & Development* 2013 page 483. Also available at <http://dx.doi.org/10.4314/idd.v17i1.23> retrieved 29-09-2018.

⁴⁸² A Work Place-Based Learning (WPBL) Policy: The National Perspective by the Department of Higher Education and Training 2015 page 3.

provides that “learners must be exposed to work place-based learning which will enable them to attain the necessary industrial skills so that they will be employable and be able to create employment themselves”.⁴⁸³

This study submits that, learners and graduates be taught and trained well, to attain the necessary qualities and skills prior to entry into workplaces. The existing workforce must not be excluded, as it also requires further training, to acquire the appropriate skills, in order to be more competent in their chosen fields of work. These contentions are corroborated by the International Labour Conference report, which provides that:

Skills development is crucial to improving productivity. In turn, efficiency is an essential bedrock of better quality or enhanced living standards and growth, which include critical factors such as employment opportunities, sustainable enterprise development and fundamental investments in quality education and training.⁴⁸⁴ The report further stresses that “effective skills development systems which connect education to technical training, technical training to labour market entry and labour market entry to workplace and lifelong learning can help a country to sustain productivity growth and translate that growth into more and better quality jobs”.⁴⁸⁵

Similarly, Quintini and Pouliakas assert that, “the collaboration of education and training institutions and the industrial or the working world is necessary for success and a synchronised approach that builds competencies and required skills through the attainment of quality education while involving all relevant stakeholders in the skills development process throughout an person’s life is necessary”.⁴⁸⁶ Quintini and Pouliakas further assert that, “other than learning on the job, work-based and job specific skills must be acquired at schools”.⁴⁸⁷

4.12 National Policy on Community Education and Training Colleges (2015)

The National Policy on Community Education and Training Colleges was published in 2015, following the provisions of section 41B (4) of the Continuing Education and

⁴⁸³ A Work Place-Based Learning (WPBL) Policy (note 483) page 4.

⁴⁸⁴ See the Skills for improved productivity, employment growth and development, International Labour Conference held at the International Labour Office Geneva, Report V, 97th Session, 2008-page v para 2 and 3.

⁴⁸⁵ International Labour Conference, 2008-page v para 2 and 3.

⁴⁸⁶ Glenda Quintini and Konstantinos Pouliakas, Matching Skills and Labour Market Needs Building Social Partnerships for Better Skills and Better Jobs, World Economic Forum Global Agenda Council on Employment, Davos-Klosters, Switzerland 2014 page 5.

⁴⁸⁷ Glenda Quintini and Konstantinos Pouliakas, World Economic Forum Global Agenda Council on Employment, Davos-Klosters, Switzerland 2014 page 8.

Training Act.⁴⁸⁸ This policy works as the first step in the establishment of a predominant institutional policy framework for the establishment of Community Education and Training Centres (CETCs).⁴⁸⁹ It provides that, “there must be ample access to education and training through viable educational institutions and it must be made available to everyone including the labour force and those without employment, young and old to encourage an economically dynamic population and community participation”.⁴⁹⁰

It pursues to accomplish the establishment of innovation and training institutions that will transform and equip every person within communities, including the employed, those without a job, young and old, in order to encourage their progressive contribution towards the economic boom of the country. The study submits that, the intensive participation of the community in the innovative and training programmes, guarantees that the community receives excellent skills, and the necessary knowledge that empowers them to secure and generate valuable jobs and opportunities.

4.13 South African Qualifications Authority (SAQA) Act, 1995

This Act was enacted to ensure the provision of quality education and training. SAQAA led to the establishment of the national body called the National Qualifications Framework (NQF), intended to establish an incorporated national framework for learning accomplishments, and expediting access to mobility and development within education, training and career paths.⁴⁹¹ This Act provides that:

This framework is aimed at improving the quality of education and training, to fast-track the process of redressing the past injustices and unfair discriminatory practices in education, training and employment opportunities; and thereby contributing to the full personal development of each learner and the social and economic development of the nation at large.⁴⁹²

Hence, Mailaret highlighted that, education has the aptitude of making persons equal, hence; it provides them with the ability to exercise freedom in developing talents,

⁴⁸⁸ Act 16 of 2006.

⁴⁸⁹ National Policy on Community Education and Training Colleges by the Department of Higher Education and Training 2015 page 3 para 5.

⁴⁹⁰ National Policy on Community Education and Training Colleges 2015 (note 490) page 5 para 2.

⁴⁹¹ Section 2 (a) and (b) of Act 58 of 1995.

⁴⁹² Section 2 (c), (d) and (e) of Act 58 of 1995.

individual occupations, and the necessary skills, that empower a person to manoeuvre through difficulties that weaken the human condition, such as poverty.⁴⁹³ It is significant to point out that the actual enforcement of this Act will assist the state to ensure that those taking part in education and training receive the best quality education that would empower them to be competitive, employable and create labour themselves.

4.14 Higher Education Act (1997) as amended

The Higher Education Act⁴⁹⁴ was enacted in 1997, to provide the best learning opportunities, maintain the workable creation of necessary knowledge and abilities, and uphold the potential of every learner, and employee.⁴⁹⁵ Section 4 of this Act provides for, “the establishment of a body known as the Council on Higher Education (CHE), which its main function is to promote quality assurance in higher education as well as promotion of access to higher education institutions including student financial aid”.⁴⁹⁶ According to Bailey, the other objective of CHE is, to encourage the provision of quality education, and build capacity within the higher education and training institutions.⁴⁹⁷

The Act also intends to broaden the learning prospects, and uphold the significance of attaining the necessary skills.⁴⁹⁸ It is for this reason that Medeshova and Amanturlina indicate that, “education should improve personal qualities of students while teaches them new practical skills through teaching and learning process”.⁴⁹⁹ Medeshova and Amanturlina are of the view that, “student-centred learning program is a good method that should be utilized as a learning activity directed at the

⁴⁹³ Gaston Mialaret, the child’s right to education, United Nations Educational, Scientific and Cultural Organization (UNESCO) 1979 page 20.

⁴⁹⁴ Act 101 of 1997.

⁴⁹⁵ See the preamble of Act 101 of 1997.

⁴⁹⁶ Section 4 and 5 (1) (c) (i), (e) and (2) (f) of Act 101 of 1997.

⁴⁹⁷ Tracy Bailey, The Role and functions of Higher Education Councils and Commissions in Africa, A case study of the South African Council on Higher Education, Centre for Higher Education Transformation (CHET) 2014 page 17.

⁴⁹⁸ Preamble of Act 101 of 1997.

⁴⁹⁹ Aigul Medeshova, Gulmira Amanturlina and Elena Sumyanova, Development of Training Skills in Students as the Precondition for Educational Competencies, International Journal Of Environmental & Science Education 2016 page 9650.

development of the individual, which provides means required to achieve results in pedagogical situations”.⁵⁰⁰

4.15 Skills Development Act (1998) as amended

It is of cardinal importance to deliberate on the notion of skills development before discussing the Act itself. According to Mopeli, the concept of skill development is influential within institutions or organisations. Mopeli asserts that, “in organisations skills development is used as a tool to improve the effectiveness of the organisation’s important resources”.⁵⁰¹ Mopeli argues that, “skills development is an essential component to ensure that employees perform their work as required and as such, it echoes instructions and or individual training in the workplace”.⁵⁰² Beardwell and Holden are of the view that, “skills development support the approach that South Africa needs to recognize the importance of integrating education, training and skills development as a way of creating an enabling environment for the country to develop workplace competence and stimulate growth for the country”.⁵⁰³ Moreover, Picard argues that, “the current problems that the country is facing are resultant from government’s failure to prioritize the implementation of skills development in the workplaces”.⁵⁰⁴ The study asserts that, in order to address this problem, government ought to intervene by employing skills development programmes within the South African labour force, thus promote self-employment and increase the levels of investment in education and training in the labour market.

The Skills Development Act (SDA) is aimed at increasing the skills of the South African labour force, by encouraging self-employment attitude and by increasing the levels of investment in education and training in the labour market. The Act also provides the workforce with chances to attain relevant new talents within their respective places of

⁵⁰⁰ Medeshova and Amanturlina, Development of Training Skills in Students as the Precondition for Educational Competencies page 9650.

⁵⁰¹ Seeiso Angel Mopeli, “Training and skills development of senior municipal officials in the Johannesburg Metropolitan”, A Dissertation Submitted to Faculty of Arts, University of Johannesburg, Johannesburg 2014 page 25.

⁵⁰² Mopeli, “Training and skills development of senior municipal officials in the Johannesburg Metropolitan 2014 page 25

⁵⁰³ Ian Beardwell and Len Holden, "Human Resource Management: A Contemporary Perspective", Pitman Publishing, London 1997.

⁵⁰⁴ Louis A Picard, "The State of the State: Institutional Transformation, Capacity and Political change in South Africa", Paarl Print, Johannesburg 2005.

work, and encourages the employers to use the workplace as a dynamic learning environment.⁵⁰⁵ It provides that:

The objectives of this Act include among others to improve the expertise of the South African labour force, to develop the quality of life of the workforce through attainment of good quality education, to escalate their chances of securing decent work and labour mobility; to increase productivity in the workplace and the effectiveness of employers; to encourage self-employment; to encourage effective collaboration between educational institutions and place of work; and to increase the levels of investment in education and training in the labour market.⁵⁰⁶

It further encourages employers to provide their workforces with opportunities to acquire new skills, make opportunities available for new employees entering the labour market, to gain work experience, and encourage them to use their workplaces as active learning platforms.⁵⁰⁷ This study asserts that the actual employment, as well as application of the provisions of this Act, as clearly outlined in section 2, leads to the realization of the objectives of this Act, and the delivery of quality education to South Africans. The study emphasizes that implementing these provisions assists to accelerate the paradigm shift, in delivering quality education to the people, which consequently equips them with relevant skills that empower them to be competitive, employable and create employment. Hence, Greyling argues that, “the SDA is aimed at enhancing the quality of life of all the employees including academics, non-academics and support staff in the higher education institutions”.⁵⁰⁸ Greyling further posits that, “the Act is also aimed at increasing productivity in organisations and institutions and envisaged that by increasing the capacity and competency levels of all employees including educators will be adding real value to the organisational and institutional effectiveness”.⁵⁰⁹

⁵⁰⁵ See the preamble of Act 97 of 1998.

⁵⁰⁶ Section 2 (1) (a) (i) - (iv) and (b) of Act 97 of 1998.

⁵⁰⁷ Section 2 (1) (c) (i) - (iii) of Act 97 of 1998. Section 2 (d)-(g) further provides that “it is the purpose of this Act to employ persons who find it difficult to be employed; to encourage workers to participate in learning programmes; to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education; to ensure the quality of learning in and for the workplace; to assist work-seekers to find work; retrenched workers to re-enter the labour market; employers to find qualified employees; and to provide and regulate employment services”.

⁵⁰⁸ Lorraine Greyling, Skills development: a strategic perspective. South African Journal of Higher Education, 2001 page 37.

⁵⁰⁹ Greyling, Skills development: a strategic perspective page 37.

4.16 Adult Basic Education and Training Act (2000)

In 2000, the Adult Basic Education and Training Act⁵¹⁰ was enacted purposely to, “regulate adult basic education and training; to provide for the establishment, governance and funding of public adult learning centres; to provide for the registration of private adult learning centres and to provide for quality assurance and quality promotion in adult basic education and training”.⁵¹¹ This Act provides that:

At the end of every academic year, there must be a quality assurance assessment conducted in relation to adult basic education and training. Consequently, there must be a report compiled according to the quality of such education which report must be presented to the Minister in relation to an applicable Province and or the country at large.⁵¹²

McKay observed that, “Adult Basic Education and Training (ABET) has to provide people including all adults who would like to participate in ABET programs, with the foundation for lifelong learning and equip them with the skills and critical capacity to participate fully in society”.⁵¹³ According to McKay, these refer to the educational base that individuals require to develop their life prospects and also the foundational income-generating or work-related skills that people require to improve their living conditions.⁵¹⁴ ABET supplies adults with the introductory knowledge, skills, understanding and capabilities necessary to improve one’s social and economic life. McKay further posits that:

ABET programs and curriculums bring education and training together, and adults taking part in ABET can attain understanding, expertise, knowledge and aptitudes to be employable and create employment themselves. These kinds of programs also provide those who participate in the program with an opportunity to study further, which would improve their lives and the lives of the communities at large.⁵¹⁵

According to the Department of Education Policy document on Adult Basic Education and Training of 1997, “ABET provides the foundation of fundamental skills, knowledge, and understanding that gives people a basis from which they can progress along a

⁵¹⁰ Act 52 of 2000.

⁵¹¹ See the preamble of Act 52 of 2000.

⁵¹² Section 32 and 34 (a) and (b) of Act 52 of 2000.

⁵¹³ Veronica McKay, *Adult Basic Education and Training in South Africa*, National Center for the Study of Adult Learning and Literacy (NCSALL) 2007 page 293.

⁵¹⁴ McKay, *Adult Basic Education and Training in South Africa* 2007 page 291.

⁵¹⁵ McKay, *Adult Basic Education and Training in South Africa* 2007 page 291.

chosen career and life path”.⁵¹⁶ This study submits that for South Africa to have quality adult education, the provision of this kind of education must be encouraged and strongly monitored on regular basis, owing to the provisions of this Act and other relevant legislation supporting access to quality adult basic education and training. Pursuant to that, monitory bodies must regularly give account to the minister of higher education and training, on the progress achieved.

4.17 Broad-Based Black Economic Empowerment Act (2003) as amended

This Act was passed in 2003 to ensure equitable training of every citizen, free from ethnic segregation, guarantee meaningful contribution by black societies toward the economy of the country, and intensify employment prospects. Section 2 of this Act affirms that, “the main objective of this Act is to promote economic transformation by enabling effective participation of blacks and to empower them by increasing their access to economic activities and skills training”.⁵¹⁷ The section further articulated that, “the Act also intends to redress the imbalances caused by apartheid administration by empowering rural and local communities to access relevant skills and to promote access to finance for black economic empowerment since race was used to control access to skills”.⁵¹⁸ This Act led to the formation of a body known as the Black Economic Empowerment Advisory Council (BEEAC), its main function being to guide the state on black economic empowerment strategies, as well as to monitor progress in accomplishing black economic empowerment.⁵¹⁹

The Act also led to the establishment of BBBEE, a process of economic advancement by the government, to provide the black population with economic power. Hence, Mparadzi and Kalula posit that, “the BBBEE was introduced to balance the economic empowerment between Black and White communities in South Africa”.⁵²⁰ It directs the equitable distribution of the country’s wealth, transversely to all South Africans, mostly

⁵¹⁶ Department of Education Policy document on Adult Basic Education and Training. A national multi-year implementation plan for adult education and training: Provision and accreditation. (1997) Pretoria, South Africa.

⁵¹⁷ Section 2 (c) of Act 53 of 2003 as amended.

⁵¹⁸ Section 2 (g) of Act 53 of 2003 as amended.

⁵¹⁹ Section 4 and 5 (a) and (b) of Act 53 of 2003 as amended.

⁵²⁰ Andrea Mparadzi and Evance Kalula, “Black economic empowerment in South Africa: A critical appraisal”, Institute of Development and Labour Law, University of Cape Town, Monograph No. 1, 2007. page 1, 7-12, 14-16, 18-20.

the previously disadvantaged black South African society.⁵²¹ Furthermore, Osode averred that, “the BBBEE is a process aimed at spreading equity holdings by incorporating the previously disadvantaged society, re-organising management structures and ensuring their participation in the economy to achieve economic justice”.⁵²²

This study submits that, education is a pivotal tool, and it is through the delivery of quality education, particularly to the black majority, to empower and equip them with the requisite quality skills and capacity, that economic transformation advances in South Africa. This study further posits that, allowing people to engage in different skills development, and capacity-building programs, indeed transforms them into a better society, which meaningfully participates in the economic growth of the country. Predicated on this notion, Thomas and Salisu posit that, “quality education has for long been recognized as a basic tool for economic development of any nation and it empowers any nation to rise to the challenges of social and economic transformation as well as technological change”.⁵²³

Thomas and Salisu are also of the view that, “the rationale for investing in education is based on the expectation of its role in contributing to social reconstruction and economic development as well as creation of sustainable economic growth. Hence transforming the economy for sustainable development cannot be complete without education because it has a link with nation building and economic development”.⁵²⁴ In the same manner, Alufohai highlighted that, “educational institutions are centres for educating, creating information, imparting knowledge, which is of utmost importance to the people for the development and management of the future for sustainability in different societies”.⁵²⁵ Likewise, Otoh averred that, “quality education is of great importance in socio-economic development and a vital process in economic growth

⁵²¹ Mparadzi and Kalula, “Black economic empowerment in South Africa: A critical appraisal” 2007.

⁵²² Patrick C Osode, “The New Broad-Based Economic Empowerment Act: A Critical Evaluation”, *Speculum Juris*, No. 18 No 1 2004 page 114.

⁵²³ Olusola Angelina Thomas, Rashidat Adedoyin Salisu and Samuel Adelowo Thomas. *The Role of Higher Education in Economic Transformation and Sustainable Development in Nigeria*. The European Conference on Education 2014 (Official Conference Proceedings) page 2.

⁵²⁴ Thomas and Salisu. *The Role of Higher Education in Economic Transformation and Sustainable Development in Nigeria*.

⁵²⁵ Edith Alufohai, *Enhancing teaching and learning for sustainable development in Nigeria Higher Institutions of Learning*. *Journal of Educational Review* 2012 5(2) 137-142.

hence it contributes to the construction and advancement of knowledge to sustain the nation".⁵²⁶ This study further submits that, for this country to subdue the real threats to economic development and stability, such as poverty and unemployment, investment in education is crucial, as the economic prosperity of this country rests on education.

4.18 Continuing Education and Training Act (2006) as amended

The Continuing Education and Training Act,⁵²⁷ as amended, enacted in 2006. This Act established Community Education and Training Colleges (CETCs), as another institutional type within the Post-School Education and Training system.⁵²⁸ This Act aimed at guaranteeing ample access to elementary adult education, further education and training for the historically-marginalized society, through continued education and training, which included the provision of education and training in the workplace. Further, it aimed at creating optimal educational opportunities, the formation of a robust knowledge acquisition, and the advancement of intermediate to high-level skills for previously marginalised people, to empower them to compete with the world of educational and technical quality.⁵²⁹ Section 2 of this Act provides that:

the purpose of this Act is to empower students to gain the required knowledge, relevant practical skills and applicable vocational and occupational competence and also to provide students with the necessary qualities required for employment, entry to a particular vocation, occupation or trade.⁵³⁰

According to the WPPSET of 2013, the attainment of education has been renowned as providing a means out of destitution for people, and as an approach to promote equality of opportunity, as the realization of greater social justice depends on equitable access to socio-economic resources.⁵³¹ According to this White Paper, for post-school systems to serve the country well, South Africa needs adequate educational institutions such as colleges and FETs, for people to learn different types of skills and qualifications, and better quality education and training.⁵³² The White Paper provides

⁵²⁶ Otoh T.N. Revitalizing higher education for socio-economic development. Nigerian Higher Education Journal 2012 263-272.

⁵²⁷ Act 16 of 2006.

⁵²⁸ See the National Policy on Community Education and Training Colleges by the Department of Higher Education 2015 page 3.

⁵²⁹ See the preamble of Act 16 of 2006.

⁵³⁰ Section 2 (1) (a) (i), (ii), (iii) and (b) (i) and (ii) of Act 16 of 2006.

⁵³¹ White Paper for Post-School Education and Training, Building an expanded, effective and integrated post-school system. A paper by the Department of Higher Education and Training 2013 page 5.

⁵³² White Paper for Post-School Education and Training 2013 page 5.

that, “the main purpose of the continuing education and training system is to prepare the workforce for the labour market and to enable people to earn sustainable livelihoods through self-employment or establishing a company to enable people to make a living for themselves and contribute skills to a developing economy”.⁵³³

4.19 Further Education and Training Act (1998)

Consistently with Continuing Education and Training Act, this Act promises to afford previously marginalised communities ample access to further education and training. Among the historically disadvantaged communities, it also creates ideal learning prospects, and knowledge acquisition mechanisms, which embrace the development of transitional to high-level skills, in these communities, to empower them to compete with the universal standards of academic and technical quality.⁵³⁴ This Act was enacted purposely to “establish a national co-ordinated further education and training system which promotes co-operative governance and provides for programme-based further education and training”.⁵³⁵

This study accentuates that, the objective of this Act can be realised if implemented effectively, thereby creating programme-based education and training institutions, and constantly monitor existing ones, in order to deliver quality relevant skills to the communities involved. Hence, Badat asserted that:

Education must improve the knowledge, proficiencies and expertise that empower graduates to take part in the economic growth, since such improvement can accelerate initiatives aimed at creating a better social equality and social development.⁵³⁶ Badat elaborated further that when transforming the educational sector, it is necessary to restructure the programmes and the curriculum to be in line and congruent with the knowledge, proficiency and abilities required in the ever-changing economy.⁵³⁷

It is therefore, based on Badat’s assertions that this study submits, education should prioritize capacitating learners, developing vocational and career-focused qualifications and programmes, and emphasize skills development.

⁵³³ White Paper for Post-School Education and Training 2013 page 8.

⁵³⁴ See the preamble of Act 98 of 1998.

⁵³⁵ Section 2 of Act 98 of 1998.

⁵³⁶ Saleem Badat, The challenges of transformation in higher education and training institutions in South Africa, Development Bank of Southern Africa (DBSA) 2010 page 16 para 4.

⁵³⁷ Badat, The challenges of transformation in higher education and training institutions in South Africa, Development Bank of Southern Africa (DBSA) 2010 page 16 para 4.

4.20 Conclusion

It is clear that there is adequate legislation, policies and laws promulgated since 1994, aimed at providing good quality education. These legislation, policies and laws point out the need and significance of investment in skills development, and capacity building, to improve the quality of education in South Africa. This calls for radical implementation and enforcement of the above legislation, policies and laws, where implementation and enforcement is lacking, in order to realise their respective aims and objectives. Such implementation improves the skills and capacity of the South African people, which consequently empowers them to be employable, and create employment, resulting in positive contribution to the country's economic growth.

Consequently, in conclusion, the reviewed legislative interventions show that in South Africa, there are abundant pieces of educational legislation and or laws, enacted to duly redressed, apartheid educational inequalities and injustices. However, even with these legal frameworks in place, the conclusion is, their enforcement is deficient. Drawing from this analysis, these frameworks require diligent enforcement to achieve their respective objectives, and as such, realize quality education. Subsequently, to ensure compliance to these laws, as it should be, continued collaboration is required, between the state, and all other stakeholders responsible for the promotion of education, inclusive of private entrepreneurs. Therefore, it remains imperative that, government ensures that the right to quality education is highly protected and enforced at all cost, and that education be utilized as a transformative, and investment tool in nation- building.

CHAPTER 5: THE CONSTITUTIONAL RIGHT TO ACCESS TO EDUCATION: A SOUTH AFRICAN PERSPECTIVE

5.1 Introduction

An analysis of the right to access education in South Africa, begins by examining the constitutional context within which the content and nature of this fundamental right has been provided in the Constitution. Accordingly, it is pertinent to trace back where this right derived from. This chapter examines the relevant provision of the Constitution on education, particularly section 29. In terms of this section, there is an obligation on the part of government, to make education available and accessible to every person, and the Constitution clearly promises the right to basic education.⁵³⁸ The Constitution also obligates the government, through adoption of practical processes, to make further education available and accessible in the course of time.⁵³⁹ Conversely, it is significant to note that this section does not specify the nature of education the state must provide.⁵⁴⁰ Section 29, of the Constitution, stipulates that every person be entitled to receive rudimentary education, inclusive of adult elementary education, and further education. In relation to the provision of further education, this section asserts that, the state must ensure that reasonable measures are in place to make this education available, and easily reachable.

This study submits that, government ensures that good quality education be delivered to, and received by the learners and graduates, in educational institutions. This to be done through employing and implementing educators' capacity building mechanisms and strategies, that capacitate educators, so as to impart the necessary knowledge and skills to learners and graduates, which in turn equips them to be employable and able to create employment. This promotes and strengthens the provision of quality education to South African educational institutions, and capacitates all learners taking part, subsequently contributing positively to the upbringing and development of the economy.

⁵³⁸ Lorette Arendse "The obligation to provide free basic education in South Africa: An international law perspective" 2011, Potchefstroom Electronic Law Journal (PELJ) 97.

⁵³⁹ Section 29 (1) (b) of the Constitution of the Republic of South Africa, 1996.

⁵⁴⁰ Elijah Adewale Taiwo, *The Implementation of the right to education in South Africa and Nigeria* (2011) 116.

5.2 Accessibility and the right to education

One mechanism that empowers people to defeat and escape destitution is through education. Hence, Tomasevski postulates that, “education plays a crucial role in the fulfilment of socio-economic rights as it enhances a person’s prospects of securing good employment, which in turn secures access to food, housing and health care services”.⁵⁴¹ Moreover, UNESCO considers education the path to sustainability, poverty alleviation, and better health.⁵⁴² According to UNESCO, a country can make no stronger, more longer-lasting investment than educating its citizens.⁵⁴³ Dwane averred that, quality education if successfully attained could be used as a bridge to cross over from poverty to a better life, thus improve the living standard of the people.⁵⁴⁴

According to UNESCO, the concept of accessibility of the right to education integrates three corresponding dimensions. Firstly, for every person education must easily be within reach, without any form of unfair discrimination. Secondly, education must be physically accessible to everyone, that is to say schools be within safe physical reach. Subsequently, schools and educational institutions must also be accessible to people with physical impairments, to exercise their right to access education. Thirdly, education must be economically accessible, that is, be within everyone’s means or affordable to all.⁵⁴⁵

5.2.1 The system of education in South Africa

From 1994, there was a major transformation in educational administration. The previously demarcated departments of education merged and restructured into one national department of education. From that time, the national department of education and the provincial departments worked hand in hand with each other, and shared responsibilities, such as the allocation of textbooks, school furniture and feeding schemes. The then previously designated homelands, namely, Transkei, Bophuthatswana, Ciskei, Venda, Gazankulu, KaNgwane, KwaNdebele, KwaZulu,

⁵⁴¹ Tomaševski, *Human Rights Obligations in Education: The 4-A Scheme*, Wolf Legal Publishers (WLP) 2006 page 47.

⁵⁴² UNESCO the Australian Multilateral Assessment March 2012 page 1.

⁵⁴³ See UNESCO and education, Thomas and Trotman Design and publications 2017 page 1.

⁵⁴⁴ Yoliswa Dwane an Equal Education (EE)’s head of policy, communications and research report delivered on 24 April 2012. Also available at www.groundup.org.za-retrived 09-03-2017.

⁵⁴⁵ See UNESCO General Comment 13 of 2003 page 9. Further see the South African Human Rights Commission (SAHRC) 2006 page 10.

Lebowa, and QwaQwa, were abolished, and replaced by nine provinces.⁵⁴⁶ Since 2009 henceforth, the National Department of Education divided into two departments, namely, “Basic Education, and Higher Education and Training”. A minister headed each Department, and their roles and functions were to oversee the Departments. The ministers were therefore responsible for their respective departments, from all the four corners of the country, while each province had its own Department of Education.⁵⁴⁷

The Department of Basic Education focuses on primary and secondary education, as well as early childhood development centres.⁵⁴⁸ The Department of Higher Education and Training, is responsible for tertiary education up to postgraduate level, technical, vocational training, as well as Adult Basic Education and Training.⁵⁴⁹ Section 29 of the 1996 Constitution, provides for access to education through these departments. . Moreover, other policies such as the RDP, the White Paper on Education and Training of 1995, and the Green Paper on Further Education and Training of 1998, aimed at developing skills and knowledge of the people through teaching and learning.

5.2.2 Defining elementary education as of right

According to UNESCO, “basic education is more than an end in itself. It is the foundation for lifelong learning and human development on which countries may build, systematically, further levels and types of education and training”.⁵⁵⁰ For this study, the word “basic” is used interchangeably with the word “elementary”, meaning in, or connected to the first stage, or level of education. The term “basic education” as stipulated in section 29 of the Constitution is debatable and for this study, it is significant to attempt to clarify its meaning thereof. Arguably, there is no exactly simple meaning of the term “basic education”, as it has not yet been clearly defined and clarified, within any of the existing legislation, policies and documents, (such as the SASA, the National Educational Policy Act, the relevant White Papers and the 1996

⁵⁴⁶ South Africa is divided into nine provinces, namely: Gauteng, Mpumalanga, North West, Limpopo, KwaZulu Natal, Eastern Cape, Western Cape, Free State and Northern Cape. See further Krisztina Tihanyi, *Blending in the rainbow nation: The Racial Integration of Schools and Its Implications for Reconciliation in Post-apartheid South Africa*, Lexington Books Lanham publishers 2006 page 51.

⁵⁴⁷ See DoE at <http://www.southafrica.info/about/education/education.htm#bands#ixzz3j6rXAZRb> >retrieved 18-08-2015. Also visited on 21-04-2018.

⁵⁴⁸ See DoE at <http://www.southafrica.info/about/education/education.htm#bands#ixzz3j6rDSU11> >retrieved 18-08-2015. Also visited on 21-04-2018.

⁵⁴⁹ See DoE at <http://www.southafrica.info/about/education/education.htm#bands#ixzz3j6qCLLBO>>retrieved 18-08-2015. Also visited on 21-04-2018.

⁵⁵⁰ See UNESCO at <http://www.unesco.org/education/framework.pdf>, retrieved 27-04-2018.

Constitution), including law reports, the courts have also not yet interpreted it.⁵⁵¹ Following the uncertainty with regard to the exact meaning of the term “elementary education”, it is clear there are many different opinions. However, the following two are possible constructions of the definition, which appears more plausible: Firstly, the term “elementary education” could refer to a specific duration of schooling: primary school, and secondly, it could refer to a standard of education: the quality or adequacy of the education.⁵⁵²

The United Nations (UN) defines the phrase “elementary education”, as a core content of the right to education, which includes “literacy, numeracy, skills relating to one's health, hygiene and personal care, and social skills such as oral expression and problem solving”.⁵⁵³ In South Africa, Woolman and Fleisch define “elementary education”, as the, “minimum levels of literacy, numeracy and essential life skills necessary to do more than menial work in a complex society”.⁵⁵⁴ Woolman and Fleisch argue that, elementary education should be about the adequacy, as opposed to the level of education.⁵⁵⁵ According to Seleoane, two meanings have attributed to the phrase “elementary education”, as used in South African legislation and education policies.⁵⁵⁶ Seleoane explains that, “in the first sense, the phrase denotes a level of education computed on the basis of time, such as a duration of five years of primary education and secondly the phrase refers to a certain content of education such as elementary reading and arithmetic skill”.⁵⁵⁷

⁵⁵¹ Stu Woolman and Bram Fleisch, *The Constitution in the classroom: law and education in South Africa 1994-2008* Pretoria University Law Press (PULP) (2009) page 1- 263.

⁵⁵² Stu Woolman and Bram Fleisch, *The Constitution in the classroom: law and education in South Africa 1994-2008* PULP (2009) page 1- 263.

⁵⁵³ Lucyline Nkatha Murungi, *Inclusive Basic Education in South Africa: Issues in its Conceptualization and implementation*, PELJ 2015, page 361. Further see Articles 26(2) of the Universal Declaration of Human Rights (1948), Article 103(1) of the International Covenant on Economic, Social and Cultural Rights (1966) and Article 29 of the UN Convention on the Rights of the Child (1989).

⁵⁵⁴ Woolman and Fleisch, *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* PULP Pretoria 2009 page 3162.

⁵⁵⁵ Woolman and Fleisch, *The Constitution in the Classroom: Law and Education in South Africa 2009* page 3162.

⁵⁵⁶ Mandla Seleoane "The Right to Basic Education" in Coetzee E and Streak J (eds) *Monitoring Socioeconomic Rights in South Africa: Achievements and Challenges*, Institute for Democratic Alternatives in South Africa (IDASA) Cape Town 2004 221-272.

⁵⁵⁷ Seleoane "The Right to Basic Education". Seleoane further argues that from the requirement under the South African Schools Act 84 of 1996 that education be compulsory for children between 7 and 15 years, it may be inferred that elementary education is equivalent to primary education.

Section 29 of the Constitution, clearly indicates that, everyone is eligible to have basic education, everyone should benefit from this kind of education, but the precise meaning of “elementary education” is still unspecified.⁵⁵⁸ According to the White Paper on Education and Training, the meaning of “elementary education” must be “settled by policy in such a way that the intention of the Constitution is affirmed”.⁵⁵⁹ The White Paper on Education and Training stipulates that:

For the purposes of the statutory requirement, what would sufficiently define basic education is an educational programme formulated in line with the level of the proposed General Education Certificate (GEC) delivered either to children at school or to young and adult people by means of other forms of delivery at any educational institution.⁵⁶⁰ The GEC educational programmes would incorporate one year of reception class plus the subsequent nine years of schooling.

Churr opined that, “the clearest definition of elementary education is in his view the UNESCO definition and since South Africa is a signatory to the Education For All (EFA) initiative of UNESCO, the assumption can be made that UNESCO’s definition is the appropriate definition for South African purposes”.⁵⁶¹ To this end, the White Paper on Education and Training also cites the definition of UNESCO thus:

Everyone shall benefit from the presented educational opportunities, which are formulated and aimed at promoting the basic learning needs. These learning needs and content embraces the indispensable learning methodologies necessary for human survival, to advance their capabilities, to live and work in dignity, to take part in developing their lives, to elevate the quality of their lives, to make conversant decisions, and to take part in the lifetime learning.⁵⁶² To name but few, these learning needs encompasses the ability to read and write, oral expression and problem solving whereas the learning content incorporates knowledge, skills, values, and attitudes.

Therefore, elementary education means, the attainment of basic learning needs, required by all persons, to participate in society, and their respective communities.⁵⁶³ These basic leaning needs comprise of what Simbo refers to as, “essential learning

⁵⁵⁸ The Constitution of the Republic of South Africa, 1996.

⁵⁵⁹ The White Paper on Education and Training.

⁵⁶⁰ The White Paper on Education and Training para 14.

⁵⁶¹ Chrizzell Churr, A Child’s Right to a Basic Education: A Comparative Study, Doctor of Laws University of South Africa 2012 page 1-462.

⁵⁶² See UNESCO, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Australian Multilateral Assessment, March 2012. Further see Woolman and Fleisch, The Constitution in the classroom: law and education in South Africa 1994-2008 PULP (2009) page 127.

⁵⁶³ United Nations Educational Scientific Cultural Organisation (UNESCO) “World Declaration on Education for All and Framework for action to meet basic learning needs” 1990 (the World Declaration on Education for All).

tools and the basic learning content”.⁵⁶⁴ According to Churr, the simplified definition of basic education refers to “the competencies, knowledge, attitudes, values and motivations that are deemed necessary in order for people to become fully literate and to have developed the educational foundations for a lifelong learning journey”.⁵⁶⁵ This study concurs with the assertion of Churr, by defining elementary education to mean, the foundation of lifelong learning, and the starting point for quality skills acquisition.

5.2.3 A child’s school life duration and attendance

In South Africa, schooling is compulsory for children aged seven to fifteen years, or attendance in grade one to grade nine, whichever happens first, and it is a parent’s responsibility to make certain the child they are in charge of attends elementary education, until said child completes that education.⁵⁶⁶ However, according to the Department of Basic Education, “the full duration of a child’s school life and attendance is 13 years or from grade 0 also known as the reception year or grade R to grade 12 which is also commonly known as matric”.⁵⁶⁷ Subsequently, the following are South Africa’s phases of elementary education: the foundation phase, which incorporates the reception year to grade 3, intermediate phase which incorporates grades 4 to 6, senior phase which incorporates grades 7 to 9, then further education and training (FET), which incorporates grades 10 to 12, or matric.⁵⁶⁸

This study emphasizes that, during the duration and attendance of basic education, a learner should not be limited to learning only the normal elementary literacy, numeracy and other simple life skills necessary for doing menial work, such as reading and writing including some arithmetic skill. Learner also need to be exposed to vocational education, with practical training, which provides them with skills, occupational competencies, and the necessary attributes to be employable and create self-employment, owing to the UN definition of the phrase “elementary education”. This prepares learners for the world of work, from the inception of their educational life, and

⁵⁶⁴ Chiedza Simbo, Defining the term basic education in the South African Constitution: An international law approach, 2012 16 Law, Law Democracy and Development page 176.

⁵⁶⁵ Chrizzell Churr, A Child’s Right to a Basic Education: A Comparative Study, Doctor of Laws, University of South Africa 2012 chapter 4 page 122.

⁵⁶⁶ See section 3 (1) of SASA.

⁵⁶⁷ See Department of Basic Education at <http://www.education.gov.za/EducationinSA/tabid/327/Default.aspx> retrieved 27-04-2018.

⁵⁶⁸ DoBE available at <http://www.education.gov.za/EducationinSA/tabid/327/Default.aspx> retrieved 27-04-2018.

adequately equips them with the necessary skills and competencies, required for the labour market. The focus is on quality and standard of the provided education, as opposed to the access since that would have already been realised.

5.3 The Constitutional right of access to education in South Africa

According to Motala and Pampallis, “education is a legal entitlement to which every person has a claim and attaining the level of availability of opportunity for education will be an immense achievement in the reconstruction and development of the country”.⁵⁶⁹ The right to education provided for in the 1993 Interim Constitution, afforded everyone the right to basic education, and equal access to educational institutions.⁵⁷⁰ This entitled every person with the right to; receive basic education, gain equal access to educational institutions, have equal access to an educational system free from any form of segregation, to enable every learner have access to basic education, and to educational institutions, in order to acquire the necessary knowledge, improve their capacity, and equip themselves with relevant skills.⁵⁷¹ Accordingly, this Interim Constitution did not make provisions for further education let alone provision for adult basic education.

The 1996 Constitution substituted the interim Constitution, it recognized the past injustices and aimed at, “healing the divisions of the past, and establish a society based on democratic values, social justice and fundamental human rights”.⁵⁷² In all intents and purposes, this Constitution, aimed at improving the quality of life of all citizens, and freeing their potential, through the promotion of the rights enshrined in the Bill of Rights.⁵⁷³ It also provided everyone with equal protection under the law. Therefore, the inclusion of socio-economic rights, including the right of access to

⁵⁶⁹ See Enver Motala and John Pampallis (eds) *The state, education and equity in post-apartheid South Africa: The impact of state policies*, Ashgate Aldershot publishers (2002) page 20.

⁵⁷⁰ See clause 32 of the South African Interim Constitution of 1993. The provisions of these interim Constitution were set out to achieve an educational system which is free from any form of discrimination which will enable every learner to have access to basic education and to educational institutions in order to acquire knowledge, improve their capacity and equip them with relevant skills. It provides that “every person shall have the right (a) to basic education and equal access to educational institutions; (b) to instruction in the language of his or her choice where this is reasonably practicable; and (c) to establish, where practicable, educational institutions based on a common culture, language or religion provided that there shall be no discrimination on the ground of race”.

⁵⁷¹ Clause 32 (a), (b) and (c) of the South African Interim Constitution of Act 200 of 1993.

⁵⁷² See the preamble of the Constitution of the Republic of South Africa, 1996

⁵⁷³ See the preamble of the Constitution, 1996.

education, in the Bill of Rights, is the starting point towards the achievement of the constitutional mandate.⁵⁷⁴

It gives everyone entitlement of the right to elementary education, which encompasses the right to adult elementary education. It is therefore clear from the wording of section 29, that everyone including children, have an immediately enforceable right to basic education, meanwhile the right to further education is rather of a qualified nature, in the sense that it is connected, and depends on the progressive implementation.⁵⁷⁵ According to Robinson, “the state has a primary duty to provide support, facilities and provide services for the realization of these rights”.⁵⁷⁶ “The Constitution further provides everyone with the right to further education and obligates the state to make it progressively and sustainably available and accessible to everyone by the implementation of reasonable measures”.⁵⁷⁷ “The Constitution further provides everyone with a right to choose language(s) to be used as medium of instructions in state educational institutions if that education is reasonable and practicable”. This right too is of a qualified nature. “The state is further obligated to consider all reasonable educational alternatives which include *inter alia* a single medium language of instruction in ensuring the effective access and in doing so, attention must be paid to

⁵⁷⁴ For a detailed discussion on socio-economic rights in the South African Constitution, see Nathaniel Bruhn ‘Litigating against an epidemic: HIV/AIDS and the promise of socio-economic rights in South Africa’ (2011) Vol.17 *Michigan Journal of Race and Law* 182-215; Ingle M ‘Socio-economic rights and women in South Africa: Nothing but a handful of feathers?’ (2011) Vol.7 (1) *The Journal for Transdisciplinary Research in Southern Africa* 95-102; Grant E ‘Human Dignity and socio-economic rights’ (2012) Vol.33 *Liverpool Law Review* 242-259; Sabrina Germain ‘Taking ‘health’ as a socio-economic right seriously: Is the South African Constitutional dialogue a remedy for the American healthcare system’ (2013) Vol.21(2) *African Journal of International and Comparative Law* 145-171; Diane Alferez Desierto ‘Justiciability of socio-economic rights: Comparative powers, roles, and practices in the Philippines and South Africa’ (2009) Vol.11 (1) *Asian-Pacific Law and Policy Journal* 114-160; Lilian Chenwi and Rishi Hardowar ‘Promoting socio-economic rights in South Africa through the ratification and implementation of the ICESCR and its Optional Protocol’ (2010) Vol.11 (1) *Economic and Social Rights Review* 3-6; Denis Davis ‘The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: What about the separation of powers?’ (2012) Vol.15 (5) *Potchefstroom Electronic Law Journal* 2-12; Eric Christiansen ‘Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court’ (2007) Vol.38 *Columbia Human Rights Law Review* 321- 386; John Mubangizi and Betty Claire Mubangizi ‘Poverty, human rights law and socio-economic realities in South Africa’ (2005) Vol.22 (2) *Development Southern Africa* 277-289; Boitumelo Moatshe and Paulin Mbecke ‘The provision of basic services through indigent grants, is it equitable and sustainable in South Africa’ (2012) Vol.5. (9) *OIDA International Journal of Sustainable Development* 55-62.

⁵⁷⁵ John Alan Robinson, Children’s rights in the South African Constitution, PER 2003 page13-14.

⁵⁷⁶ Robinson, Children’s rights in the South African Constitution, PER 2003 page13-14.

⁵⁷⁷ Section 29 (1) (a) and (b) of the Constitution, 1996.

equity, practicability and remedying harm caused by the past racially discriminatory laws and practices”.⁵⁷⁸

Robinson opined that, “the right to establish and maintain independent educational institutions, which is also a qualified right, is ordinarily exercised by parents rather than children and children are directly affected by the exercising of this right”. The assertions of Robinson were substantiated in the case of, *Ex parte Gauteng Legislature: In re Gauteng School Education Bill*⁵⁷⁹, where the argument put before the court was that, clause 32 of the Interim Constitution, makes it the state’s primary duty, “to establish, where practicable, educational institutions based on common culture, language or religion”. The Court rejected the argument and held that, “the clause guarantees a freedom to establish educational institutions based on a common culture, language or religion but it does not make it the state’s obligation”. However, a person can invoke and seek the court’s protection, where that freedom is threatened, but the language of the clause makes it quite clear that such educational institutions need not be established by the State.⁵⁸⁰

⁵⁷⁸ Section 29 (2) (a), (b) and (c) of the Constitution, 1996.

⁵⁷⁹ *Ex parte Gauteng Legislature: In re Gauteng School Education Bill* 1996 3 SA 165 (CC). The decision dealt with section 32(c) of the Interim Constitution which provided that every person shall have the right to establish, where practicable, education institutions based on common culture, language or religion provided, however, that there shall be no discrimination on the ground of race.

⁵⁸⁰ On paragraph 173 the court explains that the object of this subsection is to make clear that while every person has a right to basic education through instruction in the language of his or her choice, those persons who want more than that and wish to have educational institutions based on a special culture, language or religion which is common, has the freedom to set up such institutions based on that commonality, unless it is not practicable. This viewpoint was echoed in *Wittmann v Deutsche Schulverein*, Pretoria 1998 4 SA 423 (T) where the mother of a child enrolled at a German school objected to a requirement that the child attend academic religious-instruction classes. In essence her argument ran that this requirement violated her right to freedom of religion. The court held that this subsection guarantees the freedom of individuals to establish their own educational institutions based on their own values. The right to exclusivity on the grounds of culture, language or religion includes the right to exclude non-users of that language and non-adherents of that culture or religion, or to require conformity from them. It follows therefore, that this sub-section recognizes the freedom to establish parochial educational institutions with confessional religious observances and instruction. Attendance at religious classes may indeed be made obligatory. The State is not constitutionally obliged to provide funding to these private institutions, but neither is there a constitutional provision to subsidisation. It is clear, therefore, that the right to establish a private school based on a common culture, language or religion must by necessity include the right to exclude those who do not prescribe to the particular culture, language or religion. Freedom of religion as it relates to access to such independent educational institutions amounts to no more than the freedom of ‘non-joinder.

5.4 The protection of the right to elementary education under the 1996 Constitution

Section 29 of the Bill of Rights, guarantees the right to elementary education for both adults and children, thus government is obligated to, “protect, respect, promote and fulfil” the right to education.⁵⁸¹ Therefore in terms of section 29 (1), Government has the obligation to make education available, and accessible to every person.⁵⁸² However, it is imperative to note that this section does not specify the content and quality of education the government ought to provide.⁵⁸³ According to Malherbe, “the section does not refer to all universally accepted education rights”.⁵⁸⁴ Hence, “free and compulsory education does not form part of the right to a basic education, although provision is made for compulsory education in terms of section 3(1) of the SASA”. Malherbe postulates that, “there is also no explicit right of equal access to educational institutions, but presumably, this right is enclosed and protected by section 9 of the Constitution, which specifically deals with equality”.⁵⁸⁵ Section 9 of the Constitution provides that:

Every person is protected by and before the law and must benefit from the law on equitable basis. Equality refers to equal opportunities, which means that every person must have complete and equal exercise and enjoyment of the human rights and freedoms afforded to them. Consequently, legislative measures formulated to improve and elevate the lives of persons who were previously deprived the enjoyment of the rights and freedoms by the discriminatory processes must be put in place in an attempt to realise equality. Moreover, neither the state nor any person may directly or indirectly discriminate anyone based on any ground. A national legislation must be promulgated to guard against unfair discrimination and any discrimination based on one or more grounds as enumerated in subsection three of this section is deemed unfair except if it is established that such discrimination is fair.⁵⁸⁶

According to Churr, “the protection, promotion and fulfilment of this right can only be done if laws and regulations are passed by government, policies are developed and

⁵⁸¹ Section 7 (2) of the 1996 Constitution.

⁵⁸² Lorette Arendse, the obligation to provide free basic education in South Africa (note 10 above) page 97.

⁵⁸³ Elijah Adewale Taiwo, Implementation of the Right to Education in South Africa and Nigeria, Doctor of Laws (LLD) thesis, Nelson Mandela Metropolitan University 2011 page 116.

⁵⁸⁴ Universally accepted rights are the following: the right to education, equal access to educational facilities, freedom of choice, education in the language of one’s choice, the right to establish private educational institutions, availability, accessibility, acceptability and adaptability. For further discussion of the universally accepted education rights see Rassie Malherbe, Education rights in Boezaart (ed) Child law in South Africa (2009) 400-402.

⁵⁸⁵ Rassie Malherbe, “A fresh start 1: Education rights in South Africa” 2000 (4) European Journal for Education Law and Policy 49-55.

⁵⁸⁶ Section 9 (1),(2),(3),(4) and (5) of the Constitution. The grounds as enumerated in subsection 3 include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

skills development programmes are established”.⁵⁸⁷ In conclusion, arguably, the right to education is justifiable, and government is liable, and open to challenge in a court of law, if its statutory commitments on education are not honoured.⁵⁸⁸

The above assertions that, the state is obligated to, “protect, respect, promote and fulfil”, the right to education was emphasised in the case of *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*.⁵⁸⁹ In this case, it was made clear that the state is positively and negatively obligated to give effect to the right to a basic education in the sense that the right to elementary education imposes a positive right and a responsibility on the state to provide elementary education to everyone and not just a negative right that such persons should not be hindered in pursuing their basic education.⁵⁹⁰ Simply put, the positive obligation on the first hand means that, “government is required to take effective steps in order to guarantee that every child has access to educational facilities and that every child benefits from the right to education while negative obligation on the other hand poses a duty on the state and its agencies not to hinder or impede children’s access to education”.⁵⁹¹

It is clear from the above assertions, that the state is obligated to protect and give effect to the right to elementary education, therefore this study submits, it can be held liable by a court of law, for failure to protect and provide elementary education. This assertion is judicially confirmed in the court’s ruling in the *Juma Masjid*⁵⁹² case, where the court proclaimed the nature and meaning of the right to elementary education as, “immediately realizable” and held that:

The nature and meaning of the right to basic education as embodied in section 29(1) (a) of the 1996 Constitution must be well understood. Different from other rights as outlined in the Bill of Rights, the right to basic education is immediately realizable and it is not subjected to any limitation necessitating the availability of state resources for

⁵⁸⁷ Chrizzell Churr, *A Child’s Right to a Basic Education: A Comparative Study*, University of South Africa, Doctor of Laws, 2012 chapter 5 page 125.

⁵⁸⁸ Shirley Pendlebury, Lori Lake and Charmaine Smith (eds) “Meaningful access to basic education” 2008/2009 SA Child Gauge (Cape Town: Children’s Institute, University of Cape Town.) page 24-29.

⁵⁸⁹ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).

⁵⁹⁰ See *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC) at para 9.

⁵⁹¹ Shirley Pendlebury, Lori Lake and Charmaine Smith (eds) “Meaningful access to basic education” 2008/2009 SA Child Gauge (Cape Town: Children’s Institute, University of Cape Town.) page 19.

⁵⁹² *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).

the realization of this right. Only a law of general application could impose some degree of limitation to this right. This right is therefore different from the right to further education delivered in terms of section 29 (1) (b) because the state is obligated to make further education available with time and depending on the availability of state resources.⁵⁹³

5.4.1 Elementary education as an absolute right

Fundamental rights are not absolute, as they may be subject to reasonable restrictions. Section 7(3), of the 1996 Constitution, confirms this by providing that, “the rights in the Bill of Rights are subject to the limitations contained in section 36 or elsewhere in the Bill”.⁵⁹⁴ However, it is vital to establish the extent of the limitation on the fundamental right concerned. In this regard, two kinds of limitations need addressing. Firstly, the limitation must be in compliance with the requirements enclosed in the general limitation clause (also referred to as external limitation),⁵⁹⁵ considering all appropriate factors which include among others the nature of the right, the significance and the purpose of the limitation, as stated in section 36 of the Constitution.⁵⁹⁶

Secondly, the limitations can also be reasonable, based on specific qualifications on a specific right (also referred to as internal limitation or qualifiers).⁵⁹⁷ For example, the right to access social security, or adequate housing, the state is obligated to take realistic measures, within available means, in order to achieve the progressive realization of such rights.⁵⁹⁸ In the case of *Soobramoney v Minister of Health Kwazulu-*

⁵⁹³ *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC) para 37.

⁵⁹⁴ Section 7(3) of the Constitution of the Republic of South Africa, 1996.

⁵⁹⁵ Section 36 of the Constitution entails a three-fold test, in terms of which the limitation of a fundamental right must be; (a) in terms of a law of general application; (b) reasonable; and (c) justifiable in an open and democratic society based on human dignity, equality and freedom.

⁵⁹⁶ As enshrined in the Constitution the relevant factors referred to in section 36(1)(a)-(e) are: (a) the nature of the right;(b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose.

⁵⁹⁷ Clarence Itumeleng Tshoose, *Social Assistance: Legal Reforms to Improve Coverage and Quality of life for the poor people in South Africa*, Doctor of Laws, University of South Africa 2016 chapter 3 page 144 para 2.

⁵⁹⁸ See section 26 (2) and section 27 (2) of the Constitution. See also *Soobramoney v Minister of Health Kwazulu-Natal* 1998 1SA 765 (CC) para 11, where Chaskalson P pronounced that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources.

Natal,⁵⁹⁹ the court held that the provision, and effective realization, of these rights depended on the availability of the state's recourses.⁶⁰⁰

Regarding the external limitation, in *S v Zuma*⁶⁰¹ the Court remarked that, constitutional analysis includes the dual phases. In the first place, the aggrieved party, or the applicant, must prove an imminent infringement on the part of the aggrieving party, of the duty to, "respect, protect, promote and fulfil" the right in the Bill of Rights. Secondly, the aggrieving party must prove contravention of such right as reasonable, and that the right was justifiably limited, in accordance with the general limitation, as contemplated in section 36, of the Constitution. For this reasons this study submits that it is important to define or and discuss the internal limitations and or qualification under the Constitution as pronounced by the judiciary.

The right to (elementary) education as envisaged in section 29 is not dependent on the availability of state resources.⁶⁰² The Constitutional Court reiterated that, "when interpreting socio-economic rights that its provision depend on the availability of state resources, the government's obligation to provide such rights depends on the availability of resources on the part of the state and such obligation cannot be more than what the state's resources permit".⁶⁰³ Contrary to other socio-economic rights, the right to elementary education as contemplated in section 29 (1) (a), is a right that ought to be provided for, irrespective of the state's availability of state fiscal resources.⁶⁰⁴

It therefore denotes that, the state cannot invoke the defence of unavailability of resources to cater for elementary education, since the textual formulation of section 29 (1) (a) should not lead the court to such a conclusion. In the *Juma Masjid* case, the Constitutional Court held that, "the government had failed to fulfil its constitutional obligation to provide elementary education and further stated that the MEC has an

⁵⁹⁹ 1998 1SA 765 (CC).

⁶⁰⁰ *Soobramoney v Minister of Health Kwazulu-Natal* 1998 1 SA 765 (CC) para 11.

⁶⁰¹ 1995 4 BCLR 401 (CC) 414.

⁶⁰² The *Juma Masjid* case para 121.

⁶⁰³ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 46 and also *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) para 11.

⁶⁰⁴ Eric Berger, "The right to education under the South African Constitution" (2003) 103(3) Columbia Law Review 625.

obligation in terms of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights”.⁶⁰⁵ The Constitutional Court did not make any determination relating to the availability of fiscal means, on the part of the state.⁶⁰⁶ Without doubt, this study emphasizes that with regard to the provision of elementary education, the state is obligated to find the necessary means, to provide elementary education, or mobilise the resources for its provision, since lack of resources does not relieve the state from its responsibilities imposed by section 29 (1) (a).

Woolman and Fleisch assert that, “the provision of elementary education is not subject to a restriction such as reasonable legislative and other measures, which is a prerequisite standard adopted by the Constitutional Court in socio-economic rights cases such as cases dealing with the right to housing, health care and water”.⁶⁰⁷ Adjudicating on these rights, the Constitutional Court, in *Mazibuko* case stated that, “if the measures taken by the state are reasonable, this means that the state has fulfilled its obligation to make the rights accessible”.⁶⁰⁸ The Court held further that, “section 27(1) does not entitle anyone to claim sufficient water, but reasonable measures by the state, which aimed at making water accessible”.⁶⁰⁹ Similarly, in the case of *Government of the Republic of South Africa and Others v Grootboom and Others*, the Court noted that, “reasonable measures did not constitute the provision of housing but included the provision of temporary accommodation and constructive engagement, which would ensure humane evictions”.⁶¹⁰

Furthermore, the fundamental right to basic education is not subject to progressive realization. The Constitutional Court, in *Grootboom* case, highlighted that, “progressive realization is an expeditious and effective movement towards the realization of a particular goal”.⁶¹¹ Woolman and Fleisch posit that, “the state’s reasonable legislative and other measures are not part of fulfilling the government’s

⁶⁰⁵ *Juma Masjid* para 45-46.

⁶⁰⁶ *Juma Masjid* para 45-46.

⁶⁰⁷ Woolman and Fleisch, *The Constitution in the classroom: Law and education in South Africa* page 120.

⁶⁰⁸ *Lindiwe Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) para 49-50.

⁶⁰⁹ *Mazibuko* case para 50.

⁶¹⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 39-44.

⁶¹¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 45. See also *Lindiwe Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) para 49-50.

provision of a basic education and cannot be a defence for the state's failure to fulfil its obligations".⁶¹² This study submits that the reasonableness approach is not important, and is therefore immaterial in shaping the state's obedience to the provision of elementary education, as provided for in section 29 (1) (a). The study further submits that, the right to elementary education is not contingent upon reasonable legislative measures, and its provision is immediate. Hence, Berger depicts that

The rationale why progressive realization qualifier is excluded in section 29 (1) (a) has to be understood to mean that the provision of basic education is neither not subject to provision over time nor the availability of state resources, but to immediate provision as and when needed. For this reason, the state cannot exonerate itself from its obligations because it is simply moving towards attaining the goal.⁶¹³

5.4.2 Progressive realization

The concept "progressive realization" has been explain by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 3 as follows:

This concept creates an acknowledgement of the fact that an abrupt and full achievement of all socio-economic and cultural rights will not be done within a short space of time. In addition, the commitment varies meaningfully from that enclosed in Article 2 of the International Covenant on Civil and Political Rights (ICCPR), which contains an abrupt responsibility to respect and ensure immediate realization of all of the relevant socio-economic and cultural rights. However, the fact that progressive realization, or simply put, realization over time, is foreseen under the Covenant should not be misunderstood as depriving the obligation of all meaningful content.⁶¹⁴

The CESCR, therefore, further provides that, over time realization presents a component of flexibility, in terms of the state's obligation. Simply put, the notion progressive realization identifies that, full realization of socio-economic rights, is not commonly accomplishable over a short space of time. Consequently, states are obligated to be as swift and efficient as possible, towards full realization of the rights.⁶¹⁵ Regarding the right to education, the CESCR asserts that, "progressive realization of this right means that states have a precise and continuous commitment to move as

⁶¹² Woolman and Fleisch, *The Constitution in the classroom: Law and education in South Africa 2009* page 121.

⁶¹³ Berger "The right to education under the South African constitution" 2003 page 625.

⁶¹⁴ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3 para 9.

⁶¹⁵ See also CESCR, General Comment No. 13, para 44; General Comment No. 18, *The Right to Work*, UN doc. E/C.12/GC/18, 6 February 2006 para 20.

quick and efficiently as possible towards its full realization”.⁶¹⁶ The CESCR observed further that, progressive introduction of a fee-free education denotes that, states must not only prioritise the delivery of free elementary education, but also take robust steps, and strive towards realising free secondary and higher education.⁶¹⁷ According to Chenwi, progressive realization therefore goes beyond achieving the minimum essential levels of a particular right.⁶¹⁸

In *Grootboom* case, the Constitutional Court recognised the CESCR’s understanding of the concept, “progressive realization” with reference to General Comment No. 3, by stating that, the concept bears similar meaning in the South African Constitution.⁶¹⁹ It observed that the concept denotes that, the right is not accomplishable immediately. However, this signifies that the state must take judicious measures to accomplish the goal of the Constitution, ensure that the needs of all people are successfully fulfilled. The Court added that, “progressive realization means that accessibility should be progressively facilitated which means that administrative, operational and financial hurdles should be examined and, where possible, lowered over time”. In addition, “the right must be made more accessible not only to a larger number of people but also to a wider range of people as time progresses”.⁶²⁰

In the case of *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*, the court held that, “the concept progressive realization requires that the state must accelerate reasonable and progressive schemes to ameliorate vast areas of deprivation”.⁶²¹ Whereas Liebenberg asserts that, the use of this concept in the South African Constitution, therefore, does not mean that, the state can drag its feet

⁶¹⁶ CESCR, General Comment No. 13 para 44.

⁶¹⁷ CESCR, General Comment No. 13 para 14.

⁶¹⁸ Lilian Chenwi, Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court, Community Law Centre, University of the Western Cape, Research paper written for Studies in Poverty and Inequality Institute 2010 page 20.

⁶¹⁹ The Court highlighted at paragraph 45 that “Although the committee’s analysis is intended to explain the scope of states parties’ obligations under the Covenant, it is also helpful in plumbing the meaning of “progressive realisation” in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived”.

⁶²⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at para 45.

⁶²¹ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (8) BCLR 872 (CC) para 705.

in executing its constitutional commitments, or providing the required measures to realise socio-economic rights.⁶²² Liebenberg further opined that, “even where people already have access to socio-economic rights, progressive realization places a duty on the part of the state to improve the nature and the quality of the services to which people have access”.⁶²³

Therefore, the concept of progressive realization emphasizes the obligation on the part of the state, and recognises the fact that, “eminent full realization of all economic, social and cultural rights will generally not be feasible in a short period of time”.⁶²⁴ This concept assumes that the state’s obligations are not uniform or universal; instead, they are relative to the developmental levels and availability of resources.⁶²⁵ Chapman and Russell argue that, “it is the responsibility of the state to mobilize the resources not only those that belong to the state, but all the resources within it, including those owned individually by citizens and the private sector towards the fulfilment of the right”.⁶²⁶ In the case of *Grootboom*,⁶²⁷ the court interpreted the notion “progressive realization”, following the interpretation set by the CESCR to mean that:

Not all economic, social and cultural rights could be immediately realised, but the constitutional objective is that the basic necessities of the society be successfully met and the prerequisites of progressive realization means that the state must take reasonable measures to realise this goal.⁶²⁸

⁶²² Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution*. Juta 2010 page 188.

⁶²³ Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution*. Juta 2010 page 188.

⁶²⁴ The Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 3: the nature of States parties obligations (art. 2, para.1) 14/12/1990 para 9.

⁶²⁵ Audrey Chapman and Sage Russell (eds) *Core obligations: building a framework for economic, social and cultural rights* (2002) page 4. Following the meaning of the term “resources” as used in this context, Chapman and Russell concurrently argue that the resources contemplated in this approach as in other human rights instruments include not only those that belong to the state, but all resources within it, including those owned individually by citizens and the private sector.

⁶²⁶ Audrey Chapman and Sage Russell (eds) *Core obligations: building a framework for economic, social and cultural rights* (2002) page 4.

⁶²⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC). for further reading on the *Grootboom* judgement see Clarence Itumeleng Tshoose ‘A closer look at the right to have access to adequate housing for inhabitants of informal settlements post *Grootboom*’ (2015) Vol.30 (1) SA Public Law Journal 94-111.

⁶²⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at para 45. Further see Marius Olivier ‘Constitutional perspective on the enforcement of socio-economic rights: Recent South African experiences’ (2002) 33 Victoria University of Wellington Law Review (VULWR) 117-151.

In line with the Constitution, the responsibility to realise socio-economic rights steadily necessitates that the State take action towards the full realization of rights throughout. However, this does not alter the State's commitment to take any possible measures that are within its financial means, as well as other steps, as soon as possible.⁶²⁹ The State is also responsible for making socio-economic services more accessible to the people, as time progresses, this also requires targets and goals, linked to timeframes.⁶³⁰ Further, it is also its obligation to report any good progress towards full realization of the socio-economic rights.⁶³¹ This study argues that, the right to elementary education as contemplated in section 29(1)(a), ought to denote that elementary education is an unqualified human right, that is not subject to provision over time, but to an abrupt provision.

5.4.3 Reasonable legislative and other measures

According to the Constitutional Court decision in *Grootboom's* case, the key to the justiciability of all socio-economic rights is the standard of reasonableness.⁶³² In this case, the Court explained the concept, "reasonable legislative and other measures", to mean that, "a legal framework must be created in which an individual through state assistance can realise their rights".⁶³³ Accordingly, De Vos submits that, the provision of such reasonable measures are obligatory on the part of the state, and the state should provide for the appropriate judicial remedies, to enable the rights concerned to be enforced.⁶³⁴ According to De Vos, this means the courts may demand explanation from the state, on the measures taken to fulfill its obligations, and require the state to account, for the progress in implementing its measures, with reasons and explanations subject to assessment by the courts, for reasonableness.⁶³⁵

⁶²⁹ Jason Brickhill & Nick Ferreira 'Socio-economic rights' in Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* 6 ed. (2013) page 575.

⁶³⁰ Sibonile Khoza, *Socio-economic rights in South Africa: A resource book* 2 ed (2007).

⁶³¹ Jason Brickhill and Nick Ferreira 'Socio-economic rights' in Currie I & de Waal J (eds) *The Bill of Rights Handbook* 6 ed. (2013) 575.

⁶³² *Government of the Republic of South Africa and Others v Grootboom* at para 41. Also see *Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033 (CC)* para 68.

⁶³³ Johan De Waal, Iain Currie and Gerhard Erasmus, *Bill of Rights Handbook* 4" ed (Juta Lansdowne 2001) page 437.

⁶³⁴ Pierre De Vos, "Pious wishes of directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution" *South African Journal on Human Rights (SAJHR)* 1997 page 95.

⁶³⁵ Pierre De Vos, "Pious wishes of directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution" *South African Journal on Human Rights (SAJHR)* 1997 page 95. Further see De Waal, Currie and Erasmus, *Bill of Rights Handbook* 4" ed (Juta Lansdowne 2001) page 439-440.

Similarly, Brickhill and Ferreira opined that, the standard of reasonableness justifies the socio-economic rights in the Constitution. Brickhill and Ferreira refer to this standard as, “providing reasons” meaning, the state needs to give an elucidation, and reasons substantiating to the public its choice of means, and requires that such explanation be coherent and convincing enough to a reasonable person.⁶³⁶ The judiciary contributed immensely to the development of the reasonableness review, as a model for assessing positive socio-economic rights claims, and determining whether the means adopted are reasonably capable of facilitating the realization of the rights in question, in order to fulfil the constitutional mandate.⁶³⁷

In the case of *Grootboom*, the Court stated that, “the factual question regarding the provision of the socio-economic rights in terms of the Constitution is always whether the relevant measures adopted by the state in realising such rights are reasonable”.⁶³⁸ The court held that, “a range of possible measures could be adopted by the state to meet its constitutional obligations but some of those measures might not meet the requirement of reasonableness”. It also stressed that, “the policies and programmes must be reasonable both in their conception and in their implementation and if they fail to respond to the needs of those most desperate and in need, they may not pass the test of reasonableness”.⁶³⁹

It is worth noting that, the provision of the right to elementary education is not subject to the constraint of “reasonable legislative and other measures”, which is at the core of the rationality standard, adopted by the Constitutional Court in dealing with social and economic rights cases, such as the right to housing, health care and water.⁶⁴⁰ The court, in adjudicating on the provision of these rights, emphasized that as soon as the applicable measures taken by the state, to realize the right, are deemed reasonable,

⁶³⁶ Jason Brickhill & Nick Ferreira ‘Socio-economic rights’ in Currie I & de Waal J (eds) *The Bill of Rights Handbook* 6 ed. (2013) 568.

⁶³⁷ Sandra Liebenberg, *Socio-economic rights: adjudication under a transformative Constitution* (2010) 237.

⁶³⁸ *Grootboom* at para 41.

⁶³⁹ *Grootboom* at para 42 and 44 respectively. The Court further remarked that the test of reasonableness must also be understood in the context of the Bill of Rights as a whole. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.

⁶⁴⁰ Woolman and Fleisch, *The Constitution in the classroom: law and education in South Africa 1994-2008* PULP 2009 page 121.

the state is regarded to have fulfilled its obligation, making the right concerned accessible.⁶⁴¹

5.4.4 Within its available resources

The phrase, “within its available resources”, explained in the case of *Soobramoney*, means that obligations imposed on the state by sections 26 and 27, are contingent, and or dependent, on the availability of state resources for such purposes and such rights, might be limited owing to lack of state resources.⁶⁴² According to CESCR, “available resources” refers to, the resources within both a state’s fiscal means, and those obtainable through international support and collaboration.⁶⁴³ It is also worth noting that, a further qualification for the realization of other socio-economic rights (to the exclusion of the right to elementary education), under the Constitution, is that they are only realizable to the degree that state’s fiscal means permit. However, it must be kept in mind that this realization, which depends on the obtainability of state’s fiscal means, does not encompass the right to elementary education, since this right is immediately realizable. The state must do the best it can with the resources available, account for its usage of public revenues, and further prioritises its financial plan, and other means, in order to fulfil its constitutional mandate.⁶⁴⁴

The meaning of the phrase “available resources”, interpreted in the case of *Soobramoney*, means that the provisions of section 26 and 27, regarding access to adequate housing and social security, impose a commitment on the state to achieve these rights. However, this depends on the availability of state’s budgetary means, and that the corresponding rights themselves are not limited because of lack of

⁶⁴¹ *Lindiwe Mazibuko and others v City of Johannesburg and others 2010 (4) SA 1 (CC)* para 49-50. In this case court held that section 27 (1) does not entitle anyone to claim sufficient water, but reasonable measures by the government which aim to make water accessible. See also *Grootboom* case para 39-44. In this case the court noted that reasonable measures did not constitute the provision of a house but included the provision of temporary accommodation and constructive engagement, which would ensure humane evictions.

⁶⁴² *Soobramoney v Minister of Health Kwazulu-Natal* para 11.

⁶⁴³ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3 para 13.

⁶⁴⁴ Jason Brickhill and Nick Ferreira ‘Socio-economic rights’ in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6 ed. (2013) 568. Brickhill and Ferreira further emphasize that the minimum level of justifiability places negative obligations on the State to ensure non-interference with someone who is doing what they have a constitutional right to do and not acting in ways that will infringe socio-economic rights directly, also referred to as ‘deliberately retrogressive measures’. Brickhill and Ferreira further opined that the requirement that no one may diminish or interfere with enjoyment of a right applies not only to the State, but also to individuals and private entities.

resources.⁶⁴⁵ The court emphasized that given lack of resources on the part of the state, and their significant demands, an absolute commitment to meet these needs would not presently be capable of being satisfied.⁶⁴⁶ In the case of *Grootboom*, the court stressed there should be a balance between a goal and a means. This means that reasonable measures that the state must take to realize the rights in the Bill of Rights, must be intended to achieve the goal swiftly and successfully, but the availability of state fiscal means is an important factor to be considered in defining what is reasonable.⁶⁴⁷

It is pertinent to point out that the right to elementary education is an absolute right, which does not depend on the availability of state fiscal means, like other socio-economic human rights. Pursuant to that, the right is distinctive from other rights, hence not connected to an internal limitation requiring that the right be gradually realised. For the purposes of this study, it is important to differentiate between the “right to education” and the “right to a basic education”. According to UNESCO, “the right to education is broader than the right to a basic education since the right to basic education refers only to a person’s basic learning needs (such as literacy, oral expression, numeracy and problem solving) and the basic learning content (such as knowledge, skills, values and attitudes)”.⁶⁴⁸

UNESCO further asserts that, “the right to education is universal and includes the responsibility to provide basic education for all individuals. In other words, the right to education is not restricted to basic education: it is something more; it is a tool that improves the quality of life”.⁶⁴⁹ The proclamation of the court regarding the nature and meaning of this right, saw first articulation in the case of *Juma Musjid*, where the court held that this right is “immediately realizable”.⁶⁵⁰ The decision of the Court in this case, aimed to promote the right to elementary education, in the sense that the main concern focused on the fact that learners needed immediate alternative placements, despite

⁶⁴⁵ *Soobramoney v Minister of Health Kwazulu-Natal* 1998 1 SA 765 (CC).

⁶⁴⁶ *Soobramoney v Minister of Health Kwazulu-Natal* 1998 1 SA 765 (CC).

⁶⁴⁷ *Grootboom v Minister of Health Kwazulu-Natal* at para 46.

⁶⁴⁸ Unesco “World Declaration on Education for All: Meeting basic learning needs” at <http://www.unesco.org/education/wef/en conf/Jomtien%20Declaration%20eng.shtm>, retrieved 27-04-2018.

⁶⁴⁹ Unesco “World Declaration on Education for All: Meeting basic learning needs” <http://www.unesco.org/education/wef/en conf/Jomtien%20Declaration%20eng.shtm>, retrieved 27-04-2018.

⁶⁵⁰ *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 1996 (3) SA 165 (CC).

the state's resources, since this right is "immediately realizable", and does not depend on the availability of such resources.⁶⁵¹

5.5 The responsibility to protect, promote and implement the right to quality education

5.5.1 The historical account

It is pertinent to stress that, fundamentally, education as a right, gained first articulation on the international arena, through the Universal Declaration of Human Rights (UDHR) in 1948.⁶⁵² Although there are other instruments protecting the right to education such as the UDHR, and the Jomtien Conference of 1990, the UNESCO's Convention against Discrimination in Education (CDE) of 1960, was the first treaty to recognize the right to education as binding.⁶⁵³ The CDE's objective is to combat any form of discrimination in education, and uphold equal opportunity and treatment for all. It asserts that, discrimination in education is an infringement of the right as contemplated in the UDHR.⁶⁵⁴ This study submits that, both the UDHR and CDE oblige state signatories to strive to take steps to protect, promote, implement and enforce the laws informing the delivery of quality education. To this end, most human rights treaties and or conventions, both domestic, regional and across the globe, address the significance of protecting and upholding the right to education.

Regarding the responsibility to implement and protect the laws, the international community, through the UDHR and the CDE, developed standards to implement and enforce laws promoting quality education, which standards take into account diversity in legal systems.⁶⁵⁵ The state and other relevant stakeholders, assigned with the duties of administration, protection and promotion of the right to education, have a responsibility to monitor compliance, ensure laws are fully implemented, and enforced. This part emphasizes that, since the right to education is ultimate and inalienable, even

⁶⁵¹ Governing Body of the Juma Musjid Primary School para 74 and 78 respectively.

⁶⁵² See the Universal Declaration of Human Rights (UDHR), Adopted and proclaimed by General Assembly Resolution 217A (III) on 10 December 1948.

⁶⁵³ The UNESCO Convention against Discrimination in Education (UNESCO Convention), adopted by the General Conference at its 11th Session in Paris, 14 December 1960.

⁶⁵⁴ UNESCO Convention against Discrimination in Education 1960.

⁶⁵⁵ Article 26 (1), (2) and (3) of the UDHR. See further Article 4(a) and (b) of UNESCO Convention against Discrimination in Education (CDE).

if a signatory has not ratified a treaty promoting quality education, it is in any way bound in terms of general international customary law.

5.5.2 Implementing the right to education

It is important to define the meaning and the process of implementing the right to education. According to Ssenyonjo, like any other human right, “the right to education brings with it a set of globally agreed norms and standards, which give rise to state obligations in relation to which effective and transparent monitoring and accountability mechanisms are required”.⁶⁵⁶ Victor and Raustiala posit that, the term “implementation” is a loose concept, which defines absolute definition. Victor and Raustiala state that, implementation is a complicated method suited to the creation of not so generous theories. In addition, it is what changes ideological principles and commitments into actual practice.⁶⁵⁷

According to Mazmanian and Sabatier, it may refer to, “those events and activities that occur after the issuing of authoritative public policy directives, which include the effort to administer and the substantive impacts on people and events”.⁶⁵⁸ For purposes of this study, the term implementation refers to the process of putting into effect the instruments and standards, which puts the right to education into place.⁶⁵⁹ This means the process of turning the content of the right to education into realization. In this study, the term implementation represents the practice of converting international human rights, obligations into action, as well as the process of adopting those obligations at the national level.

⁶⁵⁶ Ssenyonjo, *Economic, social and cultural rights in international law*, Hart Publishing: Oxford & Portland 2009 page 339.

⁶⁵⁷ See Victor, Raustiala & Skolnikoff “Introduction and Overview” in Victor, Raustiala & Skolnikoff (eds) *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998) 14 & 29.

⁶⁵⁸ Mazmanian & Sabatier *Implementation and Public Policy* (1983) as quoted by Victor, Raustiala & Skolnikoff “Introduction and Overview” in *The Implementation and Effectiveness of International Environmental Commitments* 4.

⁶⁵⁹ Simon Halliday and Patrick Schmidt refer this as a process of bringing “law on the book” into “law-in-action. Further see See Denis Galligan and Denis Sandler “Implementing Human Rights” in Halliday & Schmidt (eds) *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in National Context* (2004) 7, 26 & 29.

5.5.3 Why implementation and enforcement

According to Mokhaba, implementation and enforcement of quality education finds expression in the roles played by signatories, to the international covenants promoting the right to education, national government, educators and learners.⁶⁶⁰ All these role-players make use of different approaches, to assist in realizing the right to quality education, and achieving the teaching and learning objectives.⁶⁶¹ Thus, the study submits that, it is important to indicate the ways in which these role-players behave, and how the implementation and enforcement of the right has an impact on them. Hence, the need to deliberate on the implementation and enforcement activities performed by these role players, to realize the successful implementation of the right to quality education.

5.6 State's responsibility under international law

According to Orentlicher, there is a robust international law argument that states have an obligation to respond positively to any form of violation of fundamental rights, including the right to quality education.⁶⁶² The obligation to respond positively means that, if there is an infringement of a fundamental right, these states are compelled to take reasonable steps to redress the injustices and inequities caused by such a violation. The state's responsibility under the international human rights law prohibits states from doing some things, while on the other hand it obligates them to do others. It is vital to highlight that after a violation of a right, the state assumes liability, in the event of failure to afford an effective remedy for such violation, as provided for by the international law. It is worth stating that some of the responsibilities of the states include among others to protect, respect and to fulfil human rights inclusive of the right to education.

⁶⁶⁰ Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities* chapter 4 page 179.

⁶⁶¹ Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities* chapter 4 page 179 para 2.

⁶⁶² Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale Law Journal*, 2537 and also in her *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation in Human Rights: An Agenda for the Next Century*, Louis Henkin and John Hargrove, eds., ASIL, 1994. See further Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, Oxford University Press, New York, 1995.

It is for this reason that this study emphasizes the importance of elucidating these duties. For purposes of this study, the duty to respect human rights simply means, not to impede on the right in question, whereas the duty to protect entails, taking measures to ensure no external interference with the enjoyment of the right or simply put, taking measures to ensure that others do not interfere with the exercising and enjoyment of the right. In the same manner, the duty to fulfil calls for the state to employ progressive measures, which include administrative or educative, legislative and judicial measures for the purposes of fulfilling their legal obligation as per the international law.⁶⁶³

5.6.1 The nature of state obligations

As stated above, states have an international obligation to implement economic, social and cultural rights, through international covenants and or conventions. Article 2(1) of the ICESCR provides that:

every signatory to this covenant embark on steps, independently and through international support and or collaboration (economic and technical) depending on the availability of its resources, to accomplish gradually, the full realization of the rights embodied in this covenant by employing all appropriate means which include the adoption of reasonable legislative measures.⁶⁶⁴ Article 4 of the CRC provides that: signatories shall embark on all appropriate legislative, administrative, and other measures to implement the rights as documented in this convention. The article further provide that regarding the provision of socio-economic rights, signatories shall carry out such measures based on the level of their available resources and, where necessary, within the context of international collaboration”.⁶⁶⁵

This study posits that, in qualifying the states’ obligations, the provisions of these conventions use the formulation, “in all appropriate means, including the adoption of legislative measures”.

⁶⁶³ Human Rights Committee, Nature of the General Legal Obligation on States Parties to the Covenant, Covenant on Civil and Political Rights (CCPR) General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 5-7.

⁶⁶⁴ See Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

⁶⁶⁵ See Article 4 of the Convention on the Rights of the Child (CRC). A similar provision of Article 4 of the CRC can be found in Article 2(2) of the ICCPR which states: “[w]here not already provided for by existing legislative, or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant”. Art 1 of the African Charter on Human and Peoples’ Rights, 1981 also contains similar provision. It states: “[t]he Member States of the Organization of African Unity, Parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.” See also, art 1(1) of the African Charter on the Rights and Welfare of the Child (ACRWC) adopted by the OAU in 1990 (OAU Doc. CAB/LEG/24.9/49).

Considering the provisions of Article 2(1) of the ICESCR, and Article 4 of the CRC, the nature of signatories' obligations is made of at least three important elements. In the first place, signatories are to take, "all appropriate legislative, administrative, and other measures in order to implement the rights recognized in those instruments. Secondly, in implementing those rights (socio-economic and cultural rights), signatories embark on such legislative and or administrative measures to the maximum extent of their available resources to implement and to realize the right so recognized. Lastly, where required, the progressive nature of the implementation of economic, social and cultural rights as recognized by signatories should be carried out within the framework of international co-operation".⁶⁶⁶ This study submits that, it is the responsibility of the signatories to, "use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures", in order to achieve the responsibilities under the ICESCR.⁶⁶⁷ The Principles further state that, "the legislative measures alone are not sufficient,⁶⁶⁸ and as such, other remedies such as judicial remedies, where applicable, should be provided".⁶⁶⁹

5.6.2 The national measures in implementing the right to education

Mubangizi is of the view that hence, education is a human right; it is the role of South African government to strive to accomplish Human Rights Education (HRE).⁶⁷⁰ It is important to note that South Africa as a country, has numerous human rights, including the right to health care, food, water, social security, and the right to housing, as enshrined in the Constitution, some not relevant to this research project. However, for the purposes of this study, focus will only be on education, as a fundamental human right, since it is relevant to the scope of this research. It is for this reason that this study submits that, for this right to be effectively availed, government targets schools and all educational institutions in promoting the implementation of this right. Regarding the

⁶⁶⁶ Mervat Rishmawi, A Commentary on the United Nations Convention on the Rights of the Child: Article 4- Nature of States Parties' Obligations (2006) Martinus Nijhoff Publishers, Leiden/Boston page 1.

⁶⁶⁷ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 6 June 1986 (UN Doc. E/CN.4/1987/17, 1987) & (1987) 7 Human Rights Quarterly 122-135 para 17.

⁶⁶⁸ The Limburg Principles on the Implementation of the ICESCR para 18.

⁶⁶⁹ The Limburg Principles on the Implementation of the ICESCR para 19.

⁶⁷⁰ John Cantius Mubangizi, Human rights education in South Africa: Whose responsibility is it anyway? African Human Rights Law Journal 2015 Page 504. An earlier version of this Article was presented at the 4th International Conference on Human Rights Education, 21-26 November 2013, Soochow University, Taipei, Taiwan.

implementation of the right to quality education, through schools and educational institutions, Mubangizi asserts that, the most effective, and proper attitude of implementing this human right, lies with full integration of human rights standards, into the schools' curriculum.⁶⁷¹ This initiative has also been supported by Curriculum Review Committee appointed in 2000, which recommended the infusion of HRE into the schools' curriculum.⁶⁷² Moreover, the then minister of education in 2005 devoted the department of education and the ministry of education, to incorporate the HRE across all the levels of the education streams.⁶⁷³

5.7 Roles of educators and learners

According to Mokhaba, teaching and learning should occur in a logical and organized manner. In order to keep up with the nature of teaching and learning, both educators and learners have specific roles to play, in order to make teaching and learning feasible.⁶⁷⁴ This study depicts that educators are facilitators of teaching and learning, thus responsible for skills development, and motivation of learners. Likewise, the realization of quality education dictates that learners as well play their respective role in promoting educational outcomes, which includes, among others, active participation and involvement in all classroom activities. This means that implementation and realization of quality education necessitates that, both the educators and the learners play their specific roles respectively.

5.7.1 The role and responsibilities of educators in improving educational outcomes

According to Brandy, the realization of quality education places some mandates upon educators, to further individualize instruction, plan remediation and enrichment, administer problem-solving assessments, and extensive record keeping.⁶⁷⁵ Moreover,

⁶⁷¹ Mubangizi, Human rights education in South Africa: Whose responsibility is it anyway? African Human Rights Law Journal 2015 page 504.

⁶⁷² See South African Department of Education 'A South African curriculum for the twenty-first century: Report of the review committee on curriculum 2005' <http://www.dhet.gov.za/portals/0/documents/Reports/SOUTH%20AFRICAN%20CURRICULUM%20for%20THE%20TWENTY%20FIRST%20CENTURY.pdf>. Retrieved 13-09-2019.

⁶⁷³ Andre Keel and Nazir Carrim, 'Human rights education and curriculum reform in South Africa' (2006) 5 Journal of Social Science Education 102.

⁶⁷⁴ Mokhaba, Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities 2004 chapter 4 page 228-229.

⁶⁷⁵ Laurie Brady, 'Outcomes-based Education: A critique. The Curriculum Journal 1996 7(1):13.

each of these demands requires the educator to devise and employ appropriate strategy and or tools. Therefore, this study posits that, there is a need to deliberate on the roles that educators ought to play in improving the educational system. In terms of the Outcome Based Education (OBE), educators' focus is to help each learner develop their abilities, knowledge, values and attitudes hence educators can facilitate learning, despite the fact that they are not directly participating, or taking part in the learning process.

To support this assertion, Tema is of the view that, "the educator's role can be compared to that of a soccer coach".⁶⁷⁶ This means that the coach does not offer similar coaching to all players, but provides appropriate help to each player. Moreover, the coach does not personally play the game on behalf of the players, but gets each player to develop their skills. The study, therefore, submits that, the aforementioned is analogous to the role of educators, as they are facilitators, in the process of improving learners' skills. Likewise, Jacobsen and Eggen assert that, "the educator's roles include among others to promote growth and achievement of both the social and intellectual enhancement of learners and most importantly, to increase the learner's desire and or motivation to learn".⁶⁷⁷

Cullingford asserts that, two issues underly the educators' role, which explains the difference the educators make on learners.⁶⁷⁸ The first issue is that an educator is a mentor. The concept of an educator being a mentor draws attention to the capacity of a mentor, to bring the best out of the mentee.⁶⁷⁹ Simply put, this means the educator's capacity to bring the best out of a learner. According to Cullingford, the mentor has the authority to criticize, be constrictive, command, as well as reflect on the learner's performance. A true mentor is one to whom learners turn, the person seen as a source of information, interest, and instruction.⁶⁸⁰

The second issue is that of an educator being an interpreter. This means that the educator explains the subject in the simplest way for learners to understand, by setting experiments, and or examples, use of materials learners find interesting, and making

⁶⁷⁶ Bothale Tema, Classroom practice in OBE. Joint Education Trust Bulletin, No. 7, October 1997 page 7.

⁶⁷⁷ David A Jacobsen, Paul Eggen, & Don Kauchak, Methods for teaching promoting student learning. New Jersey: Prentice Hall 1999.

⁶⁷⁸ Cedric Cullingford, The Effective Teacher. New York: Cassell 1995 page 158.

⁶⁷⁹ Cullingford. The Effective Teacher. New York: Cassell 1995 page 158.

⁶⁸⁰ Cullingford. The Effective Teacher. New York: Cassell 1995 page 158.

the subject itself more interesting.⁶⁸¹ This means that the educator becomes a source of knowledge. Vegas and Umansky assert that, educators become significant in ensuring effective learning takes place.⁶⁸² In the same vein, Hanushek opined that, quality education is a by-product of utilizing quality teachers, which in turn is the key element to improving learners' performance.⁶⁸³

5.7.2 Learners' role and responsibilities in improving educational outcome

This study depicts that, for the realization of quality education, it is not only the responsibility of the educators, but learners as well, have a role to play in teaching and learning. However, the role of the learners in contributing to the realization of quality education depends on the effectiveness of the educators in teaching and learning. Mokhaba argues that quality education commands that learners play an important role in teaching and learning.⁶⁸⁴ Mokhaba further argues that, when putting the learners' role into perspective, it is important to first look into the nature of the individual learner, and their needs, and or likes. Secondly, it is also important to look at the kind of a learner I as visualized through expected results from curriculums, aimed at improving quality education such as OBE.⁶⁸⁵

Mokhaba posits that, for educators to be successful, and achieve their objectives in teaching and learning, it is not only important that they know their learning materials thoroughly, but they also need to understand the nature of individual learners, and the things the learner likes and or dislikes. It is also significant that the educator knows, and understands, things the learner understands, and prefers, for use as a point of departure, in teaching, and learning. This approach in teaching and learning makes learners free, comfortable, and welcome, as they normally react to their surroundings, and show sensitivity to them. For example, Cullingford asserts that, things learners

⁶⁸¹ For a detailed discussion on the educators' role, see Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities*, Philosophiae Doctor (Public Affairs) Faculty of Economics and Management Sciences, University of Pretoria, 2004 chapter 4 page 225-226.

⁶⁸² Emiliana Vegas and Ilana Umansky, "Improving teaching and learning through effective incentives: Lessons from education reforms in Latin America" in E. Vegas (Ed.). 2005. *Incentives to improve teaching: Lessons from Latin America*. Washington DC: The World Bank.

⁶⁸³ Hanushek, E. "Teacher deselection" in D. Goldhaber and J. Hannaway (Eds). 2009. *Creating a new teaching profession 2009*. Washington DC: The Urban Institute Press.

⁶⁸⁴ Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities* 2004 chapter 4 page 226 para 2.

⁶⁸⁵ Mokhaba, *Outcomes-Based Education in South Africa Since 1994: Policy Objectives and Implementation Complexities* 2004 chapter 4 page 226 para 3.

understand, and prefer which also contribute effectively to the educator's teaching and learning, are *inter alia*, classrooms full of tasks to do, to use what learners have learned, and work that is relevant to them and their interest.⁶⁸⁶

5.7.3 Educators and implementation

This study emphasizes that educators are among parties accountable for the implementation of the right to education. The study maintains that, educators are the builders of the learners, or the community at large; hence, they must be well trained and equipped with relevant knowledge and skills. The reason educators are regarded as the builders is, if not properly trained, they will not be appropriately equipped to impart requisite knowledge, and provide quality pedagogic services, to the learners.

5.8 Capacitating educators for effective implementation and realization

According to the Centre for Enterprise Development, there is a lack of "accountability" on the part of educators, for the simple reason that they are not properly equipped to impart knowledge and skills, thus contribute to the realization of quality education.⁶⁸⁷ The major reason for this is that many educators fail to deliver quality education, owing to their limited capacity, and as a result, there is prevalence of poor performance in South African schools. Adedeji and Olaniyan are of the view that, for a country to fully develop, and improve its educational system, such country must consider capacitating their educators, or teaching personnel.⁶⁸⁸ Adedeji and Olaniyan further assert that, any social, economic, and cultural approach, designed to improve educational institutions and human advancement, necessitates employment of continuous educators' development programs. Adedeji and Olaniyan further indicate that, "for a country to elevate its educational system and to have the best quality education it must employ sustainable and innovative pedagogic approaches that will advance the ability and conditions of educators and teaching and learning in schools".⁶⁸⁹ This study therefore

⁶⁸⁶ Cullingford. *The Effective Teacher*. New York: Cassell, 1995, page 106.

⁶⁸⁷ Centre for Enterprise Development, a Johannesburg-based research institute 2015 page 23. Available at www.cde.org.za. Retrieved 01-09-2018.

⁶⁸⁸ Adedeji Segun Olugbenga and Olanrewaju Olaniyan, fundamentals of teacher education development; improving the conditions of teaches and teaching in rural schools across African countries, *UNESCO: International Institute for Capacity Building in Africa*, 2011.

⁶⁸⁹ Adedeji and Olaniyan, fundamentals of teacher education development; improving the conditions of teaches and teaching in rural schools across African countries 2011 page 73.

submits that, capacitating educators be used as a means to bring profound social change in values and norms, and betterment of people's lives.

Tang posits that, for a country to become a developed country, it has to endeavour to prioritise the enhancement of the mind-set, and intellectual capacity, of its nation, as well as the advancement of human capital. Tang highlighted further that, concentrating on these areas empowers the nation to elevate, and nurture its knowledge capabilities, creativity, and innovation, which are indispensable elements in the context of globalization.⁶⁹⁰ Tang further assert that, meanwhile educators as the central role players in implementing and assessing learners and graduates; they must first be imparted with the relevant practical skills, be innovative in crafting and offering their teaching modules, so as to integrate the relevant skills. Tang is of the view that, the educators' pedagogic techniques be student oriented, where learners and graduates keenly participate in the teaching and learning processes, while the educators assume the roles of facilitators and supervise the learners' activities. Problem-solving assessments, case studies, and other relevant teaching and learning mechanisms, such as presentations, and group work be extensively used as alternatives to the traditional teaching and learning approaches, to enhance their skills.⁶⁹¹

Tang concluded by alluding that educators be imparted with the necessary skills of today, for future employment, and how to formulate teaching and learning activities, so that learners and graduates attain relevant work-related skills, and proficiencies, necessary to build their futures. This is because the quality of teaching and learning, of learners, is profoundly influenced by, how much value the educational process has added to the educator.⁶⁹² Salazar maintains that, the attainment of education, vocational training, and lifetime learning, are the dominant supports of employability, and sustainable enterprise advancement, within decent work agendas, and consequently contribute to the alleviation of poverty and starvation.⁶⁹³ Salazar further asserts that, "skills development approach is crucial in encouraging a sustainable

⁶⁹⁰ Keow Ngang Tang, *Critical Issues of Soft Skills Development in Teaching Professional Training: Educators' Perspectives*, Elsevier Ltd 2015 page 128.

⁶⁹¹ Tang, *Critical Issues of Soft Skills Development in Teaching Professional Training: Educators' Perspectives* 2015 page 130.

⁶⁹² Tang, *Critical Issues of Soft Skills Development in Teaching Professional Training: Educators' Perspectives* 2015 page 130.

⁶⁹³ Salazar Jose Manuel, *Conclusions on skills for improved productivity, employment growth and development*, International Labour Conference held at the International Labour Office Geneva 2008 page 1.

development process and it can make a substantial impact in facilitating the transition from the informal to the formal economy of the country”. Salazar highlighted that, “skills development is also indispensable to address the social prospects and challenges in an attempt to meet the new demands as this can also help the state to work in a context of social discourse for shaping the national, regional and international skills development programmes that can encourage the amalgamation of socio-economic and environmental dimensions of sustainable development”.⁶⁹⁴

Salazar further avers that, skills development is a vital feature for realising the objective of securing decent employment, by increasing the output and sustainability of an enterprise, improving working conditions, and the employability of the labour force.⁶⁹⁵ Salazar maintains in his conclusion that, actual skills development needs an all-inclusive approach, which embraces among others:

- **development of core skills** – this includes the ability to read and write, numerical competence, communication skills, collaboration and problem solving and other relevant skills, learning capabilities as well as knowledge of employees’ rights and the understanding of private enterprise as the building blocks for lifetime learning and competency to adapt to change;
- **development of higher level skills** – proficient, technical and human resource expertise to make the most of or create prospects for good or high-wage employment;
- **employability** – a robust bedrock of essential skills, access to good quality education, availability of education and training chances, inspiration and support to benefit from the presented opportunities for lifelong learning, – is key for empowering the workforce to secure decent work and for supporting enterprises to implement new technologies and enter the new markets.⁶⁹⁶

⁶⁹⁴ Salazar, Conclusions on skills for improved productivity, employment growth and development, International Labour Conference held at the International Labour Office Geneva 2008 page 1.

⁶⁹⁵ Salazar, Conclusions on skills for improved productivity, employment growth and development, International Labour Conference held at the International Labour Office Geneva 2008 page 2.

⁶⁹⁶ Salazar, Conclusions on skills for improved productivity, employment growth and development, International Labour Conference held at the International Labour Office Geneva 2008 page 2.

This study emphasizes that, the profound foundation to achieve and realise effective skills development, depends on educating the educators, and thoroughly training them, so that they can produce high quality, and skilled learners.

Quintini and Pouliakas opined that, building the necessary basic skills timeously, by improving and augmenting the quality of early childhood education, through capacitating educators, is important. It is also essential to ensure that the expertise taught, and knowledge imparted at educational institutions, is relevant to the working forces; that such knowledge and expertise are preserved and enhanced during working life, acknowledged, and implemented by employers, once individuals join the labour market.⁶⁹⁷ Quintini and Pouliakas recommend that, educators learn to bring education from schools, and the professional working world, closer together, as this is vital in successful nation building. A coordinated strategy is required, that builds solid skills through high quality education to the educators, so that they impart work-based knowledge, and specific skills throughout a learner's life.⁶⁹⁸ Kamakura avers that, to avoid skills scarcity, which would alleviate poverty, ease unemployment intermediate and long term, and allow growth, a country needs to advance educators, and the skills development policies, that help to furnish learners with appropriate knowledge and expertise. Such policies may necessitate a combination of pedagogic strategies, including teaching and learning, as well as training strategies for educators.⁶⁹⁹

According to Somavia, equipping educators with skills relevant for today and tomorrow, is a prerequisite and strategic concern, for the growth and development outlooks of every cohesive country.⁷⁰⁰ Somavia maintains that, while the attainment of skills is a bedrock of securing decent work and productivity, numerous countries have utilized education, and particularly training, for the retraining of their educators, as a positive responsive methodology, towards poverty and employment challenges. Somavia avers that, the building blocks of any skills development approach, be

⁶⁹⁷ Glenda Quintini and Konstantinos Pouliakas, Matching Skills and Labour Market Needs Building Social Partnerships for Better Skills and Better Jobs, World Economic Forum Global Agenda Council on Employment, Davos-Klosters, Switzerland 2014 page 5.

⁶⁹⁸ Quintini and Pouliakas, Matching Skills and Labour Market Needs Building Social Partnerships for Better Skills and Better Jobs, World Economic Forum Global Agenda Council on Employment, Davos-Klosters, Switzerland 2014 page 8.

⁶⁹⁹ Yasuhiko Kamakura, Current and future skills, human resources development and safety training for contractors in the oil and gas industry International Labour Office, Geneva 2012 page 10.

⁷⁰⁰ Juan Somavia, A Skilled Workforce for Strong, Sustainable and Balanced Growth: A G20 Training Strategy, International Labour Office – Geneva, ILO Publications 2010 page 1.

designed on a robust foundation, with expertise, resilient relations, and interaction between the schools or educational institutions, and the work place.⁷⁰¹

Somavia concludes by alluding that, resilient education, and training methods are imbedded in the educational training institutions of every country. This means that a country with advance educators' training institutions, eventually has a strong skills development system, which in turn empowers that country to anticipate skills needed for future development. It enables necessary engagement between employers and employees, to make good contributions towards the provision of training strategies, sustainable quality, and importance of training, thus ensure that training reaches the society from all sectors, makes certain that financial mechanisms employed are feasible, and equitable, and that the outcomes of such training be continuously evaluated.⁷⁰²

This study submits that, in order to keep training relevant, there must be interaction between the training institutions, and financial institutions, which consequently builds solid bridges of relationships between the world of learning, innovation, training, and the world of professional work. This will assist continued deepening of relevant knowledge in the society, in different sectors, to improve, and develop their growth, and address developmental challenges.

5.9 Conclusion

The fundamental human right to education is protected and promoted by the Constitution. The Constitution makes it the responsibility of the South African government to provide for education, in line with the Constitution and other national, regional and international laws. The Constitution is the supreme law of the land, which advocates for the protection, and promotion of all human rights, as contemplated in the Bill of Rights. In section 39, it provides that government consider consulting international law, may consider consulting foreign laws, and apply it when there is a need, where applicable, in order to interpret the Bill of Rights, as well as to promote the spirit, purport and the objectives of the Bill of Rights.⁷⁰³ International organizations,

⁷⁰¹ Somavia, A Skilled Workforce for Strong, Sustainable and Balanced Growth: A G20 Training Strategy, International Labour Office – Geneva, ILO Publications 2010 page 1.

⁷⁰² Somavia, A Skilled Workforce for Strong, Sustainable and Balanced Growth: A G20 Training Strategy, International Labour Office – Geneva, ILO Publications 2010 page 1.

⁷⁰³ Section 39 (1) (b) and (c) of the 1996 Constitution.

such as UNESCO, fully support it, provide vital provisions, highlight rules, and standards, for countries' progression, and development of education, and training, globally.⁷⁰⁴

These laws, and standards, seek to build peace, through international collaborations in education, the sciences, and culture, and facilitate salient programmes, aimed at contributing towards the achievement of sustainable development.⁷⁰⁵ This chapter concludes that, the protection of the right to education, as supported by the Constitution, and international law, is therefore necessary and vitally important, hence education is not only of cardinal importance domestically, but also on international level, owing to its international promotion, protection and recognition, thus needs to be protected at all cost.

As a derived from the Constitution, it is significant to point out that the chapter highlighted the provision of education, and the prominence of accessing education in South Africa. Consequently, it submits that, education plays a pivotal role to augment one's prospects of acquiring better employment. It is clear that, the constitutional scrutiny in this chapter necessitates that the state upholds, cares for, and realizes, the right to education. Based on the contention that the state is bound to ensure that education is available, and easily accessed, by all, following the provisions of section 29(1), of the South African Constitution. Although it is the state's responsibility, to ensure that education is available, and easily reachable, in conclusion educators and learners, as the closest role players, have the responsibility of ensuring that the afforded education yields the best outcomes. They too are the advocates of improving educational outcomes, and making teaching and learning feasible. Moreover, educators, as builders of a nation, need adequately capacitating to enable sustainable realization of the right to quality education.

⁷⁰⁴ Chrizzell Churr, *A Child's Right to a Basic Education: A Comparative Study*, University of South Africa, Doctor of Laws 2012 chapter 5 page 126.

⁷⁰⁵ UNESCO, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Australian Multilateral Assessment March 2012.

CHAPTER 6: THE ADMINISTRATION AND ENFORCEMENT OF THE RIGHT TO QUALITY EDUCATION IN SOUTH AFRICA

6.1 Introduction

In a democratic country, the right to education is an exercise that engrosses all arms and domains of government to work together, including the judiciary. After the legislature has made the framework available, it is the executive's responsibility to ensure that the right is enforced, and achieved, whilst the judiciary ensures appropriate interpretation of the right in question. The actual provision of education needs a good co-operative governance approach between the national and provincial departments and or spheres, including a strong partnership with school governing bodies. It is an undisputed fact that, litigation is deemed argumentative; however, it opens the door to achieving an appropriate, improved, "access to the right to education", and stands as the sole feasible avenue open to minorities, to petition redress of grievances.⁷⁰⁶ The "right to education" has also been discussed and construed by the judiciary, in both the local and the international courts.

According to Emiola, in modern democratic societies, the mechanisms of management of public affairs and governance are precise, and somewhat definitive.⁷⁰⁷ Accordingly, three main organs of state are primarily vested the power to administer the government.⁷⁰⁸ These are the executive, legislature and judiciary. The executive power goes to the head of state, usually the president or the prime minister, as the case may be. For instance, section 83 of the South African Constitution of 1996 provides that: "the president is the head of State and the head of the national executive".⁷⁰⁹ In terms of section 85(1) and (2), the executive executes government policies. Overwhelming responsibilities, and the complex nature of government

⁷⁰⁶ Antonella Mameli, 'Judicial review, social antagonism and the use of litigation as a tool for combating poverty' in Williams et al (eds) *Law and poverty* (London, Zed Books, 2005); Marius Pieterse, 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) Vol.29 (3) *Human Rights Quarterly* 800-804; See also Benjamin Davy and Sony Pellissery, 'The citizenship promise (un)fulfilled: The right to housing in informal setting' (2013) Vol.22 *International Journal of Social Welfare* 77-80.

⁷⁰⁷ Akintude Emiola, *Remedies in Administrative Law* (2000) Emiola Publishers Limited, Ogbomosho, Nigeria, page 5.

⁷⁰⁸ Emiola, *Remedies in Administrative Law* page 5.

⁷⁰⁹ Section 83(a) of the Constitution of the Republic of South Africa, 1996.

business presupposes that, the chief executive sometimes delegate executive powers to lower officials. Through delegation, the executive is able to maintain law and order in the society. The executive is responsible for maintaining peace and tranquillity in the country, hence, any attempt to cause a breakdown in law and order, by any person or persons immediately prompts control by the security agents put in place by the government.⁷¹⁰

South Africa is a constitutional democratic country with nine provinces, three spheres of government, and an independent judiciary.⁷¹¹ Although judiciary is also defined as, “part of government, they are however independent so that courts can protect citizens without being influenced or pressurised by government”.⁷¹² All the three spheres, or levels of government in the country, have their own legislative and executive authority, defined by the Constitution as “distinctive, interdependent and interrelated”. All these authorities must be in line with the Constitution, laws and policies enacted by the National Parliament.

Baghai asserts that, basic human rights given to people, are the symbols of change to modernity, and these rights assure care for the most helpless individuals, in the context of increasingly unwarranted circumstances of modern life.⁷¹³ Consequently, any person or group of persons who experience infringement of their rights, are entitled to access effective justice, or other suitable remedies at national and international levels.⁷¹⁴ In this context, the judiciary plays an important role in the enforcement and protection of the right to education, as entrenched in section 29 of the Constitution.

⁷¹⁰ Section 85(1) and (2)(a)-(e) of the Constitution of the Republic of South Africa, 1996.

⁷¹¹ See the Structure and functions of the South African Government at www.gov.za > retrieved 18-08-2015, revisited 16-12-2018.

⁷¹² See the spheres of government at www.etu.org.za > retrieved 18-08-2015, revisited 16-12-2018.

⁷¹³ Katayoun Baghai, *Social systems, theory and judicial review: Taking jurisprudence seriously* (Burlington, Ashgate Publishing, 2015) 28.

⁷¹⁴ United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, available at: <https://www.refworld.org/docid/47b17b5b39c.html> [accessed 16 December 2018] para 77.

6.2 The scope of the State's obligation

Section 7(2) of the Constitution, places a positive obligation on the part of the state, to “protect, promote and fulfil” the rights enshrined in the Bill of Rights. The obligation to respect on the other side necessitates the state and other relevant stakeholders, on a primary level, such as the chapter nine institutions, to assist, and refrain from encroaching on the right to education, thus protect it at all cost. Section 29(1) (a), assures every person the right, not to have their “right to education” exposed to undue and unfounded interference, and or restriction. There is a commitment on the part of the state, and other private stakeholders, to refrain from preventing or prejudicing access to the right to education.⁷¹⁵ This has been the case, and was emphasised in the case of, *Ex parte Gauteng Provincial Legislature*,⁷¹⁶ where the court held that, “the right to basic education creates a positive right that basic education be delivered and made available for every individual and not just a negative right that such individuals should not be obstructed in pursuing their basic education”.⁷¹⁷

In the premises, this study emphasizes that, the right to education imposes both positive and negative obligations on the state, to provide for education. Regarding a positive obligation, the state is mandated to take actual measures in order to ensure that every person has access to educational institutions and facilities, and that they benefit from the right to education, while the negative obligation compels the state and its stakeholders, not to inhibit or obstruct children's access to education.⁷¹⁸ The state also has a commitment, following the provisions of article 13 of the ICESCR, to make education “available, accessible, acceptable and adaptable”.⁷¹⁹ These are the essential and interrelated core elements of education, which contribute to the successful provision of the right to quality education, as discussed in detail below.

⁷¹⁵ *Grootboom* para 34.

⁷¹⁶ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).

⁷¹⁷ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) at para 9. It should be kept in mind that although this case was decided under the Interim Constitution (Constitution of the Republic of South Africa 200 of 1993), it is still of great value and importance because it emphasizes the state's obligation to promote and to give effect to the right to a basic education.

⁷¹⁸ Shirley Pendlebury, Lori Lake & Smith C (eds) 2008/2009 *South African Child Gauge* 19. See also Churr, A Child's Right to a Basic Education: A Comparative Study, University of South Africa, Doctor of Laws 2012 chapter 5 page 133.

⁷¹⁹ Article 13(2) of the ICESCR.

This study depicts that, the obligation to “protect, promote and fulfil” the rights in the Bill of Rights, inclusive of the right to education, is of seminal importance, and for this reason, necessitates the state set up statutory and institutional interventions, whereby all persons can realize their rights. The study further postulates that, educational legislation and other relevant measures connected thereto, must be formulated, to strengthen existing ones, in a way that guarantees equal and non-discriminatory access for all persons, particularly the disadvantaged and vulnerable people. Therefore, the state must set up the administrative and regulatory legislative frameworks, including the necessary judicial pronouncements, for the effective realization of this right, thus create opportunities for its attainment and enjoyment. Hence, the obligations under the ICESCR that, “states are expected to adopt legislative measures in conjunction with financial, administrative, educational and social measures with a view to achieving progressively the full realization of the socio-economic rights including the right to education”.⁷²⁰

6.3 Access to the judiciary by applicants to adjudicate right to education

According to section 38 of the Constitution, any aggrieved claimant of any right, in the Bill of Rights, is eligible to approach the courts to seek specified remedies.⁷²¹ Liebenberg posits that, “that communities who are marginalised by a complex web of factors such as their race, gender, poverty, disability and their spatial location in remote rural areas face almost insurmountable obstacles in gaining access to courts so as to vindicate their constitutional rights”.⁷²² Liebenberg points out that, “access to legal services also remains a persistent problem in South Africa and concedes further that one way in which the constitutional dispensation has made it to some extent easier for the underprivileged to gain access to courts is to broaden the categories of people permitted to approach the courts for appropriate remedy in circumstances where their rights have been infringed or threatened”.⁷²³ Liebenberg further opined that, “the legal right or standing to institute a court action is no longer reserved for the person directly

⁷²⁰ Article 13 of the ICESCR.

⁷²¹ Section 38 (a)-(e) of the Constitution.

⁷²² Sandra Liebenberg ‘Forging new tools for vindicating the rights of the poor in the crucible of the Eastern Cape’ (2014) public lecture delivered at the Rhodes University Law Faculty 28 July 2014 available at http://blogs.sun.ac.za/seraj/files/2014/08/Public-Lecture_Rhodes_FINAL.pdf retrieved 20-12-2018.

⁷²³ Liebenberg ‘Forging new tools for vindicating the rights of the poor in the crucible of the Eastern Cape’ 2014.

and personally affected by a breach of a legal right”.⁷²⁴ This means that any person can still approach the court, to protect and further the interest of another person or persons, even though not directly affected by the breach. The person can approach the court for a remedy, on behalf of those who are unable to act on their own.

The study is in concurrence, and shares the same sentiments with the above assertions by Liebenberg, as it is still a problem for some people to get access to courts, especially those located in deep and remote rural areas, including those less informed and or unlearned. This particular group of people is most unlikely informed about access to courts, as per the provisions of section 38, of the Constitution. Pursuant to that, these groups of illiterate people are unlikely to be familiar with the correct procedures to approach and access the courts, in case of infringement or threats to their rights. Given that the *locus standi* /legal standing to institute action is, not only reserved for those directly aggrieved, institutions with either direct or indirect interest, may assist as stipulated in section 38 of the Constitution. Some people still harbour the perception, if not mind-set, that the law and justice remain as inaccessible and elusive as a mirage, tools that only work for those with political connections, and financial muscle.

Currie and De Waal, explains *locus standi*, refers to the status of verifying whether a person who approaches a court, is the suitable to present the matter to the court for adjudication.⁷²⁵ For example, in cases where a person alleges violation of their right to education, as espoused in section 29, such a person can rely on the provisions of section 38 of the Constitution. In *Gerber v Vooritter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening*,⁷²⁶ the court held that:

The central objective of section 38 was to provide unrestricted *locus standi* to every person whose rights has been infringed so that they would be able to approach the relevant court for a remedy. The section intends to uphold the fundamental rights and freedom as enumerated in the Bill of Rights. In order to realise the determination of this section and to ensure that appropriate remedies are granted, the courts are obligated

⁷²⁴ Liebenberg ‘Forging new tools for vindicating the rights of the poor in the crucible of the Eastern Cape’ 2014.

⁷²⁵ Currie and De Waal, *The Bill of Rights Handbook* 6th ed (Juta & Co Ltd, 2014) 73.

⁷²⁶ *Gerber v Vooritter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening* 1998 (2) SA 559 (T).

to determine whether an applicant's rights and or freedom had been violated or encroached.⁷²⁷

Through section 34, the Constitution gives every person the right to have any dispute that can be resolved by application of the law, decided in an impartial public hearing before a court or, where applicable, or another independent and impartial tribunal or forum.⁷²⁸ While in sections 9(1), and 35(3), of the Constitution guarantees equal protection by the law, and the right to a fair trial. It is therefore imperative to note that, in the context of this study, the right of access to the courts denotes access to courts or tribunals that adjudicate educational disputes. Hence, Nyenti opined that, "the legal dimension of the concept of access to justice was developed as an element of the fundamental principle that all people should enjoy equality before the law".⁷²⁹

Furthermore, Holmes posits that, "it is crucial that the right to have access to justice be interpreted widely so as to include many of the needs of the poor, in particular the realization of their right to education".⁷³⁰ With regard to access to courts, section 38 of the South African Constitution provides provisions for *locus standi*, to enable people to act on their behalf, or on behalf of others, who cannot act on their own behalf, in circumstances where their constitutional rights have been threatened or violated by providing that:

Any person enumerated in this section is entitled to approach a court of law for a relief if that person believe that a right in the Bill of Rights has been interfered with or threatened, and the court may grant appropriate relief as it deems fit, including a declaration of rights. The persons who may approach a court are, a person acting -

- (a) In their personal interests;⁷³¹
- (b) On behalf of those who cannot act in their own names;
- (c) As a member of, or in the interest of, a group or a class of persons;
- (d) In the public interest; or
- (e) As an association acting in the interest of its members.⁷³²

⁷²⁷ *Gerber v Vooritter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening*, 1998 para 569.

⁷²⁸ See section 34 of the Constitution.

⁷²⁹ Mathias Nyenti, Access to justice in the South African social security system: Towards a conceptual approach *De Jure* (2013) 903.

⁷³⁰ Dave Holmes, The constitutional justification for free legal services in civil matters in South Africa, *Speculum Juris* 2 (2013) 2.

⁷³¹ According to Tshoose the notion interest includes the interest required for the joinder of a party in an action or an application.

⁷³² Section 38 of the South African Constitution. See also *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 para 4 and 5. For further reading on access to courts, see Tshoose, *Social Assistance: Legal Reforms to Improve Coverage and Quality of life for the poor people in South Africa* 2016, chapter 4 page 158-162. For further reading on the scope and ambit of class action, see *Children's Resource Center Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA); *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC); *Ferreira v Levin NO* 1996 1 SA 984 (CC). See also Neels

It is apparent from these constitutional provisions, that the Constitution allows all applicants with violated educational rights, to approach the courts for relief. According to Currie and De Waal, such an applicant needs to have *locus standi*, and sufficient interest in such proceedings.⁷³³ In the same vein, Okpaluba is of the view that, the notion of “sufficient interest” is linked to the classifications of persons contained in section 38, of the Constitution.⁷³⁴ According to Currie and De Waal, “an association acting in the interest of its members must show that the members have a sufficient interest in the remedy it seeks while a person acting in the public interest must show that the public has a sufficient interest in the remedy he/she seeks”.⁷³⁵

It is for this reason this study posits that, class action in the context of the right to education, provides a persuasive weapon in the hands of individuals whose educational rights have been infringed, hence it allows for a single or small group of representative to institute legal action on behalf of a large group who share with the representative concerned the same interest in the remedy being sought.

6.4 A discussion of selected case law on the role of the judiciary in the protection and enforcement of the right to quality education

The judiciary plays a critical, and an active role, in interpreting and giving content to the right to education, as provided for in section 29 of the Constitution, through profound pronouncements, and judgements. To some extent, these judgements and pronouncements become essential regulatory tools, shaping and compelling compliance in implementation and enforcement of the right to education. This study submits that, the right to education is inalienable, and as such, it is incumbent on the government and relevant institutions responsible for the delivery of education, to

Swanepoel, The judicial application of the “interest” requirement for standing in constitutional cases: A radical and deliberate departure from common law (2014) *De Jure* 63-84.

⁷³³ Currie and De Waal, *The Bill of Rights Handbook* 6th ed (Juta & Co Ltd, 2014) page 78-79.

⁷³⁴ Matthew Chuks Okpaluba, Constraints on judicial review of executive conduct: The juridical link between the Marikana mineworkers’ imbroglio and the Gauteng e-tolling saga’ *TSAR* 2 (2015) 286. Also see Currie and De Waal, *The Bill of Rights Handbook* 6th ed (Juta & Co Ltd, 2014) page 78-79

⁷³⁵ Currie and De Waal, *The Bill of Rights Handbook* 6th ed (Juta & Co Ltd, 2014) 73. See further in Permanent Secretary, Department of Welfare, *EC v Ngxuza*, where Cameron JA, writing for the Full Bench had this to say: “In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it”.

ensure that the right is promoted and provided at all cost. This chapter articulates the different interpretations and ruling given by the courts on the nature and meaning of, availability, accessibility, acceptability and adaptability of the right to education. It highlights the importance of infrastructural amenities, and social economic goods and services, as integral to the delivery of the right to education. Emphasis here is on how the judiciary construed the right to education in South Africa, and internationally. Closely related to the preceding assertions, below is a discussion of cases, under different headings and subheadings:

6.4.1 The Nature and Meaning of the Right to Education

*Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*⁷³⁶, was the first case that proclaimed the “nature and meaning” of the right to basic education as immediately realizable. This case involved a number of learners enrolled at *Juma Masjid* School, a public school operating on a private property. The owner of said property, (*Juma Masjid* Trust) approached the High Court, and successfully obtained an eviction order against the state, and the learners attending the school, and evicted the learners from the school. Following dissatisfaction with the High Court decision, the state, and the *Juma Masjid* school governing body, unsuccessfully appealed the decision in the Supreme Court of Appeal. However, eventually they found relief in the Constitutional court. It was the concern of the Constitutional court that, the learners be provided with alternative placement, into another school.⁷³⁷

In this case the Court held that, “it is important to have a clear understanding of the meaning of the right to basic education as embedded in section 29(1) (a) of the Constitution”. That right, as condensed in this section, is immediately realizable, which shows its dissimilarity to other socio-economic rights. This denotes that, the realization of this right does not depend on availability of state fiscal means, and as such, must be abruptly realised. The court emphasized that, “the right to basic education in section 29(1) (a) may be limited only in terms of a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity,

⁷³⁶ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).

⁷³⁷ See *Juma Masjid Primary School* para 74 and 78.

equality and freedom". In its ruling, the court further stressed that, "the right to basic education is different from other rights particularly the right to further education as provided for in section 29(1) (b) merely because it may only be limited in terms of a law of general application unlike the right to further education which the state is only obliged to make it progressively available and accessible".⁷³⁸

To proclaim the, "nature of the right to education", the judgement in this case also mirrored the prominence of section 28 (2), of the Constitution, which asserts that, "a child's best interests are of paramount importance in every matter concerning the child".⁷³⁹ The decision of the Court, in this case, promoted the right to basic education in the sense that, it was mainly concerned with fact that learners be provided with alternative placements, since the right to basic education is "immediately realizable", and not dependent on the availability of state resources.

The courts, through their pronouncements, did not only emphasize the, "nature and meaning" of the right to education, but also ventilated on the importance of good infrastructural amenities, and ample socio-economic resources, for the realization of quality education. These were emphasized in the case of, *Section 27 v Minister of Education*,⁷⁴⁰ an urgent application brought before the North Gauteng High Court, sought a declaratory order that, failure by the Department of Basic Education to deliver textbooks to schools across Limpopo constituted an infringement on the right to basic education. Hence, the application sought an order to direct the department, to provide the textbooks as a matter of urgency. Accordingly, this duly constituted a transgression against the right to basic education, equality as well as dignity. The court observed that, "education is critical in both freeing and unlocking the potential of each person and it also found that textbooks are an essential component of quality learning and teaching".⁷⁴¹ In this regard, the court established that, "the failure by the respondents to provide text books constitutes a violation of the right to basic education".⁷⁴²

⁷³⁸ See *Juma Masjid Primary School* para 37.

⁷³⁹ See also *Sonderup v Tondelli* 2001 1 SA 1171 (CC) para 29.

⁷⁴⁰ *Section 27 v Minister of Education* 2013 2 SA 40 (GNP).

⁷⁴¹ See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 22.

⁷⁴² See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 32.

The court points out that, if a right is violated it should be followed by an effective and meaningful remedy. Failure to do so means that the rights were not protected, and hence according to the Constitution, the Court must ensure that appropriate action is implemented to remedy the situation.⁷⁴³ The court further held that, “it is without a shadow of doubt that an order only for delivery of text books will not address the consequences and effects of the failure of delivery for the first half of the year”. The whole situation boils down to require the strong intervention by the Court to address the loopholes in learning and the quality in learning and teaching.⁷⁴⁴ This is to guarantee that the detriment they would have perpetually endure because of not having the necessary textbooks, is improved.⁷⁴⁵ The Court’s decision in this case protected and promoted the right to quality basic education, not achievable without textbooks.

According to Skelton many authors concurred, interpreted the observation of the Court, and posited that, indeed the right to basic education is a direct enforceable right, and is not subject to progressive realization, like other socio-economic human rights.⁷⁴⁶ These assertions were further confirmed in the case of, *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*.⁷⁴⁷ This case involves the learners in a public school who wanted to learn in a language of their choice. The dispute arose between the Head of Department of Education of the province, and a public school, together with its governing body. The dispute was about the school’s language policy, the school used Afrikaans as the only medium of instruction. The court held that the HoD had the power to limit, or withdraw the authority given to the SGB, to select the language of instruction in the school. The court further emphasized that if need be the HoD withdraw the powers of the SGB, as the HoD had the authority to assign a provisional body, for the purpose of executing the same responsibilities and functions, as provided by the South African Schools Act. The Supreme Court of

⁷⁴³ See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 35.

⁷⁴⁴ *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 36.

⁷⁴⁵ See *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 36. See further Nevondwe and Matotoka on Promoting and protecting the right of access to basic education in South Africa, the Thinker for thought, volume 57 November 2013 page 8-13.

⁷⁴⁶ See Ann Skelton, The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law, 2013 page 3. See further Veriava & Coomans “The Right to Education” in *Socio-Economic Rights in South Africa* (2005) (eds Brand & Heyns) 60; Woolman & Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 9.

⁷⁴⁷ *Head of Department, Mpumulanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC).

Appeal reversed the decision. The HoD argued that, his conduct to withdraw the powers of the SGB, to choose the language of instruction, was reasonable, and therefore, the decision of the court was lawful, hence, the negotiations with the governing body had failed.

The Court held that the HoD had the power to withdraw the functions of the SGB to regulate the school's language policy, based on sound reasons. These functions are conferred on the HOD's in terms of the provisions of section 29(2) of the Constitution read together with section 22 of the SASA. This means that if the HoD has withdrawn the functions of the governing body, the said functions vest in her/him but may only be exercised for the purposes of a specified remedy. The Court in this case did not deal with the determination of whether the HoD acted reasonably or not, because of the fact that his exercise of power to withdraw the functions of the governing body was influenced by his decision to appoint a provisional committee to determine the schools language as rooted in section 25 of the SASA. The Court further held that the HoD failed to draw a clear distinction between the powers vested in him under section 22 and those vested in him under section 25 of SASA. This means that he contaminated his exercise of power by incorrectly relying on section 25. This also means that the HoD did not have the legal powers to appoint the committee to determine the school language policy which resulted in declaring all his actions unlawful and been set aside. In his judgement Moseneke the then DCJ stated that the powers and functions of the SGBs to determine the language policy must be understood within the wider and explicit constitutional arrangement to make education gradually accessible and available to all considering fairness, practicability and the redress of the apartheid practice and injustices.⁷⁴⁸

In *Madzodzo and Others v Minister of Basic Education and Others*,⁷⁴⁹ an application filed against the National and Provincial Education Departments, compelled them to deliver school furniture to all schools across the Eastern Cape province. The applicants in this case were parents with children attending public schools in the Eastern Cape Province. The application primarily concerned children attending three

⁷⁴⁸ *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 61.

⁷⁴⁹ *Madzodzo and others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

public schools, but eventually more parents joined the class suit, which led to consideration of a remedy for the whole province. The Department of Education argued that, distribution of the school furniture, and other resources, only take place after the conclusion of an audit, of existing furniture across the province.

The Court rejected the argument of the Education Departments, and held that, school equipment such as furniture formed an integral component for the immediate realization of the right to elementary education, and so the state was bound to make it available promptly.⁷⁵⁰ The Court further held that, failure by the department to deliver the necessary school furniture in schools across the Province, encroached on the learners' rights to receive quality education. It further said that, individual learners were entitled to immediate access to education, through delivery of the appropriate furniture to the respective schools, equal treatment, in a dignified manner, same as their counterparts in other Provinces. It remains an ongoing problem of infringement of learners' right to education, if there is a delay in the delivering the school furniture, or no delivery at all, particularly for schools located in deep rural and remote areas, as these are usually under resourced. The Court ordered the Department of Education to distribute the required furniture promptly, as it already recognized the deficiency.⁷⁵¹ This upheld and protected the right to quality education, as it is unachievable without the availability of the said furniture. This case proved that infrastructure, and other resources such as furniture form important resources for the delivery of quality education, and the realization of the right to education, and as such, must be available.

The other case on the promotion of quality education through infrastructure was *Komape and Others v Minister of Basic Education*.⁷⁵² This case concerned a five-year-old Michael Komape, a grade R learner at *Mahlodumela* lower primary school, at *Chibeng* village, near *Seshego*, in the Limpopo Province. However, this case not only involved Michael, and his family, but all the learners attending schools situated in most rural areas across the Limpopo Province, living without basic sanitation facilities,

⁷⁵⁰ See *Madzodzo and others v Minister of Basic Education and Others* 2014 para 17.

⁷⁵¹ See Lucy Jamieson (Children's Institute, University of Cape Town), Nikki Stein (Section 27), and Samantha Waterhouse (Community Law Centre, University of the Western Cape), *South African Child Gauge* 2014 part one: Children and law reform page 15.

⁷⁵² *Komape and Others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC.

at schools administered by the National Department of Basic Education, and the Limpopo Provincial Department of Education.

Michael met his untimely death when he fell and drowned in a pit toilet located on the school premises, which shattered his parents' dreams, and expectations. The plaintiffs (members of the Komape family), sought relief for negligence, and wrongful death, caused by breach of a variety of care duties, which caused his premature death. Attributing for the relief sought, the plaintiffs argued that Michael's death caused them untold suffering, grief and emotional shock.⁷⁵³ In the alternative, the plaintiffs also claimed for punitive damages, penalty and pre-emption for the wrongful conduct, which prompted the death of Michael, and compensation for the harm endured from the breach of the defendants' statutory rights and duties.⁷⁵⁴

The plaintiffs sought (as claim B), relief to the amount of two million rand, for the grief suffered. Alternatively, compensation claimed for harm suffered because of the defendants' breach of statutory rights and obligations, derived from the following basis:

- (a) The defendants neglected to perform various care duties including their constitutional responsibility to look after Michael, while on the school premises;
- (b) The plaintiffs were within their right to believe that Michael had protection from any form of detriment, whilst in the care of the defendants;
- (c) The demise of Michael was foreseeable looking at the condition of the ablution facilities on the school premises.⁷⁵⁵

In claim C the plaintiffs also sought for past and future medical expenses, for impaired mental health problems, caused by the shock and trauma they endured following Michael's demise. In claim D and E respectively, the plaintiffs sought for funeral expenses, and loss of earnings.⁷⁵⁶ The respondents acknowledged accountability in

⁷⁵³ *Komape and Others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC para 6. This relate to claim A which is based on the delictual damages for emotional trauma and shock suffered by the plaintiffs.

⁷⁵⁴ *Komape and Others v Minister of Basic Education* para 7 and 9.

⁷⁵⁵ Para 11. This was claim B wherein the plaintiffs were claiming amount equal to two million for the grief suffered, alternatively, constitutional damages.

⁷⁵⁶ *Komape and Others v Minister of Basic Education* para 12.

respect of claim A, C, D and E relating to the plaintiffs. In the same way, foreseeability of harm, in relation to the secondary victims, was similarly acknowledged, thus did not need determination. The monies claimed in respect of claim D and E were also acknowledged, and verdict granted, based on the settlement agreement reached between the parties, regarding those claims.⁷⁵⁷

The defendants disputed the quantum of benefits demanded by each plaintiff as general damages in respect of claim A. Claim B inclusive of the declaratory order remained in argument. Regarding claim C, the need for, and number of consultations required regarding future medical costs for psychological treatment for the plaintiffs (specifically the minor children), were not acknowledged. The defendants argued that the onus to prove the necessity, and the number of consultations required for future medical costs relating to psychological treatment of the plaintiffs remained with the Plaintiffs.⁷⁵⁸

The court indicated that, “the aim of a claim for damages *ex delicto* is not to enrich a claimant who has suffered loss, but to compensate for the loss suffered”.⁷⁵⁹ In this regard, the court described the compensation claim by the plaintiffs (as constitutional damages), nothing short of a claim for retributive damages.⁷⁶⁰ The court further pointed that, “in situations where courts are faced with such claims, they must decide whether an award of constitutional damages is fair and reasonable”. Muller J opined that, “in his view, an appropriate remedy is an order directed at the enforcement, protection and the prevention of future encroachment of the rights protected in the Bill of Rights if the harm suffered is not adequately addressed by an effective common law claim for damages the elements of which include violations of protected human rights”.⁷⁶¹

⁷⁵⁷ *Komape and Others v Minister of Basic Education* para 14-15.

⁷⁵⁸ *Komape and Others v Minister of Basic Education* para 16.

⁷⁵⁹ *Komape and Others v Minister of Basic Education* para 67. In arriving to this, the court made reference to the case of *Telematrix (Pty) Ltd v/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)* par 12.

⁷⁶⁰ In explaining this, the court referred to *Jones v Krok 1995 (1) SA 677 (AD) 696C-H* that a claim for punitive damages is against public policy and foreign to South African law. The court further alluded that the claim for compensatory damages is not a delictual claim based on fault. Also see Johann Neethling and Johannes M Potgieter, *Neethling-Potgieter-Visser Law of Delict 6th ed Lexisnexis Durban (2010) 123-124*.

⁷⁶¹ See *Komape and Others v Minister of Basic Education* para 67. Muller J in making this submissions referred to quite a number of cases including but not limited to *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (AGRI SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA) 62*; *Darson Construction (Pty) v City of Cape Town 2007 (4) SA 488 (CPD) 509-510* ; *Monie Holdings (Pty) Ltd v Premier of Limpopo Province (2007) 3 SA All SA 410 (T) 421-422*; Muller J also referred to *Pierre De Vos*

The court upheld that, on the one hand, it was not convinced that retributive damages served as suitable relief in this regard, and on the other hand, if the plaintiffs succeeded in this claim, they would appear overcompensated, thus not serve the wellbeing of society.⁷⁶² In saying this, the court relied on the absence of convincing evidence that, if punitive damages awarded in favor of the plaintiffs, it might serve to realize the protection of the rights violated, let alone act as a deterrent in future violations of such rights, by the defendants.⁷⁶³

In conclusion, the court held that, a structural interdict was the appropriate, fair and reasonable relief, to justify the constitutional provisions effectively. The court further held that, the best interest of every learner attending a rural schools with pit sanitary facilities, anywhere across the province, must take preference.⁷⁶⁴ In the court's view, this appeared the only effective way to ensure that government took initiatives, to provide basic sanitary facilities where there was none, and improve those facilities, where they were lacking in those schools. The court acknowledged, with no doubt, that to achieve this needed a lot of effort on the part of state, however, that could not prevent the court from ordering the state to meet and comply with its constitutional obligations.⁷⁶⁵ The court emphasized need to order the implementation of effective remedial actions, for the restoration of lost and degraded self-respect, and interests of learners in attending public schools across the province. Therefore, the blatant encroachment of the learners rights, imbedded and provided for in the Constitution, cannot in any way be allowed to happen, without taking remedial steps to protect, enforce and prevent any such future encroachment.⁷⁶⁶

(Ed) South African Constitutional Law in Context Oxford University Press Goodwood (2014) page 410-412. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) para 70. Muller J emphasized further that Courts are also under a general obligation to develop the common law under section 39(2) of the Constitution if the common law is deficient. *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 958 (CC) para 44-45; 57.

⁷⁶² See *Komape and Others v Minister of Basic Education* para 68. The court held that the punitive damages cannot be an appropriate relief hence it will only serve to compensate the plaintiffs but it will not serve the interest of society at large with specific reference to learners attending rural schools in Limpopo without adequate and safe sanitary facilities. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 82.

⁷⁶³ *Komape and Others v Minister of Basic Education* para 68.

⁷⁶⁴ *Komape and Others v Minister of Basic Education* para 70.

⁷⁶⁵ *Komape and Others v Minister of Basic Education* para 70. The court further said that the evidence presented before it shows that inadequate effort was made to replace old sanitary facilities at some schools across the Limpopo Province.

⁷⁶⁶ *Komape and Others v Minister of Basic Education* para 70.

The court held that, a declaration of rights would not serve planned purpose, if left to the defendants, to observe the law in due course, hence, the necessity of future actions, to reduce consequent unnecessary costs incurred when eventually enforcing those rights.⁷⁶⁷ Moreover, history proved that the defendants lacked aspiration, and a will to act in the best interest of learners. This is because evidence adduced during the trial, proved that, Section 27 engaged with the Limpopo Provincial Department of Education around 2012, concerning the poor conditions of the sanitary facilities across Limpopo.⁷⁶⁸ Furthermore, the Limpopo department also reported the underprivileged and critical sanitary dares in the Province, to the National Department of Basic Education. Notwithstanding the engagement by Section 27, as well as the visits to schools, and reports to the National department, no meaningful progress happened, to resolve the problems identified, and to improve the sanitary facilities in schools across the Province.⁷⁶⁹

It was also apparent from the evidence adduced by a budget analyst called in by the plaintiffs, that even though, sufficient fiscal resources were allocated to the Province during the 2012-2013 budget, for provision of proper sanitary facilities, at 66 schools across the Limpopo Province, nothing happened due to beaurocratic red tape, non-attainment and signing of the service level agreements.⁷⁷⁰ Based on the evidence offered, the court opined that, the provincial Department of Education showed lack of commitment, to utilize the fiscal means allocated for the provision of sanitary facilities, as indicated in the financial plan. Consequently, all the unused funds went back to the treasury, instead of utilizing them for the intended purpose.⁷⁷¹

The court ordered both the first, and the second defendants, to provide, and erect, adequate numbers of proper, dignified latrines, at every rural school across the Province, previously fortified with pit sanitary facilities. The new facilities to be easily accessible, secured, safe, offering privacy, and upholding health and hygiene standards, based on an evaluation of the most appropriate, safe, and hygienic sanitation technology.⁷⁷² Despite the fact that the court remained mindful that this

⁷⁶⁷ *Komape and Others v Minister of Basic Education* para 70.

⁷⁶⁸ *Komape and Others v Minister of Basic Education* para 24.

⁷⁶⁹ *Komape and Others v Minister of Basic Education* para 24.

⁷⁷⁰ *Komape and Others v Minister of Basic Education* para 25.

⁷⁷¹ *Komape and Others v Minister of Basic Education* para 25.

⁷⁷² *Komape and Others v Minister of Basic Education* para 72.

order placed additional liability on the state's fiscal means, the court ordered the first, and second defendants to put before it, relevant information regarding the exact delivery times, and the necessary program and processes to be developed, to achieve this goal. This, said the court, will enable it to perform a supervisory role in executing the order to justify the constitutional right of the learners attending schools with poor and degrading sanitary facilities in rural Limpopo.⁷⁷³ The first and the second defendants were also ordered to pay for the future medical treatment, in respect of the minor plaintiffs.

In concurrence with the court, this study posits that, the order for the compensation (constitutional damage), for the breach of constitutional obligation, by the defendants, as sought by the plaintiffs, would not have been an appropriate order, only serving to satisfy the plaintiffs. On the other side it would have failed to vindicate the constitutional right of the learners, attending schools fortified with poor sanitary facilities. This would have set precedence in future claims of the same nature. The study emphasized that a structural interdict remained the only proper remedy, fair and reasonable, for the situation and for future purposes. Hence, it sought to address, and justify, the constitutional rights of learners' schooling in all under resourced schools, with pit toilets facilities. This also, to guard against future flagrant infringement of the learners' constitutional rights, and implement appropriate remedial measures to provide for, protect, enforce and prevent any more future violations of the rights, as contemplated in the Bill of Rights. It also serves as a precedent, and contributes to the effective realization of proper and dignified sanitary facilities, in rural schools across all South Africa. This also promotes the realization of human (learners) rights, it does not only address the challenge, or and the difficulties faced, by the *Komape* family, but the existing rural schools fortified with pit sanitary facilities across all the South African provinces.

The other case that dealt with school infrastructural amenities, was, the case of *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape*.⁷⁷⁴ This case concerned the Eastern Cape Department of Education's ongoing failure to fulfil its constitutional obligation, to provide proper sanitation facilities, and

⁷⁷³ *Komape and Others v Minister of Basic Education* para 71.

⁷⁷⁴ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape*, Bisho Case No: 645/19, unreported.

clean water supply, to the schools in the Province.⁷⁷⁵ As a result, a number of schools from across the Eastern Cape Province demanded the provision of safe, and adequate, school facilities. In this case, an urgent application lodged in the Eastern Cape High court, compelled the respondents to take appropriate steps, to provide safe, proper and adequate school facilities, which provided for feasible teaching, and learning in schools, within the Province. The School Governing Body (SGB) sought relief, to ascertain the provision of reliable, regular water, and sanitation facilities at schools, as a matter of urgency.⁷⁷⁶ The applicant argued that without a regular supply of clean running water at the schools, learners are compelled to fetch drinking water from rivers and streams, or other nearby sources, outside of the school premises. According to the applicant, this exposed the learners to risky and dangerous situations, which forced them in some cases, to drink possibly contaminated water from those unreliable sources, and as such possibly result in numerous negative, health implications on the learners.⁷⁷⁷

Another problem with lack of safe, secured, and dignified ablution facilities in schools, lies in learners, including teachers, resorting to utilizing unsafe facilities, such as pit toilets, or to opting for other alternatives like bushes, fields, and open areas to relieve themselves. The implication of all this is that pit toilets not designed for use by young people, are hazardous, learners risk falling into those pit toilets. Likewise, other alternatives bushes, fields or open areas are simply unsanitary, undignified, and humiliating, a direct encroachment on the human right to dignity.⁷⁷⁸

The applicant (SGB) brought the application in different dimensions. In the first, the applicant brought it in its own interest, this entitled them to receive the necessary, and adequate installation, maintenance, and restoration, of safe infrastructural facilities, thus create conducive teaching, and learning environment.⁷⁷⁹ On the other side, the

⁷⁷⁵ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 9 of the founding affidavit. The applicant argued that the provision of sanitary facilities of improved standard and clean water to schools across the province is an essential component of the learners' constitutional right to basic education as contemplated in section 29 of the Constitution.

⁷⁷⁶ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 5 of the founding affidavit.

⁷⁷⁷ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 10 of the founding affidavit.

⁷⁷⁸ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 11 of the founding affidavit.

⁷⁷⁹ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape, Bisho* Case No: 645/19, unreported para 7.1 of the founding affidavit. In this regard the SGB brought the application in terms of section 38 (a) of the Constitution.

learners could not bring the application on their own, despite the fact that they were entitled to the right to education, in terms of section 29 of the Constitution, the provision of good infrastructural amenities, and conducive to teaching, and learning. Hence, the SGB brought the application in the learners' interest.⁷⁸⁰ Moreover, the applicant brought the application acting in the public interest, in terms of section 38 (d) of Constitution, the provision of good infrastructural amenities, and the implementation of the right to education is a matter concerning public interest.⁷⁸¹ Therefore, a breach of the constitutional right, in terms of failure to provide good infrastructural facilities, has a direct impact on the extent to which learners exercise their right to quality education, and as such, is a matter that falls in the public interest domain.

In respect of the respondents, the court ordered the them, particularly the second respondent, (superintendent-general, Eastern Cape Education Department), to undertake to erect, reinstate, and effect, all repairs necessary to comply with the applicable norms, and standards, for public school infrastructure.⁷⁸² The regulation provides for norms and standards relating to, *inter alia*, the provision of proper classrooms, power supply, school libraries, laboratories, sports field infrastructure, fencing, and most significantly, the provision of sufficient and sustainable clean water supply, and sanitary facilities.⁷⁸³

With regards to, the provision of water, regulation 11 of the Norms and Standards provides that, "all schools must have sufficient clean water supply which complies with all relevant laws and which is available at all times for drinking, personal hygiene, and where appropriate, for food preparation. Sufficient water-collection points and water-use facilities must be made available at all schools to allow convenient access to, and use of water for drinking, personal hygiene and, where appropriate for food preparation. The choice of an appropriate water technology must supply technology for each particular school and must be maintained in good working order. Sources of clean water supply could include one or more of the following: a municipal reticulation

⁷⁸⁰ In this regard the SGB brought the application acting on behalf of the learners following the provisions of section 38 (b) of the Constitution. See *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 7.2 of the founding affidavit.

⁷⁸¹ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 7.3 of the founding affidavit.

⁷⁸² The regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure were promulgated on the 29 November 2013 in terms of section 5A of the South African Schools Act (SASA).

⁷⁸³ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 31 of the order.

network; rain water harvesting and, when so required, tanker supply from municipalities; mobile tankers; boreholes and when so required, tanker supply from municipalities; or local reservoirs and or dams”.⁷⁸⁴

In relation to the provision of proper ablution facilities, or sanitation, regulation 12 of the norms and standards provides that:

Every school must have adequate number of ablution facilities that can be easily reached by all learners and educators, which are dignified, provide safety and confidentiality, encourage health and hygiene standards and are in all material times in good working condition. Choosing a suitable and safe ablution facilities and or equipment must be based on a valuation conducted on the utmost appropriate sanitary technology for each school. Appropriate sanitation facilities could include among others water born sanitation; small-bore sewer reticulation; septic or conservancy tank systems; ventilated improved pit latrines; or composting toilets. However, plain pit and bucket latrines are considered inappropriate and are therefore not allowed at schools.⁷⁸⁵

Regarding the new sanitary facilities, the court ordered the respondents to appoint a contractor, to erect new ablution facilities compliant with the minimum uniform norms, and standards, after completion also demolish the old ablution facilities.⁷⁸⁶ The court also ordered the respondent, to cover and secure incomplete manholes and pits, make them safe for learners, install proper doors to cubicles and urinals, fit a proper roof to the ablution facilities, and complete all necessary repairs, and renovations, to all external and internal walls.⁷⁸⁷ The court emphasized that, while in that process, the respondent do everything necessary to cause, install at least five temporary ablution facilities, safe, age appropriate, dignified and fully functional.⁷⁸⁸

Regarding the clean water, the court ordered respondent to do everything necessary to appoint a service provider, to undertake the following work: establish whether underground water exists, easily accessed by means of a borehole, within the school premises. If the availability of underground water is established, the respondent shall

⁷⁸⁴ See regulation 11 (1), (2), (3) and (4) of the Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure as promulgated on the 29 November 2013 in terms of section 5A of SASA. See also *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 33 of the order.

⁷⁸⁵ Regulation 12 (1), (2) and (3) of the Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure as promulgated on the 29 November 2013, in terms of section 5A of SASA.

⁷⁸⁶ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 2.1 and 2.2 of the order.

⁷⁸⁷ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 2.2.1.2 – 2.2.1.5 of the order.

⁷⁸⁸ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 2.2.2 of the order.

do everything necessary to appoint a service provider to embark on the drilling process.⁷⁸⁹ While in this process, the court directed the respondents, to create a joint written representation to the local authority, for eminent supply of potable water to the school. Moreover, the court directed the first respondent (MEC for Education Eastern Cape), to oversee the process of purchasing potable bottled water from a service provider, to be paid for by the Eastern Cape Department of Education, after presenting an invoice to the office of the head of Department, without deduction from the allocated resources.⁷⁹⁰

6.4.2 The core elements of the right to education

Taiwo perceived that, “the right to receive education does not only guarantee access to education but also implies that the aims of education must be met”.⁷⁹¹ Taiwo argue that, “the purpose of education, among others, is to equip learners with basic skills and knowledge that will enable them to break out of poverty and be active and productive members of the society”.⁷⁹² Hence, the right to education also refers to a right to empowerment. Accordingly, Tomasevski posits that, “the purpose of education is however defeated if the education offered does not meet the aims of education in general”. According to Tomasevski, the Committee on Social, Economic and Cultural Rights (CSECR) notes that, “education in all forms and levels, must be characterized by availability, accessibility, acceptability and adaptability”.⁷⁹³ Tomasevski refers to these features as 4A-scheme, commonly known as such.

This part of the chapter uses the Tomasevski’s 4A-scheme, to evaluate the adequacy of the education offered in South Africa. According to Skelton, “these features form a useful benchmark against which to measure government’s performance towards the realization of the right to adequate education through judicial pronouncement and

⁷⁸⁹ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 2.3.1.1-2.3.1.2 of the order.

⁷⁹⁰ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 2.3.3 of the order.

⁷⁹¹ Taiwo, *The Implementation of the Right to Education in South Africa and Nigeria* (published LLD theses Nelson Mandela Metropolitan University 2011) page 94.

⁷⁹² Taiwo, *The Implementation of the Right to Education in South Africa and Nigeria*

⁷⁹³ Tomaševski, *Human Rights Obligations in Education: The 4-A Scheme*, Wolf Legal Publishers (WLP), 2006, page 47. Katarina Tomasevski was the United Nations (UN) Special Rapporteur on the Right to Education from 1998 to 2004. Tomasevski developed the 4 A-scheme and the UN Committee on Social, Economic and Cultural Rights (CSECR) adopted it in their *General Comment on the Right to Education*, issued in 1999.

policy interventions”.⁷⁹⁴ It should be borne in mind that, section 29 of the Constitution, preserves the right to elementary education, but does not provide for a detailed standard of such education. This study posits that, such education be of a specific standard, adequate for it to sustainably, and positively, empower the learners receiving it.

This was emphasized in the United States, case of *Campaign for Fiscal Equity Inc v the State of New York*,⁷⁹⁵ where, “the applicant had contended that the standard of education in New York City schools did not meet the requirement of a “sound elementary education” found in the State of New York’s Constitution”. The New York Constitution of 1938, provided that the legislature be responsible to create, maintain and support an educational system offering fee-free public schools education, wherein every child of the state could be educated.⁷⁹⁶ The New York State Court of Appeal (the State’s highest court) had, in a preliminary judgment, defined the phrase sound elementary education, as the basic ability to read and write, calculating, including communication skills that empower children to become effective members of the public, to function efficiently, secure employment, and be capable of voting, and serving the country.⁷⁹⁷

On appeal, the Court stretched the definition and meaning, to say such education must empower people to acquire necessary skills and competitive employment, and that, the requirement of being an effective member of the public mean more than being eligible to vote, or serve the country, but to do so in a capable, and knowledgeable manner.⁷⁹⁸ In light of the information articulated in this chapter, the chapter also

⁷⁹⁴ Ann Skelton ‘The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law’ 5 available at www.saflii.org/za/journals/DEJURE/2013/2.pdf Retrieved on 28-04-2020.

⁷⁹⁵ *Campaign for Fiscal Equity Inc v the State of New York* 100 NY 2d 893 (‘CFE II’) as quoted by Stu Woolman and Brahm Fleisch, *The Constitution in the Classroom: Law and Education in South Africa 1994-2008*.

⁷⁹⁶ See Article 11 of the Constitution of the State of New York 1938. This Constitution was revised, with amendments adopted by the Constitutional Convention of 1938 and approved by vote of the people on November 8, 1938 and amendments subsequently adopted by the Legislature and approved by vote of the people. As amended and in force since January 1 2018.

⁷⁹⁷ See *Campaign for Fiscal Equity Inc v the State of New York* 100 NY 2d 893 (‘CFE II’) as quoted by Woolman and Fleisch, *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* 2009.

⁷⁹⁸ *Campaign for Fiscal Equity Inc v the State of New York* 100 NY 2d 893 (‘CFE II’) as quoted by Woolman and Fleisch, *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* 2009 page 906. Also see Siphelo Dlamini Mbeki, *Critical evaluation of the realization of the right to basic education in light of the 2012 Limpopo textbook saga*, Masters of Laws (LLM) in Constitutional and Human Rights Law Litigation, Faculty of Law, University of KwaZulu-Natal, Howard Campus 2014 chapter 5 page 40 and 41.

established that South Africa's elementary education falls short of attaining such objectives. Since the Constitution does not describe the standard of South African elementary education, this USA court pronouncement can be used as a guideline by South African judicial system, to construe the satisfactory level for the South African elementary education, in order for it to appropriately empower learners. Moreover, for the South African educational system to achieve the goals of quality education, it ought to be one that is available freely to all, without discrimination, accessible to all physically and financially, and be acceptable and adaptable, to meet the learners' and community's needs. According to the CESCR, "education in all its forms and at all levels shall exhibit the above interrelated and essential features".

6.4.2.1 Availability of the Right to Education

According to Taiwo, availability means that, "the state must establish schools so that education should be available freely to all children in need of it without any form of discrimination".⁷⁹⁹ According to Verheyde, this embodies the responsibility to take fiscal and practical actions in order to guarantee that an educational co-ordination of good quality is established and upheld.⁸⁰⁰ It necessitates that the operational educational organizations and platforms, have to be available in abundance, within the educational institution and sector.⁸⁰¹ This includes imposing a responsibility on the part of the state, to make operative education accessible to those staying in remote and rural areas, including those who cannot, for any reason, attend and establish such educational organizations.⁸⁰² Taiwo further posits that, the state must establish, and make available schools and educational institutions to all children in need. This also implies that, delivery of learner support materials such as, textbooks, school furniture, and good infrastructure, be done in time, for learners to commence lessons as soon as the academic year starts. This also denotes that, in those schools' adequate educators ought to be available, and appropriately skilled and competent.

⁷⁹⁹ Taiwo, *The Implementation of the Right to Education in South Africa and Nigeria* (published LLD theses Nelson Mandela Metropolitan University 2011) page 101.

⁸⁰⁰ Mieke Verheyde, *A Commentary on the United Nations Convention on the Rights of the Child: Article 28- The Right to Education* (2006) Martinus Nijhoff Publishers, Leiden/Boston.

⁸⁰¹ See CESCR General Comment No. 13: The Right to Education para 6(a).

⁸⁰² Fons Coomans, "Content and Scope of the Right to Education and Obstacles to its Realization" in Y Donders & V Volodin (eds) *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) page 198.

Availability of education was also the issue in the case of *Centre for Child Law v Government of the Eastern Cape Province*,⁸⁰³ usually referred to as, the “mud schools case”. This case involved a number of schools in the Eastern Cape, who fought for some time, to get the provincial department of education to remedy severe difficulties with infrastructure. The problems included; dilapidated mud classrooms, missing roofs, in some cases, classes conducted in nearby households, no clean, running water, or proper sanitation, lack of furniture, no tables, chairs and school desks suitable for learners at the school. The Legal Resources Centre adjudicated over the matter on behalf of the seven schools concerned. However, the Legal Resource Center extended the relief to benefit all schools enduring the same infrastructural backlog, in the province, and not only the initial seven schools named in the lawsuit.

In this case, the court held that, failure by the provincial government to develop and improve the educational standards, through provision of appropriate learning facilities for learners to have conducive learning environment, constituted a breach of the learners’ constitutional right, which compromised the right to quality education. In settlement of this matter, a memorandum of understanding was reached between the Legal Resources Centre and the provincial government, pledged to address the problems of infrastructural backlog, and social amenities, within a three-year period, a plan to be overseered, and administered by the National Department of Basic Education, for its realization.⁸⁰⁴

Availability also identified as the issue in the case of *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape*,⁸⁰⁵ which dealt with a deterrent to the availability of basic education. This case concerned a tender awarded to supply educational stationery for grades R-12 learners in schools cutting-across the Eastern Cape Province. After unsuccessfully bidding for the tender, Freedom Stationery brought an urgent legal application following its dissatisfaction with the tender procedure.

⁸⁰³ *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bisho, case no 504/2010.

⁸⁰⁴ *Centre for Child Law v Government of the Eastern Cape Province*. See also Mbeki, Critical evaluation of the realization of the right to basic education in light of the 2012 Limpopo textbook saga, Masters of Laws (LLM) in Constitutional and Human Rights Law Litigation, Faculty of Law, University of KwaZulu-Natal Howard Campus 2014 chapter 5 page 42 para 1.

⁸⁰⁵ *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* (59/2011) [2011] ZAECBHC1 unreported.

Freedom Stationery, as the applicant filed for an interim interdict against the state, to refrain from entering into any arrangement with another stationery supplier, in relation to the same tender.

The Centre for Child Law, acting as *amicus curiae*, advised the court to make certain that the ruling pronounced, insured that the learners are not left without the necessary writing implements, as these are required by learners to realize their right to education. The court held that, the problems besetting the provincial educational system was the state's fault, consequently the court could not rule in government's favour, hence, urged the government to address the issues. This implied that granting an interdict in favour of the applicant, upheld the applicant's rights, but meant that the learners would wait longer to receive their scholastic stationery. The court, nonetheless, made no clear provision in its ruling, for the immediate provision of writing implements required for the learners across the province, to access their right to education.

This study, therefore, argues that, this case stands in direct contrast to the general attitude of promoting and protecting the right to education, that has been embraced, promoted and protected by the judiciary, as revealed by the argument and some of the significant rulings in education, such as *Juma Masjid* case and *Madzodzo* 's case.⁸⁰⁶ For example, in the *Juma Masjid* case, the conclusion of the court was to promote the right to elementary education, in the sense that it was mainly concerned with learners receiving alternative placements, since the right to elementary education is "immediately realizable", thus not dependent on the availability of state fiscal means. In the same vein, in *Madzodzo*, the court ordered the Department of Education to deliver the required school furniture promptly, as it was aware of the shortage.

This protected, and upheld the right to quality education, not achievable without the delivery of said scholastic furniture, to the respective schools in the province. The judgement in this case proved that, the provision of age-appropriate school furniture is a necessity for the general upbringing, and the realization of the right to quality education. By so ruling, in the *Freedom Stationery* case, the court meant that the state

⁸⁰⁶ See *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC) and *Madzodzo and others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

compromised the right to education, and it seemed that the fundamental rights of the learners across the Province were not of paramount importance, and as such not prioritized. The study further argued that, what the court should have done was to order the timeous provision or delivery of scholastic stationery to all schools in need, across the Eastern Cape Province.

6.4.2.2 Accessibility of the Right to Education

Access of the right to education, was defined in the case of, *Centre for Child Law v Minister for Basic Education Eastern Cape*,⁸⁰⁷ to refer to, “the child’s ability to enrol and as a result attend school”. Beiter is of the view that, accessibility means that educational institutions and programmes have to be accessible to every person, and encompasses three aspects, namely, accessibility without discrimination, physical and economical accessibility.⁸⁰⁸ Woolman and Fleisch posit that, in order to ensure an effective, economically accessible education, it is required that those learners who are destitute, and live in relative destitution, must be helped and supported accordingly, by the government in order to make sure that they access quality education.⁸⁰⁹

In 2011, in the case of, *Adam Legoale v MEC for Education, North West*,⁸¹⁰ the applicants together with the Centre for Child Law, represented by the Legal Resources Centre, brought an application to the North West Court in Mafikeng, seeking the provision of fee-free learners’ transport to and from school. The said applicants were the parents and the caregivers of learners enrolled and attending school at *Rakoko* High School in *Mabeskraal*, North West Province. These applicants and their children were families living in *Siga* a village, situated about 25 kilometres from *Mabeskraal*. The learners were previously enrolled and attended a school (JC *Legoale* Commercial School), based within their vicinity and within walking distance to and from the school, until the state closed the school as part of rural reasoning process in 2009.⁸¹¹

⁸⁰⁷ *Centre for Child Law v Minister for Basic Education Eastern Cape* [2012] 4 All SA 35 (ECG).

⁸⁰⁸ Beiter, *The Protection of the right to education by international law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (2005) page 487.

⁸⁰⁹ Woolman and Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) page 131-132.

⁸¹⁰ *Adam Legoale v MEC for Education, North West*, North West High Court, Mafikeng, case no 499/11, unreported.

⁸¹¹ In the Affidavit filed on behalf of the Centre it was pointed out that the closure of public schools is regulated by section 33 of SASA, which involves a consultative process with the school governing body. Closure of a

Without transport provision, some learners dropped out of school, because their families could not afford to pay the transportation costs from their incomes, as most of them depended on government grants and or pensions. In their application, the applicants sought the provision of a fee-free learners' transport to and from their school. The Centre for Child Law requested that strategies and programmes, to provide for the transportation of learners be developed, and made public, so that learners and their parents, or caregivers could become aware of their constitutional rights. The agreement reached resulted in court ordered settlement.⁸¹²

Some of the terms of the agreement require that the Department of Public Works and Transport work hand in hand with the Department of Education, to provide transportation to learners, from *Siga* village to their schools at *Mabeskraal*, from 8 August 2011, for a period of 3 months, or until longer-term measures came in place, whichever occurred first. The two departments were to jointly, fully fund and appropriately arrange transportation of the learners, to cater for their daily needs. The agreement also permitted applicants' direct interaction with the two departments, to assess progress. In the event that any one of the departments failed, or did not comply with the terms of the agreement, any of the parties had the right to approach the High Court on an urgent basis.⁸¹³

In 2013, the Constitutional Court also delivered a judgment in, *MEC for Education in Gauteng v The Governing Body of Rivonia Primary School*.⁸¹⁴ This case, "involved the relative powers of school governing bodies and provincial Education Departments in determining a school's capacity to accommodate learners. In this case, the Head of the Gauteng Department of Education instructed the school governing body of Rivonia Primary School to admit a learner, even though the school was full in terms of its own admissions policy". The school governing body challenged this, argued that, "the provincial department did not have the power to issue such an instruction".

rural school should be governed by the underlying principles set out in the Report of the Ministerial Committee on Rural Education: A new vision for rural schooling, which also requires a consultative process.
⁸¹² *Adam Legoale v MEC for Education, North West*, North West High Court, Mafikeng, case no 499/11, unreported.

⁸¹³ See Ann Skelton, The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law page 11-17.

⁸¹⁴ *MEC for Education, Gauteng and Others v Governing Body of the Rivonia Primary School and Others* 2013 (6) SA 582 (CC).

The Court ruled that the provincial Departments of Education, were authorised to overrule the admission policies of their respective schools, however, they must do that in a procedurally fair manner, and in accordance with the powers conferred by the SASA, and or any other relevant laws. The Court pronounced the “right to education”, a fundamental human right empowers people to achieve their potential, and improve their living personal circumstances,⁸¹⁵ and relate this to the General Comment 13.⁸¹⁶ The Court also gave emphasis to, “the prominence of meaningful engagement by and between all role-players in education to ensure that the best interests of learners are advanced at all times”. This case was recorded the third on the subject of the co-operation between the provincial Departments of Education and SGBs, in a set of Constitutional Court judgments.⁸¹⁷

In *Mutukane and Others v Laerskool Potgietersrus*,⁸¹⁸ the applicants, parents and caregivers, wanted to enrol their children at an English-medium stream school, Laerskool Potgietersrus. The parents were unsuccessful in their application to have their children admitted and enrolled as learners at Laerskool Potgietersrus. “The respondent was the member of an executive council of the then Northern Province responsible for Education, Arts, Sport and Culture, who joined the other applicants in his official capacity to represent the interest of parents who would like to send their children to the school and also in the public interest”.

The applicants stressed that black learners were negated admission to the school, based on the respondent’s school policy, which excluded admission, based on racial grounds. The first applicant, Mr. Matukane, a black resident of the then Potgietersrus,

⁸¹⁵ *MEC for Education* 2013 para 26.1.

⁸¹⁶ See para 28 of the judgement (this is a quotation from General Comment 13) which provides that “Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities”.

⁸¹⁷ See also: *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2011 4 SA 531 (FB); *Head of Department, Department of Education, Free State Province v Harmony High School and Another*, 2014 (2) SA 228 (CC); *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*, 2010 (2) SA 415 (CC). All these three judgments have emphasised the need for consultation and co-operation to ensure full realisation of all learners’ right to basic education.

⁸¹⁸ *Mutukane and others v Laerskool Potgietersrus* 1996 (3) SA 223 (TPD).

wanting his three children to be enrolled in the school, approached the principal to enquire about getting his children enrolled. The principal then informed the first applicant to wait, allow the school time to determine availability of vacant places to enrol the children. Not convinced that the delay in receiving a response was legitimate, the first applicant approached the Provincial Department of Education, which informed him that vacant places were available at the school. Based on the information received, he went back to the school, completed the necessary application forms, and subsequently purchased the school uniforms for the children. The next day on arrival with the children at school, he found a group of White parents blocking the school gate, and they refused him access into the school premises. The day after, his children were once again, denied access into the school premises.

The hearing established that fifty-five black children denied admission into the school in the same way, no black child received admission in that school, and none appeared on the school's waiting list. Following the treatment given to Mr. Matukane, a group of black parents and or caregivers approached the High Court to seek an order compelling *Laerskool Potgietersrus* to enrol their children. At the High Court, the school contended that it did not reject admission of the children based on racial grounds, but did because they had reached the maximum number of the new intakes, and as such, unable to accommodate more children.⁸¹⁹

The school further argued that, had it admitted the black children it would have been over populated by English-speaking children, and that would abolish the Afrikaans ethos, morals and beliefs of the school. In support of its argument, the school further asserted that, "section 32(c) of the Interim Constitution promotes the right to establish, where possible, educational institutions founded on a common culture or language, provided that there shall be no discrimination on the ground of race". It also contended that, "the school was eligible to implement admission requirements designed to preserve and promote the prevailing Afrikaans values and beliefs of the school". Moreover, it was emphasized that, "a Department of Education directive gave the school governing body the power to regulate its admission criteria".⁸²⁰

⁸¹⁹ However, at the time of hearing of the case, the school had 580 Afrikaans-speaking students and 89 English-speaking students.

⁸²⁰ See *Mutukane and others v Laerskool Potgietersrus* 1996 (3) SA 223 (TPD).

Spoelstra J held *inter alia* that:

Discrimination on the grounds of race has been proved to the satisfaction of the court. This is so because there has never been any learner of colour admitted to the school regardless of the number of applications received by the respondent. The fact that there has never been any admission of black learner be it this year or the previous years is a clear and robust indication to that effect. The court held further that the respondent failed to prove that there was no unfair discrimination based on race against any learner of colour. In addition, even if their applications had been unsuccessful because they had elected to receive their education through English, it would still constitute unfair discrimination.⁸²¹

Another case that dealt with accessibility involved a matter regarding the exclusion of pregnant learners from their schools. The case of *Welkom High School v Head, Department of Education, Free State Province*,⁸²² involved two cases brought independently to the Bloemfontein High Court, and later combined due to their similarities. In the cases, the girls involved became pregnant, and as such, expelled from the school because of their pregnancies. The “pregnant learner policy” informed the decision to deny the two girls access to education, as adopted by the governing bodies of each school. These policies, founded in line with the National Department of Basic Education policy of 2007, referred to them as, “measures for the prevention and management of learner pregnancies”.⁸²³ In response to parents and or guardians’ complains the Provincial Department of Education substituted the decision of the school and reinstated the pregnant learners relying on a 2010 Circular, which provides that “a pregnant learner should return to school as soon as possible”.

The Human Rights Commission and the Centre for Child Law,⁸²⁴ contended that, the Court ought to decide on the correctness of the policy that excludes the pregnant learners, or order the departments and the schools to amend their policies, to be in line with the Constitution. The Court refused this, and emphasized that no legal instrument existed to deal with the constitutionality of the policy. Not convinced by the High Court decision, the HoD of the Free State Provincial Department of Education appealed the decision. During the appeal, the Court did not make any ruling, or

⁸²¹ See *Mutukane and others v Laerskool Potgietersrus* 1996 (3) SA 223 (TPD).

⁸²² *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB).

⁸²³ In particular, both schools pointed to measure 22 which reads: “However, it is the view of the Department of Education that learners as parents should exercise full responsibility of parenting, and that a period of absence of up to two years may be necessary for this purpose. No learner should be readmitted in the same year that they left school due to a pregnancy”.

⁸²⁴ As the *amici curiae* in this case.

contribution in relation to the constitutionality, or the lawfulness of the policy, but concentrated more on exercising of administrative powers, and the principle of legality.⁸²⁵ It is worth noting Rampai J's remarks that, "there are two groups of children adversely affected by these decisions, namely the teenage mothers and their babies". Rampai J further said, "perhaps the greatest gift that can be given to the two little babies of the two teenage mothers is to ensure that their mothers continue to learn, so that they can become better parents in the near future".⁸²⁶

Another case that dealt with accessibility of the right to education is the case of, *Moko v Acting Principal of Malusi Secondary School and Others*.⁸²⁷ This case involved Mr. Moko, a grade 12 learner at Malusi secondary school, based in Marobjane Village, Avon, Senwabarwana, Limpopo Province. On or about 25 November 2020, Mr. Moko, (the applicant) arrived at his school, to sit for an examination for Business Studies Paper 2, as part of his final matric qualification. Ironically, the acting Principal of Malusi secondary school, Mr. Mokgonyana, (the first respondent), met the applicant and other two fellow learners at the school gate, and denied them access into the school premises, because of failure to attend certain additional lessons, prior to the commencement of the exam. They received instruction to return to their respective homes, and summon their parents, and or guardians to the school, deliberations on the matter.⁸²⁸

The applicant left the school as instructed by the first respondent, however, unlike his fellow learners, he failed to bring the parents or guardian to school, let alone to locate them. As a result, he returned to the school alone, to find the school gates still locked, and the Business Studies Paper 2 examination already in progress. As such, the first respondent refused to allow the applicant to sit for the examination. This conduct by the first respondent deprived the applicant an opportunity to write his examination as scheduled.⁸²⁹

⁸²⁵ See *Head, Department of Education, Free State Province v Welkom High School* 2012 6 SA 525 (SCA).

⁸²⁶ See *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB) para 80.

⁸²⁷ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30.

⁸²⁸ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 7.

⁸²⁹ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 7 and 8.

Subsequent to the missed examination, the applicant met with first respondent, in an attempt to resolve the matter amicably. The first respondent informed the applicant that he would only allow him to sit for a supplementary examination, scheduled in May 2021. Dissatisfied by this the applicant elevated the matter to the Members of Executive Council Limpopo Department of Education, (the second respondent), who instructed the District Director to attend to the matter as urgently as possible. The District Director informed the applicant on the decision taken for the first respondent, and further confirmed the applicant would only be given an opportunity to write the supplementary examination, in May of 2021.⁸³⁰

The applicant, aggrieved by the decision, of the first and second respondents, that he would only complete his matric examinations mid-2021, approached the High Court of South Africa, Limpopo Division, Polokwane, on urgent basis, seeking relief the opportunity to sit for the missed examination as soon as possible.⁸³¹ The court upheld the decision of the first and second respondents, established that the applicant be allowed to write the missed examination paper in May of 2021, and for that reason, declined to allow the matter to be determined, and heard on an urgent basis. Therefore, the applicant's application was struck from the roll, for lack of urgency.⁸³²

Aggrieved by the decision of the High Court, its determination that still did not afford him urgent relief, to write the missed examination imminently, the applicant approached the Constitutional Court directly, on an urgent basis. In this Court, the applicant sought an urgent order to write the missed paper before the release of other examination results, to enable final collation, and release of results, at the same time as other matric examination results.⁸³³ The applicant asserted that the conduct of the first respondent was unreasonable and also violated his right to basic education as mandated by section 29(1)(a) of the Constitution as well as his right to further education as entrenched in section 29(1)(b) and it must be declared inconsistent with section 29(1)(a) and (b) of the Constitution. This is because if the applicant was to write the missed paper in May of 2021, he will not be able to commence further

⁸³⁰ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 9.

⁸³¹ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 10.

⁸³² *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 11.

⁸³³ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 12.

education at any institution of higher learning at the beginning of 2021, which will constitute a delay on his part.⁸³⁴

After realising that the applicant has initiated the litigation in the Constitutional Court, the respondents decided not to oppose the application and all filed notices to abide by the decision of the Constitutional Court. Furthermore, the second and fourth respondents filed submissions in an effort to assist the Court, wherein they showed their enthusiasm to offer the applicant an opportunity to write the missed examination in January 2021.⁸³⁵ However, the offer to afford the applicant an opportunity to write his missed examination came only after the litigation had been initiated in the Constitutional Court.⁸³⁶

In deciding on this matter, the Court referenced the case of *Madzodzo*⁸³⁷ and *Juma Musjid*,⁸³⁸ and upheld that, access to school is a prerequisite for the realization of the right to education. The court emphasized that, access to an examination, particularly the one that is necessary to complete schooling, is also an indispensable component, in the realization of the right to education. The court upheld that, denying the applicant access into the school premises, and precluding him from writing his examination, particularly when his lateness was duly instigated by the first respondent, defiantly breached the applicant's right to education, in terms of section 29(1)(a) of the Constitution.⁸³⁹ The court emphasized that the applicant nearly lost the opportunity of pursuing further education, at institution of higher learning as of February 2021, due to the conduct of the first respondent.⁸⁴⁰ The court declared this conduct a violation of the applicant's right to education, as entrenched in section 29(1) of the Constitution. As a result, the second and fifth respondent were ordered to afford the applicant an opportunity to write the missed paper on 15 January 2021.⁸⁴¹

⁸³⁴ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 13.

⁸³⁵ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 22.

⁸³⁶ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 45.

⁸³⁷ *Madzodzo and others v Minister of Basic Education and Others* para 19.

⁸³⁸ *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* para 43.

⁸³⁹ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 35.

⁸⁴⁰ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 37.

⁸⁴¹ *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 para 48.

6.4.2.3 Acceptability of the Right to Education

According to Taiwo, acceptability requires that, the arrangement and components of education, inclusive of the curriculum teaching and learning approaches, be acceptable to learners and parents, and that the form and content of education be relevant at all times.⁸⁴² This study argues that, acceptability is of paramount importance in the South African context, hence during apartheid schools located in remote rural areas and townships had their own separate curricula which were deliberately promulgated to make African learners less or under-skilled “second class” citizens. Post 1994, the newly introduced curricula, teaching approaches, and legislation aimed to redress educational imbalance.⁸⁴³ By the same token, Beiter opined that, “acceptability requires the state to set and enforce minimum norms and standards in education concerning for an example, quality of the education, safety and health at schools”.⁸⁴⁴ This study emphasizes that adequacy also be connected to acceptability, since education which should be accepted ought to be one that sufficiently equips learners with the required and relevant skills, desired to survive after their formal studies.

6.4.2.4 Adaptability of the Right to Education

Adaptability shows that, the state is responsible for making certain that the South African educational policies, frameworks and practices are inclusive, and applicable to all children. Skelton asserts that, “adaptability raises the question as to whether South African educational laws and policies are adequately flexible to respond to the educational needs of every learner, including those living with disabilities”. Therefore, this means that adaptability incorporates educational access for children with special needs.⁸⁴⁵

⁸⁴² Taiwo, *The Implementation of the Right to Education in South Africa and Nigeria* 2011 page 102.

⁸⁴³ Section 2 (g) of Act 53 of 2003 as amended. This is among others one of the legislation promulgated after 1994 aimed at redressing the past educational imbalances.

⁸⁴⁴ Beiter, *The Protection of the right to education by international law*, (2005) page 477. See also Mbeki, *Critical evaluation of the realization of the right to basic education in light of the 2012 Limpopo textbook saga*, Masters of Laws (LLM) in Constitutional and Human Rights Law Litigation, Faculty of Law, University of KwaZulu-Natal Howard Campus 2014 chapter 5 page 44.

⁸⁴⁵ See Ann Skelton, *The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law* page 21.

The case of, *Western Cape Forum of Intellectuals Disability v Government of the Republic of South Africa*,⁸⁴⁶ was an important case as it dealt with, the protection of “rights of children” with profound or severe intellectual incapacities. In this case, the Forum provided schools, centres and other educational amenities for children with intellectual impairments, in the Western Cape Province. The Forum contented however that it does not receive any form of support in the form of educational resources, or funding from the Department of Education. After years of making an effort to engage with the government about this concern, the Forum, duly represented by the Legal Resources Centre, decided to take their matter to court, and in doing so, joined the national and the provincial governments. The state argued that, “it provides children with moderate to mild intellectual disability with education; however, it is not responsible to immediately provide education for profoundly intellectually impaired children, and furthermore argued that such children could not benefit from education due to their severe impairment”. The applicants emphasized that severely impaired children also needed quality educational amenities, to benefit from education.

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

The case of, *Minister of Education v Harris*,⁸⁴⁷ was also decided on the dispute related to age discrimination. In this case, the Minister of Education proclaimed a notice, under section 3 (4) of the National Education Policy Act,⁸⁴⁸ stating that, “a learner should not be enrolled in grade one in an independent school if he or she did not reach the age of seven in the same calendar year”. Talya Harris was one of the children in the group of those registered at the age of three, at King David Pre-Primary School, spent three years being prepared for primary school 2001. Talya Harris’ sixth birthday fell on 11th

⁸⁴⁶ *Western Cape Forum of Intellectuals Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).

⁸⁴⁷ *Minister of Education v Harris* 2001 (4) SA 1297 (CC).

⁸⁴⁸ Act 27 of 1996.

January 2001, shortly before the start of the academic year. Her parents approached the court, to challenge the legitimacy of the notice, and successfully sought an order that allowed her enrolment into the grade 1 class, the year she turned six. The Court professed the notice unconstitutional, and illegitimate, and as such ordered King David Primary School to enrol Talya to their grade 1 class.

The court held, *inter alia*, that, “the Minister’s conduct gravely unjustifiable and discriminatory against Talya and similarly situated children, and accordingly the directive violated the right to equality as guaranteed by section 9 of the Constitution. It held further that by requiring Talya and other similarly situated children to sit at home waiting for the year to pass, the Minister’s conduct unjustifiably violated section 28(2) of the Constitution, which provides that a child’s best interests are of paramount importance in every matter concerning the child”.⁸⁴⁹ The Constitutional Court confirmed the unconstitutionality of the notice, and declared it unjust.

6.5 Jurisprudence from other countries

The study argues that the right to quality education has also gained appreciation in the international arena. International courts have also reiterated on the importance of access to quality education. This was, proven in the case, of *Velev v Bulgaria*.⁸⁵⁰ In this case, the applicant was a Bulgarian national, born and living in Stara Zagora (Bulgaria). Arrested, on suspicion of unlawful possession of firearms, and detained, he spent 29 months, on remand, in Stara Zagora Prison. First the Stara Zagora prison authorities, and eventually the Supreme Administrative Court, rejected his requests to attend school operations inside the prison, so he could complete his secondary education. The national authorities gave a variety of reasons to justify refusal to enrol the applicant in the school. To note, the system did not allow mixing prisoners who had no prior convictions, with those who had, like the applicant. Hence, the right to education only applied, for prisoners deprived of their liberty, after final conviction, and not to those on remand.

⁸⁴⁹ See also *Sonderup v Tondelli* 2001 1 SA 1171 (CC) para 29 and *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17.

⁸⁵⁰ *Velev v Bulgaria* (application no. 16032/07).

The state furnished neither practical reasons, for instance a lack of educational means at the school, nor a strong explanation, as to the legitimate grounds for refusing to enrol the applicant in the prison school. In the premise, on the evidence before it, the Court found that, “the denial to enrol the applicant in the Stara Zagora prison school had not been adequately predictable, had not followed a lawful aim and had not been proportional to that aim”. The European Court of Human Rights held that, “the denial to enrol the applicant at the prison school violated Article 2 of Protocol No.1 (right to education) of the European Convention on Human Rights (ECHR)”.⁸⁵¹

The case of, *Brown v Board of Education of Topeka*⁸⁵² involved minor children of the so-called Negro race, who needed admission into a public school in their vicinity, without being segregated based on race. A legal representative, acting on behalf of the minor children, approached the court to seek an order, to permit public schools in the children’s respective communities, to enrol them on a non-discriminatory basis. White schools had refused admitting the children, based on the apartheid laws, promoting discrimination on the grounds of race. Allegedly, the discrimination deprived the applicants of the equal protection of the laws under the Fourteenth Amendment. In adjudicating on this matter, the court first denied relief to the applicant, based on the so-called, “separate but equal” doctrine, announced by the Court in, *Plessy v Ferguson*.⁸⁵³ Under that doctrine, impartiality in as far as the treatment is concerned is afforded when all the races are provided with equal facilities, even though these facilities are separate. The Court then ordered that “the applicants be admitted to the schools attended by the White children due to their superiority to the Negro schools”.⁸⁵⁴

⁸⁵¹ Article 2 of Protocol No.1 (right to education) of the European Convention on Human Rights (ECHR) provides that “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. The decision of the court can also be found on www.echr.coe.int.

⁸⁵² *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).

⁸⁵³ *Plessy v Ferguson*, 163 U. S. 537.

⁸⁵⁴ The Court stressed the importance of education in these words: “Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to

6.6 Conclusion

In the absence of an independent, courageous and vigorous judiciary, a Bill of Rights cannot realize its aims and its transformative projections will remain unrealised.⁸⁵⁵ This chapter showcased that, the judiciary, can protect the right to education, in two dimensions. The first, through the legislative powers of construing legislation, upholding the rules of the common law, and the second, by deciding on constitutional, and other challenges, which ruling stands as precedent. The courts therefore use constitutional provisions, to promote and protect the right to education.⁸⁵⁶

This chapter concludes that, it is the judicial obligation, to ensure that every person has the right to actual remedy, following any acts infringing on their fundamental rights, such as the right to education, as provided for by the Constitution, and or by any law. Failure by government, to efficiently implement a particular legislation, or address a dispute about the content of a statutory provision, introduces the role and the intervention by the judiciary. Consequently, the judiciary may use precedents, and constitutional provisions, to revitalise deadlocks about the implementation of social and fundamental rights.⁸⁵⁷

Moreover, section 8 of the Constitution provides, “that when applying the Bill of Rights to a natural or juristic person, a court in giving effect to the right in the Bill of Right, must apply and or develop the common law to the extent that legislation does not give effect to that right”. However, the court may also develop rules of common law, in order to limit the right, in accordance with the limitation in terms of section 36 (1) of the Constitution.⁸⁵⁸ In the same vein, the judiciary are also obligated, in terms of section 39 of the Constitution, to consider international law, and foreign law.⁸⁵⁹ As highlighted

succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.”

⁸⁵⁵ Sandra Liebenberg “Reflections on drafting a Bill of Rights: A South African perspective” in N Kersting (ed) Constitution in transition: Academic inputs for a new constitution in Zimbabwe (2009) GTZ and Friedrich Ebert Stiftung 21 – 45.

⁸⁵⁶ Christof Heyns and Danie Brand “Introduction to Socio-economic Rights in the South African Constitution” in Socio-economic Rights in South Africa, Law Democracy and Development available at <http://www.idd.org.za/by-type/refereed-articles/104-articles-vol-2-2/198-introduction-to-socioeconomic-rights-in-the-south-african-constitution.html>. Retrieved 28-04-2020.

⁸⁵⁷ See Frans Viljoen “The Justiciability of Socio-economic and Cultural Rights: Experience and Problems” in Human Rights in Education, Science and Culture, Ashgate Publishing 2007 page 58.

⁸⁵⁸ See section 8(3) (a) of the Constitution. See also section 39(2) of the Constitution.

⁸⁵⁹ See section 39 (1)(a)-(c) of the Constitution.

in this chapter, a number of cases, concerning the right to quality education, have come before the South African courts.⁸⁶⁰ In the process of adjudicating over the matters, the judiciary also assisted in giving nature, and meaning, of the right to (basic) education, as provided for in terms of, section 29 (1) of the Constitution, and also assisted in the implementation process.⁸⁶¹

Furthermore, it is noteworthy to reiterate that, once a right has been renowned by the Constitution, and laid down in any legislation, adherence and guarantee makes it necessary to provide the required remedy in the event of their transgression.⁸⁶² A remedy in this regard, is a court order, in response to a proven violation of a person's right.⁸⁶³ This means that, the court needs to ensure every person has the right to an applicable remedy, as granted by the Constitution, or the law, in cases of violation of their fundamental human rights. Following a constitutional provision, the judiciary may pronounce any law, or conduct, found to be inconsistent with the Constitution, to be invalid, to the extent of its inconsistency.⁸⁶⁴ The courts further enjoy broad powers: to grant any order that is just, and equitable;⁸⁶⁵ which orders include, declaration of invalidity, a declaration of rights,⁸⁶⁶ prohibitory or mandatory interdicts, exercising a supervisory jurisdiction, judicial review and compensation. Ultimately, in the absence of this remedial arrangement, it may be too remote to realize the constitutional objectives.

In light of the local, and international case laws, as discussed in this chapter, it is apparent that, the judiciary contributed more than enormously, in enforcing, and realising education as a fundamental human right, making it clear to the government, and its people that, "the right to education is an empowerment right that enables

⁸⁶⁰ See cases which include but not limited to the *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC); *Section 27 v Minister of Education* 2013 2 SA 40 (GNP); *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).

⁸⁶¹ Regarding the nature and meaning of the right to (basic) education see *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC).

⁸⁶² See Jean-Bernard Marie "National Systems for the Protection of Human Rights" in *Human Rights: International Protection, Monitoring, Enforcement* page 261.

⁸⁶³ Mbazira You Are the "Weakest Link" in *Realizing Socio-Economic Rights: Goodbye- Strategies for Effective Implementation of Court Orders in South Africa* (2008) 3-4.

⁸⁶⁴ See section 172 (1)(a) of the Constitution.

⁸⁶⁵ See section 172 (1)(b) of the Constitution.

⁸⁶⁶ See section 38 (1) of the Constitution.

people to realise their potential and improve their living conditions”. As provided above, a distinction has been made between the “right to basic education” (section 29 (1) (a)), and the “right to further education” (section 29 (1) (b)), as contemplated in the Constitution. The courts had also reiterated that, the right to basic education be understood, as it is “immediately realizable”, unlike other “socio economic rights”. This right “may only be limited in terms of a law of general application which is reasonable and justifiable, unlike the right to further education which the state is in terms of this right only obliged through reasonable measures to make it (further education) progressively available and accessible”.

CHAPTER 7: IMPEDIMENT TO THE RIGHT TO ACCESS EDUCATION IN SOUTH AFRICA

7.1 Introduction

Education is of pivotal importance, in as far as, socio-economic human rights exist, and it releases people from the bondage of ignorance, misconception and fear.⁸⁶⁷ It is one fundamental right, on which materialization of many other rights depend, and provides people with dignity, and self-confidence. Education is of cardinal importance for successful human existence, and empowers persons to fully take part, and function in the society.⁸⁶⁸ According to Bekker, education is of seminal importance, it improves the human mental capacity to reason, think critically about issues. It is necessary and essential for human existence. People grow to full humanity, or maturity through the process of education. Human development and maturity, attained through the acquisition of knowledge and necessary expertise, in turn make a difference in the human condition.⁸⁶⁹

Similarly, Tomasevski postulates that, “education also contribute immensely in the realization of socio-economic rights: it augments a person’s chances of securing good employment, which in turn secures access to food, housing and better health care services”.⁸⁷⁰ This denotes that “a person who is educated or who had access to quality education has more chances of securing good employment as opposed to someone who is not educated”. In the same way, the court, in *Juma Masjid’s* case quoting the definition and or meaning of education from the ICESCR held that,

Education is a fundamental human right and also a crucial means of accomplishing other human rights. As an enabling right, education is the important instrument, by which a marginalized society can use to revitalize themselves out of poverty and starvation and attain the means to meaningfully participate in their communities. It plays an indispensable role in empowering women kind, protecting children from any form of exploitation and hazard such as child labour and sexual exploitation. Education is acknowledged as the most indispensable investment tool states can make use of in order to develop themselves. Nevertheless, the importance of education is not just

⁸⁶⁷ Devenish “Aspects of the Right to Education in the Constitution” 1998 2 *De Jure* 224-225.

⁸⁶⁸ Devenish “Aspects of the Right to Education in the Constitution” 1998 2 *De Jure* 224-225. Also see Akinbola, The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities, *African Human Rights Law Journal*, vol 10 2010 page 457-477.

⁸⁶⁹ See Bekker, A compilation of essential documents on the rights to food and nutrition.

⁸⁷⁰ Tomasevski, *Human Rights Obligations in Education* page 47.

practical: a well-educated, informative and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.⁸⁷¹

Notwithstanding the perception about education, as an important tool for transforming a marginalized society, from destitute to a better and survival, the study posits that, in South Africa there are a number of social ills and constraints for the realization of quality education. Poverty, lack of proper, good infrastructure, lack of electricity in schools, proper running water, dignified sanitation, inadequately capacitated educators, pandemics like HIV/AIDS and Corona Virus, are some of the factors presenting challenges, and setbacks in the way to full realization of the right to quality education. Therefore, this chapter identifies, and discusses, obstacles and difficulties, that hamper the right to education in South Africa. This chapter discusses and emphasizes the adverse effects of the social challenges affecting education.

7.2 Realities and Educational Impediments

This study argues that in South Africa there are a number of impediments and barriers standing in the way of realizing quality education, such as poverty, unemployment, teenage pregnancies and other socio-economic amenities; such as provision of clean running water, dignified ablution facilities and proper classrooms. Similarly, there are deadly viral diseases such as HIV/AIDS, Corona Virus, which are formidable impediments to accessing education, in South Africa. However, due to the limitations and scope as outlined in chapter one of this study, discussion of all the educational barriers, and impediments in the educational sector, is not feasible. For this reason, the discussion will only be limited to the realities, barriers and impediments considered the most indispensably related and relevant, to the present study.

7.2.1 Poverty

According to Natrass, one of the most persuasive social and economic concerns facing the country post 1994 government is poverty and disparities.⁸⁷² In addition, Teffo posits that, the destitute are the most vulnerable, and experience extreme poverty in their day-to-day lives, due to lack of basic resources such as food, clothing

⁸⁷¹ See General Comment 13 of ICESCR.

⁸⁷² Natrass N and Jeremy Seekings 'Two nations? Race and economic inequality in South Africa today' (2001) Vol.130 (1) *Daedalus* 45-63.

and shelter to meet their needs. Teffo argues that, “this kind of situation make the living and the social environment of the destitute to be extremely stressful, insecure and severely limits the options available to improve their lives”. Teffo postulates that, under such a life situation, it becomes virtually impossible to break the cycle of poverty, marginalization, and alienation of the indigent from the society.⁸⁷³

Moreover, another different school of thought embraces a comprehensive view of the notion poverty. According to this school of thought, poverty incorporates not only deprivation, such as limited earnings and consumption, but also low levels of education and poor health.⁸⁷⁴ This thought is augmented by Larson’s description of absolute poverty, that is characterized by among others malnutrition, illiteracy, disease and neglected surroundings.⁸⁷⁵ Moreover, in the final pronouncement of the World Summit for Social Development in 1995, the UN emphasized that

Poverty has many appearances or displays which include lack of income and fruitful socio-economic amenities and resources adequate to safeguard sustainable living; hunger and malnutrition; ill well-being; inadequate or lack of access to education and other basic services; increased ill health as a result of poor diet and mortality from illness. It also constitutes destitution and inadequate housing; hazardous environments; and social segregation and exclusion. It is also branded by a lack of contribution in decision-making and in civil, social and cultural life.⁸⁷⁶

Accordingly, Tshoose opined that, “Statistics South Africa advocates for a broader perspective of poverty, than merely the extent of low-income, low-expenditure in a country. It is rather the denial of opportunities and choices most basic to human development to lead a long, healthy, creative life, and enjoy a decent standard of living, freedom, dignity, self-esteem, and respect from others”.⁸⁷⁷ Similarly, Kaseke posits that, “in South Africa, poverty has a racial dimension as it is more pronounced and

⁸⁷³ Teffo ‘Education for poverty alleviation: Myth or reality?’ proceedings of the colloquium on ‘Education and poverty reduction strategies: Issues of policy coherence’ 21-23 February 2007 organised by the Policy Analysis Unit of the Human Science Research Council (HSRC) 69.

⁸⁷⁴ World Bank World Development Report 2000/2001 Attacking Poverty (Oxford University Press 2001)15-29.

⁸⁷⁵ Larsen ‘Who cares about and for marginal people’ (2002) Danish Social Science Research Council, Copenhagen available at www.ihis.aau.dk/gep/publicationer/nr3.pdf November 23 2004 retrieved 18-04-2020.

⁸⁷⁶ See the United Nations World Summit for Social Development in 1995. Further see the poverty-wellbeing shareweb (section “Addressing poverty in practice – Understanding poverty”): available at <https://www.shareweb.ch/site/Poverty-Wellbeing> retrieved 18-04-2020.

⁸⁷⁷ Tshoose 2016 page 71. Further, see Statistics South Africa available at www.statssa.gov.za retrieved 18-04-2020.

popular among the Black population, as a result of the legacy of colonialism and apartheid".⁸⁷⁸

In relation to education, this study posits that, poverty has two dimensions, and or negative impacts to the realization of quality education. In the first place, learners who find themselves living in poverty, most likely underperform in their academic lives, resultant from poverty.⁸⁷⁹ As a matter of fact, no learner performs well at school or rather to concentrates in school activities, on an empty stomach. For school-going age children, poverty can result from other factors, such as being orphaned at a young age, unemployed parents, or guardians. It is commonplace that the complete absence of both parents, and or guardian, reduces the chances that the children will enroll, attend and complete school.⁸⁸⁰ More often than not, it remains an undisputed fact that, orphaned children are likely to abandon school at an earlier stage, for example, prior to matric or tertiary levels, as compared to non-orphaned. This is because the orphans (learners or children) are forced to drop out, to seek employment in order to eradicate poverty, in their families, since there is no caregiver, In this way, the realization of quality education is adversely affected, and as a result suffers.⁸⁸¹

Secondly, learners who did not have opportunity to attend school up to higher institutional level, due to factors such as poverty and being orphans, are more unlikely to secure lucrative employment, which propels the vicious cycle of poverty.⁸⁸² This means that their inability to attend school up to the tertiary level, and or complete it, determines their chances of securing proper employment. This means that the learners endure difficulties in becoming gainfully employed, or securing lucrative employment, owing to the inability to attain quality education.⁸⁸³ This is supported by Isaac's assertion that, the impediment in accomplishing quality education (such as poverty), remains one of the worst obstructions, to the realization of an improved life for all in South Africans. It creates huge disparities, and weakens the self-esteem of many people who enter adult life without the most necessary tool (which is education),

⁸⁷⁸ Edwell Kaseke 'Poverty reduction in South Africa: The old-age pension' in Becker U et al International standard – setting and innovation in social security (Kluwer Law International 2013) 159.

⁸⁷⁹ Ramdass, The challenges facing education in South Africa, Tomorrow People Organisation 2009.

⁸⁸⁰ Ramdass, The challenges facing education in South Africa, Tomorrow People Organisation 2009.

⁸⁸¹ Ramdass, The challenges facing education in South Africa, Tomorrow People Organisation 2009.

⁸⁸² Ramdass, The challenges facing education in South Africa, Tomorrow People Organisation 2009.

⁸⁸³ Ramdass, The challenges facing education in South Africa, Tomorrow People Organisation 2009.

to fully express themselves or participate meaningfully to society.⁸⁸⁴ Likewise, Schussler postulate that, “the right to education is a deliverance right. It plays a dominant role in the realization of other fundamental rights including socio-economic as well as civil and political rights. Education is vital to gaining access to the labour market. A person with no formal schooling runs a 30 percent risk of remaining unemployed whereas a person with a tertiary education runs a risk of less than five percent”. Schussler further asserts that, “education is the utmost influential factor of wages in South Africa. A person with no formal schooling earns 21 times less in a lifetime than a person with a tertiary education”.⁸⁸⁵

7.2.2 Unemployment

Unemployment is another form of social challenge related to poverty. This study posits that, it is important to understand the definition of unemployment, or what is meant by being unemployed. Statistics South Africa defines unemployed to mean the following:

Persons between 15 and 64 years of age who were not working in the reference week. These persons must have tried to look for employment keenly or attempted to start a business at least in a month preceding the survey interview. Moreover, those persons must have been available and willing to start the work, for instance, they would have been able to commence with their responsibilities or to operate a business in the reference week. By the same token, if they had not been able to look for a job in the previous month but had a job to commence or a business to start at a specified date in the future and were available to do the task.⁸⁸⁶

As an illustration, to be counted as an unemployed person, one ought to have engaged in initiatives to seek employment, or to set-up some form of self-employment in a form of own business.⁸⁸⁷ Therefore, the official rate of unemployment as per the Statistics South Africa, disregards all persons who report that they do want employment or to be employed, yet they have not taken active initiatives to search for employment, or attempt to start own business in the preceding month.⁸⁸⁸

According to Statistics South Africa, the broader definition of unemployment includes those who are discouraged to seek employment, simply put, the discouraged work-

⁸⁸⁴ Eslyn Isaacs at al, Entrepreneurship education and training at the Further Education and Training (FET) level in South Africa, South African Journal of Education 2007.

⁸⁸⁵ Mike Schussler, What are you worth? 7th United Association of South Africa (UASA) Employment Report 2008 page 13.

⁸⁸⁶ Statistics South Africa, Labour Force Survey Quarter 4 (Q4) 2012.

⁸⁸⁷ Statistics South Africa, Labour Force Survey Quarter 4 (Q4) 2012.

⁸⁸⁸ Statistics South Africa, Labour Force Survey Quarter 4 (Q4) 2012.

seekers.⁸⁸⁹ This refers to people who did not take any active initiatives, to seek employment, in the month preceding the survey interview.⁸⁹⁰ For purposes of this study, discouraged work-seekers are those people whom, due to lack of quality education, have since lost interest, and hope of seeking employment. This may be a result of poor, and or lack of education, causing low self-esteem, creating the belief that, they could never secure a lucrative job.

Statistics South Africa compiled a survey called, the Quarterly Labour Force Survey (QLFS), which indicates that the working-age population, (from 15 to 64 years) improved by 145 000 or 0,4 per cent in the fourth quarter of 2019, equated to third quarter figures of the same year. Compared to fourth quarter of 2018, the working-age population improved by 594 000 or 1,6 per cent. The number of employed persons improved by 45 000 to 16,4 million, in the fourth quarter of 2019, while the number of persons without jobs decreased by 8 000 to 6,7 million, compared to third quarter of 2019, resulting in an increase of 38 000 (up by 0,2 per cent) in the number of individuals in the labour force.⁸⁹¹ The official unemployment rate in South Africa remained unchanged, at 29, 1 per cent between the third quarter and the fourth quarter of 2019.⁸⁹²

According to the QLFS, “of the 6,7 million unemployed persons, 55 per cent had education levels below matric, followed by those with matric at 34,7 per cent, in fourth quarter of 2019. Only 1,9 per cent of the unemployed persons were graduates, while 6,8 per cent had other tertiary qualifications, as their highest level of education”.⁸⁹³ Subsequently, based on this information, the study argues that, education is therefore, a starting point for every individual, to have a clear understanding of the world around them, and to empower such person to participate meaningfully in the society.⁸⁹⁴ It enormously contributes towards the fulfilment of other socio-economic rights, such as the right to freedom of information, and freedom of association. Of importance, and relevant to the study, education also increases an individual’s chances of acquiring

⁸⁸⁹ Statistics South Africa Labour Force Survey: September 2005 xxiv).

⁸⁹⁰ Statistics South Africa Labour Force Survey: March 2005 xxi.

⁸⁹¹ The Quarterly Labour Force Survey (QLFS) Quarter 4: 2019 conducted by Statistics South Africa page 1-3 published 11 February 2020 also available at <http://www.statssa.gov.za/?cat=31> retrieved 28-04-2020.

⁸⁹² See The Quarterly Labour Force Survey (QLFS) Quarter 4: 2019 conducted by Statistics South Africa page 1-3, published 11 February 2020 also available at <http://www.statssa.gov.za/?cat=31> retrieved 28-04-2020.

⁸⁹³ The Quarterly Labour Force Survey (QLFS) Quarter 4: 2019 conducted by Statistics South Africa page 7.

⁸⁹⁴ Tomaševski, Human Rights Obligations in Education: The 4-A Scheme 2006 page 47.

better jobs which in turn secures access to other socio-economic needs, such as good food as well as good health care services. It is without doubt that, from the facts pronounced by the QLFS, those who had a nominal level of education, which included matric and below, had most been hit by the high levels of unemployment. Whereas, the percentage or the unemployment rate of graduates, including those with other tertiary qualifications, was very low. This is a clear indication that education plays a significant role in enhancing individual's chances of securing an employment.

The National Development Plan (NDP) provides that, the profound level of poverty and inequitable distribution of income, are partially a result of low levels of formal employment rate, which excludes a large number of the population from actively participating in the development of the economy.⁸⁹⁵ The study emphasizes that colonialism and apartheid, restrained educational development, skills and labour market contribution from the black majority, and kept them confined to destitution.⁸⁹⁶ Moller notes that, although the democratic evolution in South Africa commenced years ago, the socio-economic arrangements remain adversely affected by the legacy of the apartheid government.

The study shares the same sentiment, and asserts that, despite the social transition aimed at improving the lives of previously marginalized South Africans, since 1994, the socio-economic structures particularly the educational configuration, appears to remain affected by the colonialism and apartheid system. For example, the allocation and provision of educational resources, such as running water and dignified ablution facilities, proper and effective libraries, laboratories, computer labs and related infrastructures in White schools, are still better and their schools well-resourced, as compared to the schools for the previously disadvantage groups, which are mostly located in the townships and rural areas.⁸⁹⁷

According to Statistics South Africa, social inequalities particularly in the educational sector still exist, hence, the majority of people such as the previously disadvantaged,

⁸⁹⁵ See National Development Plan - 2030 354-356.

⁸⁹⁶ Tshoose 2016 page 73.

⁸⁹⁷ Ocampo 'A brief history of educational inequality from Apartheid to the present' 19 September 2004 available at www.stanford.edu/Inequity.html retrieved 17-01-2020; See also Mail & Guardian dated 15 November 2006, 'Apartheid legacy haunts SA's schools' available at www.mg.co.za retrieved 17-01-2020.

remain marginalized and impoverished.⁸⁹⁸ Concurrently, the study submits that, this occurs to those ordinarily residing in townships, where for example education is of low quality and standard, and unemployment rates are high. Seekings avers that, the reason for South African high unemployment rate is twofold. In the first place, it is due to the fiscal growth pattern, which has remained too low to absorb the increasing numbers entering the labour market.⁸⁹⁹ Secondly, government policies and actions by businesses and organized labour, all together have resulted in a skewed growth path, in favor of the unemployed, in that employment has dropped regardless of the supposed growing economy.⁹⁰⁰

Clearly, this study maintains that, unemployment affects the realization of quality education, learners whose parents and or guardians are unemployed, often drop out of school at an early stage. Such learners normally migrate to urban areas in search of employment, in an attempt to lessen the burden of hunger and poverty at their homesteads, given their unemployed caregivers. Remarkably, they too happen to be unsuccessful in securing lucrative employment, due to their level of education, a fact to sure exacerbate the unemployment rate, and as such, affects the realization of quality education. Furthermore, being unemployed exaggerates the level of poverty in their households, and their communities at large.

7.2.3 Less capacitated educators

In the first place, it is important to understand what an educator is and what less capacitated or incapacitated educator means. According to Thompson, “the word educator means someone who gives intellectual, moral, and social instruction especially to a child or someone who provides education”.⁹⁰¹ According to section 1 of the SASA the word, “educator” refers to “any person, excluding a person who is

⁸⁹⁸ See Statistics South Africa Quarterly Labour Force Survey Quarter 4, 2014; See further Stewart L ‘Rights discourse and practices, everyday violence and social protests: Who counts as subject and whose lives are real in the Neo-Colonial South African Nation State’ (2014) Vol.18 LDD 5-6.

⁸⁹⁹ Jeremy Seekings, ‘Do South Africa’s unemployed constitute an underclass’ Center for Social Science Research, (2003) Working paper no..32, University of Cape Town, 8.

⁹⁰⁰ Seekings ‘Do South Africa’s unemployed constitute an underclass’ Center for Social Science Research, (2003). See further Mohammed Jahed and Zulaikha Brey, ‘Structural transformation of economies: Lessons from the South’ Development Bank of Southern Africa 3-16 available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/Sessionpercent20I.1.4_1.Structuralpercent20Transformationpercent20ofpercent20Economies.pdf retrieved 21-04-2020.

⁹⁰¹ Della Thompson, *The Concise Oxford Dictionary of Current English*. Ninth edition. Oxford: Clarendon 1995 page 431.

appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at a school".⁹⁰² Whereas, Jones and Roach defined the phrase less capacitated or incapacitated educator to mean that, an educator unable to do defined task something because that person does not have the ability or is too weak.⁹⁰³ In the context of this study the phrase less capacitated, or incapacitated educator means that, an educator is incapable of yielding good learners' performance, owing to lack of sufficient capacities, and skills, necessary to discharge such pedagogical responsibilities.

It is without a shadow of doubt that, there are a number of challenges contributing to their incapacity. The study asserts that, the challenges stand in the way of achieving what is known as, Open Education Resources (OER), which are educational resources intended to promoting access to education, and assisting in overcoming educational impediments, concomitant to the traditional ways of teaching and learning. This includes virtual teaching and learning pedagogies, and the use of technology relevant to the 21st century. Conversely, this study posits that, the OERs can be realised and effectively used in settings already having better infrastructure, availability of educational equipment allowing the proper use of the OERs, which include educators' readiness and learners' exposure.

This becomes a problem particularly for South African schools located in remote areas without electricity, internet services and connectivity. This includes places without functional and maintainable roads, hampering movement to cyber cafes, internet services at predetermined fees.⁹⁰⁴ The study stresses that, in discussing the incompetences of educators, it is also important to consider impediments faced by the educators, in teaching the learners or executing the OER. The educators face challenges, as they are expected to impart knowledge to learners through the use of

⁹⁰² See section 1 of the South African Schools Act 84 of 1996.

⁹⁰³ Daniel Jones, Peter Roach, Jane Setter and John Esling. Cambridge dictionary 2011. Also available at <https://www.pdfdrive.com/cambridge-english-pronouncing-dictionary-18th-edition-pdf-retrived> 01-09-2018.

⁹⁰⁴ Ann Hildah Gatakaa Kinyua, When the Trainer is Untrained: Stakeholder Incapacitation in Implementation and Utilisation of Open Educational Resources in Kenya, available at http://oasis.col.org/bitstream/handle/11599/3356/PCF9_Papers_paper_137.pdf?sequence=1&isAllowed=y retrieved 22-01-2021.

the OERs, when they themselves are not well versed with them, poorly taught or not trained at all to use them, or under-resourced to perform their pedagogic obligations.⁹⁰⁵ These challenges include *inter alia* lack of awareness, poor ICT skills, and negative attitude on the part of educators.

Regarding lack of awareness, it was established that most educators are not familiar with the use of OER, and ICT equipment.⁹⁰⁶ The reason for this being that educators themselves, particularly the ageing group, have not been recipients of modern resources and technology, as they entered the teaching profession using the passionate approach of the traditional texts and the old way of doing things as the only source of teaching and learning.⁹⁰⁷ According to Bateman, educators know about the existence of the OER, and the relevant information on the internet, however, they are not aware that such information can assist them to deliver subject contents to their learners, more efficiently.⁹⁰⁸ This diminishes educators' self-confidence in the use of ICT. Beggs posits that, educators' fear of failure in the use of technology constitutes lack of confidence.⁹⁰⁹ Moreover, Balanskat depicts that, educators' limited knowledge in the use of technology makes them nervous to utilize it in their classrooms, and hence not confident enough to use it in their teaching and learning process.⁹¹⁰ On the

⁹⁰⁵ Kinyua, When the Trainer is Untrained: Stakeholder Incapacitation in Implementation and Utilisation of Open Educational Resources in Kenya, available at http://oasis.col.org/bitstream/handle/11599/3356/PCF9_Papers_paper_137.pdf?sequence=1&isAllowed=y retrieved 22-01-2021.

⁹⁰⁶ Kinyua, When the Trainer is Untrained: Stakeholder Incapacitation in Implementation and Utilisation of Open Educational Resources in Kenya, available at http://oasis.col.org/bitstream/handle/11599/3356/PCF9_Papers_paper_137.pdf?sequence=1&isAllowed=y retrieved 22-01-2021.

⁹⁰⁷ Kinyua, When the Trainer is Untrained: Stakeholder Incapacitation in Implementation and Utilisation of Open Educational Resources in Kenya, available at http://oasis.col.org/bitstream/handle/11599/3356/PCF9_Papers_paper_137.pdf?sequence=1&isAllowed=y retrieved 22-01-2021.

⁹⁰⁸ See Peter Bateman, Discussion Paper: The AVU Open Educational Resources (OER) Architecture for Higher Education in Africa. OECD Expert Meeting – Barcelona, 2006. Further see Kinyua, When the Trainer is Untrained: Stakeholder Incapacitation in Implementation and Utilisation of Open Educational Resources in Kenya, available at http://oasis.col.org/bitstream/handle/11599/3356/PCF9_Papers_paper_137.pdf?sequence=1&isAllowed=y retrieved 22-01-2021.

⁹⁰⁹ Thomas Beggs, (2000). Influence and barriers to adoption of instructional technology. Paper presented at the Proceedings of the Mid-South Instructional Technology Conference, Murfreesboro, TN 2000 page 9-11. Further, see Moses Makgato, Challenges Contributing to Poor Integration of Educational Technology at Some Schools in South Africa. Mediterranean Journal of Social Sciences 2014 page 1286.

⁹¹⁰ Anja Balanskat, Roger Blamire, & Stella Kefala, A review of studies of ICT impact on schools in Europe, European Schoolnet: European Communities 2006.

other side, the study highlights that, the fear to use technology in their teaching spaces constitutes incompetency in their teaching pedagogy.

In relation to ICT skills and competencies, the study stresses that most educators have limited ICT skills, with the majority self-taught, as necessitated by pursuing higher education. This means that those who pursued further studies to the post-graduate levels, had to become more computer literate. Even then, their technological abilities remained limited, as dictated by the work applicable to their course of their studies.⁹¹¹ In addition, Makgato laments that, many educators lack ICT skills and competencies because they lack passion for change and integration, which brings ICT into their teaching practice.⁹¹²

This study avers that; educators' lack of passion towards the use of available technological resources emanates from negative or poor attitudes. Kinyua supports this by asserting that, even in well-resourced schools, educators feel inconvenienced, as they need prior arrangement to access computer rooms, and to monitor their learners' movement between the computer rooms and their regular classrooms.⁹¹³ Kinyua asserts that, educators mostly complain about their relationships and co-operation with computer room attendants, as not friendly. Moreover, those who make the effort to use the computer rooms, fall victim to negative attitudes from their colleagues, particularly the older ones with poor technological skills, as they tend to view the use of technology as a show-off of their technological expertise.⁹¹⁴

7.2.3.1 Educators and their role in improving educational outcomes

It is important to highlight that educators are one of the contributors in the educational process. Vegas and Umankys assert that, educators are important in ensuring that

⁹¹¹ For example, most educators are proficient and able to use Microsoft Word as it was commonly used in the pursued of their studies whereas they are incompetent in the use Microsoft Excel and Microsoft Powerpoint.

⁹¹² See Newman coated by Makgato, Challenges Contributing to Poor Integration of Educational Technology at Some Schools in South Africa. *Mediterranean Journal of Social Sciences* 2014 page 1286.

⁹¹³ Kinyua, When the Trainer is Untrained: Stakeholder Incapacitation in Implementation and Utilisation of Open Educational Resources in Kenya, available at http://oasis.col.org/bitstream/handle/11599/3356/PCF9_Papers_paper_137.pdf?sequence=1&isAllowed=y retrieved 22-01-2021.

⁹¹⁴ Kinyua, When the Trainer is Untrained: Stakeholder Incapacitation in Implementation and Utilisation of Open Educational Resources in Kenya, available at http://oasis.col.org/bitstream/handle/11599/3356/PCF9_Papers_paper_137.pdf?sequence=1&isAllowed=y retrieved 22-01-2021.

teaching and learning takes place in schools and educational institutions.⁹¹⁵ In the same vein, Hanushek posits that, the quality and capacity of educators is the crucial element to improve learners' performance.⁹¹⁶

This study argues that, there is a need to provide educators with the necessary skills and competencies, to enable delivery of high quality education and knowledge to learners. The study further argues that, it remains the state's obligation to ensure that educators go through the necessary educators training programmes, to acquire the relevant skills and aptitudes, for transforming the country through capacitation of learners. This means that, providing educators with skills and competencies is a vital stepping-stone towards achieving the right to education, and an important platform for delivery of quality education to learners. Moreover, the onus is on government to ensure attendance and effective participation in the training programmes, is compulsory for achievement of effective results. The study submits that, if educators are not capacitated it would not be feasible to in turn, capacitate the learners. By capacitating educators, South Africa will be improving its educational system, and striving for the realization of sustainable quality education.

The study submits that, capacitating the educators be used as an instrument to bring profound educational and social transformation in values and norms, and improvement of people's lives. Consequently, according to the Centre for Enterprise Development (CED), there is a lack of "accountability" on the part of educators, for the reason that they are not appropriately skilled to impart knowledge and skills, thus contribute to the realization of quality education.⁹¹⁷ This is because many educators fail to impart the necessary quality education to the learners, owing to their pedagogic incapacity, and as such, there is substandard performance in schools across South Africa. The consequence of this is that educators will not be able to impart eminent knowledge and expertise to the learners, and as such, the quality of the education remains compromised. Therefore, government must assist by enrolling them to the training programmes, at the state's expense.

⁹¹⁵ Emiliana Vegas and Ilana Umansky, "Improving teaching and learning through effective incentives: Lessons from education reforms in Latin America" in E. Vegas (Ed.). 2005. Incentives to improve teaching: Lessons from Latin America. Washington DC: The World Bank page 14.

⁹¹⁶ Eric Hanushek, "Teacher deselection" in Dan Goldhaber and Jane Hannaway (Eds). 2009. Creating a new teaching profession. Washington DC: The Urban Institute Press 2009 page 171.

⁹¹⁷ See the Centre for Enterprise Development, a Johannesburg-based research institute, 2015 page 23. Available at www.cde.org.za retrieved 01-09-2018.

Similarly, Adedeji and Olaniyan contend that, educators with high aptitude are the key tools, which a country can use to develop and improve its educational system.⁹¹⁸ Adedeji and Olaniyan further assert that, any socio economic approach, indented to improve human development through school empowerment, must consider continuous educators' training and development programs. Adedeji and Olaniyan indicate that, "for a country to improve its educational system and to have the best quality education it must provide sustainable pedagogical innovative strategies that will improve the capacity and conditions of educators and their teaching methods in schools".⁹¹⁹ In the same way, Tang asserts that, since educators play a crucial role in the execution and evaluation aspect of learners and graduates education, they are the first personnel in the educational arena to equip with relevant practical skills, and they must be innovative in planning and shaping their teaching components to integrate those relevant skills.⁹²⁰

Tang is also of the view that, the educators' pedagogic methods be student centred, where learners and graduates actively take part in the learning process, while the educator assumes the role of facilitator and overseer of the learners' activities. Problem solving erudition, case study, and other relevant teaching and learning practices; such as actual presentations and group work, be adopted extensively, utilized instead of the traditional teaching and learning approaches, to enhance their skills.⁹²¹ Tang concluded by alluding to the importance of educators being taught the necessary skills of today for the jobs of tomorrow, and how to shape teaching and learning, so that learners and graduates acquire occupation-relevant skills and competencies needed in the foreseeable future. This is because the quality of teaching and learning depends heavily on how much value the educational process has added to the educator.⁹²²

⁹¹⁸ Segun Olugbenga Adedeji and Olanrewaju Olaniyan, fundamentals of teacher education development; improving the conditions of teaches and teaching in rural schools across African countries, UNESCO: International Institute for Capacity Building in Africa 2011 page 73.

⁹¹⁹ Adedeji and Olaniyan, fundamentals of teacher education development; improving the conditions of teaches and teaching in rural schools across African countries, UNESCO: International Institute for Capacity Building in Africa 2011 page 73.

⁹²⁰ Keow Ngang Tang, Critical Issues of Soft Skills Development in Teaching Professional Training: Educators' Perspectives, Elsevier Ltd 2015 page 130.

⁹²¹ Tang, Critical Issues of Soft Skills Development in Teaching Professional Training: Educators' Perspectives 2015 page 130.

⁹²² Tang, Critical Issues of Soft Skills Development in Teaching Professional Training: Educators' Perspectives 2015 page 130.

Based on Tang's observation, the study postulates that, sustainable development of human capital, and the improvement of the character and intellectual capacity of a nation, be prioritised by way of capacitating educators, so that the educators empower learners, for such a nation to become a developed country. The study further argue that focusing on the capacitation of educators empowers the country to increase its capability for knowledge, inspiration, and innovation, which are crucial components in the context of globalization.⁹²³ The study emphasizes that the most ideal foundation to achieve and realise effective skills development depends on educating the educators, and thoroughly training them for the best results in turning out high quality and skilled learners.

Quintini and Pouliakas opined that, building elementary skills timeously, by expanding and developing the quality of early childhood learning, through capacitating educators, is vital. Yet again, it remains imperative to ensure that educators are highly trained, in order to impart the required expertise and knowledge to learners. Educators should ensure that the imparted knowledge and qualities are appropriate for the working world; that such qualities are sustainable and enhanced during work life; and that they are renowned and employed by employers once learners leave school and join the labour market.⁹²⁴ Therefore this study maintains that, educators also be taught the best ways to succesfully marry education at schools, to the occupational world, as that is essential for developing a prosperous nation. A synchronised strategy is required, that builds concrete talents, through high quality education to the educators, so that they can impart work-based knowledge and specific skills throughout a learner's life.⁹²⁵

Kamakura avers that, to avoid future skills shortages geared at minimizing poverty, and reducing unemployment, in the medium and long term, and to enable growth, South Africa needs to develop learning and training strategies for the educators,

⁹²³ Tang, *Critical Issues of Soft Skills Development in Teaching Professional Training: Educators' Perspectives* 2015 page 128.

⁹²⁴ Glenda Quintini and Konstantinos Pouliakas, *matching skills and labour market needs building social partnerships for better skills and better jobs*, World Economic Forum Global Agenda Council on Employment, Davos-Klosters, Switzerland 2014 page 5.

⁹²⁵ Quintini and Pouliakas, *matching skills and labour market needs building social partnerships for better skills and better jobs*, World Economic Forum Global Agenda Council on Employment, Davos-Klosters, Switzerland 2014 page 8.

purposely designed to equip the learners with relevant knowledge and skills.⁹²⁶ Somavia asserts that, equipping educators with relevant skills, necessary for current and future purposes, is a prerequisite and strategic concern, for the transformation and developmental viewpoints of every cohesive country.⁹²⁷ Somavia maintains that, since skills are the bedrock of better work and productivity, many countries have used educators' training programmes as their positive responsive approaches towards employment challenges.⁹²⁸ This study argues that, a robust and effective educational system for a country is rooted in the educators training program. This means that for a country to have quality educated citizens who contribute meaningfully to the country's economy, it needs to train educators to equip them with the ability to impart the necessary knowledge and skills to the learners.

7.2.4 Teenage Pregnancy

Teenage pregnancy is one of the prevalent social ills confronting the educational sector across the world.⁹²⁹ It is important to explain the meaning of teenage pregnancy for clearer understanding. Mothiba and Maputle explain teenage pregnancy, as conception by a woman less than 19 years old. Mothiba and Maputle posit that, teenage pregnancy is mostly common amongst young women who hold poor expectations regarding attainment of a good education or job opportunities.⁹³⁰ In a similar vein, Konkco explains teenage pregnancy to mean, a girl child under the age of twenty who falls pregnant, while still attending school.⁹³¹ According to Konkco, teenage pregnancy is predominant in rural areas, compared to urban areas, because of lack of sexual education.⁹³²

⁹²⁶ Yasuhiko Kamakura, Current and future skills, human resources development and safety training for contractors in the oil and gas industry International Labour Office, Geneva 2012 page 10.

⁹²⁷ Juan Somavia, A Skilled Workforce for Strong, Sustainable and Balanced Growth: A G20 Training Strategy, International Labour Office – Geneva, ILO Publications 2010 page 1.

⁹²⁸ Somavia, A Skilled Workforce for Strong, Sustainable and Balanced Growth: A G20 Training Strategy, International Labour Office – Geneva, ILO Publications 2010 page 1.

⁹²⁹ Tebogo Mothiba and Maria Maputle, 'Factors contributing to teenage pregnancy in the Capricorn district of the Limpopo Province', Curationis 2012 available at [http:// dx.doi.org/10.4102/ curationis.v35i1.19](http://dx.doi.org/10.4102/curationis.v35i1.19) retrieved 23-05-2020.

⁹³⁰ Mothiba and Maputle, 'Factors contributing to teenage pregnancy in the Capricorn district of the Limpopo Province', Curationis 2012 available at <http:// dx.doi.org/10.4102/ curationis.v35i1.19> retrieved 23-05-2020.

⁹³¹ See Eunice Xoliswa Konkco, An investigation into factors contributing towards teenage pregnancy in secondary schools: a case study in the Elliotdale sub-district, chapter 1 page 13, University of Fort Hare.

⁹³² Konkco, An investigation into factors contributing towards teenage pregnancy in secondary schools: a case study in the Elliotdale sub-district page 1.

Similarly, Spencer defines teenage pregnancy, as conception by a girl child between the ages of thirteen and nineteen.⁹³³ Whereas Macleod describes teenage pregnancy as, “a social problem in which adult practices and functions (sexual intercourse, reproduction and mothering) are displayed or practiced by a person who, owing to her age and developmental status, is not yet an adult”.⁹³⁴ In the same breath, Malahlela defines teenage pregnancy to mean, conceiving and parenting of girl-children still in school (primary or secondary), normally aged between thirteen and nineteen, enrolled in grades eight to twelve, which have adverse effects on their educational growth (such as dropping out), and negative effects on future development or adjustment into adult life.⁹³⁵

For the purposes of this study, teenage pregnancy refers to, a girl child of school-age, who falls pregnant. The study pronounces teenage pregnancy as one of the social problems confronting most countries all over the globe. This study perceives teenage pregnancy as the major obstacle against the accomplishment and the realization of a girl child’s education. This study asserts that, in South Africa, the problem of teenage pregnancy is on the rise, fuelled by a number of factors, such as, poverty, poor access to contraception, inaccurate and inconsistent use of contraception, and poor sex education, which for the purposes of this study are not relevant and therefore not discussed. It is argued that, despite knowing the different contributing factors, and what drives teenage pregnancy, its effect is that, it contributes and serves as an impediment and challenge in the realization of the right to quality education for a girl child. These conceptions are unplanned which fact constitute challenges hence the learner would have to spend more time nurturing the child.

7.2.4.1 Teenage pregnancy and the teenagers’ right to education

It is worth remarking that the SASA protects pregnant learners, and as such forbids discrimination on those grounds, in schools and educational institutions. Section 5 of the SASA provides that, “a public school must admit learners and serve their

⁹³³ Spencer S, The eHow: Facts about Teenage Pregnancy 2011. Available at http://www.ehow.com/about_4619346_teen retrieved 23-05-2020.

⁹³⁴ See Catriona Macleod, *Adolescence, Pregnancy and Abortion: Constructing a Threat of Degeneration*. Routledge, New York 2011.

⁹³⁵ Kate Moyagabo Malahlela, *The effects of teenage pregnancy on the behaviour of learners at secondary schools in the Mankweng area, Limpopo*, Master of Education University of South Africa, 2012 chapter 1 page 8.

educational requirements without unfairly discriminating in any way”.⁹³⁶ The section further provides that, “the governing body of a public school may not administer any test related to the admission of a learner to a public school or direct or authorize the principal of the school or any other person to administer such test”.⁹³⁷ Based on this section, this study argues that, the exclusion of a girl child from school due to her pregnancy, does not serve the educational interest of that child, and is discriminatory. Moreover, for a pregnant girl child denied schooling, because of pregnancy, such exclusion violates her fundamental human right to education, which is not in line with the Constitution and the SASA.

Similarly, section 9 of the Constitution of South Africa provides that, “the state may not unfairly segregate directly or indirectly against any person on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.⁹³⁸ From these provisions, it is vibrant that the law is clear that pregnant learners cannot be turned away from school; it is however not clear as to how schools ought to deal with pregnant learners and nursing learner-parents.

The persistent challenge that the school authorities face relates to how to deal with the pregnant learners, and their special needs in the schools. McNealy maintains that, teenage motherhood is the number one reason for most girls dropping out of school, and when school administrators encumber pregnant and nursing learners to attend school due to their pregnancy or parenthood they contribute to the dropout rates.⁹³⁹ In some instances, the school authorities such as principals and educators tend to discourage pregnant learners from attending school, for fear of possibly dealing with a situation where a pregnant learner goes into labour while at school.⁹⁴⁰ If they do not request that the pregnant learner discontinue her studies, sometimes they request the parents or guardian of the pregnant learner, to accompany, and stay with her in the

⁹³⁶ Section 5 (1) of the South African Schools Act 84 of 1996.

⁹³⁷ Section 5 (2) of the South African Schools Act 84 of 1996.

⁹³⁸ See section 9 (3) of the Constitution of the Republic of South Africa, 1996.

⁹³⁹ McNeeley, Pregnant and parenting girls. *Wisconsin Women’s LAW Journal* 2007 22:2. Further, see Mashudu Ramulumo and Victor Pitsoe Pitsoe, Teenage pregnancy in South African Schools: challenges, trends and policy issues, *Mediterranean Journal of Social Sciences* 2013 page 755.

⁹⁴⁰ Ramulumo and Pitsoe Pitsoe, Teenage pregnancy in South African Schools: challenges, trends and policy issues 2013 page 758.

school premises, also in case pregnant learner has complications or gives birth on the school premises.⁹⁴¹

This study argues that, if the school authority denies pregnant learners access to schooling they violate the learners' constitutional provisions, as well as the provisions of SASA, which allow learners to attend school and exercise their right to education, despite their pregnancy. In some cases, school policies on teenage pregnancy focus on the consequences of the teenage pregnancy, or early childbearing, which at times result in suspension, or expulsion of the pregnant learners. Consequently, not all pregnant learners remain in school, or teenage mothers return to school. This is usually a result of inadequate support from their parents and family members, peers and educators, and sometimes the stigma of being a teenage parent.⁹⁴²

This was, adjudicated in the case of, *Welkom High School v Head, Department of Education, Free State Province*.⁹⁴³ This involved two similar cases, brought individually before the Bloemfontein High Court, and later merged because of the similarity in facts. In both the cases, the pregnant learners were instructed to remain at their respective homes, not attend school, following their pregnancies. Thus, the pregnant learners were denied access to education, based on the "Pregnant Learner Policy" adopted by the learners' schools. In denying the pregnant learners access, the schools based their argument on measure 22 of the Pregnant Learner Policy which provides that

As per the Department of Education, every girl child who happen to give birth while learning must be given time off from the school for up to two academic years for the purposes of accouchement and nurturing the child. This means that learner should not be readmitted to their schools within two years after they left school owing to their accouchement.⁹⁴⁴

Based on this policy, the pregnant learners were excluded and sent home. In response the expulsion, parents of the pregnant learners lodged grievances with the school concerned. The Provincial Department of Education response overturned the school's decision, reinstated the pregnant learners in their respective schools. The decision of

⁹⁴¹ Ramulumo and Pitsoe Pitsoe, Teenage pregnancy in South African Schools: challenges, trends and policy issues 2013 page 758.

⁹⁴² Ramulumo and Pitsoe Pitsoe, Teenage pregnancy in South African Schools: challenges, trends and policy issues 2013 page 758.

⁹⁴³ *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB).

⁹⁴⁴ See measure 22 of the Pregnant Learner Policy which was in turn based on a National Department of Basic Education policy dated 2007 entitled "measures for the prevention and management of learner pregnancies".

reinstating the learners was based on a circular sent out in 2010, which postulated that, “a pregnant learner should return to school as soon as possible”.

The Human Rights Commission, and the Centre for Child Law (as *amici curiae*), maintained that the court make a ruling, on the suitability and the constitutionality, of School Pregnant Learner Policies, and order the schools and the Departments of Education to amend their policies and guidelines, to make them in line with the Constitution. The Court overruled the arguments by the *amici curiae*, and stated that, “it could find no legal avenue to address the questions of constitutionality”.

In the High Court, the HoD remained dissatisfied, and appealed the decision to the SCA. The pronouncement of the SCA did not make any remarks concerning the constitutionality or the legality of the policy; rather it focused on the application of administrative power and the principle of legality.⁹⁴⁵ Rampai J remarked that, the decision of excluding the pregnant learners from their respective schools, adversely affected two groups of children namely, the teenage mothers as well as their unborn babies. Rampai J further concluded that, the greatest thing to be done for the two children of the two teenage mothers lay in ensuring that their mothers continued their schooling and learnt some skills, so that they could become better parents.⁹⁴⁶

In the Constitutional Court, the proceedings began with reflecting whether the SASA permitted SGBs in public schools to adopt pregnancy policies. In this regard, Khampepe J held that, “the governance responsibilities placed on the school governing bodies and their authority to adopt codes of conduct empower them to adopt pregnancy policies”. However, the court found that, “the power to adopt pregnancy policy was restricted by the SASA and the Constitution and as such; it did not extend to adopting pregnancy policies that have exclusionary effects”. The court held that, “for this reason no governing body may adopt and enforce a policy that undermines among other things the fundamental right (such as the right to education) of pregnant learners to freedom from unfair discrimination and to receive an education”. In considering the unconstitutionality of the pregnancy policies, the court held that, “the policies were discriminatory hence they differentiate between students based on their

⁹⁴⁵ See *Head, Department of Education, Free State Province v Welkom High School* 2012 6 SA 525 (SCA).

⁹⁴⁶ See *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB) para 80.

pregnancy which fact is disallowed in terms of the provisions of section 9 (3) of the Constitution”.

The court further held that, “the requirement that students should report to the school authority when they believe to be pregnant violate their fundamental rights such as the right to human dignity in terms of section 10, the right to privacy in terms of section 14 and the right to bodily and psychological integrity in terms of section 12 (2) of the Constitution”. This also included the obligation placed on other learners, to report to the school authorities, any doubts that their fellow learner conceived. In the final instance, Khampepe J concluded that, “the nature of the policies which requires the exclusion of pregnant learners violates section 28(2) of the Constitution which provides that a child’s best interest is of paramount importance in every matter concerning the child”. In line with its pronouncement, the court ordered the SGBs to amend their pregnancy policies in line with the judgement, and also provide it with a duplicate of the amended policies.

7.2.4.2 Consequences of teenage pregnancy

It is also important to note that, notwithstanding the fact that the law permits pregnant and nursing learners to continue learning, attending school, some of them choose to stay at home, due to lack of peer support, as well as the social stigma of being a teenage mother, which also contributes to high dropout rates. Quoting from the provision of section 3 of SASA, “every parent is required to ensure that every child of school going age for whom he or she is responsible attend school from the first day of the year in which they turn seven until the last school day in which they reaches the ninth grade or they reaches the age of fifteen”.⁹⁴⁷ Therefore, this means the law requires every girl child of school-age, to be in school, regardless of whether she has conceived or not. Simply put, the girl child should not be discriminated based on her pregnancy.

Ramulumo and Pitsoe Pitsoe assert that, despite the fact that the law in South Africa protects teenage mothers from being discriminated in schools, due to pregnancy, substantial evidence still exists to confirm that pregnant learners receive requests not

⁹⁴⁷ See section 3 of the South African Schools Act 84 of 1996.

to attend school, for the duration of their pregnancies.⁹⁴⁸ According to Ramulumo and Pitsoe Pitsoe, this is possibly because in most communities young pregnant women carry the perception of bad influencers, on other young women, especially of school-age.⁹⁴⁹ This study argue that, in a situation where parents are either absent, or working and living in different areas, from their parenting children, the learners bear the burden of nurturing their children and as a result, their school work suffers.⁹⁵⁰ The implication is that non-existence of parental care, may cause or fuel teenage pregnancy.

In addition, it is necessary to highlight that, not every pregnant learner drops out from school after realizing that she is pregnant. This study argued that most pregnant teenagers continue schooling for the duration of their pregnancies, or return to school soon after childbirth. The study further argued that pregnancy and teenage motherhood does not always end a girl child's schooling. Sometimes the pregnant learner drops out after realizing she is pregnant, but in most cases the learner will remain in school or return soon after the child is born. However, for many who choose to continue schooling for the duration of their pregnancies, or return following childbirth, their grades and academic progress sometimes are affected. This is substantiated by Shefer and Bhana, they assert that, "when teenage mothers do return to school their performance is more likely to be affected, and many moves from doing well academically to becoming average or underachievers hence they are balancing motherhood and schooling".⁹⁵¹

Moreover, Ardington supported the assertions of Shefer and Bhana by quoting from the Southern African Labour and Development Research Unit (SALDRU), when it highlights that, "even when controlling for pre-birth characteristics (of the mother), teenage mothers had poorer educational outcomes than girls who did not give birth

⁹⁴⁸ Ramulumo and Pitsoe Pitsoe, *Teenage pregnancy in South African Schools: challenges, trends and policy issues* 2013 page 758.

⁹⁴⁹ Ramulumo and Pitsoe Pitsoe, *Teenage pregnancy in South African Schools: challenges, trends and policy issues* 2013 page 758.

⁹⁵⁰ See Deevia Bhana et al. *Pregnant girls and young parents in South African school* 2008 available at <https://repository.uwc.ac.za/xmlui/bitstream/handle/10566/151/BhanaPregnentGirls2008.pdf?sequence=5&isAllowed=y>. Retrieved 24-05-2020.

⁹⁵¹ Tamara Shefer et al. 'It isn't easy': Young parents talk of their school experiences. In Robert Morrell, Deevia Bhana, and Tamara Shefer. (eds). (2012). *Books and Babies: Pregnancy and Young Parents in Schools*. Cape Town: HSRC Press page 139.

during their teenage stage”.⁹⁵² According to Ardington, “teenage childbearing significantly impacted on learner’s educational outcome in that teenage mothers are likely to be two thirds of a grade behind their peers; 20 percentage points less likely to matriculate and 25 percentage points more likely to drop out of school”.⁹⁵³

7.2.4.3 Educational and social challenges faced by pregnant learners in schools

It is pertinent to highlight that pregnant learners face some significant challenges, such as irregular class attendance, fear, loneliness, and lack or insufficient time for study or homework.⁹⁵⁴ On the subject of irregular class attendance, Dunn and Theron opined that, “teenage pregnancy may be associated with a syndrome of failure to remain in school because pregnancy is disruptive when it comes to school attendance”.⁹⁵⁵ Likewise, Chigona and Chetty assert that, “some teachers are mostly not sure about how to handle pregnant learners at school because pregnant learners do not have time to do their homework.”⁹⁵⁶ This implies that these girls come back to the school system as mothers without any emotional and supportive preparations for their new situations. As such, they are overwhelmed with the new expectations resulting in them not performing well academically and in many cases dropping out of school”.⁹⁵⁷ Chigona and Chetty also posit that, “most of the pregnant learners do not attend classes regularly and their academic performance is usually below average resulting in very few chances of succeeding in their matric examinations”.⁹⁵⁸

Concerning pregnant learners’ fears and loneliness, it is self-evident that pregnant learners sometimes become fearful to participate in classroom discussions, particularly during Life Orientation programmes, wherein the subject matter deals with

⁹⁵² Cally Ardington. at al, Revisiting the ‘Crisis’ in Teen Births: What is the impact of teen births on young mothers and their children? A Southern African Labour and Development Research Unit Policy Brief. UCT 2012 page 2.

⁹⁵³ Ardington at al, Revisiting the ‘Crisis’ in Teen Births: What is the impact of teen births on young mothers and their children? A Southern African Labour and Development Research Unit Policy Brief. UCT 2012 page 3.

⁹⁵⁴ Nadine Dunn and Linda Theron, Coping strategies for adolescents birth-mothers who return to School following adoption. South African Journal of Education 2006.

⁹⁵⁵ Dunn and Theron, Coping strategies for adolescents birth-mothers who return to School following adoption. South African Journal of Education 2006.

⁹⁵⁶ Agnes Chigona and Rajendra Chetty, Girl’s education in South: Special Consideration to Teen Mothers as Learners. Africa. Journal of Education for International Development. Vol. No. (3) 2008.

⁹⁵⁷ Chigona and Chetty, Girl’s education in South: Special Consideration to Teen Mothers as Learners. Africa. Journal of Education for International Development. Vol. No. (3) 2008.

⁹⁵⁸ Chigona and Chetty, Girl’s education in South: Special Consideration to Teen Mothers as Learners. Africa. Journal of Education for International Development. Vol. No. (3) 2008.

sex and related matters, such as pregnancy and sexually transmitted diseases, intimacy and love life in general.⁹⁵⁹ This is simply because such discussions makes them feel like culprits or victims of sexual activities, something that could be used against them in class or in the community at large. Such fear and loneliness leads to social isolation, and regression to an earlier phase of life where the learner felt secure. The study submits that, educators need to motivate the pregnant learners to participate during such programmes as their experience, and resultant opinions could assist in educating and supporting other learners at risk of the same fate.

About lack or insufficient time for studying, doing homework, the study avers that, post childbirth the young mothers may not have enough time for reading, or attending to do their homework, whilst at home, because of the added responsibilities of motherhood, the need to nurture their children. The study further emphasizes the difficulty, to be a learner, a mother, and a growing young girl, all at the same time, and balance all effectively. This is because the responsibilities of motherhood take much of the learners' time, especially when the child falls ill, hence, necessitates the learner's absence from school, to care for the child or seek medical assistance. It may also present difficulty for the learner mother to concentrate, pay full attention to her academic activities, especially when the child is not well.

Similarly, Chigona and Chetty postulate that, "both pregnant school girls and those who gave birth indicated that they do not have enough time to complete their homework, or to study while at home because they have to attend their children. When they return from school, their relatives who take care of the child want to be free of the child-care chores".⁹⁶⁰ The children also need constant parental and maternal attention from the mothers, such as breastfeed, or other nourishment, after school. Chigona and Chetty also highlighted that, the unwillingness of educators to support the young learner mothers, as they miss lessons, due to their children being sick, or they attending post-natal clinic, or medical treatment.⁹⁶¹ Chigona and Chetty concludes that, "pregnant learners and nursing learner mothers faces challenges both at school

⁹⁵⁹ See Konkco, An investigation into factors contributing towards teenage pregnancy in secondary schools: a case study in the Elliotdale sub-district page 53.

⁹⁶⁰ Chigona and Chetty, Girl's education in South: Special Consideration to Teen Mothers as Learners. Africa. Journal of Education for International Development. Vol. No. (3) 2008 page 5.

⁹⁶¹ Chigona and Chetty, Girl's education in South: Special Consideration to Teen Mothers as Learners. Africa. Journal of Education for International Development. Vol. No. (3) 2008.

and at home and this results in girls dropping out of school because they cannot cope with school and the demands and pressures of motherhood”.⁹⁶²

7.2.5 HIV and AIDS

It is important to first look at the meaning of HIV and AIDS, as used in this part, to avoid misconception have a clearer understanding. HIV defined as Human Immunodeficiency Virus. This is the first stage, which brings along a variety of health or medical problems, starting from the time of infection through to the when the virus transforms into AIDS.⁹⁶³ AIDS is the abbreviation for Acquired Immune Deficiency Syndrome. This is the sickness, characterized by one or more diseases indicators.⁹⁶⁴ Clinically research has proven that it may take about ten years, or even more, for AIDS to develop after a person tests positive for the HIV infection. In 1992, the Centres for Disease Control (CDC) in USA, developed a medical classification following the stages through which the infection progresses, and grows within the human body, classified as follows:⁹⁶⁵

The first group encapsulates what is called, “Seroconversion illness”, which takes place within the first few weeks of infection. Seroconversion illness occurs in the early stage of the HIV infection. This includes illnesses such as rash, strong fever and congestion, joint or muscle pain, nausea or loss of energy, and swollen lymph nodes.⁹⁶⁶ The second stage is, “Asymptomatic phase”. This is the phase of chronic infection with HIV, during which there are, however, no symptoms of HIV infection. The duration of this phase differs, depending on how quickly the HIV virus is growing itself within the infected person, and the individual’s genetic differences, that affect the way the immune system handles the virus.⁹⁶⁷

⁹⁶² Chigona and Chetty, Girl’s education in South: Special Consideration to Teen Mothers as Learners. Africa. Journal of Education for International Development. Vol. No. (3) 2008 page 5. For a further discussion on the Consequences of teenage pregnancy in schools, see Konkco, An investigation into factors contributing towards teenage pregnancy in secondary schools: a case study in the Elliotdale sub-district page 52-54.

⁹⁶³ See http://www.patscotland.org.uk/medical_appendices/H/HIV%20INFECTION%20AIDS.pdf, retrieved 21-04-2020.

⁹⁶⁴ http://www.patscotland.org.uk/medical_appendices/H/HIV%20INFECTION%20AIDS.pdf, retrieved 21-04-2020.

⁹⁶⁵ http://www.patscotland.org.uk/medical_appendices/H/HIV%20INFECTION%20AIDS.pdf, retrieved 21-04-2020.

⁹⁶⁶ See <http://www.hivsymptomsonline.com/seroconversion-illness.html>, retrieved 21-04-2020.

⁹⁶⁷ See <http://www.nlm.nih.gov/medlineplus/ency/article/000682.htm>, retrieved 21-04-2020.

The third stage is called the, “Persistent Generalized lymphadenopathy (PGL)” which is a chronic phase that involves, among other issues, swelling of the lymph nodes on at least two body parts, outside the groin normally lasting three months or longer. The PGL commonly develops on the neck and underarm areas.⁹⁶⁸ The last stage is “Symptomatic infection”. This refers to a phase where the infection of the HIV virus becomes high, the symptoms are present, but AIDS not yet developed. Some of the symptoms of infection include, persistent diarrhoea, fever, excessive sweating, particularly at night, persistent fatigue and mouth disorders.⁹⁶⁹

7.2.5.1 HIV/AIDS and its impact on educational sector

HIV/AIDS pandemic is one of the deadly developmental challenges, globally. Obviously, this epidemic already took the lives of masses of people, which caused untold physical, emotional and psychological distress.⁹⁷⁰ Evidently, the HIV/AIDS virus is also regarded as, one of the most precarious threats against the realization of children’s rights, (including the right to education), in South Africa and the world over. I AIDS exacerbates the effects of poverty, and unemployment, hence, weakens and threatens child welfare.⁹⁷¹ It is also considered as one of the biggest threats to childhood, and humanity, because of the massive impact on fundamental socio-economic human rights, such as the right to freely receive, and impart information, as well as the right of equal access to education.⁹⁷² The study submits that the virus is devastating and unmerciful puts an end to human lives, and diminishes living standards of all ages which fact adversely affect the South African educational system.

Kelly avers that, this epidemic is not only a health problem, but rather a developmental predicament with destructive impacts, which hamper the realization of developmental goalmouths in the fields of human and economic well-being such as the right to education. The AIDS pandemic; reduces human life expectancy, which in turn

⁹⁶⁸ See <http://labspace.open.ac.uk/mod/oucontent/view.php?id=452603§ion=1.6.1>, retrieved 21-04-2020.

⁹⁶⁹ See <http://www.nlm.nih.gov/medlineplus/ency/article/000603.htm>, retrieved 21-04-2020.

⁹⁷⁰ See Ndebele “South Africa has experienced a late epidemic” available at <http://ujdigispace.uj.ac.za/bitstream/handle/10210/2409/Dinky%20Chapter%201%20%26%202%20Final.pdf?sequence=2> retrieved 21-04-2020.

⁹⁷¹ Sonja Giese, Helen Meintjies and Jo Monson, “Schools as nodes of care and support for children affected by HIV, AIDS and poverty” 2005 Child Gauge page 37.

⁹⁷² Sloth-Nielsen and Benyam Mezmur, HIV/AIDS and children’s rights in law and policy in Africa: Confronting hydra head on in Sloth-Nielsen Children’s rights in Africa: A legal perspective 2008 page 281.

increases the number of orphaned children, raises the levels of poverty, exerts severe pressure on the health sectors.⁹⁷³

For purposes of this study, it is key to emphasize HIV/AIDS also has negative and harmful consequences on the educational system. For example, amongst the infected learners there is normally a drop in school enrolment and school attendance; high dropout rates and increased absenteeism.⁹⁷⁴ This study depicts that, there is also a reduction in the number of HIV/AIDS infected learners enrolled in schools. The main cause of this is that, it is a common course that if a child born with the said virus, in their system, chances of the child living long enough to go through all the levels of school diminish.⁹⁷⁵ Moreover, orphaned children are likely to abandon school earlier, as compared to non-orphans. It is an undisputed fact that when both parents or/and guardians are deceased, there are less chances the children enroll and attend school. Orphaned children often drop out, and seek employment in order to eradicate poverty, and starvation in their families, because of the absence of caregivers. In this way, the realization of quality of education suffers enormously.⁹⁷⁶

Regarding educators, the quality and standard of education drastically decreases, with educators meeting premature demises, increased rates of absenteeism, and death.⁹⁷⁷ It is against this backdrop, this study posits that, the pandemic reduces the supply of qualified teachers, and reduces the numbers of children in every generation. There is a reduction in supply of educational services, a result of teachers' deaths from the disease.⁹⁷⁸ The death of qualified teachers disrupts the children's opportunity to access uninterrupted delivery of quality education. Infected teachers living with the virus, are often absent, sometimes for days, or too ill to provide quality education required for the children. As the virus progresses, physically devastates the infected educators, it renders them incapable of effectively teaching the learners, their

⁹⁷³ Kelly "Planning for education in the context of HIV/AIDS" <http://unesdoc.unesco.org/images/0012/001224/122405e.pdf> retrieved 21-04-2020.

⁹⁷⁴ Ndebele "South Africa has experienced a late epidemic" <http://ujdigispace.uj.ac.za/bitstream/handle/10210/2409/Dinky%20Chapter%201%20%26%20%20Final.pdf?sequence=2> retrieved 21-04-2020.

⁹⁷⁵ Ramdass, The challenges facing education in South Africa, Tomorrow People Organisation 2009.

⁹⁷⁶ Ramdass, The challenges facing education in South Africa, Tomorrow People Organisation 2009.

⁹⁷⁷ Ndebele "South Africa has experienced a late epidemic" <http://ujdigispace.uj.ac.za/bitstream/handle/10210/2409/Dinky%20Chapter%201%20%26%20%20Final.pdf?sequence=2> retrieved 21-04-2020.

⁹⁷⁸ Ramdass, The challenges facing education in South Africa, Tomorrow People Organisation 2009.

absenteeism and demises increase, as a result weakening the educational system. This way, the quality of education is adversely affected.

The discussion of this pandemic, particularly in this chapter, is relevant, as the disease has severe implications on the provision of quality education. The provision of the education including the aspect of quality is jeopardized by this sickness, the crucial point being its effect on the educational system, the fact that learners are deprived of their constitutional right to education.⁹⁷⁹ Arguably, HIV/AIDS causes a serious damage or impact on the educational system, which deprives learners their fundamental right to education.

7.2.5.2 Educational demand

According to Carr-Hill et al, the HIV/AIDS pandemic has a negative impact on the educational system; fewer children are being born because one or both parents died prematurely. In some cases children born with this virus, the majority of them die before they grow beyond school-age, or before they reach tertiary level education, which compromises the children's right to access education.⁹⁸⁰ In most cases, it is not easy for HIV/AIDS affected families to exempt their children from daily household tasks, let alone their responsibilities to look after their younger siblings, and sick family members, likely to be the parents.⁹⁸¹ This is because sick family members who mostly are the parents, and sometimes siblings cannot perform the household responsibilities due to their ill health.

These leads to less children or students completing their educational path let alone basic education. Another reason for the inability to complete school is that, children themselves become infected with HIV/AIDS, or their workload from daily household responsibilities are too much, thus unable to cope with them.⁹⁸² Moreover, the provision of education becomes unaffordable for those HIV/AIDS infected families,

⁹⁷⁹ Churr, A Child's Right to a Basic Education 2012 chapter 8 page 258.

⁹⁸⁰ Roy Carr-Hill, Kamugisha Joviter Katabaro, Anne Katahoire & Dramane Oulai, The Impact of HIV/AIDS on Education and Institutionalizing Preventive Education. Education in the Context of HIV/AIDS. Available at <http://unesdoc.unesco.org/images/0012/001293/129353e.pdf> retrieved 22-04-2020.

⁹⁸¹ See Carr-Hill, Katabaro, Katahoire and Oulai, The Impact of HIV/AIDS on Education and Institutionalizing Preventive Education. Education in the Context of HIV/AIDS. Available at <http://unesdoc.unesco.org/images/0012/001293/129353e.pdf> retrieved 22-04-2020.

⁹⁸² Carr-Hill, Katabaro, Katahoire & Oulai, The Impact of HIV/AIDS on Education and Institutionalizing Preventive Education. Education in the Context of HIV/AIDS. Available at <http://unesdoc.unesco.org/images/0012/001293/129353e.pdf> retrieved 22-04-2020.

because of loss of income, attributed to ill health, or death of a parent/s or family members who had a better employment. The study emphasizes that, the fact that the provision of basic education is free, as provided for by SASA, does not necessarily mean that no other costs attach to the provision of this education. Evidently, there are costs connected to the provision of basic education, which require a direct contribution on the part of the parents, or guardians. In some cases, this include costs related to transport for the learners, to and from school, and additional lessons as a need arises.

7.2.5.3 Supply and quality of education

Governments, most of the time are confronted with the problem of inadequate fiscal resources, to put in place the process of education. The resources include capacitated educators, and other related teaching and learning aids, such as textbooks, and school furniture.⁹⁸³ This study avers that, in order to realize the right to quality education, and properly administer and manage the educational sector, the supply or provision of education, must be attributable to capacitated and enthusiastic educators, to provide quality teaching and learning. Arguably, quality education can effectively be attained, in the presence of quality and dignified infrastructure. However, it is important to emphasize that, the mere presence of good quality infrastructure, without passionate, capacitated educators, most likely amounts to failure on the part of the state, to provide quality and sound education. The impact of HIV and AIDS on the lives of the educators, also contributes to government's failure to supply learners with quality education, due to untimely demises of educators, young and old.

Again, the quality of education deteriorates when this pandemic takes those responsible for facilitating its provision. Due to this epidemic, the educational sector endures the burden of educators' absenteeism, and loss of lives of important officials, such as educators, school inspectors, and management personnel. This also compromises the quality of education, and arguably, the outcome of HIV and AIDS is that schools will be left without its central characters.⁹⁸⁴

⁹⁸³ See <http://unesdoc.unesco.org/images/0012/001293/129353e.pdf> retrieved 22-04-2020.

⁹⁸⁴ Debbie Gachuhi "The impact of HIV/AIDS on education systems in the eastern and southern Africa region and the response of education systems to HIV/AIDS: life skills programmes available at <http://www.unicef.org/lifeskills/files/gachuhi.pdf>, retrieved 22-04-2020.

7.2.5.4 Children and learners as victims of HIV and AIDS

It is pertinent to emphasize the significance of the level of suffering, and poverty the children bear due to this pandemic. This pandemic does not only leave children orphaned, and destitute, it rips away their childhood, as they are forced to assume their parents' household responsibilities after the deaths. Consequently, children forced into the adult world, and instantly assume mature adults' roles involving household chores, care-giving sick family members, which is too much for them to perform while simultaneously attending school.⁹⁸⁵ At times, children find themselves under pressure to engage in paid work, for survival income, or just to meet daily needs of their families. Therefore, it becomes difficult, if not impossible for them to access adequate education, when the limited income only suffices for basic needs such as food, health care, and clothing.⁹⁸⁶

Furthermore, these children are mostly unable to fully attend, and complete school, due to their domestic workload. At times, the time spent on their education often competes with the time needed for their domestic responsibilities, which results in the decrease in school attendance. Children end up losing hope, interest in learning, and attending school, in general exhaustion sets in, caused by the heavy household duties, and responsibilities. Occasionally the children give up their schooling path completely, due to lack of money for school-related expenses, such as, transport, extra lessons, with the limited funds reserved used for basic needs, such as food, clothes and medication.⁹⁸⁷ Effectively these children are marginalized, deprived of their constitutional right to education, which is not only detrimental to them but to the overall society, and the country at large, since children are the future leaders of the country. Therefore, is it accurate to conclude that HIV and AIDS, destroys families, leaves societies hopeless, and devastates nations.⁹⁸⁸

⁹⁸⁵ See <http://www.avert.org/aids-impact-africa.htm>, retrieved 22-04-2020.

⁹⁸⁶ Linda Richter "The impact of HIV/AIDS on the development of children" available at <http://www.iss.co.za/pubs/Monographs/No109/Chap2.pdf> retrieved 22-04-2020. See further <http://www.avert.org/aids-impact-africa.htm>, retrieved 22-04-2020.

⁹⁸⁷ Richter "The impact of HIV/AIDS on the development of children" available at <http://www.iss.co.za/pubs/Monographs/No109/Chap2.pdf> retrieved 22-04-2020.

⁹⁸⁸ Churr, A Child's Right to a Basic Education 2012 chapter 8 page 267.

Similarly, it is key to highlight that HIV and AIDS adversely affects children's capacity to learn. According to Dlamini HIV and AIDS has a devastating and immeasurable impact on children as learners. Dlamini asserts that:

Learners who are infected with this virus perform poorly in their academic endeavors. However, the poor performance of infected learners is not because they are not intelligent, but it is due to the fact that most of the time they are absent from classes and as a result they turn to lose almost 80 per cent of what is learnt in their class activities.⁹⁸⁹

This study submits that, learners fail to attend, and complete their school education due to HIV and AIDS. First, infected learners might have irregular school attendance due to ill health caused by the disease. This dismally affects their pass rates, and finally compromises their right to quality education. When they do attend school, it becomes very difficult for them to concentrate, or pay attention, as the sickness weakens their immune system. When the virus becomes stronger, and starts to overpower their bodies, the attendance becomes poorer, with the learners spending more of their time in health care facilities, for medical attention, and assistance to revive their health, or stay alive. This as well compromises their access to education.

Secondly, when learners are not affected, at times they still fail to attend and complete their school education, because of the burden of life responsibilities, caring for their infected family members, be it siblings, and or parents/guardians. They assume mature adult roles, and responsibilities, which include daily household chores, such as, cooking, washing, cleaning, also taking care of sick family members, in turn this renders their time for education, insufficient. If they do attend school, their attendance becomes less productive, as they find it difficulty in paying full attention to school work, and participating in any activities within the school environment, due to trauma, depression, and stress. Enduring ongoing day-to-day burdens, soon becomes overwhelming causing, depression, and/or trauma, health issues, or at times bereavement of siblings, or parents, caused by HIV and AIDS. In cases where the parents or siblings died, the orphaned learners lack encouragement to continue with

⁹⁸⁹ Dlamini "Impact of HIV/AIDS on the didactic situation at schools in Mpumalanga" available at http://libserv5.tut.ac.za:7780/pls/eres/wpg_docload.download_file?p_filename=F1982178366/DlaminiST.pdf retrieved 23-04-2020.

education, no homework support, or household enthusiasm, and complete lack of family support, which inevitably translates to low pass rate.⁹⁹⁰

7.2.5.5 Educators as victims of HIV and AIDS

The study submits that, the right to education is an enabling right that plays an essential role in accomplishing socio economic, including political rights.⁹⁹¹ The right to (basic education), must be enjoyed and provided for regardless of the state's other fiscal commitments while the state, through realistic processes, must make further education progressively available, and accessible.⁹⁹² Yet, the most important prerequisite, for the realization of quality education, is ensuring that education is both physically and economically accessible to those previously denied access.⁹⁹³ Moreover, the quality of education should ensure learners develop to their full potential, and enable them to compete on equal footing with each other, for occupational opportunities, and access to advanced educational institutions.⁹⁹⁴

However, education characterized by low quality and standard, fragmented by incapacitated educators and other social ills, such as under resourced, unsafe and unhealthy environment, deprive learners from exercising and enjoying their right to quality education.⁹⁹⁵ Nevertheless, Adedeji and Olaniyan highlight that, "for a country to improve its educational system and to have the best quality education it must provide sustainable pedagogical innovative strategies that will improve the capacity and conditions of educators and teaching in schools".⁹⁹⁶

This study asserts that, for the achievement of good quality education, with a positive, developmental impact, on learners, delivery must be effected by a team of capacitated, enthusiastic, healthy and well-nourished educators. Such educators impart quality knowledge, and skills to learners, and transform them to a better nation. This is

⁹⁹⁰ For a thorough discussion of the impact of HIV and AIDS of children and learners see Churr, *A Child's Right to a Basic Education* 2012 chapter 8 page 266-270.

⁹⁹¹ Schussler, *What are you worth?* 7th United Association of South Africa (UASA) Employment Report 2008.

⁹⁹² See section 29 of the Constitution.

⁹⁹³ Veriava, *Free to Learn*, A discussion paper on the School Fee Exemption policy, the Children's Institute, University of Cape Town December 2005.

⁹⁹⁴ Veriava, *Free to Learn*, A discussion paper on the School Fee Exemption policy, the Children's Institute, University of Cape Town December 2005 page 3.

⁹⁹⁵ Van Leeve, *Childhood social anxiety and social support-seeking: Distinctive links with perceived support from teachers*, *European Journal of Psychology of Education* 2014 page 29.

⁹⁹⁶ Segun Olugbenga Adedeji and Olanrewaju Olaniyan, *fundamentals of teacher education development; improving the conditions of teaches and teaching in rural schools across African countries*, UNESCO: International Institute for Capacity Building in Africa 2011 page 73.

because educators hold the responsibility of being the most significant role players in the educational arena. Their undertakings include educating learners, to the best of their abilities, promoting learners' intellectual and social well-being, and learners' development.⁹⁹⁷ Notwithstanding this fact, HIV and AIDS pandemic negatively affects educators, and their provision of education, consequently affecting the whole educational system.

7.2.5.6 Educators' ill health and demise resultant from HIV and AIDS

This study submits that, the good health of the educator is of paramount importance, for the provision of quality education. This means that for the effective provision of quality education, educators need to be physically, and mentally healthy, for effective facilitation of the provision, and to impart knowledge to the learners. However, if the educators themselves are sick it hampers the the provision of education, as affected by absenteeism, from poorly health. Conversely, it is important to note that the ill health, and at times premature death of educators, adversely affects proper educational delivery, and maintenance. This constitutes a decline in quality delivery, and maintenance of education. It is noteworthy to mention that decline in quality education delivery, and maintenance does not only affect learners in the lower educational institutions, such as primary and secondary schools, but also affects the students in institutions of higher learning, such as universities and colleges, as these also face a high prevalence of HIV and AIDS infections.

This drastically decreases the quality and provision of education, because educators are confronted with increasing level of absenteeism and at times, they meet their untimely deaths.⁹⁹⁸ The escalation in educators' mortality rate seriously compromises education qualifications, expertise and experience.⁹⁹⁹ It is important to emphasize that, educators play an important role in realizing other professions. Simply put, for every person to fulfil his or her dreams of becoming a professional in their chosen field they

⁹⁹⁷ Ndebele "South Africa has experienced a late epidemic" <http://ujdigispace.uj.ac.za/bitstream/handle/10210/2409/Dinky%20Chapter%201%20%26%20%20Final.pdf?sequence=2> retrieved 21-04-2020.

⁹⁹⁸ Ndebele "South Africa has experienced a late epidemic" <http://ujdigispace.uj.ac.za/bitstream/handle/10210/2409/Dinky%20Chapter%201%20%26%20%20Final.pdf?sequence=2> retrieved 21-04-2020.

⁹⁹⁹ Ndebele "South Africa has experienced a late epidemic" <http://ujdigispace.uj.ac.za/bitstream/handle/10210/2409/Dinky%20Chapter%201%20%26%20%20Final.pdf?sequence=2> retrieved 21-04-2020.

must go through school, in other words through the hands of a quality educator. For this reason, educators are builders of other professions, or builders of a better life, in general. Therefore, educators' death compromise attainment of other qualifications, because if educators die there would be no one to transform education and to educational services and as a result the educational sector as a whole suffer. Regarding the compromise in expertise, and experience, it bears significance to indicate that, HIV and AIDS, also kill the most experienced educators, for example, those who taught in the teaching profession for a long time. It therefore diminishes the teaching profession and it destroys the valuable expertise the profession carried. This is a serious compromise for the realization of quality education.

7.2.5.7 Educators' absenteeism and poor performance

HIV and AIDS weaken the immune system, therefore, absenteeism among infected educators increases day in and day out. Moreover, both affected and or non-affected educators sometimes frequently absent themselves from work, because the amount of household duties and family responsibilities increase when taking care of infected family members. More often, their absence constitutes additional amount of work on those present, as they are urged, sometimes compelled by circumstances to share the daily educational duties and responsibilities of absent colleagues. They do this because of the enthusiasm to promote teaching and learning, and the provision of quality education. In some cases, when the infected educators become very sick, it becomes difficult and at times impossible for them to carry on their vocation, and effectively perform their duties and responsibilities as educators.¹⁰⁰⁰

Emphatically, the study posits that, HIV and AIDS has a huge, negative impact on educators' work performance, particularly when the symptomatic illness emerges, simply because the disease weakens the whole body, and reduces the ability to actively perform their teaching responsibilities. At times, as their performance is deteriorates, they start to develop a sense of guilt, because they can no longer put as much effort into their teaching duties, as they used to, due to their ill health. Consequently, educators tend to succumb to pressure, and overwhelming fear, on

¹⁰⁰⁰ Dlamini "Impact of HIV/AIDS on the didactic situation at schools in Mpumalanga" available at http://libserv5.tut.ac.za:7780/pls/eres/wpg_docload.download_file?p_filename=F1982178366/DlaminiST.pdf retrieved 23-04-2020. See further Churr, A Child's Right to a Basic Education 2012 chapter 8 page 272.

realizing that they are unable to meet their teaching targets, and standards of excellence as they did before.¹⁰⁰¹

Furthermore, infected educators over the passage of time, slowly lose morale, motivation, and interest, in their teaching profession, because they no longer cope with the workload of their duties, and responsibilities. For this reason, their job as educators, face serious compromise due to physical inability to perform, especially knowing this is due to a lifelong sickness. Majority of the infected educators are no longer productive in their teaching work, their morale since perished, and as such, they since lost interest in their professional development. Most of them lost confidence in life, and believe they lost the battle.¹⁰⁰² Therefore, the HIV and AIDS epidemic have severe and detrimental effects, on the educational sector.

7.2.6 Infrastructural challenges

It must be kept in mind that education is the most powerful instrument, in not only developing the skills, abilities, knowledge and aptitude among individuals, but also in alleviating some of the socio-economic problems such as poverty, illiteracy and unemployment.¹⁰⁰³ Quality education lays the sturdy foundation for sustained economic growth. However, this study argues that, the provision of quality education can be effective on a school environment with good infrastructure. Arguably, in not only schools, but also in institutions of higher learning such as colleges and universities.

Good infrastructure sets a good foundation for good quality education, and the provision, and availability of proper infrastructural facilities within the school premises, is of paramount importance. When governments make provision for adequate infrastructural facilities in schools, then good developments take place in the overall

¹⁰⁰¹ Ndebele “South Africa has experienced a late epidemic” <http://ujdigispace.uj.ac.za/bitstream/handle/10210/2409/Dinky%20Chapter%201%20%26%202%20Final.pdf?sequence=2> retrieved 21-04-2020.

¹⁰⁰² Ndebele “South Africa has experienced a late epidemic” <http://ujdigispace.uj.ac.za/bitstream/handle/10210/2409/Dinky%20Chapter%201%20%26%202%20Final.pdf?sequence=2> retrieved 21-04-2020. For a further discussion and deliberation on the effect of HIV and AIDS on educators see Churr, A Child’s Right to a Basic Education 2012 chapter 8 page 271-273.

¹⁰⁰³ Radhika Kapur, Education for All in India with Focus on Elementary Education: Current Status, Recent Initiatives and Future Prospects, 2018 available at www.researchgate.net retrieved 28-04-2020.

teaching and learning environment.¹⁰⁰⁴ Government and other stakeholders responsible for the promotion of quality education, such as Section 27 of the 1996 Constitution need to ensure the existence of appropriate infrastructural facilities, in schools across the country. These stakeholders need to take measures with regards to the allocation, and use of financial resources, for the promotion of proper infrastructural facilities. This is because the provision and availability of sufficient financial resources are considered to be the most vital contributing factor in promoting infrastructural facilities.¹⁰⁰⁵

In trying to understand the meaning of infrastructure, various contexts exist. According to Fisher school infrastructure is divided into two factors namely, structural and cosmetic factors.¹⁰⁰⁶ Fisher posits that, the structural factor includes, school buildings, learner's density and or capacity, and class sizes. On the other side cosmetic factors include, school grounds, proper school furniture, books and other learning materials. In the same vein, Boissieri describes infrastructure as, hardware and software. Boissieri denotes that, the hardware factor refers to the school buildings, classrooms, furniture, as well as proper sanitation, while software includes the curriculum, textbooks and other learning materials.¹⁰⁰⁷ In line with the South African National Education Infrastructure Management System (NEIMS), school infrastructure includes, the number of learners per educator, sanitation facilities, running water in the school premises, electricity, furniture, computers and other communication technologies.¹⁰⁰⁸

Amsterdam posits that, "considering the National Policy for Equitable Provision of an enabling School Physical Teaching and Learning Environment and the National

¹⁰⁰⁴ Gouri Sankar Bhunia, Pravat Kumar and Soumen Duary, Assessment of School Infrastructure at Primary and Upper Primary Level: A Geospatial Analysis. *Journal of Geographic Information System*, 2012 page 4. Also available at https://file.scirp.org/pdf/JGIS20120500007_28973302.pdf retrieved 28-04-2020.

¹⁰⁰⁵ Bhunia, Kumar and Duary, Assessment of School Infrastructure at Primary and Upper Primary Level: A Geospatial Analysis. *Journal of Geographic Information System* 2012 page 4. Also available at https://file.scirp.org/pdf/JGIS20120500007_28973302.pdf retrieved 28-04-2020.

¹⁰⁰⁶ Kenn Fisher, Building better outcomes: The impact of school infrastructure on student outcomes and behaviour. *Schooling Issues Digest*, Canberra: Australia 2000. Available at http://www.dest.gov.au/sectors/school_education/publications_resources/schooling_issues_digest/ retrieved on 28-04-2020.

¹⁰⁰⁷ Maurice Boissiere, Determinants of Primary Education outcomes in Developing Countries. World Bank Operations Evaluation Department. The World Bank, Washington DC. 2004 Available at <http://www.worldbank.org.ed> retrieved 28-04-2020.

¹⁰⁰⁸ Department of Education, Republic of South Africa (September 2007). National Assessment Report (Public Ordinary Schools): National Education Infrastructure Management System (NEIMS). <http://www.education.gov.za> retrieved 28-04-2020.

Minimum Uniform Standards for School Infrastructure it appears that understanding the school infrastructure is consistent with Boissieri's conceptualization of infrastructure as a hardware factor".¹⁰⁰⁹ For this study infrastructure refers to, adequate school facilities such as, a well built school with proper classrooms, which makes the learning environment conducive, which in turn will makes teaching, and learning feasible. This also includes provision, and or availability of safe, secured, and dignified ablution facilities, which provide privacy, and most significantly promotes health and hygiene, to users including learners and educators in schools.

Infrastructural resources such as, proper classrooms, and dignified sanitation facilities are denoted to be the most significant pre-requisites, to providing an opportunity for quality teaching and learning.¹⁰¹⁰ Evidently, where there is proper provision, and or availability of adequate school infrastructure, within an educational institution, then not only teaching and learning processes, and instructional strategies, such as, classes with reasonable and suitable number of learners, are organized in an appropriate manner, but learners also gain awareness, of how to make use of added skills and knowledge, towards sustaining their living conditions, in an efficient manner.¹⁰¹¹ This means that learners will be able to recognize and understand the importance of attaining quality education. Therefore, it is argued that school infrastructures are the most significant changes desirable within the school premises.

However, there are several infrastructural hindrances, such as, dilapidated classrooms, poor and degrading sanitary facilities, which fact is makes provision of quality teaching and learning processes, unaccomplishable, or not realizable at the school level. The study further emphasizes that, poor infrastructural amenities therefore, prohibit the acceleration of quality education, and does not bring realization to fulfillment. Furthermore, the accessibility of basic infrastructural facilities, such as, good classrooms and proper ablution facilities, are the necessary requirements for improving the learning environment in schools, and making the environment

¹⁰⁰⁹ Christina Amsterdam, School Infrastructure in South Africa: Views and experiences of educators and learners, Conference Paper, University of South Africa May 2010. Also see Boissiere, Determinants of Primary Education outcomes in Developing Countries. World Bank Operations Evaluation Department. The World Bank, Washington DC. 2004 Available at <http://www.worldbank.org.ed> retrieved 28-04-2020.

¹⁰¹⁰ Kapur, Education for All in India with Focus on Elementary Education: Current Status, Recent Initiatives and Future Prospects, 2018 page 15 available at www.researchgate.net retrieved 28-04-2020.

¹⁰¹¹ Kapur, Education for All in India with Focus on Elementary Education: Current Status, Recent Initiatives and Future Prospects, 2018 page 15, available at www.researchgate.net retrieved 28-04-2020.

conducive, in turn making teaching and learning feasible.¹⁰¹² Consequently, lack of proper infrastructure proves to be a major impediment within the course of acquisition of quality education.

7.2.6.1 The importance of school infrastructure

According to Kapur, the concept of infrastructure has not only been used in educational institutions, but also in other organizations such as the work place, a fact which led to people paying more attention towards the development of infrastructure.¹⁰¹³ However, for purposes of this study, the concept of infrastructure is, deliberated from the schools' point of view. It is important to highlight that it is through the provision, and or the availability of adequate infrastructure, that the learners are able to benefit in a number of ways in schools. For example, learners are able to perform their academic work in an organized manner hence there no learner density, and the capacity or size of class would be adequate.

Moreover, learners become motivated, learning and applying their skills in a class environment, which is comfortable for execution of individual tasks. Learners are comfortable and contented within school premises fortified with adequate infrastructural amenities, do their school work more effectively, contributing towards better accomplishment of their professional, and personal objectives.¹⁰¹⁴ For this reason, it is important for the South African government to plan its fiscal means adequately, thus develop school infrastructural amenities in all schools across the country.

This study argues that, availability or ample provision of proper infrastructure in schools, motivates learners to carry out their classroom tasks in a well-organized and proficient manner, hence, good infrastructural amenities such as, classrooms supplied with proper school furniture, creates a more conducive, welcoming environment, which improves their learning. Likewise, the availability of adequate infrastructural facilities

¹⁰¹² Savita Kaushal and Sudhanshu S. Patra, Elementary Education in Bihar: Some Reflections from DISE Data. <http://www.dise.in/Downloads/Use%20of%20Dise%20Data/Savita%20Kaushal%20&%20%20Sudhanshu%20S.%20Patra.pdf> retrieved 28-04-2020.

¹⁰¹³ Kapur, Infrastructure development in schools 2019 page 2, available at www.researchgate.net retrieved 28-04-2020.

¹⁰¹⁴ Kapur, available at www.researchgate.net retrieved 28-04-2020. Further, see Education and Skills Committee. Scottish Parliament Corporate Body. Available at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/ES/2017/10/2/Schoolinfrastructure/ESS052017R11.pdf> retrieved 28-04-2020.

in the school premises or classrooms motivates educators to carry out their pedagogical duties and responsibilities more effectively. Educators will also be able to render the necessary quality contribution, through imparting skills and knowledge to the learners, and promoting learners' growth and development.¹⁰¹⁵

7.2.6.2 The key features of infrastructure

In contextualizing the key features of infrastructure, more emphasis must be on the reasons for insisting on good infrastructural amenities, demonstrated to be highly beneficial in facilitating the fulfillment of educational goals, and working towards the realization of quality education.¹⁰¹⁶ Furthermore, it is important to ascertain how the learners, and educators, effectively utilize the infrastructural facilities provided to carry out their respective duties and responsibilities, in the appropriate manner. Some of the important features of infrastructure relevant to the study are stated and discussed as follows:

7.2.6.2.1 School infrastructure as indispensable

It is significant to highlight that, good school infrastructural facilities are indispensable, and as such without them, learners and educators will not find pleasure and contentment in performing their teaching and learning responsibilities. Kapur asserts that, infrastructural services are essential, learners and educators require them to discharge their duties and responsibilities.¹⁰¹⁷ Therefore, it is indispensable for government to adequately plan for financial resources, make the necessary budget allocations for valuable improvements to school infrastructure. Generally, schools situated in urban and developed areas have adequate infrastructural amenities. These schools have sufficient financial resources, and therefore it is easy for them to carry out improvements on existing school infrastructure, and facilitate provision of new infrastructure. On the contrary, schools situated in rural areas are usually underfunded, and therefore, undersupplied, thus have poor infrastructural facilities, which reduces the morale of both the learners in such schools, and educators employed there. Therefore, it is essential for government to strive for the improvement

¹⁰¹⁵ Kapur, 2019, available at www.researchgate.net retrieved 28-04-2020.

¹⁰¹⁶ See Education and Skills Committee. Scottish Parliament Corporate Body. Available at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/ES/2017/10/2/Schoolinfrastructure/ESS052017R11.pdf> retrieved 28-04-2020.

¹⁰¹⁷ Kapur, 2019, available at www.researchgate.net retrieved 28-04-2020.

of existing infrastructural facilities, and provide better infrastructure in underprivileged schools, such as those in rural areas. Hence, school infrastructure is indispensable, one of the vital components, contributing towards achievement of academic goals, such as attaining quality education.¹⁰¹⁸

7.2.6.2.2 School infrastructure as personality advancement

This study argues that, the key objective of educational institutions is to promote growth and development of learners, and enrich their personalities. Learners enroll in educational institutions to acquire skills and knowledge, for sustenance of better living standards, for themselves as well as contribution in promoting the wellbeing of other individuals. The implication of this is that personal advancement is a significant factor in the lives of the people, and it is through the acquisition of education that an individual can bring about positive changes to their life. Although, it remains important to emphasize that it is highly likely for individuals to acquire good quality education where there is provision or availability of adequate infrastructural facilities. It is pertinent to recognize there is a strong relationship between infrastructure amenities, quality education and personal advancement.¹⁰¹⁹

7.2.6.3 Categorizing school infrastructure

It is significant to bear in mind that the term infrastructure is comprehensive. This means that, the concept applied comprehensively, not only in terms of educational institutions, but also other organizations, public places and within communities. According to Kapur, “the concept include quite a number of aspects which include playgrounds, library facilities, laboratories, computer centres, technology, machinery, tools, equipment and so forth”.¹⁰²⁰ Fisher defined the term infrastructure by linking it to educational institution. In defining the term infrastructure, Fisher categorized the term into structural and cosmetic factors.¹⁰²¹ Fisher explained structural factors to include *inter alia* school buildings, learners’ density or capacity, and the size of classes, whereas cosmetic factors included, school grounds, proper school furniture,

¹⁰¹⁸ Kapur, 2019, available at www.researchgate.net retrieved 28-04-2020.

¹⁰¹⁹ See www.researchgate.net retrieved 28-04-2020.

¹⁰²⁰ www.researchgate.net retrieved 28-04-2020.

¹⁰²¹ Fisher, Building better outcomes: The impact of school infrastructure on student outcomes and behaviour. Schooling Issues Digest 2000. Available at http://www.dest.gov.au/sectors/school_education/publications_resources/schooling_issues_digest/ retrieved on 28-04-2020.

books and other leaning materials. Equally, Boissieri define school infrastructure as hardware, referring to good school buildings and classrooms, proper furniture, as well as dignified sanitation facilities.¹⁰²² Following Fisher's definition of school infrastructure, and relevance to this study, infrastructure is being looked at from the schools' perspective, referring to good school buildings, school furniture and other teaching and learning materials, such as textbooks. For a common understanding of school infrastructure, it is important to examine the different types, or categories of school infrastructure.

7.2.6.3.1 School buildings and classrooms

School buildings and classrooms must always be in good condition, and not damaged. In the first place, good buildings and classrooms attract more visitors to the schools; individuals interested in schools, and parents, for admission of their children, and so forth.¹⁰²³ It is important for the government to make provision for maintenance of the school buildings and classrooms, as this enables the learners to continue their learning in a good and healthy environment, making facilitation of teaching and learning more motivating.

It is prudent to emphasize that the condition of the classroom is significant in imparting teaching and learning, thus facilitating the realization of the academic objectives.¹⁰²⁴ Within the classroom, it is also imperative that the temperature remains favorable and conducive to the learners, by providing adequate cooling and heating apparatus, in accordance with the weather conditions. This helps learners maintain a good level of concentration on their academic activities, and educators as well, will find the classrooms' environment more comfortable for discharging their teaching responsibilities. Poor and or unfavorable indoor temperatures have negative implications; such as flu or colds for learners and educators, which may cause absenteeism, in turn impact the teaching and learning processes.¹⁰²⁵ Furthermore, it

¹⁰²² Boissiere, Determinants of Primary Education outcomes in Developing Countries. World Bank Operations Evaluation Department, 2004 Available at <http://www.worldbank.org.ed> retrieved 28-04-2020.

¹⁰²³ Education and Skills Committee. Scottish Parliament Corporate Body. Available at <https://sp-bpr-en-prod-nep.azureedge.net/published/ES/2017/10/2/Schoolinfrastructure/ESS052017R11.pdf> retrieved 28-04-2020.

¹⁰²⁴ Kapur, 2019, available at www.researchgate.net retrieved 28-04-2020.

¹⁰²⁵ See Tennessee Advisory Commission on Intergovernmental Relations (2003). Do K-12 School Facilities Affect Education Outcomes? Nashville, Tennessee. Available at <http://www.state.tn.us/tacir> retrieved 28-04-2020.

is important to ensure that there is provision of adequate furniture in classrooms, for a proper teaching and learning activities, to guard against situations where learners are forced to improvise for instance, learn while sitting on the floor. Hence, Fisher asserts that, uncomfortable and inappropriate school furniture creates problems, such as backache, poor concentration span, as well as writing difficulties, thereby reducing learning interest and opportunity.¹⁰²⁶

Evidently, education under dilapidated buildings is likely to be of low standard and poor quality. For example, learners attending school in mud structures are underprivileged and mostly under resourced which turns to negatively affect their right to education. The provision of good school buildings was the issue under contention in the case of, *Centre for Child Law v Government of the Eastern Cape Province*¹⁰²⁷, wherein schools across Eastern Cape Province struggled to advance their infrastructural amenities. Initially, only seven schools affected sought relief for the provision of good school infrastructure, however with time the relief sought extended to benefit all schools lacking proper infrastructure across the province. The schools demanded the provision of adequate and properly built classrooms, from the provincial department of education. The schools in question consisted of mud classroom structures, with missing roofs, no running water, or dignified ablution facilities for learners to relieve themselves. There was also inadequate school furniture, which included desks, tables and chairs for the learners, and in some instances, lessons took place in the nearby households.¹⁰²⁸

In adjudicating this matter, the court held that the Eastern Cape provincial government's failure, to advance and facilitate development of educational facilities, by means of providing inappropriate school furniture, and failing to erect good quality classrooms and proper facilities for running water, constitutes a breach of the learners' constitutional right, which also compromises the learners right to quality education.¹⁰²⁹ The court ordered the Eastern Cape provincial government to address the

¹⁰²⁶ Fisher, Building better outcomes: The impact of school infrastructure on student outcomes and behaviour. Schooling Issues Digest 2000.

¹⁰²⁷ *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bisho, case no 504/2010.

¹⁰²⁸ *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, 2010. Also see Mbeki, Critical evaluation of the realization of the right to basic education in light of the 2012 Limpopo textbook saga, 2014 chapter 5 page 42 para 1.

¹⁰²⁹ *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bisho, case no 504/2010.

infrastructural backlog, across the whole province, with the process being managed by, the national department of basic education.¹⁰³⁰

Thus, this study posits that, the provision of good school infrastructural facilities, such as proper classrooms with cooling and heating equipment, and school furniture, is vital and contributes to the effective realization of quality education. This means that the onus is on government to ensure that, all schools are provided with basic school infrastructural amenities, such as running water, proper school buildings and classrooms, and decent sanitation facilities, for a conducive learning environment, and the smooth running of the educational activities.

Moreover, in class, learners require textbooks to facilitate the learning process. Textbooks are an integral part of teaching and learning in schools. Thus, it is always significant to provide learners with the relevant textbooks, to bring about improvement in the teaching and learning process. Therefore, non-provision of textbooks to student constitutes an infringement of their right to education, and compromises the provision of quality education. This violation is stressed in the case of *Section 27*¹⁰³¹ where an application lodged at the court sought a declaratory order, declaring failure by the Department of Basic Education, to provide textbooks to schools across Limpopo Province, to be a violation of the right to elementary education.

The applicant also sought an order to direct the department, to deliver promptly, textbooks to all the schools that had not yet received them, across the Province. The Court observed that textbooks are indispensable components for the realization of quality education, whereas quality education itself is crucial in unlocking the potential of every person.¹⁰³² The court held that, “failure by the Department of Basic Education to provide textbooks to schools across Limpopo is a defilement of the right to education, which not only compromises the learners’ right, but also the provision of quality education hence, quality education cannot be accomplished without textbooks”.¹⁰³³

¹⁰³⁰ *Centre for Child Law v Government of the Eastern Cape Province, Eastern Cape High Court, Bisho*, case no 504/2010.

¹⁰³¹ *Section 27 v Minister of Education* 2013 2 SA 40 (GNP).

¹⁰³² *Section 27 v Minister of Education* 2013 para 22.

¹⁰³³ *Section 27 v Minister of Education* 2013 para 22.

7.2.6.3.2 Provision of clean running water

The study argue that, clean drinking water is perceived as an essential requirement for all human kind, and it is obligatory for government to make sustainable provision of clean drinking water, not only in schools, but also in individuals' homesteads. Clearly, learners and educators normally spend between six to seven hours a day within the school premises, and as such, need to have access to clean drinking water suitable for human consumption.¹⁰³⁴ At times, if the school premises do not have proper, and clean running water facilities, learners, educators, staff members, including visitors, are compelled to carry water from their respective homes when coming to the school premises. If they do not bring their own drinking water, they are bound to fetch drinking water from unreliable water sources, such as streams, rivers or other available nearby sources outside the school premises. Simply put, they will be sharing the water sources with animals. The implication is individuals' high risk of exposure to contaminated drinking water, which can cause serious health hazards.

The provision of clean running water, inside school premises, is indispensable, as highlighted in the case of, *School Governing Body of Dalaguba Junior Secondary School*¹⁰³⁵, where the Eastern Cape provincial Department of Education failed to provide running water to schools across the Province. In this case, the school governing body (SGB) claimed that the provincial Department of Education failed to perform its constitutional obligation, thereby failing to provide sanitation amenities, and most importantly, clean drinking water to schools across the Province.¹⁰³⁶ A number of schools demanded, from the provincial Department of Education, provision of adequate school facilities such as clean running water in schools across the Province. In court, the SGB sought relief for the provision of permanent and reliable, water infrastructure, to provide clean running water at the schools.¹⁰³⁷ In its argument, the SGB highlighted that failure by the provincial department to do so, left learners with no choice, but to draw drinking water from unreliable and unsafe water sources such as

¹⁰³⁴ Kapur, 2019, available at www.researchgate.net retrieved 28-04-2020.

¹⁰³⁵ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape*, Bisho Case No: 645/19, unreported.

¹⁰³⁶ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 9.

¹⁰³⁷ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 5 of the founding affidavit.

rivers, streams, ponds, or other sources outside of the school premises. This exposes learners to hazardous situations, which compel them to consume possibly contaminated water, unsafe for drinking purposes, thus compromise the health, and wellbeing of the learners.¹⁰³⁸

The court ordered the provincial department to erect the infrastructural facilities necessary to comply with the Norms and Standards for public school infrastructure. The regulation provides for norms and standards, which relate to, the erection of reliable watercourse infrastructure, for the provision of sustainable clean running water, fit for for human consumption.¹⁰³⁹ Regulation 11 of the Norms and Standard provides that

Every school must have a safe and reliable watercourse to provide students, educators and all the school personnel with clean water for drinking, personal hygiene, and where appropriate for food preparation. Such watercourse must at all material times be safe, accessible and in accordance with all relevant laws. Adequate water-collection points such as taps and water-use amenities such as rest rooms and kitchens must be made available at all schools to allow convenient access to, and use of water for drinking, personal hygiene and, where appropriate for food preparation.¹⁰⁴⁰

Because provision of drinking water, in schools is indispensable, the court ordered that, while the provincial department was in the process of erecting the necessary water infrastructures, at the affected schools, the respondents be jointly responsible for supplying bottled drinking water promptly, to those schools in the Province, with the process administered by the MEC for Education Eastern Cape. As part of this process, the MEC was to facilitate purchasing of the bottled drinking water, paid for, by the provincial Department of Education.¹⁰⁴¹

The importance of the provision of clean running water was not only an issue of concern in schools, but also in households. The case of, *Mazibuko*¹⁰⁴², is one of the landmark cases that dealt with the provision of clean running water. This case

¹⁰³⁸ *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 10 of the founding affidavit.

¹⁰³⁹ Regulation 11 (1), (2), (3) and (4) of the Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure 2013.

¹⁰⁴⁰ See Regulation 11 (1), (2), (3) and (4) of the Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure 2013. Further, see *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 13 of the court order.

¹⁰⁴¹ See para 2.3.3 of the court order in *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape*.

¹⁰⁴² *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

concerned the right of access to water, as enshrined in section 27 of the Constitution.

Section 27 of the Constitution provides that:

Every person is entitled to have access to health care, which include reproductive health care; adequate food and water; and social security, including if they are unable to provide for themselves and their dependents, appropriate social assistance. In order to accomplish the progressive realization of each of these rights, the state must take reasonable legislative and other measures within its existing monetary budget.¹⁰⁴³

This case considered the lawfulness of operation, *Gcin'amanzi* meaning operation "Save Water", a project introduced by the City of Johannesburg, conducted in Phiri Soweto, South Africa, to address the problems of water loss, and non-payment of water services. The project involved re-positioning of water pipes, (last erected by the apartheid government, which the City argued were rusty and leaking), geared to advance water supply, and to reduce water loss, by erecting pre-paid water meters, to bill consumers for water usage in excess of six kiloliters per household. In terms of the City of Johannesburg Water Policy, each household received at least six kiloliters of free basic water, as an allowance, and the consumer had to pay for any additional consumption above six kiloliters.

The applicants did not like the arrangement, therefore challenged the City's Free Basic Water policy, in terms of which free six kiloliters were provided monthly per household. In their argument, the applicants argued that six kiloliters per household is insufficient particularly those households with many members. Again, the applicants challenged the lawfulness of the installation of pre-paid water meters, arguing that it is unreasonable.¹⁰⁴⁴ Despite the fact that applicants accepted that the old system of water supply, was unsustainable, and required replacement, the applicants still stressed that the City's policy, and the manner in which it was implemented was unlawful, unreasonable, unfair, and in breach of the applicants' constitutional right to sufficient water, as provided in the provisions of section 27 of the Constitution.

Following the decisions of the High Court, and the Supreme Court of Appeal, the court deliberated on two issues. First, whether the City's policy, on the supply of free basic water, particularly the City's decision to limit the supply for each household, to six

¹⁰⁴³ See section 27 (1)(a), (b) and (c) and (2) of the Constitution of the Republic of South Africa.

¹⁰⁴⁴ See *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

kiloliters of water per month, conflicted with the provisions of section 27, of the Constitution, and section 11, of the Water Services Act.¹⁰⁴⁵ The other issue was, whether the installation of pre-paid water meters, by the City was lawful.¹⁰⁴⁶

To bear in mind, the High Court held that, “the installation of pre-paid water meters was unlawful and unfair”. The court also found the City’s Free Basic Water policy to be unreasonable, and therefore unlawful. The court further ruled that, “the City should provide the applicants and all other residents in similar residents and situations with at least fifty liters of free water daily per household”.¹⁰⁴⁷ Consequently, the Supreme Court of Appeal varied the decision of the High Court, and held that, “at least forty-two liters of free water per day and per household would be reasonable within the meaning of section 27 of the Constitution”. The Supreme Court of Appeal also directed the City to restructure its policy (the Free Basic Water Policy), guided by the decision of the court. The court also held that, “the installation of the water meters was unlawful on the ground that the City’s By-laws did not make provision for such pre-paid water meters”. In the premise, the court gave the City two years to rectify its By-laws in accordance with provisions of the pre-paid meters.¹⁰⁴⁸

The court ruled that, “the City’s Free Basic Water Policy (the City’s decision to supply each household with six kiloliters of water per month) is reasonable and as such it is not in conflict with the provisions of section 27 of the Constitution and with the national legislation regulating the provision of water services, namely; the Water Services Act, specifically section 11”. Section 11 of the Water Services Act provides that

Every person is entitled to have access to basic water supply and basic sanitation. Every institution responsible for the supply of water must advocate for the realization of these rights. Each institution must have a water services development strategy, which encapsulate measures to be implemented for the realization of these rights.¹⁰⁴⁹

Similarly, the constitutional court held that, “the installation of pre-paid meters was lawful and accordingly set aside the orders made by the High Court and the Supreme

¹⁰⁴⁵ Water Services Act 108 of 1997.

¹⁰⁴⁶ *Mazibuko and Others v City of Johannesburg and Others* para 6.

¹⁰⁴⁷ See the decision of the High Court in *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28.

¹⁰⁴⁸ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28.

¹⁰⁴⁹ See section 11 (1), (2), (3) and (4) of the Water Services Act 108 of 1997.

Court of Appeal”.¹⁰⁵⁰ The Court further held that, the obligation placed by section 27 on the state, strives for the realization of the right to access water. The court further denotes that, the Free Basic Water policy, is informed by progressive realization, thus, it takes time for everyone to have access to sufficient water. In conclusion, the court indicated, contrary to the High Court and the Supreme Court of Appeal. It is inappropriate for a court of law, to quantify what constitutes “sufficient water”, since this is a matter to be best addressed by the government.¹⁰⁵¹ On the installation of pre-paid water meters, the court emphasized that, “the Water Services Act and the City’s By-laws authorized the City to introduce the pre-paid water meters as part of Operation *Gcin’amanzi*”. In this regard, the court concluded that, “the installation of the meters was neither unfair nor discriminatory”.¹⁰⁵²

This study shares similar sentiment with the decision of the courts in this case, and substantiates that, both section 27, of the Constitution, and section 11, of the Water Services Act, promote access to sufficient water supply. In this instance, had the City left the pipes licking, that could have wasted many liters of water. Besides, if the consumers of water do not pay for the usage of water in excess of the free basic water, they tend to waste the provided water supply. This study posits that, water is an essential commodity, thus requires saving at all cost, in schools, households, and everywhere else. For an example, lack of water at the learners’ households, affects their education one way or another, as learners must spend much of their time fetching water from other sources, for household use. This compromises the provision of quality education to learners. This is based on the fact that, learners thus end up spending less of their time on school activities, and more of their time on finding water, for the household use.

7.2.6.3.3 Provision of dignified ablution facilities

The provision and construction of proper sanitation facilities across urban and rural community schools, is of paramount importance.¹⁰⁵³ When providing the sanitary facilities, it is necessary to establish separate restrooms for males and female learners

¹⁰⁵⁰ See *Mazibuko and Others v City of Johannesburg and Others* para 9.

¹⁰⁵¹ See *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

¹⁰⁵² See *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

¹⁰⁵³ Kapur 2019 available at www.researchgate.net retrieved 28-04-2020.

in schools, so that learners have their own space, and privacy while using the restrooms.¹⁰⁵⁴ When providing sanitation facilities, it is important to ensure the availability of other important amenities, such as clean running water, paper towels, soap, and cleaning detergents, for purposes of personal hygiene. It is therefore, important to have proper sanitation facilities, which provide privacy, promote health, and hygiene for a healthy learning environment. Moreover, in the provision of sanitation facilities government must do everything necessary to erect safe, age appropriate, dignified and fully functional restrooms.¹⁰⁵⁵

The importance of provision of proper and dignified ablution facilities, at learner's schools, was examined in the case of, *Komape*.¹⁰⁵⁶ This case involved a learner, five year old boy, died after falling and drowning in a pit toilet, located at his school premises. His parents sought relief for wrongful and negligent breach of care duties towards the learner, which caused his death. The parents alleged that the school failed to provide, and exercise due care for the learner, which resulted to his death. Furthermore, the parents highlighted emphatically, that the death of their son was foreseeable, given the condition of sanitary facilities on the school premises, which they argued they were dilapidated, and not proper.¹⁰⁵⁷

In relation to, the erection of proper sanitation facilities in the school concerned, the court ordered; both the Minister of Basic Education, and the Limpopo Department of Education, to provide and erect, at each rural school, using pit sanitary facilities across the Province with a sufficient number of proper and dignified toilets for each school for the usage of all learners which are easily reached, secured and safe and which provide privacy and promote health and hygiene based on an assessment of the most suitable safe and hygienic sanitation technology.¹⁰⁵⁸ It is therefore, important for government to ensure that, every school, particularly those situated in rural areas, using poor and degrading sanitation facilities, are provided with safe, age appropriate, secured and dignified sanitary facilities, suitable for use by learners and educators. This study

¹⁰⁵⁴ Kapur 2019 available at www.researchgate.net retrieved 28-04-2020.

¹⁰⁵⁵ See *School Governing Body of Dalaguba Junior Secondary School v MEC for Education, Eastern Cape* para 2.2.2 of the order.

¹⁰⁵⁶ *Komape and Others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC.

¹⁰⁵⁷ *Komape and Others v Minister of Basic Education* para 11.

¹⁰⁵⁸ *Komape and Others v Minister of Basic Education* para 72.

argues that, failure to provide proper sanitation leaves learners and educators no choice, but to opt for other unhygienic, undignified and humiliating alternatives, such as dry streams, bushes, fields, or open areas to relieve themselves. This implies that safety is compromised during that time they are away from the school premises for the purposes of relieving themselves or put differently, responding to the call of nature.

The provision of ablution facilities is not only vital in schools, but the significance demonstrated in homes. This was the issue of concern in the case of, *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Other*.¹⁰⁵⁹ In this case, the occupiers of the *Harry Gwala*, an informal settlement near Johannesburg, approached the Court, to compel the provision of toilets, pending a decision on whether the informal settlement required upgrading, or relocation to formal housing. The Court had, by agreement between the parties, ordered the municipality to expand provision of portable water in the settlement, and then dismissed the occupiers' claims for the provision of toilets. Before the matter could reach the Court, the municipality adopted a new policy, the terms of which stated that, every informal settlement within its area of jurisdiction, be provided one public chemical toilet per ten households. The occupiers criticised the policy, cited it as unreasonable in two dimensions. In the first dimension, the claimants argued that, the expectation of the municipality, that ten households share one toilet, compromised the occupiers' right to dignity. Secondly, the claimants argued that, the occupiers be given proper ventilated and improved pit latrines, of their preferred choice.¹⁰⁶⁰

In light of the adoption of the municipality's new policy for the provision of chemical toilets to informal settlements, the respondents offered additional funding to provide at least one chemical toilet for every four households, at *Harry Gwala* informal settlement. Both the occupiers, and the municipality rejected the offer, based on the fact that this would be unfair to other informal settlements within the municipality's area of jurisdiction.¹⁰⁶¹ The occupiers also insisted on their demand for proper toilets, at least one toilet per household. The court ordered the MEC for local government and housing Gauteng, to upgrade the status of Harry Gwala informal settlement, within fourteen months of the date of the court order, by providing proper and dignified

¹⁰⁵⁹ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC).

¹⁰⁶⁰ See *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC).

¹⁰⁶¹ See *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* para 53 and 54.

sanitation facilities, as well as a range of other services, including sufficient lighting to enhance community safety, and access by emergency services vehicles.

7.2.7 Lack of electricity facilities

Electricity is an important source of energy, and without it, life would not be the same. It remains one of the most significant facilities, not only in educational institutions, but also in all organizations, workplaces and homes.¹⁰⁶² Through the accessibility of electricity, people feel comfortable within their ecological conditions, and carry out their responsibilities and activities in a convenient manner.¹⁰⁶³ In most parts of the world, electricity generation is through power stations, and then distributed through networks of transmission power lines, to residential homes, offices, and factories including schools. The availability of electricity facilitates provision of social services, such as lighting, operating technology, cooking, cooling and heating systems, and so forth. However, it is extremely difficult to store the huge quantities of electricity that people need, which means the need for continuous generation of large quantities, sufficient for people's ever-increasing demands.¹⁰⁶⁴

Therefore, lack of electricity in schools inhibits smooth running of academic activities. For this reason, Kapur asserts that, lack of electricity in schools impedes learners' concentration on their studies, and equally precludes educators from proactively discharging their pedagogical duties and responsibilities.¹⁰⁶⁵ Government need to ensure provision of electricity throughout all the schools running without electricity facilities. It is key to indicate that in the present modern existence, learners and educators use technology in the delivery various tasks, including teaching and learning duties which to a major extent use electricity. Moreover, provision of electricity facilities needs supplementary provision from other sources such as generators, inverters and solar energy, to ensure uninterrupted power supply throughout the working day. The reason for the supplementary power supply is, in the event of load shedding the pedagogical activities should continue.

¹⁰⁶² See *Polyoak Packaging (Pty) Ltd v Eskom Ltd* (21218/08) [2011] ZAWCHC para 1.

¹⁰⁶³ Kapur 2019 available at www.researchgate.net retrieved 28-04-2020.

¹⁰⁶⁴ *Polyoak Packaging (Pty) Ltd v Eskom Ltd* (21218/08) [2011] ZAWCHC para 1.

¹⁰⁶⁵ See Kapur, 2019, available at www.researchgate.net retrieved 28-04-2020.

7.2.7.1 Electricity and modern education

It is therefore crucial to recognize that electricity plays a major role in the provision of quality education system in this modern era. Thom posits that, the modern educational system makes provision for the role of technology in teaching and learning, which requires all educational institutions to have access to electricity, in order to meet their respective educational objectives.¹⁰⁶⁶ Furthermore, the World Economic Forum recognizes electricity as key in the digital high technology fourth revolution, which combines technologies, leading to unprecedented paradigm shifts in the economy, in business, society, individual life, and most importantly provision of quality education.¹⁰⁶⁷

A crucial part of the modern educational system is the modification of curriculums using approaches such as OBE including ABET.¹⁰⁶⁸ The central point of the modern educational system is the use scientific apparatus and high technology. Conversely, to achieve this objective, and to be up to date with modern educational systems, there is need for the provision of sustainable electricity, to enable uninterrupted utilization and operation of all the equipment and devices requiring regular electrical power supplies.¹⁰⁶⁹ Equally, programs such as ABET require lighting, as it sometimes takes place during night classes, and the use of Technology Enhanced Learning (TEL), relating to the use of computers, and audio-visual devices, which also run on electricity. The study therefore argues that, if a school is not electrified, it will not be possible to use technological devices such as computers, and as such, compromises the modern educational system.

This also encumbers the smooth running of teaching and learning, since learners' environment falls short of the necessary comfortable to enhance learning activities. Educators too would find it difficult to discharge their day-to-day pedagogical duties and responsibilities without electricity, because most of their teaching aids computers,

¹⁰⁶⁶ Cecile Thom, A development framework for rural electrification: Some preliminary findings, Energy & Development Research Centre, University of Cape Town May 1997 page 15.

¹⁰⁶⁷ See the World Economic Forum Agenda 2017, Forum: The future is bright for the electricity sector. Here's why: available at [https:// www.weforum.org/agenda/2017/01/why-the-future-is-bright-for-the-electricity-industry/](https://www.weforum.org/agenda/2017/01/why-the-future-is-bright-for-the-electricity-industry/) retrieved 28-04-2020.

¹⁰⁶⁸ See Thom, A development framework for rural electrification: Some preliminary findings, Energy & Development Research Centre, University of Cape Town May 1997 page 16.

¹⁰⁶⁹ Thom, A development framework for rural electrification 1997 page 16.

audio visual equipment, and other information technology devices use electricity. Moreover, both learners and educators need to have their teaching and learning activities and programs, in a conducive and welcoming classrooms equipped with proper cooling and heating systems. This means that it will be difficult for both learners and educators to effectively deliver the subject matter without electricity, particularly the use of science and technology. Since educators enhance their teaching methods by use of electrical teaching aids such as computers, it becomes easier for learners to relate the information from the book with what is being displayed before them.

Learners stand to gain substantive knowledge through participation, during practical experiments or use of visual aids. Hence, it is hard for learners to cope without electricity particularly when preparing for examinations. This has a negative impact on the overall school performance, particularly for the previously disadvantaged schools, most located in rural areas, do not have electricity, and cannot afford the use of generators, for lighting or even other teaching and learning apparatus. As a result, those poor schools ultimately produce poor performance, which compromises the quality of education and the learners' right to education.

7.2.8 Corona virus and its impact on educational sector

7.2.8.1 What is corona virus

The recent threat and impediment to access to quality education is corona virus, the so-called COVID-19.¹⁰⁷⁰ It is important to have a clear understanding of what the corona virus is, before examining its impact on the right to education, and the entire educational sector. The World Health Organization (WHO) defines coronaviruses as, “a large family of viruses that cause illness on mammals ranging from the common cold to more severe diseases”. The name derives from the Latin word “*corona*”, which means “crown” or “halo”, and refers to the shape of the virus particle, as viewed under a microscope.¹⁰⁷¹ WHO emphasizes that, “coronaviruses are a large group of viruses that are common among animals” It further asserts that, “in rare cases, they are what

¹⁰⁷⁰ COVID-19 is a disease caused by a new strain of coronavirus. It is also important to explain the meaning of the acronym COVID for common understanding. 'CO' stands for corona, 'VI' for virus, and 'D' for disease. Formerly, this disease was referred to as '2019 novel coronavirus' or '2019-nCoV'.

¹⁰⁷¹ See the WHO definition of coronavirus available at <https://www.cnn.com/2020/01/20/health/what-is-coronavirus-explained/index.html> retrieved 12-05-2020.

scientists call zoonotic, meaning they can be transmitted from animals to humans, according to the US Centers for Disease Control and Prevention”.¹⁰⁷²

According to WHO, “the common signs of infection include respiratory symptoms, fever, cough, and shortness of breath and breathing difficulties. In more severe cases, infection can cause pneumonia, Severe Acute Respiratory Syndrome (SARS), kidney failure and even death”.¹⁰⁷³ COVID-19 is therefore the disease caused by a novel coronavirus, and WHO named it on 11 February 2020, which name is short for coronavirus disease.¹⁰⁷⁴ The WHO declared the outbreak of coronavirus, “a Public Health Emergency of International Concern” on 30 January 2020 and a pandemic on 11 March 2020 respectively.¹⁰⁷⁵ For the purpose of this study, the names coronavirus, and COVID-19 will be used interchangeably.

7.2.8.2 The effect of Corona Virus on the educational sector

According to UNICEF, the outbreak of COVID-19 was declared a Public Health Emergency of International Concern (PHEIC), and the virus spread to all corners of the globe, all countries, and territories including South Africa. What is known about this virus is that, it is transmitted through direct contact with respiratory droplets of an infected person, normally generated through coughing and sneezing. People can also get infected from touching surfaces contaminated with the virus.¹⁰⁷⁶ UNICEF contended that the protection of learners and educational facilities was important. Hence, precautions were necessary for the prevention of the potential spread of COVID-19 in schools and other educational surroundings. Moreover, care also needs to be taken to avoid isolating learners and educators, who might have been exposed to the virus. It is important to keep in mind that the virus does not discriminate in any way, be it based on race, borders, ethnicities, disability status, age or gender.¹⁰⁷⁷

¹⁰⁷² See the US Centers for Diseases Control and Prevention available at https://www.cdc.gov/coronavirus/2019-ncov/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2Findex.html retrieved 12-05-2020.

¹⁰⁷³ See WHO available at <https://www.cnn.com/2020/01/20/health/what-is-coronavirus-explained/index.html> retrieved 12-05-2020.

¹⁰⁷⁴ See WHO available at <https://www.cnn.com/2020/01/20/health/what-is-coronavirus-explained/index.html> retrieved 12-05-2020.

¹⁰⁷⁵ See WHO available at <https://www.cnet.com/health/pandemic-what-it-is-and-how-it-affects-you/> retrieved 12-05-2020.

¹⁰⁷⁶ See UNICEF, the key message and sections for prevention and control in schools, March 2020 available at www.who.int/covid-19/schools retrieved 12-05-2020.

¹⁰⁷⁷ UNICEF, the key message and sections for prevention and control in schools, 2020 page 3 available at

For this reason education settings in all educational institutions continued to be welcoming, and supportive environments created, measures taken by schools to prevent the spread of COVID-19 by learners, educators, and all the support staff who may have been exposed to the virus, while preventing learners, educators and the support staff from segregation.¹⁰⁷⁸ UNICEF recommended that in order to contain the spread of the virus, sick learners, educators and support staff, exhibiting symptoms of the corona virus, need not come to school. This will involve the separation of ill learners and staff from those who are not sick without having to create a stigma and a process for informing parents or caregivers and consulting with health care facilities whenever is necessary.¹⁰⁷⁹

In accordance with the pronouncement by the President of the Republic of South Africa Cyril Ramaphosa, on 15 March 2020, schools closed from Wednesday 18 March 2020. The decision to close schools and educational institutions was informed by the warning provided by the National Institution of Communicable Diseases (NICD) and WHO, who shared the news about an alarming increase in the infection rates from the virus. The decision was also informed by news identifying schools as high risk, hot spot areas, for easy, wide spread infection from the virus.¹⁰⁸⁰

Following the closing of schools, the president announced a countrywide lockdown, as a precatation against the spread of the coronavirus. In an attempt to keep the teaching and learning momentum, the Department of Basic Education introduced digital learning, wherein teaching and learning was taken to the communities through television and radio programmes, in order to support the learners during the period of lockdown. The digital school expanded to community television and radio, to reach an even larger audience.¹⁰⁸¹ The outbreak of the virus also created a dilemma in the

www.who.int/covid-19/schools retrieved 12-05-2020.

¹⁰⁷⁸ UNICEF, the key message and sections for prevention and control in schools, 2020 page 3 available at www.who.int/covid-19/schools retrieved 12-05-2020.

¹⁰⁷⁹ UNICEF, the key message and sections for prevention and control in schools, 2020 page 5 available at www.who.int/covid-19/schools retrieved 12-05-2020.

¹⁰⁸⁰ See Containment/management of COVID-19 for schools and school communities by the Department of Basic Education available at www.education.gov.za> COVID19 retrieved 12-05-2020.

¹⁰⁸¹ See the Department of Basic Education Basic Education expands STEM digital school during Coronavirus COVID-19 lockdown available at <https://www.gov.za/speeches/basic-education-expansion-stem-digital-school-during-covid-19-coronavirus-lockdown-21-apr>. Retrieved 13-05-2020.

institutions of higher learning, such as colleges and universities. The institutions adopted online teaching and learning, to cater for their students despite the pandemic.¹⁰⁸²

However, this study argues that, in the premise, it was difficult to facilitate this process satisfactorily, given the fact that most students did not have access to the appropriate technological devices, and issues of connectivity presented a hindrance for online teaching and learning. This was because most students studying in those institutions are mainly from rural areas and settlements, some without electricity, and definitely no internet connectivity. To promote online teaching and learning, some institutions such as Central University of Technology (CUT), provided students with electronic devices, as not all students had devices or satisfactory connectivity. Some students were still unable to use the devices due to problems with internet connectivity, and other social ills, such as power cuts due to load shedding, or complete lack of electricity at their homesteads, and therefore, in some cases, the remote teaching and learning proved impossible.¹⁰⁸³

Effectively, the corona virus posed a serious threat to the realization of quality education, which also constituted litigation on the subject matter. This was the matter of concern in the case of, *Tebella Institute of Leadership, Education, Governance and Training v Minister of Basic Education*.¹⁰⁸⁴ In this case the applicants brought an urgent application before the Polokwane High Court, to stop the Minister of Basic Education Angie Motshekga from carrying out her recovery plans for the reopening of schools, following the minister's statement. On 30th April 2020, the Minister and the Department of Basic Education presented a statement on the basic education sector recovery plans for the reopening of schools, following the Covid-19 lockdown.¹⁰⁸⁵

¹⁰⁸² See Universities South Africa, Public universities are readying themselves for virtual teaching and learning during the national lockdown, Emergency teaching and learning during the COVID-19 era Available at <https://www.usaf.ac.za/universities-coronavirus-covid-19-updates/>. Retrieved 13-05-2020.

¹⁰⁸³ Universities South Africa, Available at <https://www.usaf.ac.za/universities-coronavirus-covid-19-updates/>. Retrieved 13-05-2020.

¹⁰⁸⁴ *Tebella Institute of Leadership, Education, Governance and Training v Minister of Basic Education case No: 2647/2020*.

¹⁰⁸⁵ See statement by the Minister of Basic Education, Mrs. Angie Motshekga on the basic education sector recovery plans for the reopening of schools, following the covid-19 lockdown adjustment of regulations available at <https://naptosagp.org.za/index.php/8-sub-article/840-statement-by-minister-of-basic-education-30-april-2020>. Retrieved 12-05-2020.

On the statement, the Minister announced they had deliberations about the precautions necessary to allow reopening of schools. He further announced that reopening of the schools would start with grades seven and twelve. The Minister further alluded that, “in the preparations for the opening of schools, as the Department of Education in consultation with the Department of Health, they have developed standard operating procedures for the containment and management of the corona virus for schools and school communities”. The standard operating measures provided strategies for all the administrators involved with the steps and processes to be undertaken to contain the spread and manage current cases of corona virus.¹⁰⁸⁶

The minister indicated on the report that, the National Coronavirus Command Council (NCCC) approved and recommended that the school calendar for 2020 be adjusted as follows:

Office-based staff must report for duty on the 04th May 2020 following the directive from the Department of Public Service and Administration. Then, school management teams should return to work on the 11th May 2020. The minister stressed that this was done to ensure that the management teams would prepare the school premises for the return of the learners. Educators to report for duty on the 18th May 2020 and of relevance to this study, grade seven and twelve learners to go back to school on the first day of June 2020.¹⁰⁸⁷ The minister pointed out on her report that the strategy is to have the school officials in the school premises so that they would be able to receive the required materials for safety purposes and to prepare the school for teaching and learning under the new and or different conditions.¹⁰⁸⁸

Based on the Minister’s report, the applicant in the case of, *Tebeila Institute of Leadership, Education, Governance and Training v Minister of Basic Education*, sought relief to prevent the Minister from allowing or directing that, grade seven and twelve learners report to their respective schools on the first day of June 2020. Simply,

¹⁰⁸⁶ The Minister stated that the Standard Operating Procedures will include Guidance for childcare facilities and schools on preventing the spread of the Corona Virus; Role of childcare facilities and schools in responding to the COVID-19; Management of COVID-19 cases in a childcare facility or school; Guidelines for Heads of Departments and Supervisors on COVID-19 – procedures regarding employees; Management and monitoring of absenteeism in schools; Management of learner transport measures; Closure of a unit / component / office / department, if an employee tested positive for COVID-19; and How to clean educational establishments, where there were learners, staff members, or others, with suspected or confirmed cases of COVID-19.

¹⁰⁸⁷ See statement by the Minister of Basic Education available at <https://naptosagp.org.za/index.php/8-sub-article/840-statement-by-minister-of-basic-education-30-April-2020> page 12. Retrieved 12-05-2020.

¹⁰⁸⁸ See <https://naptosagp.org.za/index.php/8-sub-article/840-statement-by-minister-of-basic-education-30-april-2020> page 13. Retrieved 12-05-2020.

the application requested to halt the Minister's schools' recovery plan. The applicant alleged that it was too early to let the learners return to school and by so doing, the Minister exposed said learners to the virus, and as such compromised their right to live through what was called, "saving the academic year 2020"

In response to the applicant's allegations, the respondent opposed the application, on the following grounds: First, the respondent submitted that the matter was not urgent, and therefore applicant should not have brought the matter on urgent basis. Second, the applicant failed to submit sufficient evidence, or demonstrate their legal standing, to prove the necessity of litigation.¹⁰⁸⁹ Third, the respondent submitted that Polokwane High Court did not have jurisdiction over the matter. The applicant should have taken the application to the Pretoria High Court, which has jurisdiction over the office of the Minister of Education, and where the Department is located. Furthermore, the Pretoria High Court was the area of jurisdiction for all the other relevant actions, such as the public statement by the Minister, made on 30th, April 2020, and the decision regarding the phased re-opening of schools for grade seven and twelve learners.¹⁰⁹⁰

Last, the respondent emphasized the application's incorrect propositions. Example, the respondent indicated that the applicant advanced a false proposition that, according to the Minister's report, the learners would return to school without putting any proper precautions and protocols in place, to safeguard learners' safety against potential infection from the corona virus. To prove its case, and put it in the proper perspective, the respondent stated that, the applicant's case alleged, the statement by the Minister of Education demonstrated the Minister already took the final decision to re-open the schools, which the respondent argued was not the case.¹⁰⁹¹

In deciding this matter, the Court dismissed the applicant's case. In dealing with this matter, Muller J cited, in his judgement that, the court had no jurisdiction to hear the

¹⁰⁸⁹ See *Tebeila Institute of Leadership, Education, Governance and Training v Minister of Basic Education* para 7 of the respondent's affidavit.

¹⁰⁹⁰ See *Tebeila Institute of Leadership, Education, Governance and Training v Minister of Basic Education* para 8 of the respondent's answering affidavit.

¹⁰⁹¹ *Tebeila Institute of Leadership, Education, Governance and Training v Minister of Basic Education case* para 11 of the respondent's answering affidavit.

matter, and make any determination. In his judgment Muller J agreed with the department's argument that, the competent court to deal with this matter would have been the Pretoria High Court, located in Pretoria, where the offices of the minister and the department of education are also located, and not in Polokwane.¹⁰⁹²

7.3 The issue of bullying in schools

It is necessary to take a close look at the meaning of the word bullying, before considering its effects on the system of education in schools. Piskin defines bullying as, a situation wherein a learner is repeatedly, and or over time subjected to undesirable conduct from one, or more other learners.¹⁰⁹³ At first hand, this illustrates direct physical conduct, for example, pushing, pulling or even hitting. On the other hand, it encompasses direct verbal actions, for example, insulting, intimidating, calling hurtful names, and so on. Moreover, at times bullying is indirect, for example, spreading rumors, causing social exclusion, and so on.¹⁰⁹⁴ Piskin further asserts that, this conduct normally takes place in three different dimensions. In the first instance, it involves antagonistic behavior or deliberate harm doing. In the second, the bullying is committed frequently, and over time. Lastly, it usually takes place within an interpersonal-relationship environment characterized by an imbalance of power.¹⁰⁹⁵

7.3.1 Bullying behavior in schools

According to Piskin, bullying in schools remains a global problem, with adverse consequences on the school environment, and the right of learners to perform their teaching and learning activities, in a comfortable and safe environment, without fear of victimization.¹⁰⁹⁶ Moreover, bullying can have adverse, lifelong consequences for,

¹⁰⁹² See the decision of *Tebeila Institute of Leadership, Education, Governance and Training v Minister of Basic Education* case.

¹⁰⁹³ Metin Piskin, School Bullying: Definition, Types, Related Factors, and Strategies to Prevent Bullying Problems, *Educational Sciences: Theory and Practice* 2002 2(2) page 556. Available at https://www.researchgate.net/publication/284631890_School_bullying_Definition_types_related_factors_and_strategies_to_prevent_bullying_problems retrieved 08-05-2021.

¹⁰⁹⁴ Piskin, School Bullying: Definition, Types, Related Factors, and Strategies to Prevent Bullying Problems, *Educational Sciences: Theory and Practice* 2002 2(2) page 556.

¹⁰⁹⁵ Piskin, School Bullying: Definition, Types, Related Factors, and Strategies to Prevent Bullying Problems, *Educational Sciences: Theory and Practice* 2002 2(2) page 556.

¹⁰⁹⁶ Piskin, School Bullying: Definition, Types, Related Factors, and Strategies to Prevent Bullying Problems, *Educational Sciences: Theory and Practice* 2002 2(2) page 555.

the learners who bully others, and those who become victims of bullying.¹⁰⁹⁷ This study posits that, the implication of this is that, bullying is a serious social challenge, which directly affects a large number of learners in schools, either as bullies or as the victims. This study stresses that bullying usually occurs in, or around school premises, with the outdoor play area being the most common location. This study submits that, the play area is where bullying behavior is more rampant, as learners are usually not monitored in that space. The corridors leading to the learners' respective classrooms are also among other spaces where bullying is likely to occur. At times, it also happens inside the classrooms, and outside school premises. According to Boulton and Smith, there are three groups of learners affected by the bullying behavior, namely, the victims, the bullies and those bullies who themselves also get bullied.¹⁰⁹⁸

7.3.2 The effects of bullying

It is trite that, bullying behavior can have an antagonistic effect on the bullied learner and their educational life. It is inevitable that victims of bullying become nervous and fearful, in the setting in which the bullying took place, and in the company of the perpetrators. This means they are more likely to respond with evasive actions, which has a negative impact in their academic activities. This may include absenteeism, or absconding from school, avoiding certain places at school, self-isolation, and even suicide in extreme cases. At times, the victims may even become aggressive, bring weapons to school in readiness to retaliate, or defend themselves. Such extreme conduct disturbs the victims' attention and concentration on their school activities, resulting in poor academic performance, or a drop in school grades, and sometimes dropping out of school completely. More often than not, victims are severely affected to such an extent they become suicidal, refuse to go back to school, or even develop chronic illnesses, such as depression, anxiety attacks. This affects the provision of quality education, and as a result interferes with the right to education. This highlights that bullying is also an impediment in realizing access to education, and as such, it negatively affects the psychological, social, as well as educational development of learners.

¹⁰⁹⁷ Dan Olweus, *Bullying at school: What we know and what we can do*. Malden, MA: Blackwell Publishing, 1993 page 140.

¹⁰⁹⁸ Michael Boulton and Peter Smith, *Bully/victim problems in middle school children: Stability, self-perceived competence, peer perceptions and peer acceptance*. *British Journal of Developmental Psychology* 1994.

7.3.3 Strategies to combat bullying in schools

To combat bullying in schools, this study submits that, it is imperative that learner victims immediately report any such malicious conduct to their caregivers, and or educators. In contrast, the reality on the ground is that, most learners who fall victim rebelliously opt not to report the actions to either their caregivers or educators. To possibly stop or prevent the bullying in schools, this study submits that, learners, educators, parents or caregivers need to acknowledge the existence of bullying behavior, and concede that it is a persistent problem, that necessitates implementation of schoolbased intervention programs. In doing so, the study recommends that, the school community, including parents or caregivers, be conversant with bullying behavior and its effect on the educational system. Furthermore, the onus is on the school community to proclaim this behavior malicious, and intolerable, therefore must encourage learners to report such conduct immediately. Consequently, schools must develop relevent policies, and implement appropriate programs, such as anger management, to deal decisively with anger and violence, including teaching the learners alternatives ways of releasing the aggression.

7.4 Conclusion

It is worth noting that, learners globally, have the same educational needs and desires. Emphatically, lack of proper and quality education, hinders the progressive development of learners or children in general. Furthermore, it is the learners' right that they all pursue their education at adequately resourced schools, or educational institutions, with proper educational facilities such as clean running water, dignified sanitary facilities, good electrified and spacious classrooms, libraries and related amenities in order to enjoy the companionship of teaching and learning. The provision of these facilities and amenities assists learners to benefit from the education process, thus acquire critical thinking strategies, to afford them meaningful contribution towards the economy, and the overall life environment.

However, lack, and or poor provision of these educational amenities, negatively affects the realization of quality education. Moreover, the existence, or rampant presence of social ills and obstacles, such as poverty, unemployment, HIV and AIDS, and so forth, as discussed in this chapter, interferes with the effective realization of quality education, as it prevents the successfull acquisition of relevant knowledge and skills.

This ultimately, and directly affects overall economic and the social development of the country. Quality education plays a pivotal role particularly in the eradication of poverty. Therefore, in conclusion, education is significant to all global economies and societies.

The laws, such as the Constitution of South Africa, SASSA, as well as international instruments discussed in this study, emphasize that, learners have the right of access to education, and that the obligation is on signatories to the international instruments, to provide learners or children in particular, with education, and help them accomplish their educational needs, and enrich themselves. For this reason, the South African government is obligated to fulfill its statutory mandate, since the Constitution is the ultimate law of the country, any law or conduct found to be inconsistent with it is invalid, and it must be satisfied.¹⁰⁹⁹ South Africa is also a signatory to the regional and international instruments discussed in this study. Therefore, it is obligated to give effect to the right to education. Nevertheless, social ills and obstacles, such as poverty, unemployment, less capacitated educators, dilapidated classrooms, HIV and AIDS, as discussed in this chapter, impede the realization of quality education.

The significance of acquiring quality education, and the impact education has on the development of individuals, is emphasized throughout this study, and therefore, it is key to emphasize the importance of protecting the right to education, since the right is interrelated to the right to development. Similarly, it is necessary to address, and find the best approach for resolving the challenges prohibiting the smooth running of teaching and learning activities and responsibilities. Further, the protection of education should not only be confined to elementary, or basic education, or learners of a specific age, however it should cover education in general, and accommodate every learner despite their age. It is irrefutable to say that, education provides a means through which every individual can respond to their human rights, responsibilities and commitments, which are central tools for fulfillment of the goals of equality and harmony.¹¹⁰⁰ This chapter concludes that, without addressing the social ills and

¹⁰⁹⁹ For the supremacy of the Constitution, see section 2 of the Constitution of the Republic of South Africa, 1996.

¹¹⁰⁰ See Human rights education associates available at http://www.hrea.org/index.php?doc_id=402, retrieved 25-05-2020.

challenges that prohibit the realization of quality education, South African government will not accomplish the educational needs and desires of its people.

CHAPTER 8: COMPARATIVE ANALYSIS WITH CHINA, FINLAND AND SINGAPORE

8.1 Introduction

In this chapter, the study employed the legal comparative method, to find resolutions, in particular, to explore possible the most feasible means to achieve accessibility, enforcement, and effective realization of the right to quality education. In this chapter, the development of legal rules is examined, which includes the interaction between laws, and proposed solutions to existing laws based on the comparative, and extensive review of relevant literature, laws, statutes, and national and international instruments. China, Finland and Singapore were used as comparator countries and valuable lessons from these countries were drawn and applied, to improve and strengthen South African laws and educational approaches. The reasons for using these countries are that they have some of the best practices for providing, and delivering quality education, to their learners which lessons are introduced from the elementary educational level. These practices include equity in allocation of educational resources, provision of free transportation for learners, to and from their schools, and fee-free education. These countries have laws, policies and legislation, such as the Basic Education Act, the Compulsory Education Law of the People's Republic of China (1986), as amended and the Skills Future Singapore Agency Act, aimed at driving quality education.

Although the challenge may relate to transplanting an educational system from one country to another,¹¹⁰¹ South Africa can draw valuable lessons, and immensely benefit from international¹¹⁰² comparative experiences.¹¹⁰³ Moreover, this study emphasizes the benefits of taking initiatives, to improve educational institutions, and their practices, thus where necessary follow precedents from other countries. It is for this reason that this study used international developments as a point of reference in relation to the South African educational system. Below, the chapter single out and discusses some

¹¹⁰¹ Geoffrey Samuel, *An introduction to comparative law theory and method* (UK, Hart Publishing Oxford Portland 2013) 45.

¹¹⁰² Ryan Goodman and Derek Jinks, *Socialising states – Promoting human rights through international law* (Oxford University Press 2013) 1-16.

¹¹⁰³ Pierre Legrand, 'The Impossibility of legal transplants' (1977) 4 *Maastricht Journal of European and comparative Law* 1111.

of the countries used as a point of reference for they are known to be having the best educational system.

8.2 China

The People's Republic of China (hereinafter China), is a country situated in East Asia. It is the world's highest populated republic with a residents of about 1.4 billion as of 2019. According to Worldometer elaboration of the latest United Nations data, as of June 2020, China's population estimated 1,439,237,384. China's population equated to 18.47 per cent of the total world population.¹¹⁰⁴ Covering almost 9.6 billion square kilometers, it is one of the world's largest countries in terms of area.¹¹⁰⁵

China has twenty-three (23) provinces, five independent regions (Guangxi, Inner Mongolia, Ningxia, Tibet and Xinjiang), and four direct-controlled municipalities (Beijing, Shanghai, Chongqing and Tianjin). China was declared a republic in 1949, and from that time, it has been a single-party state, with dominantly organised political and fiscal arrangements, and resources, for manufacturing, owned and run by the state.¹¹⁰⁶

8.2.1 An overview of the China's educational system

Like any other country, China's educational system consist of basic and higher education. In China basic education comprises of a three year pre-school education, six years primary education, three year lower secondary (also referred to as junior high school), and three year upper secondary (also referred to as senior high school) education.¹¹⁰⁷ At upper secondary education level, there is a progressively large sector of vocational-technical education, which comprises about 50 per cent of the total learner intakes at upper secondary level. Moreover, the higher education consists of; two to three years of college, mostly comprising of education of vocational-technical nature, four-year university, or college offering bachelors' degrees, and some other

¹¹⁰⁴ Worldometer available at <https://www.worldometers.info/demographics/china-demographics/> retrieved 25-06-2020.

¹¹⁰⁵ According to the Worldometer elaboration of the latest United Nations data, the current population of China as of Thursday, June 25, 2020, is estimated at 1,439,237,384. Based on the information by Worldometer data China's 2020 mid-year population is estimated at 1,439,323,776 people according to UN data.

¹¹⁰⁶ See Education system China EP-Nuffic 2nd edition December 2010 version 3 January 2015.

¹¹⁰⁷ Zhou Nanzhao and Zhu Muju, Educational Reform and Curriculum Change in China: A Comparative Case Study, International Bureau for Education, Completed in December 2006 and revised in April 2007 page 4.

forms of higher education and training. Post-graduate programmes include master's degrees, which take two to three years, and doctoral degree programmes, which take three years.¹¹⁰⁸ There is a single Ministry of Education (MOE), under the State Council, as the central educational authority, responsible for overall planning and policy - making in the educational sector. Management of elementary education largely dispersed to, provincial, or municipal, and county governments, and or stakeholders. Higher education is controlled and overseen at the national, provincial, or municipal levels.¹¹⁰⁹

China's compulsory education persists for nine years. This consists of primary school attendance for at least six years, at times preceded by a few years of preschool. Preschool education is not compulsory, and therefore most of the preschools are under private ownership. However, the state is taking a more active role by encouraging the enrolment of children into preschool before taking them to primary school. Same as in South Africa, compulsory education in China is comprises six years of primary school, and three years of lower, or junior high school.¹¹¹⁰ After completion of the compulsory education, learners proceed to senior secondary, or high school, normally provided for by three different types of schools, namely, general senior school, specialized (also referred to as technical) and vocational (also referred to as professional) schools.

Specialized and vocational schools offer, subject, or work specific education, and training. Graduates from these schools normally acquire occupation-specific skills required, to enter the labour market. However, it is also possible for a graduate from a specialized school, to take the national university entrance examination, and go into a vocational university; yet, although it is rare in practice.¹¹¹¹ Higher education is provided for by institutions of higher learning, including universities and colleges (general, technical and vocational), and entry into these institutions is highly competitive. The right to grant Bachelors' degrees is bestowed on the individual universities. However, this right is also being granted to specialized institutions, such

¹¹⁰⁸ Nanzhao and Muju, Educational Reform and Curriculum Change in China: A Comparative Case Study, International Bureau for Education, Completed in December 2006 and revised in April 2007 page 4.

¹¹⁰⁹ Nanzhao and Muju, Educational Reform and Curriculum Change in China: A Comparative Case Study, International Bureau for Education, Completed in December 2006 and revised in April 2007 page 4.

¹¹¹⁰ Nanzhao and Muju, Educational Reform and Curriculum Change in China 2007 page 4.

¹¹¹¹ Nanzhao and Muju, Educational Reform and Curriculum Change in China 2007 page 4.

as medical and agricultural schools, including educators' training schools. These universities, and some of the specialized institutions, also have the right to grant Masters' and Doctoral degrees. The colleges mostly provide non-university, post-secondary education, and the graduates receive diploma qualifications.¹¹¹²

Education in China remains the responsibility of the Ministry of Education of People's Republic of China. The Ministry of Education is the stakeholder of the State Council, whose duty is to oversee educational matters across the country.¹¹¹³ State Council is the main managerial authority in China, headed by the Premier. The Council is responsible for executing the policies, regulations including the laws implemented by the National People's Congress.¹¹¹⁴ At the country or the national level, there are bureaus responsible for education, whereas, at the provincial level, there are departments, or commissions of education, responsible for educational matters. The departments or commissions of education, or the universities, under the Ministry's management, implement educational guidelines and policies, designed by the Ministry of Education locally.

At times, local educational authorities and departments of education, formulate policies and documents corresponding with the national policies, but comprising of the local regulations and strategies, for specific implementation. This means that as local government implements policies, it can add more practical adjustments and guidelines. As a result, the policies and documents, designed by the central or the national government, aim to set general goals, rather than dictate specific approaches. Thus, when these plans and approaches reach schools, and or educational institutions, they already include practical guidelines.¹¹¹⁵

¹¹¹² Nanzhao and Muju, *Educational Reform and Curriculum Change in China*, 2007 page 5.

¹¹¹³ For a thorough discussion of the Ministry of Education in China see *Education in China: A Snapshot OECD 2016* page 12.

¹¹¹⁴ The responsibilities of Ministry of Education in China include among others to draw up strategies, policies and plans for educational reform and development; and to draft relevant rules and regulations and supervise their implementation. For a detailed responsibilities of the Ministry of Education in China see Annexure A, *Education In China: A Snapshot, OECD 2016* chapter 1 page 58-59.

¹¹¹⁵ *Education In China: A Snapshot, OECD 2016* chapter 1 page 12 para 2.

8.2.2 The right and the promotion of quality education in China

Good quality education has always been highly cherished in China. According to Huimin and Xiang, the Chinese people believe that quality education ensures, not only future development of individuals, but also promotes the Chinese, including the country's prosperity.¹¹¹⁶ The Chinese government values the acquisition or attainment of quality education. It believes that quality education forms the foundation of national development, and modernization. Like South Africa, China has numerous educational laws, and regulations. These educational laws, and regulations, represent the most effective operative ways of navigating and monitoring applications, throughout a large and complex (educational) system.¹¹¹⁷

Thus, the Chinese government uses educational laws and policies, to promote and care for the right to have access to education, including educational institutions, and to guarantee the realization of education of high quality and standard. These laws and regulations, often drafted by the Ministry of Education, are then submitted to the, National People's Congress for final approval. Once the laws are approved, the, State Council promulgates or passes them, and the National People's Congress validates the local policies, regulations and application strategies at the respective levels.¹¹¹⁸ Some of the, important educational laws, and their ostensible contributions, are discussed hereunder:

8.2.2.1 Compulsory Education Law of the People's Republic of China (1986) as amended (CEL)

For example, the law on compulsory education, enacted in 1986, was a breakthrough law for China. According to the Compulsory Education Law of 1986, "every school-age child with the Chinese nationality have the right to receive compulsory education and their parents have the responsibility to enroll their children in schools and to ensure that those children attend and complete nine years of compulsory education". Article 4 of the Compulsory Education Law of 1986 provides that, "the State, the community, schools and more importantly families shall in accordance with the law

¹¹¹⁶ See Qin Huimin and Zhou Xiang, Private Higher Education in China: History, Legislation and Future, Australian and New Zealand Education Law Association (ANZELA) Conference 2016 page 3.

¹¹¹⁷ Education In China: A Snapshot, OECD 2016 chapter 1 page 12 para 4.

¹¹¹⁸ Education In China: A Snapshot, OECD 2016 chapter 1 page 12 para 4.

safeguard the right to compulsory education of school-age children”.¹¹¹⁹ This law was, formulated in accord with the, Constitution of the People’s Republic of China, and the actual conditions persisting in China, for the purpose of upholding rudimentary education, and building of a collective society, that is culturally, ideologically, materially, developed.

Moreover, the Act provides that, “in relation to the provision of compulsory education, the state policies and regulations supporting quality elementary education must be implemented to improve the quality of instruction and to enable every school-age child to achieve all-round development morally, intellectually and physically so as to lay a robust foundation for improving the qualities of the entire nation and for cultivating a well-educated and self-disciplined builders of socialism with high ideals and moral integrity”.¹¹²⁰ This law provides further that, all school-going age children, shall attend and complete the compulsory education at no cost, and in support of general school attendance by the poor learners, the state shall establish a financial aid system.¹¹²¹ This means that there shall be no tuition fees for all learners receiving compulsory education.

This law was, also formulated with the purpose of guaranteeing, and enforcing, the application of compulsory education policy, and augmenting the quality of the Chinese nation.¹¹²² This law provided among others that, “the state council and the local people’s governments at the county level and above shall reasonably allocate the educational resources, improve the conditions of weak schools, take measures to ensure implementation of the compulsory educational policies, and guarantee that school-age children from families with financial difficulties receive compulsory education”.¹¹²³ This law depicts that, “in this country there should be a body which supervises compliance with educational laws and regulations in the educational work,

¹¹¹⁹ See Article 4 of the Compulsory Education Law of the People’s Republic of China 1986 as amended in 2006. This law established a comprehensive system, and described rules for schools, teachers, teaching and learning, as well as education financing and the legal responsibilities of social sectors. The law was revised in 2006.

¹¹²⁰ See Article 3 of Compulsory Education Law of the People’s Republic of China 1986 as amended in 2006.

¹¹²¹ See Article 11 of Compulsory Education Law of the People’s Republic of China 1986 as amended in 2006.

¹¹²² Article 1 of the Compulsory Education Law of the People’s Republic of China, Adopted at the Fourth Session of the Sixth National People’s Congress on April 12, 1986, and amended at the 22nd Session of the Standing Committee of the Tenth National People’s Congress on June 29 2006.

¹¹²³ See Article 6 of the Compulsory Education Law of the People’s Republic of China (1986) as amended in 2006.

teaching quality and development which body shall issue supervisory reports to the general public”.¹¹²⁴

8.2.2.2 The Constitution of the People’s Republic of China (1982) as amended in 2004

The Constitution of the People’s Republic of China provides that, “the state develops educational facilities of various types in order to wipe out illiteracy and provide scientific, technical and professional education for workers, peasants, state functionaries and other working people”.¹¹²⁵ It also encourages people to become educated, and acquire relevant skills, through self-study. This Constitution provides that, “it is the state’s obligation to provide necessary vocational training to citizens before they are employed”.¹¹²⁶

8.2.3 China’s success story through Technical Vocational Education and Training (TVET)

The Chinese TVET, an all-inclusive educational system, introduced by the government, aimed to meet the needs of Chinese citizens at different levels. To meet China’s industrialization drive challenges, the state frequently takes legislative initiatives and measures, to restructure China’s TVET system. For example, the Vocational Education Law of 1996 provides, the structure for the application, and enforcement of vocational education, and training systems. Through this educational law, China ensured a strong collaboration between vocational institutions, and the society, enterprises and villages, and the country, to become market-oriented, through approaches, such as learning and practice, learning while working, and putting more emphasis on practical and vocational competencies and skills, rather than theoretical learning.¹¹²⁷

Article 3 of the Vocational Education Law of 1996 provides that, “vocational education constitutes an important component of the nation’s educational undertakings as well

¹¹²⁴ The Compulsory Education Law of the People’s Republic of China (1986) as amended in 2006 Article 8.

¹¹²⁵ See paragraph 2 of Article 19 of the Constitution of the People’s Republic of China (1982) as amended in 2004.

¹¹²⁶ See Article 42 of the Constitution of the People’s Republic of China.

¹¹²⁷ See Skills Development in India, 2015 page 35 available at http://www.dget.nic.in/upload/uploadfiles/files/MX-M453N_20140829_190139.pdf. Retrieved 12-07-2020.

as an important avenue for promoting economic and social development and employment". It further provides that, "the State undertakes the development of vocational education, promotes its reform so as to improve its quality and institute and perfect the system of vocational education that suits the needs of the socialist market economy and the need of social progress".¹¹²⁸

China's vocational education informed by, the country's skills development model, turned into a highly successful story, and improved rapidly. In China, fifty-nine (59) per cent of the people entering the labour market are skilled, and from that percentage, thirty nine (39) per cent hold vocational trained skills. The skills development model in China, empowered the transformation of many of China's secondary schools, into skills-training institutions, and effectively encouraged internships and placements, for the vocationally trained persons.¹¹²⁹ The vocational education system in China, consist of education in vocational schools, and vocational training. Education in vocational schools is more theory based, and administered by the Ministry of Education, with a nominal emphasis on vocational training. Likewise, the Ministry of Human Resources and Social Security (MOHRSS), administers vocational training, concentrating on post-school, pre-employment, and on-the-job practical training, as well as training and re-training, for those out of school or out of work.¹¹³⁰

8.2.4 Salient features of China's vocational education

China has school-education, as well as vocational training, offering hands-on training to learners. Legislation, such as, the 1996 Vocational Education Law, guarantees and emphasizes, active industry involvement in vocational education and training. Article 5 of the Vocational Education Law provides that, "citizens shall have the right to receive vocational education according to law".¹¹³¹ As per the policy directive, every student ought to spend at least one year on occupation, or workplace training, during the upper secondary programme. Consequently, this makes industry participation a significant and integrated characteristic, of the entire TVET system. It is also important

¹¹²⁸ Article 3 of the 1996 Vocational Education Law of the People's Republic of China.

¹¹²⁹ Skills Development in India 2015 page 35 available at http://www.dget.nic.in/upload/uploadfiles/files/MX-M453N_20140829_190139.pdf. Retrieved 12-07-2020.

¹¹³⁰ Skills Development in India 2015 page 35 para 4 available at http://www.dget.nic.in/upload/uploadfiles/files/MX-M453N_20140829_190139.pdf. Retrieved 12-07-2020.

¹¹³¹ See Article 5 of the 1996 Vocational Education Law of the People's Republic of China.

to emphasize that, in China the government is not the only body responsible to provide vocational education.

Enterprises also actively participate in the provision of vocational education, by designing curriculums, training educators, the provision of equipment training in schools, and educational institutions, and placement of learners for internships, and so on. This is stated in Article 6, which provides that, “people’s governments at various levels shall incorporate the development of vocational education into their plans for national economic and social development. It further provides that trade organizations, enterprises and institution shall in accordance with law; fulfill their obligations to provide vocational education”.¹¹³² In addition, commerce also gives numerous fiscal inducements, to encourage active industry involvement in vocational training, for example, the allocation of land at subsidized prices, and first and preferential treatment in cases of the awarding of government projects.¹¹³³

Moreover, the vocational education institutions, and their skill development programmes, in China are decentralized, run by the local government and village collectives. The local authorities, are given a platform to decide on a portion of the curriculums, in accord with local needs. For instance, “the curricula of vocational schools and related institutions are designed such that, one-third includes general academic skills defined nationally by the Ministry of Education, another third are nationally defined content associated with the particular occupation, and the remaining third are determined locally at the school level with the help of local enterprises”.¹¹³⁴ Article 11 provides that, “the administrative departments for education, labour and other relevant departments under the State Council shall, within their respective functions and responsibilities defined by the State Council, be responsible for the different aspects of vocational education”.¹¹³⁵ It further provides that, “local people’s governments at or above the county level shall strengthen leadership, overall

¹¹³² Article 6 of the 1996 Vocational Education Law of the People’s Republic of China.

¹¹³³ Article 6 of the 1996 Vocational Education Law of the People’s Republic of China.

¹¹³⁴ Skills Development in India, 2015 page 37 available at http://www.dget.nic.in/upload/uploadfiles/files/MX-M453N_20140829_190139.pdf. Retrieved 12-07-2020. For example, in Chongqing, the shares of primary, secondary and tertiary sectors are 8, 55 and 37 per cent respectively. Accordingly, the focus of trades in the curriculum for the respective sectors is 7, 52 and 41 per cent respectively.

¹¹³⁵ See Article 11 of the 1996 1996 Vocational Education Law of the People’s Republic of China.

coordination, supervision, guidance and assessment of vocational education in areas under their jurisdiction”.¹¹³⁶

Regarding the funding and financing mechanisms, the 1996 Vocational Education Law requires that, “twenty (20) per cent of the annual education budget should be allocated to vocational education and training”. Article 26 provides that “the State encourage efforts to raise funds in accordance with the law and through multiple avenues for developing vocational education”.¹¹³⁷ Financing of the provision of vocational education, is not the sole responsibility of the state, but also of enterprises and other private institutions, through donations. This means all stakeholders and institutions, join hands for the successful provision of quality vocational education. The State encourages enterprises, institutions, non-governmental organizations, other public organizations, and individuals, to donate towards aiding vocational education, also encourages organizations and individuals abroad, to fund or donate towards vocational education.¹¹³⁸

In addition, all enterprises, are required to utilize 1.5 per cent of their payroll, for in-house training, and failure to do so, requires that an equivalent amount, be donated to the State, for vocational education, and adult training. Likewise, the standard and quality of vocational education in China is not compromised. To ensure that vocational education in China is of good quality and high standard, the government investments huge in providing quality infrastructural amenities, for vocational education and training. Moreover, China has strong arrangements, to ensure educators in vocational institutions remain abreast of the requirements of modern industry. By so doing, educators, in vocational institutions, must spend at least one month in the respective industry, each year, or at least two months, every two years.¹¹³⁹

8.2.5 Lessons to be learned from China

This study posits that, following the promulgation of the above laws, it is without a shadow of uncertainty that such initiative by China proved to be a significant

¹¹³⁶ Article 11 of the 1996 Vocational Education Law of the People’s Republic of China.

¹¹³⁷ Article 26 of the 1996 Vocational Education Law of the People’s Republic of China.

¹¹³⁸ Article 35 of the 1996 Vocational Education Law of the People’s Republic of China.

¹¹³⁹ See Skills Development in India 2015 page 38 available at http://www.dget.nic.in/upload/uploadfiles/files/MX-M453N_20140829_190139.pdf. Retrieved 12-07-2020.

breakthrough for China's educational system. For example, the Compulsory Education Law of 1986, in accord with the Constitution of the People's Republic of China, warrants all Chinese nationals of school-age, the right to compulsory elementary education. Of importance is that, this law advocates for government, and most significantly, the community, schools themselves, and the families, to ensure all children attain compulsory elementary education.¹¹⁴⁰

This study postulates that, the situation is different in South Africa, because in terms of the SAsA, parents and or guardians hold the responsibility for children to enroll, attend and complete compulsory education.¹¹⁴¹ Like in China, it ought to be the responsibility of government, communities, and everyone responsible for the smooth running of the school, or the educational system, to ensure that children of school-age attend and complete their compulsory education. Consequently, this study submits that South Africa must adopt this approach, based on its success in China. The approach continues to be an accomplishment in China, because the responsibility of ensuring attendance and completion of compulsory education is an activity that requires cooperation between the state, and all the stakeholders responsible for the protection of education.

Similar to South Africa, and in relation to this law, China lets off parents from the responsibilities of paying school fees. This law posits that, in support of the provision of general school attendance, the state provides financial assistance to the needy and marginalized, whereas compulsory education shall be provided at no cost.¹¹⁴² In South Africa, section 39 of the SAsA, accentuates this assertion by providing that, a school fees may only be determined and paid at a public school, provided there is a resolution to that effect.¹¹⁴³ This means that, compulsory elementary education must be provided for at no cost.

Similarly, the Constitution of the People's Republic of China of 1982, promotes eradication of illiteracy, through the development of educational institutions and facilities, such as institutions providing technical and or vocational education.¹¹⁴⁴ The Constitution prioritizes equipping the entire labour force, including farm workers, state

¹¹⁴⁰ Article 4 of the Compulsory Education Law of the People's Republic of China 1986 as amended in 2006.

¹¹⁴¹ Section 3 (1) of the South African Schools Act.

¹¹⁴² Article 11 of Compulsory Education Law of the People's Republic of China 1986 as amended in 2006.

¹¹⁴³ Section 39(1) of the South African Schools Act.

¹¹⁴⁴ Article 19 of the Constitution of the People's Republic of China (1982) as amended in 2004.

employees, and other working personnel, with specialized education skills, pertinent to their fields. The Constitution does not only prioritize equipping the working force with professional education, but emboldens them to engage in lifetime learning, to attain the necessary expertise relevant to their respective occupations.¹¹⁴⁵ South Africa must also emulate China in this regard, and strive to empower every work force, by employing sustainable workers development programs.

To meet its economic development drive, and challenges, China reformed its TVET system, by adopting statutory initiatives. For instance, promulgating the Vocational Education Law of 1996 as an initiative to bring the vocational education and training close together. This Act advocates for the prioritization of active industry participation, practical and vocational competencies, as opposed to theoretical teaching and learning, while epitomizing a sustainable collaboration between vocational institutions and enterprises, whereas on the other side implementing approaches like learning while working.¹¹⁴⁶ The Act affords every citizen the right to vocational education, in accordance with the applicable laws and policies.¹¹⁴⁷ Decisively and as per the policies, every learner must devote at least a period of twelve months, on workplaces related to their fields of study, for workplace training, during their upper secondary schooling.

Of importance is that, enterprises actively participate in the provision of vocational education. This is substantiated by the provisions of Article 6, of the Vocational Education Law of 1996, which stipulate that enterprises and trade organizations provide vocational education, as a measure of fulfilling their responsibilities.¹¹⁴⁸ This means that, it is not the sole responsibility of the state, to provide vocational education. It is worth noting that South Africa must adopt and implement this approach, in as far as the provision of vocational education is concerned. This study is of the contention the South African government embolden trade organizations, particularly private enterprises, to provide vocational education, to learners in, or around their area of operation. Besides, South Africa can also learn and adopt the practice of ensuring that, while taking part in secondary education, every learner spends at least a year in

¹¹⁴⁵ Article 42 of the Constitution of the People's Republic of China.

¹¹⁴⁶ Skills Development in India, 2015 page 35 available at http://www.dget.nic.in/upload/uploadfiles/files/MX-M453N_20140829_190139.pdf. Retrieved 12-07-2020.

¹¹⁴⁷ Article 5 of the 1996 Vocational Education Law of the People's Republic of China.

¹¹⁴⁸ Article 6 of the 1996 Vocational Education Law of the People's Republic of China.

workplace training relevant to their studies, in order to acquire the necessary competencies.

Furthermore, China teaches its youth, skills that serve the national interest. This means that in China, each year, admissions allocations into universities are done in accordance with the quantity and quality skills the country demands most, at any given point and time. For example, if the country needs a specific discipline, then there will be a substantial increase in the number of enrolments in that discipline, compared to other disciplines. Moreover, after the standard national exams at the end of secondary school, students who scores the required grades for admission into universities, have more options to study what they aspire, as their first preference in universities.¹¹⁴⁹ Whilst, those who only just managed to get the university admission, but did not excel, may not be able to get into desired study programmes, although given the option of other programmes to select from. Learners who fail to get the university admission score required, ordinarily enroll in vocational skills training colleges, that teache them skills relevant to what the country need to ensure placement or employment on completion.¹¹⁵⁰

The study submits that, it is important for South Africa to learn, and adopt the educational system of China, by first establishing the disciplines and skills required, before enrolling learners into institutions of higher learning, such as universities. This means that like China, South Africa must determine the country's skills requirement before enrolling learners every year. This will circumvent unemployment difficulties upon completion of learners' respective studies, and as a result alleviate poverty. Moreover, learners who did not manage to get admission into universities, but registered in vocational skills training institutions must choose tough relevant skills that the country requires to elevate their employment opportunities.

8.3 Finland

Finland is a country situated in the Northern Europe, neighboring Sweden, Norway and Russia. It is the eighth-largest country in Europe with an area of about 338,455

¹¹⁴⁹ Manyika Kangai, Xi Jinping in Africa: 10 Lessons from China that can transform Africa, 27-07-2018 available at <https://newafricanmagazine.com/17158/>. Retrieved 27-01-2021.

¹¹⁵⁰ Kangai, Xi Jinping in Africa: 10 Lessons from China that can transform Africa, 27-07-2018 available at <https://newafricanmagazine.com/17158/>. Retrieved 27-01-2021.

square kilometres.¹¹⁵¹ According to the World Population Review, its population estimates 5,542,228 people.¹¹⁵² Finland comprises of at least six provinces, about three hundred small municipalities, which normally have few residents.¹¹⁵³ It has nine cities with Helsinki as the capital city.¹¹⁵⁴ According to the Institute for Languages of Finland, there are more than hundred diverse languages, spoken in Finland.¹¹⁵⁵ However, the official languages (also called national language) are Finnish and Swedish. Most people in Finland speak Finnish, with a smaller percentage speaking Swedish. Finland gained its independence in 1917, and has been a republic since then.

8.3.1 An overview of the Finnish educational system

Like any other country, the Finnish educational system comprises of early education and care, pre-primary education, basic education, general upper secondary education, vocational education, higher as well as adult education.¹¹⁵⁶ Finland also has a compulsory education system, which comprises one year of pre-primary education, and learners enrol for this level at about six years of age. Learners between seven and sixteen years of age enrol and attend the compulsory basic education, subject to the provisions of section 9 of the Basic Education Act, which normally takes nine years of learning.¹¹⁵⁷

Higher education in Finland includes, training in institutions of higher learning, such as universities and universities of applied sciences. Universities engage in research, teaching and learning, and award degree and doctorate qualifications, whereas universities of applied sciences are devoted to applied research and development.¹¹⁵⁸

¹¹⁵¹ See World Bank Development Indicators available at <https://databank.worldbank.org/source/world-development-indicators>. Retrieved 12-07-2020.

¹¹⁵² See the World Population Review available at <https://worldpopulationreview.com/countries/finland-population> retrieved 28-08-2020.

¹¹⁵³ This Provinces are Eastern Finland, Lapland, Oulu, Southern Finland, Western Finland and Aland Islands. The Aland Islands province is regarded as an autonomous province and the others are just provinces.

¹¹⁵⁴ Other cities include Espoo, Jyväskylä, Tampere, Vantaa, Turku, Oulu, Lahti and Kuopio.

¹¹⁵⁵ See the Institute for the Languages of Finland available at https://www.kotus.fi/en/on_language/languages_of_finland- retrieved 28.08.2020.

¹¹⁵⁶ The Finnish educational system available at <https://www.oph.fi/en/education-system-> retrieved 28.08.2020.

¹¹⁵⁷ Section 9 (1) of the Basic Education Act 628 of 1998 provides that “the extent of the basic education syllabus shall be nine years”.

¹¹⁵⁸ The Finnish educational system available at <https://www.oph.fi/en/education-system-> retrieved 28.08.2020.

The Finnish education is under the Finnish National Agency for Education, aimed at developing acquisition of quality education and training, including lifelong learning.¹¹⁵⁹

Furthermore, education in Finland is relatively independent, and a state controlled system.¹¹⁶⁰ This means that the Finnish government determines the objectives of education, which includes partition of classrooms, duration between subjects, as per the provisions of section 14 of the Basic Education Act.¹¹⁶¹ In addition, the ministry of education drafts educational legislation and government resolutions regarding the provision of education.¹¹⁶² The Finnish National Board of Education is responsible for laying the fundamental contents of instruction in different subjects, and the national core curriculum, whereas the local authorities (generally municipalities), are responsible for the hands-on organization of schooling, including the arrangement of municipal curriculum, based on the national core curriculum.¹¹⁶³ Subject to the Basic Education Act, the local authority has an obligation to deal with the arrangements of the provision of basic education for school-age children residing within its area of jurisdiction.¹¹⁶⁴

8.3.2 Funding the Finnish educational system

Despite the independence, the Finnish educational institutions (providing basic and upper secondary education), are mostly publicly funded through local authorities, such as municipalities. This means the responsibility of funding the educational institutions, falls on the Finnish government, and its municipalities (local authorities). To this end, basic education is part and the responsibility of the municipal (local authority) basic

¹¹⁵⁹ The Finnish National Agency for Education available at <https://www.oph.fi/en> - retrieved 28.08.2020.

¹¹⁶⁰ Sirkku Kupiainen, The Finnish education system and PISA available at <https://www.researchgate.net/publication/228647231> - retrieved 28.08.2020.

¹¹⁶¹ Section 14 (1) of the Basic Education Act provides that “the government shall determine the general national objectives referred to in this Act and the allocation of lesson hours to the teaching of different subjects and subject groups and to guidance counselling”.

¹¹⁶² Kupiainen, The Finnish education system and PISA available at <https://www.researchgate.net/publication/228647231> - retrieved 28.08.2020.

¹¹⁶³ Section 14 (2) provides that “the National Board of Education shall determine the objectives and core contents of different subjects and cross-curricular themes, guidance counselling and other education referred to in this Act and the basic principles of home-school cooperation and pupil welfare under the purview of the local education authority”. Further see Kupiainen, available at <https://www.researchgate.net/publication/228647231> - retrieved 28.08.2020.

¹¹⁶⁴ Section 4 (1) of the Basic Education Act 628 of 1998 provides that “the local authority shall have an obligation to arrange basic education for children of compulsory school age residing in its area and pre-primary education during the year preceding compulsory schooling”.

services, which receives funding as statutory state's allocations.¹¹⁶⁵ The state distributes statutory allocations according to the number of school going (6-15 years) age learners, residing and or schooling within a particular municipality. As per the provision of section 6 of the Basic Education Act, the Finnish education is located within local authorities, to make traveling of learners to and from school as safe and short as possible.¹¹⁶⁶

Furthermore, the funding for secondary education, including vocational education and training, depends on the number of learners registered, and reported by a particular school. Moreover, allocation of funding for universities, and universities of applied sciences, depends on the unit costs per learner, project funding, and performance-based funding. For instance, successfully completed degrees form part of performance-based funding.¹¹⁶⁷ Same as in South Africa, the Finnish universities receive government subsidies; however, they are also expected to raise additional funding from other sources, such as external donors, and research output earnings.

Remarkably, Finnish education is free at all levels.¹¹⁶⁸ This means that there is no tuition fee payable to the school or educational institution. In basic education (including pre-primary and lower secondary), educational necessities, such as textbooks, meals, and transportation for learners staying far from school premises, are provided free for learners. However, at upper secondary and higher educational levels, learners are responsible for their own learning materials, such as textbooks. Adult education is the only one where learners are responsible for paying tuition fees. Conversely, to promote equity in Finnish education, and ensure study opportunities, there are well-developed grants and study loans for adult education. This financial aid is mostly for full time study in an educational institution.¹¹⁶⁹

¹¹⁶⁵ Finnish education in a nutshell available at https://www.oph.fi/sites/default/files/documents/finnish_education_in_a_nutshell.pdf - retrieved 28.08.2020.

¹¹⁶⁶ See section 6 (1) of the Basic Education Act 628 of 1998.

¹¹⁶⁷ See https://www.oph.fi/sites/default/files/documents/finnish_education_in_a_nutshell.pdf - retrieved 28.08.2020.

¹¹⁶⁸ Finnish education in a nutshell by the Ministry of Education and Culture, Finnish National Agency of Education, 2018 page 6 available at <https://www.oph.fi/en/statistics-and-publications/publications/finnish-education-nutshell> - retrieved 28.08.2020. Section 31 (1) of the Basic Education Act 628 of 1998 provides that “the necessary textbooks and other learning materials, and school equipment and materials shall be free of charge for the pupil”.

¹¹⁶⁹ See <https://www.oph.fi/en/statistics-and-publications/publications/finnish-education-nutshell> - retrieved 28.08.2020.

8.3.3 Equity as a basic value in Finnish educational system

It is without doubt that the main principle of Finnish educational system is to ensure that all the Finnish citizens have equal access to an education of high quality and standard. This means that similar educational opportunities be available to all Finnish citizens regardless of age, origin or financial status.¹¹⁷⁰ Finland's strategy prioritizes acquisition of quality education, thus adequately invests in education and training. Its educational system produces graduates well equipped with relevant skills and knowledge, and is one of the best across the globe.¹¹⁷¹

This is substantiated by Kumpulainen and Lankinen's remarks that, "equity has been a profound and leading basic principle of Finnish education policy, covering the whole educational system from early education to higher education and beyond into adult education".¹¹⁷² According to the Finnish National Board of Education (FNBE), equity remains the foundation of the national curricula at all levels of the Finnish educational system. The principle of equity entails that, "everyone needs sufficient learning skills and opportunities to educate and develop themselves in different learning environments throughout their lifespan".¹¹⁷³ According to the FNBE, "the central objective of the Finnish educational policy is to afford all Finnish citizens equal opportunities to receive education regardless of age, domicile, financial status, sexual orientation or origin".¹¹⁷⁴

Niemi emphasize that, "from the late 1960s, Finland has been developing its education system towards a comprehensive model that is aimed at ensuring equal opportunities for all learners".¹¹⁷⁵ Niemi further asserts that, "this system does not employ streaming

¹¹⁷⁰ See the Finnish education in a nutshell by the Ministry of Education and Culture, Finnish National Agency of Education, 2018 page 6 available at <https://www.oph.fi/en/statistics-and-publications/publications/finnish-education-nutshell> - retrieved 28.08.2020.

¹¹⁷¹ Betsy Brown Ruzzi, Finland Education Report, National Center on Education and the Economy New Commission on the Skills of the American Workforce 2005 page 2.

¹¹⁷² Kristiina Kumpulainen and Timo Lankinen. Striving for educational equity and excellence: Evaluation and assessment in Finnish basic education. In Hannele Niemi, Auli Toom and Arto Kallioniemi (Eds.), *Miracle of education: The principles and practices of teaching and learning in Finnish schools*, 2012, page 69-81. Rotterdam: Sense Publishers.

¹¹⁷³ See Finnish Ministry of Education and Culture (MEC), November 2014. Available at www.minedu.fi [in Finnish] Retrieved 13-10-2020.

¹¹⁷⁴ See the Finnish National Board of Education (FNBE), *Education in Finland*. 2014 available at <http://www.oph.fi/english/education-> Retrieved 13-10-2020.

¹¹⁷⁵ Hannele Niemi, *The Finnish Educational Ecosystem: Working for Equity and High Learning Outcomes* eds Jari Multisilta, Finnish Innovations and Technologies in Schools, A Guide towards New Ecosystems of Learning 2014 Sense Publishers, page 7.

or tracking and students are in mixed ability groups and are provided with versatile support for achieving the aims of the basic education”.¹¹⁷⁶ Therefore, this study posits that, it requires a dedicated education provider to discern the importance of equal educational opportunities for diverse learners, and for this reason, equity in education requires good support structures and systems for all learners. Hence, the Finnish educational system strives for sustainable equity in education, thus the main reason for its outstanding teaching and learning outcomes.¹¹⁷⁷

8.3.4 The right and the promotion of quality education in Finland

Like in any other country, every learner in Finland has the right to quality education, which includes general educational support. Finland perceives every learner’s educational life as important, and therefore be maximized.¹¹⁷⁸ Thus, educational support is indispensable in every educational institution. Pursuant to that, Finland provides guidance and counselling, aimed at supporting, helping, and guiding learners, to progressively perform in their studies, and be able to make appropriate and rational decisions concerning their educational lives and career paths.¹¹⁷⁹ Most importantly, guidance and counselling is the responsibility of every education personnel. Thus, educators are required to treat every learner with respect, and dignity, assist them to capitalize on their learning capabilities.

This study recognizes that, the Finnish educational system is aims at ensuring all Finnish citizens have equal access to quality education, which means availing all educational opportunities without any form of discrimination.¹¹⁸⁰ This makes equity and quality the leading values in the Finnish educational system, with basic education developed as a common component for all students, in every school. The Finnish educational strategy promotes and prioritizes acquisition of quality education, and

¹¹⁷⁶ Niemi, The Finnish Educational Ecosystem: Working for Equity and High Learning Outcomes and Jari Multisilta, Finnish Innovations and Technologies in Schools, A Guide towards New Ecosystems of Learning 2014 Sense Publishers page 8.

¹¹⁷⁷ Kumpulainen and Lankinen. Striving for educational equity and excellence: Evaluation and assessment in Finnish basic education. In Niemi, Toom and Kallioniemi (Eds.), Miracle of education: The principles and practices of teaching and learning in Finnish schools 2012 page 69-81. Rotterdam: Sense Publishers.

¹¹⁷⁸ <https://www.oph.fi/en/statistics-and-publications/publications/finnish-education-nutshell> - retrieved 28.08.2020.

¹¹⁷⁹ <https://www.oph.fi/en/statistics-and-publications/publications/finnish-education-nutshell> - retrieved 28.08.2020.

¹¹⁸⁰ The Finnish education in a nutshell by the Ministry of Education and Culture, Finnish National Agency of Education 2018 page 6 available at <https://www.oph.fi/en/statistics-and-publications/publications/finnish-education-nutshell> - retrieved 28.08.2020.

perceives education as a lifetime investment. This makes its educational system one of the best across the globe.¹¹⁸¹ To achieve its educational objective, Finland promulgated various educational laws and regulations, aimed at promoting attainment of quality education. Some of the significant legislative frameworks, which brought a remarkable contribution to the Finnish educational system, are singled out and discussed below:

8.3.4.1 The Finnish Constitution (1999) as amended in 2011

The Finnish Constitution promotes delivery of education to its citizens. Section 16 provides that, “everyone has the right to basic education free of charge”. It further provides that, “the public authorities shall guarantee for everyone equal opportunity to receive educational services in accordance with their ability and special needs, as well as the opportunity to develop themselves without being prevented by economic hardship”.¹¹⁸² This Constitution further guarantees the freedom of higher education.¹¹⁸³ The Constitution is not the only framework promoting education in Finland, there are some other laws, such as the Basic Education Act of 1998, and the Higher Education Institution Act of 2006, aimed at promoting the acquisition of (a fee-free) quality education. These laws, together with the Finnish Constitution, strive to promote and prioritize the attainment of quality education for all citizens, and ensure they have equal access to education, including educational institutions. Other laws are discussed hereunder:

8.3.4.2 Basic Education Act of 1998 as amended

In 1998, the Finnish government promulgated the Basic Education Act¹¹⁸⁴, which provides for basic education and compulsory schooling. This Act is also applicable to provision of pre-primary education, predominantly provided during the year preceding compulsory schooling.¹¹⁸⁵ Section 2 provides that, “the central purpose of education as referred to in this Act is to support the pupil’s growth into humanity and into ethically responsible members of the community, the society at large and to provide them with

¹¹⁸¹ Ruzzi, Finland Education Report, National Center on Education and the Economy New Commission on the Skills of the American Workforce 2005 page 2.

¹¹⁸² Section 16 of Finland's Constitution of 1999 as amended in 2011.

¹¹⁸³ See Section 16 of Finland's Constitution of 1999 as amended in 2011.

¹¹⁸⁴ Basic Education Act 628 of 1998.

¹¹⁸⁵ Section 1 (2) of the Basic Education Act 628 of 1998 as amended.

the necessary knowledge and skills needed in life”.¹¹⁸⁶ This Act also emphasizes the importance of attaining pre-primary education (as part of basic or early childhood education), known to improve a child’s learning capacity. Through this Act, Finland asserts the attainment of education, as a way of promoting equity and civilisation within a particular society.¹¹⁸⁷ Hence, the Act provides that, “the aim of education shall be to secure adequate equity in education throughout the country”.¹¹⁸⁸

This Act also states that, “the provision of education and the operations of an educational institution shall be decided by the competent ministry in accordance to the government’s directives as the central education provider”.¹¹⁸⁹ However, government may authorize any registered foundation, and or educational institution, to provide for education, subject to the conditions enumerated within the provisions of section 7 of the Basic Education Act, which government may revoke if the applicant does not comply. These conditions include; the applicant must possess the appropriate professional and financial qualities, and provision of such an education is conditional on, applicant not pursuing it for the purpose of financial gain.¹¹⁹⁰

Moreover, the Act provides for the provision of a fee-free education. This means the necessary educational materials, such as, textbooks and learning materials, must be free to learners. Pursuant to the provision of a fee-free education, the Act provides for the provision of an appropriate meal for every learner on every school day.¹¹⁹¹ Unlike in South Africa, the Finnish learners of compulsory school-age are entitled to free transportation to and from school, if the distance to their respective schools exceeds five kilometers. As an alternative to free transportation to and from school, the Finnish state allocates a reasonable and adequate subsidy for learners’ transport.¹¹⁹² The

¹¹⁸⁶ Section 2 (1) of the Basic Education Act 628 of 1998 as amended.

¹¹⁸⁷ Section 2 (2) of the Basic Education Act 628 of 1998 as amended.

¹¹⁸⁸ Section 2 (3) of the Basic Education Act 628 of 1998 as amended.

¹¹⁸⁹ Section 8 (1) of the Basic Education Act 628 of 1998 as amended.

¹¹⁹⁰ Section 7 (1) - (5) of the Basic Education Act 628 of 1998 as amended.

¹¹⁹¹ Section 31 (1) and (2) of the Basic Education Act 628 of 1998 as amended provides that “teaching, the necessary textbooks and other learning materials, and school equipment and materials shall be free of charge for the pupil”. The Act provides further that “a learner attending basic education shall be provided with a balanced and appropriately organized and supervised meal on every school day”.

¹¹⁹² Section 32 (1) of the Basic Education Act 628 of 1998 as amended provides that “if the distance to school for a pupil in basic education or in additional voluntary education exceeds five kilometers, the pupil shall be entitled to free transportation”. The section further provides that “additionally a pupil in basic education, in additional voluntary education or in pre-primary education shall be entitled to free transportation when the travel to and from school is too difficult, strenuous or dangerous in view of the pupil’s age or other circumstances”. The section conclude by providing that “an alternative to free transportation is an adequate subsidy for transporting or accompanying the pupil to school”.

study argues that, the provision of a sustainable and appropriate meal for every learner on every school day, a fee-free educational approach, as well as free transportation to and from schools, is worth simulating and adopting by the South African educational system, to achieve quality education.

8.3.4.3 Higher Education Institution Act, 2006

The Higher Education Institution Act¹¹⁹³ led to the founding of Higher Education Institutions, which are independent, and aimed at conducting teaching, research, and search for knowledge. This Act provides that, “the role of Higher Education Institution is to contribute to the creation and dissemination of knowledge and skills to students as well as to the society in general”.¹¹⁹⁴ The Act further stipulates that, “the Higher Education Institution must be a center of knowledge which deliver education to students through teaching and participation in scientific research for the purposes of equipping and preparing them for jobs that require scientific methods, knowledge and skills”.¹¹⁹⁵

8.4 Finnish educators training program

This study asserts that, educators are the builders of an educated society and as such, they must be well equipped and capacitated first. Adedeji and Olaniyan posit that, “a country that indent to build its educational system must consider adopting continuous educators’ development programs”. Adedeji and Olaniyan further emphasized that, “this must incorporate sustainable pedagogical innovations aimed at improving the capacity of educators”.¹¹⁹⁶ Like any other country, Finland’s educators’ education is acquired through universities. Universities use National Core Curriculum standards, to build their educators’ training program. However, unlike in South Africa, where most of the educators attain their education through colleges, in Finland, the majority if not all educators teaching at all levels of education, are university educated, and very few

¹¹⁹³ Act 63 of 2006.

¹¹⁹⁴ Article 2 of the Higher Education Institution Act 63 of 2006 para 1.

¹¹⁹⁵ See Article 2 of the Higher Education Institution Act para 2.

¹¹⁹⁶ Adedeji and Olaniyan, fundamentals of teacher education development; improving the conditions of teaches and teaching in rural schools across African countries 2011 page 73.

are from colleges operating in concurrence with the polytechnics. Pursuant to that, they all possess master's degrees in education.¹¹⁹⁷

This is contrary to the South African situation, where a person can be an educator with a first, and or undergraduate university degree. According to the National Board of Education, "Finnish educators are the best hence universities are able to choose the very best to high standards of entry".¹¹⁹⁸ Finland perceives continuous education and training for educators, as a privilege, and educators are required to participate actively in continued training programmes, as part of their employment. This is because educators are a key resource, for the attainment of quality education.

8.5 Lessons to be learned from Finland

Like in South Africa, the Finnish educational system provides for education in locations within the local authorities, to make traveling for learners, to and from school, as safe and short as possible.¹¹⁹⁹ Conversely, regarding transportation, the Finnish government provides for learners residing far from their school premises, with free transport to and from their schools. It is worth emphasizing that like in South Africa and other countries, the Finnish education is state funded. Funding for the educational institutions providing secondary education, which include vocational education and training, depend on the number of learners enrolled at a particular school or educational institution.

Likewise, funds allocation, in the institutions of higher learning, such as universities, and universities of applied sciences is according to the project and unit cost per learner. Most importantly, Finland prioritizes performance-based funding. This means that a successfully completed project forms part of the performance funding. It is based on this assertion that the study recommends that South Africa learn and adopt, the prioritization of performance-based funding in schools, more in particular in institutions of higher learning, such as colleges and universities. This encourages learners to work

¹¹⁹⁷ Adedeji and Olaniyan, fundamentals of teacher education development; improving the conditions of teaches and teaching in rural schools across African countries 2011.

¹¹⁹⁸ Ruzzi, Finland Education Report, National Center on Education and the Economy New Commission on the Skills of the American Workforce 2005 page 8.

¹¹⁹⁹ Section 6 (1) of the Basic Education Act 628 of 1998.

hard, and be motivated to achieve academic excellence, and not compromise the quality of the South African education.

Despite the issues of funding, Finland prioritizes equity in the acquisition of quality education, a profound and primary principle of the Finnish educational policies covering the Finnish educational sector.¹²⁰⁰ According to the Finnish Ministry of Education, equity means learners have sufficient learning opportunities to develop themselves.¹²⁰¹ This study argues that, sufficient learning opportunity means, availability of ample teaching and learning resources or facilities, for the learners' environment to be conducive to learning. The study argues that, sufficient learning opportunities means, availability of teaching and learning materials and facilities, such as relevant textbooks, appropriate school furniture, proper classrooms and dignified ablution facilities.

South Africa must adopt this by employing the prioritization of sufficient learning opportunities across the country. Emphatically, the study asserts that, allocation of educational facilities in rural areas is not equal to that in urban areas. For this reason, it is crucial that said allocation of educational resources, be equitable to realize quality education in South Africa. Notably, Finland has a robust fee-free educational system, worth adopting. This means that South Africa can learn and adopt the Finnish fee-free educational system, and implement it particularly in higher education. More often than not, high tuition fees tend to preclude other learners from further their studies, which hinders the realization of quality education.

Similar to China, the provision of education in Finland is informed educational legislative, as discussed above. The legislative initiatives brought notable contribution to the Finnish educational system, hence the recommendation that South Africa emulate it. Moreover, these educational laws are in accordance with the Finnish Constitution. Similar to South Africa and China, the Finnish Constitution promotes delivery of education to every Finnish citizen, and affords every person of school age, the right to receive elementary education at no cost. In addition, it provides the government with the power to ensure every citizen has equal educational

¹²⁰⁰ Kumpulainen and Lankinen. Striving for educational equity and excellence: Evaluation and assessment in Finnish basic education. In Niemi, Toom and Kallioniemi (Eds.), *Miracle of education: The principles and practices of teaching and learning in Finnish schools 2012* page 69-81. Rotterdam: Sense Publishers.

¹²⁰¹ Finnish Ministry of Education and Culture (MEC), November 2014. Available at www.minedu.fi [in Finnish] Retrieved 13-10-2020.

opportunities, and receives the necessary educational resources. Those taking part in the educational process must have these educational opportunities and resources, in accordance with their personal capabilities and special necessities, including the prospect to improve themselves despite financial incapacities and destitution.¹²⁰²

In accord with the Finnish Constitution, the Basic Education Act of 1998 provides fee-free elementary education to every learner similar to the South African position. In the same vein, the Act supports the provision of a proper meal to every learner each school day.¹²⁰³ However, it is the contention of this study that, in South Africa the provision of meals are decisively unsustainable, and periodical, particularly in remote rural areas and townships, innundated with poverty and destitution. Ironically, some of these are informal settlements, already with insufficient feeding arrangements, whereas they need the feeding measures most. The reason why learners in these settlements need the feeding arrangements most, is their families' live in abject poverty, and mainly depend on social and child support grants, for daily survival. Therefore, this study recommends that South Africa adopt the Finnish feeding system, and perhaps prioritize it where it is mostly needed such as in rural areas. Such a system must be sustainable and run throughout the year for better fallouts.

Dissimilar to the position in South Africa, Finnish learners of compulsory education receive free transport to and from their respective educational institutions, if the traveling distance is more than five kilometers. Alternative to the provision of free transport, and where such provision is impractical, the Finnish government allot ample and equitable subsidy to the learners, for transport costs to and from their schools.¹²⁰⁴ This study recommends that South Africa learn this approach and adopt it, for the success of education in the country.

8.6 Singapore

The Republic of Singapore (Singapore) is an autonomous island located at the southern tip of Peninsular Malaysia, in the South East of Asia, around eighty five (85) miles north of the equator.¹²⁰⁵ Singapore is the only city-island-nation in the world. It

¹²⁰² See section 16 of Finland's Constitution of 1999 as amended.

¹²⁰³ Section 31 (1) and (2) of the Basic Education Act 628 of 1998 as amended.

¹²⁰⁴ Section 32 (1) of the Basic Education Act 628 of 1998 as amended.

¹²⁰⁵ Greg Rodgers, Where is Singapore, available at <https://www.tripsavvy.com/where-is-singapore-1458491-> retrieved 26-10-2020.

is one of the highly developed countries in Southeast Asia, and one of the countries with strongest economies in the world. Its area measures about two hundred and eighty (280) square miles, with over 6.2 million residents in it. Despite Singapore having one of the strongest economies, the Singaporean citizens receives high quality education.¹²⁰⁶

8.6.1 An overview of the Singaporean educational system

All Singaporean children start primary education at the age of seven. This is a six-year schooling programme intended to give the school-aged children a resilient educational foundation, aimed at developing language and numeracy skills, building character, and nurturing sound values and good habits.¹²⁰⁷ During the last year of learners' primary schooling, they undertake the Primary School Leaving Examination (PSLE), which evaluates learners' suitability for undergoing the secondary education, and qualifies them entry into a secondary educational school, and or programme matching their learning pace, strengths, ability and inclinations. On the contrary, learners can also gain admission into a secondary schooling programme based on their various strengths and or interests, in areas such as fine art or sports.¹²⁰⁸

The secondary schooling takes four or five years, with curricula designed to match the learners' learning ability and interest.¹²⁰⁹ Upon completion of the four or five year's secondary schooling, learners sit for an exam referred to as, General Certificate of Education (GCE). Further, learners receive options for pursuing their post-secondary education, diverse routes determined by their capabilities and interests. Learners may

¹²⁰⁶ Rodgers, Where is Singapore, available at <https://www.tripsavvy.com/where-is-singapore-1458491-> retrieved 26-10-2020.

¹²⁰⁷ Ministry of Education, Singapore, "Education Statistics Digest 2016" available at <https://www.moe.gov.sg/about/publications/education-%C2%AD%E2%80%90statistics> – Retrieved 26-10-2020.

¹²⁰⁸ Ministry of Education, Singapore, "Education Statistics Digest 2016" available at <https://www.moe.gov.sg/about/publications/education-%C2%AD%E2%80%90statistics> – Retrieved 26-10-2020.

¹²⁰⁹ This means that the learners are streamed into three diverse groups namely, express, normal (academic) or normal (technical).

choose from, junior colleges, fine art specialised schools, polytechnics, or technical education institutions.¹²¹⁰ Alternatively, the learners may opt for a university.¹²¹¹

8.6.2 The right and the promotion of quality education in Singapore

According to the Singaporean Ministry of Education, education in Singapore aims to bring out the best in every learner, by allowing them space to ascertain their abilities, realize their potential, and develop a passion for an ongoing learning lifestyle.¹²¹² The Ministry of Education (MOE)'s main objectives, are geared to nurture every learner, and help the learner develop themselves by ensuring they have the necessary proficiencies, to flourish in the 21st century.¹²¹³ MOE's educational delivery caters for every learner, despite learning strengths, interests, capabilities and learning styles. Like in South Africa, bilingualism plays an important role in the Singaporean educational system.

This means that, while other subjects are taught in English, every learner also has the opportunity to learn their official mother tongue,¹²¹⁴ providing learners with the language competencies, not only for accessing their cultures, but also for encouraging them to appreciate their cultures and heritage.¹²¹⁵ Proficiency in their mother tongues exposes learners to diverse people and different cultures, and knowledge of other cultures and values gives them a competitive urge to excel globally.¹²¹⁶

Schwab posits that, Singapore is one of the topmost performing states in education, globally.¹²¹⁷ As reflected through indicators such as, learners' performance scores, universal comparisons, numbers of learners enrolled for higher education courses,

¹²¹⁰ Ministry of Education, Singapore, "Education Statistics Digest 2016" available at <https://www.moe.gov.sg/about/publications/education-%C2%AD%E2%80%90statistics> – Retrieved 26-10-2020.

¹²¹¹ Regarding the universities for undergraduate and graduate studies, Singapore has six autonomous state-funded universities and one private university.

¹²¹² See Ministry of Education. Education statistics digest 2016. Available at <https://www.moe.gov.sg/docs/default-source/document/publications/education-statisticsdigest/esd-2016.pdf>. Retrieved 27-10-2020.

¹²¹³ Ministry of Education. Education statistics digest 2016. Available at <https://www.moe.gov.sg/docs/default-source/document/publications/education-statisticsdigest/esd-2016.pdf>. Retrieved 27-10-2020.

¹²¹⁴ The official mother tongues being taught and used in Singapore include Mandarin, Malay and Tamil.

¹²¹⁵ Ministry of Education. Education statistics digest 2016. Available at <https://www.moe.gov.sg/docs/default-source/document/publications/education-statisticsdigest/esd-2016.pdf>. Retrieved 27-10-2020.

¹²¹⁶ Ministry of Education. Education statistics digest 2016. Available at <https://www.moe.gov.sg/docs/default-source/document/publications/education-statisticsdigest/esd-2016.pdf>. Retrieved 27-10-2020.

¹²¹⁷ Klaus Schwab. The global competitiveness report, 2014-2015. Available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf. Retrieved 27-10-2020.

and graduation rates.¹²¹⁸ Singaporean learners consistently score high, particularly in subjects such as mathematics, science, and literacy, as shown in assessments such as, the Programme for International Students Assessment (PISA), Trends in International Mathematics and Science Study (TIMSS) and Progress in International Reading Literacy Study (PIRLS).¹²¹⁹

Singaporean attitude towards the development of potential of learners through education is determined on merit, and academic excellence streaming, credits and rewards go to those who show talent and achievement. Moreover, Lim asserts that, education based on meritocracy, and the practice of academic streaming, remains a contributing factor to determine a learners' socio-economic future in the labour market.¹²²⁰ Therefore, this study emphasizes every parent responsible for learners' education, must ensure that the children attend school, and view the attainment of quality education, as a crucial criterion for the children's accomplishments in the future.

Furthermore, in Singapore there is a phenomenon of "*kiasu*" (a fear to lose), which is inculcated to learners and they have encultured it.¹²²¹ This phenomenon is a highly competitive method of placing high expectations on a learner, to academically outshine and succeed in all school activities, which include the national examinations.¹²²² The *kiasu* competitive and meritocratic phenomenon, results in learners attending additional learning programs and or centers during the evening or weekends, for diversified activities such as literacy and numeracy, to accelerate learners' academic performance.¹²²³

¹²¹⁸ Klaus Schwab. The global competitiveness report, 2014-2015. Available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf. Retrieved 27-10-2020.

¹²¹⁹ Schwab. The global competitiveness report, 2014-2015. Available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf. Retrieved 27-10-2020. For example, in the 2015 PISA comparative study, Singapore took the first position in all three categories of reading, mathematics and science marking Singapore's best performance yet in the global benchmarking test.

¹²²⁰ Sirene Lim, Exploring colonization: Situating young children's experiences within the multiple contexts of globalizing Singapore. Unpublished doctoral dissertation. Teachers College, Columbia University, 2007. Available at http://works.bepress.com/sirene_lim/9/. Retrieved 27-10-2020.

¹²²¹ Lana Yiu Lan Khong, Family matters: The role of parents in Singapore education. Singapore: Marshall Cavendish Academic 2004.

¹²²² Khong, Family matters: The role of parents in Singapore education. Singapore: Marshall Cavendish Academic 2004.

¹²²³ Khong, Family matters: The role of parents in Singapore education. Singapore: Marshall Cavendish Academic 2004. These additional programmes may include Early Childhood Care and Education (ECEC) programme or centers.

Like in South Africa, Singapore has laws, policies and legislation aimed at promoting the provision of quality education. This study submits that the laws, policies and legislation fuel development of quality education, through the establishment of the institutes or special bodies, responsible for promoting delivery of quality education across Singapore. Some of the legislative frameworks and their remarkable influence to the Singaporean educational system are outlined below:

8.6.2.1 Institute of Technical Education Act, 1992

The Institute of Technical Education Act¹²²⁴ provided for the establishment of a body known as, the Institute of Technical Education, Singapore, directed to promote delivery of quality education and developing skills of the Singaporeans. The Act provides that, “the functions of the institute shall include among others making provision and conduct of technical education and training, and further education programs, for persons employed in or intending to be employed in commerce or industries as well as making provision for accrediting programs and qualifications for training, education and technical skills”.¹²²⁵

8.6.2.2 Skills Future Singapore Agency Act, 2016

The Skills Future Singapore Agency Act,¹²²⁶ was promulgated by the Singaporean Parliament, on August 2016, the purpose; providing Singaporeans with a well-rounded education designed to develop them to their full potential and nature them to be good citizens. The Act makes provisions for the establishment of an agency, which promotes delivery of quality education to Singaporeans.¹²²⁷ The Act provides that, “it is the function of the agency to identify, promote, facilitate, develop and upgrade the skills and competencies for the current, emerging and future needs of the Singapore workforce.”¹²²⁸

According to World Data on Education, “education should equip students with relevant skills and sufficient knowledge as well as the right values and attitude to assure the

¹²²⁴ Act 8 of 1992.

¹²²⁵ Section 5 (a) and (d) of the Institute of Technical Education Act 8 of 1992.

¹²²⁶ Act 24 of 2016.

¹²²⁷ A body called the Skills Future Singapore Agency is established in terms of section 3 of the Skills Future Singapore Agency Act 24 of 2016.

¹²²⁸ Section 5 (1) (b) of the Skills Future Singapore Agency Act.

livelihood of the individual and the country's survival and success". It further provides that, "children must learn to be self-reliant, yet able to work closely with others, individually competitive, yet with a strong social conscience".¹²²⁹

8.6.3 Lessons to be learned from Singapore

Meyer and Ramirez assert that, for a country to have well-constructed socio-economic development, it needs to invest in education, by ensuring that its citizens receive quality education.¹²³⁰ This study emphasizes that, education is an instrument used by a country to support its goals directed at building the nation. It is for this reason that this study uses Singapore as a comparator country, because it offers a noteworthy example of an under-developed country, which successfully transformed itself from an impoverished and weak country, into an economically vibrant and educationally advanced modern country, through education. This study, highlights Singapore's success story, accentuating the country's investment drive to develop a world-class education system, designed to develop quality human capital,

Emphatically, the success story rests on the fact that, the education is well thought out, as the central vehicle in building the nation, and developing a proficient, competent, adaptive and productive workforce, also encouraging a social cohesion among the various ethnic groups.

Like any other country, Singapore has educational frameworks designed to promote the Singaporean educational system. This means that all the initiatives supporting the provision of education in Singapore, stem from their legal educational frameworks. For instance, the Institute of Technical Education Act of 1992, informed the establishment of the Institute of Technical Education, the body formed to improve the abilities of the Singaporeans, by equipping them with the necessary education. The important role of this body is; to ensure that there is provision of proper functioning of practical or vocational education and training for those in business and other industries.

This study emphasizes that Singapore prioritizes imparting their workforce with relevant education, to satisfy the need for sustainable quality education, to take the

¹²²⁹ See UNESCO World Data on Education, 7th Edition (2011) Singapore page 1.

¹²³⁰ John Meyer, Francisco Ramirez and Yasemin Huhoglu Soysal. World expansion of mass education, 1870–1980. *Sociology of Education*, 1992, 65(2), 128–149

economy to the next level. Moreover, the Skills Future Singapore Agency Act of 2016 established an independent agency, responsible for identifying and promoting, the skills necessary, for present and future needs of the Singaporean workforce.¹²³¹ The agency is responsible for ensuring learners are well equipped with adequate knowledge, and skills necessary to work with others diligently, observe social ethics, yet be self-reliant.¹²³² This study submits that South Africa must prioritize the provision of practical education at educational institutions, to equip learners with the necessary practical skills and aptitudes relevant to the 21st century. In addition, it must also prioritize equipping existing labour force with the necessary education and practical occupational skills, to sustain and salvage the economy of the country.

It is impertinent to highlight that the long-term objective of the educational system in Singapore is, to prepare learners for the challenges of a knowledge economy, and to enhance the economic competitiveness of Singapore. McKinsey report substantiates the success of the Singaporean schools.¹²³³ The report points out, that, high-performing Singaporean educational system is prominent, it focuses on three fundamental factors namely, effective mechanism, effective processes and effective systems and support structures.¹²³⁴ According to the report, effective mechanism advocates for implementation of selective mechanisms for educators, so that the right and competent people become educators. This means that for learners to acquire quality education, such education be bestowed on educators first. In other words, the quality of the educational system cannot exceed the quality of its educators.

To enhance effective mechanisms, effective processes promote regular and sustainable educators training and development programs, putting more emphasis on professionally developing educators to be effective instructors, by subjecting them to capacity building and development programs.¹²³⁵ This means the best way to achieve

¹²³¹ Section 5 (1) (b) of the Skills Future Singapore Agency Act 24 of 2016.

¹²³² UNESCO World Data on Education, 7th Edition (2011) Singapore page 1.

¹²³³ McKinsey & Co. How the world's best-performing school systems come out on top 2007. Available online at: http://www.mckinsey.com/App_Media/Reports/SSO/Worlds_School_Systems_Final.pdf. Retrieved 03-11-2020.

¹²³⁴ McKinsey & Co. How the world's best-performing school systems come out on top 2007. Available online at: http://www.mckinsey.com/App_Media/Reports/SSO/Worlds_School_Systems_Final.pdf. Retrieved 03-11-2020.

¹²³⁵ McKinsey & Co 2007. Available online at: http://www.mckinsey.com/App_Media/Reports/SSO/Worlds_School_Systems_Final.pdf. Retrieved 03-11-2020.

excellent outcomes, is to improve and empower the instructors, enhance their ability to impart relevant knowledge and skills to the learners.

Hence, this study emphasizes that, educators are the most important driving force for the delivery of quality education. Moreover, educators are the building blocks of every nation, and it is through the attainment of quality education that a society can bring profound social transition from poverty to a better life. On the other hand, the study argues that, the success of every country is rooted in its education, achieved by ensuring that educators are well equipped with the necessary training, to enable effective discharge of their duties. Consequently, this imparts the requisite skills and knowledge to learners, which in turn fulfills the realization of quality education.

Likewise, effective systems and support structures must be in place, to ensure every learner benefits from the excellent instruction. This means that the best way for a school or any educational institution, to achieve outstanding performance necessitates raising living conditions, and or standards of every learner. For this reason, this study emphasizes that, for South Africa to improve its educational system, socio-economic amenities, and educational facilities, be improved and available to all learners, to create an environment conducive to learning.

Emphatically, the study highlights that underprivileged support structures, such as poor infrastructural amenities and socio-economic services, prevent the acceleration of quality education, thus derail its achievement. This study highlights that, for a learner to register good progress, perform well and yield successful results, their educational environment must be welcoming and conducive to learning, in as far as availability of the necessary infrastructural and social services is concerned. As stressed throughout this study, lack of infrastructural services and poor social services are the main obstacles to realizing quality education.

8.7 Conclusion

Following the analysis in this chapter, the findings clearly demonstrate that there are countries with educational systems that are fundamentally well developed and designed, compared to South Africa's educational system. Countries like China, Finland and Singapore as discussed above. These countries have laws, policies and legislation, which drive their quality education programmes. The countries are

celebrated for, some of the best systems, practices, as relates to the provision and delivery of quality education to their citizens. The practices include equity in allocation of educational resources, the provision of free transportation for learners to and from their schools, and fee-free education. For this reason, this chapter concludes that South Africa ought to adopt the educational approaches employed in these countries, and emulate them to yield better educational outcomes. Further, a close analysis of legal rules, including the interaction between the educational laws of these countries, identifies valuable lessons that South Africa must draw on. Thus, South Africa must emulate the comparator countries, by adopting and implementing similar approaches to improve its educational approach.

CHAPTER 9: CONCLUSION AND RECOMMENDATIONS

9.1 Conclusion

This chapter is devoted to the conclusion drawn from the whole study. Therefore, the conclusion emanating from this study is that, quality education is an important instrument that, can be used to transform people's lives, and as a bridge to transition from poverty to a better standard of living. As such, any conduct that compromises the provision of quality education, requires decisive elimination at all cost, and where total prevention is not possible, determine the best action to minimize adverse impact. The study has shown that quality education is a pillar used to improve the social lives of the poor and vulnerable. The study revealed that attainment of quality education, is closely related to the improvement of economic and social development, and if compromised, produces incapacitated and unskilled graduates, which adversely affects the lives and well being of the citizens.

In conclusion, the process and attainment of quality education must take place or carried out in an environment that is conducive to learning, fortified with good infrastructural amenities, and sustainable socio-economic goods and services. Nevertheless, the study concludes that reality has proved that education provided under poor and dilapidated infrastructural amenities, under-resourced schools with no or underprivileged socio-economic goods and services is likely to be of low standard and poor quality. It is an undisputed fact that South Africa has adequate educational laws, and or legislation to promote quality education, by ensuring that school infrastructure is in good condition, and the necessary and proper socio-economic goods and services are available in schools and educational institutions. The study further concludes that implementation and enforcement of existing laws where compliance is failing is necessary.

It is trite that education contributes immensely to the country's overall economic boom. This is so because graduates who received quality education have more chances of securing lucrative and sustainable employment, which allows government to collect revenue to fund socio-economic development. It is however, clear that the South African government is though not entirely, funding the attainment of quality education

from public revenue through bursaries and loans such as NSFAS and other SETAs. It is emphasized that the continuous funding of the education, which is of low quality and deprived standard and does not yield the purported results will cripple the economic growth of the country hence; government will not be able to collect revenue in return from the graduates.

To improve the provision of quality education, and produce and sustain high quality standards in the educational sector, the South African government promulgated legislation and policies such as SASA, SDA and RDP. Despite these measures, this study concludes that reality has revealed that, government alone cannot bring about the necessary change (be it funding or other socio-economic services) in the educational system, but requires other relevant and interested stakeholders, such as entrepreneurs and the community at large to actively collaborate with the state.

This study also affirmed that educators are the most important driving force in the educational sector hence, as they ensure that effective teaching and learning takes place in the educational institutions, and adequately capacitated educators, can improve the learners' performances. This study, also revealed that, educators build learners, therefore, they also need building, to bring about profound educational and social change, in values and norms, as needed for the betterment of people's lives. Consequently, the study concludes that there is lack of accountability on the part of educators; hence, they are not capacitated to impart the necessary skills to learners.¹²³⁶ Based on this study, capacitated educators are the most significant educational instrument a country needs to develop for effective utilization in creating a powerful educational system.¹²³⁷ Ultimately, the study concludes that the reason why educators form part of the important contributors towards achieving quality education is that, if not properly trained, they are unable to impart the requisite knowledge and provide quality pedagogic services to the learners.

¹²³⁶ See the Centre for Enterprise Development, a Johannesburg-based research institute 2015 page 23. Available at www.cde.org.za retrieved 01-09-2018.

¹²³⁷ Adedeji and Olaniyan, fundamentals of teacher education development; improving the conditions of teaches and teaching in rural schools across African countries, UNESCO: International Institute for Capacity Building in Africa 2011 page 73.

In addition, poverty and unemployment are interrelated pitfalls confronting the realization of quality education in South Africa. This study concludes that the destitute, and those most vulnerable subjected to abject poverty, are living in stressful, insecure environments, which severely limits options to improve their lives through education. It is clear that if a person is a destitute person, living in extreme poverty, lacks basic resources such as food, clothes and shelter. Therefore, it is extremely difficult if not impossible for such person to pursue education, under those poor social conditions. As such, they would rather strive to meet their most basic needs first, like shelter, food and clothing, as opposed to education.

Similarly, unemployment is also one of the serious social problems responsible for abject poverty living conditions, and severely inhibits the realization of the right to education. Typically, learners with unemployed parents, and or caregivers often drop out of school at an early age. This is owing to the fact that they lack basic social resources such as food, and clothes, including school materials. Consequently, the unemployed parents/guardians migrate to other places, particularly urban areas in search of employment, to alleviate hunger and poverty. Being a vicious cycle, poor education or lack thereof hampers any if not all efforts to secure profitable employment. This only exacerbates the problem, increases the unemployment rate and as such, compromises the learners' educational life, and future.

This study adopted Comparative analysis with China, Finland and Singapore, to determine if South Africa could benefit from those countries' experiences, identify valuable lessons that it could emulate to improve the South African educational system. Although a number of similarities exist between South Africa and these countries, for example, their educational structures, the study emphasizes that, there are appreciable lessons that South Africa can learn and adopt from these countries, which may bring about the much-needed change to the country's educational sector.

9.2 Recommendations

In light of the discussion charted in this study, it is vibrant that the educational system in South Africa faces serious challenges from the abundant, prevalent social ills, constraints, barriers including poverty, unemployment, poor infrastructural amenities

and inadequate social resources. Despite these social issues and challenges, the following recommendations remain pertinent, to developing high quality education.

The protection and promotion of quality education embedded in international law, which binds all signatory member states. For an effective realization of quality education, it is crucial to consider international law.¹²³⁸ For this reason, it is necessary that signatories conform to international law. The signatories should reflect the protection and promotion of quality education domestically within their legislative frameworks, for example, through their constitutional guarantees, policies and regulations. Conversely, the state's promulgations are not enough. Consequently, they need collaboration and active interaction with the public, private entrepreneurs and interested stakeholders.

Ultimately, the South African government should ensure that allocation of educational resources in schools across the country is equitable, despite the schools' geographical location. This means all schools are entitled to ample educational resources, to enable effectual and proper teaching and learning, regardless of location, rural or urban areas. It must make certain that schools particularly those situate in remote areas of the country receive quality functional educational resources such as libraries, laboratories, computer labs, and any other relevant facilities, to develop the required standard of teaching and learning processes. Likewise, education must be available and accessible at all cost. This means availability of schools, educational institutions and programmes, further, be physically and economically accessible to every person without discrimination. The most underprivileged groups as identified in this study, the completely destitute, and those relatively poor, living in remote areas to be a priority.

Given the fact that redressing the dispossession of quality education is a lengthy process, it is pertinent that the South African government identify the social ills and constraints posing grave hindrances to South Africans, particularly the underprivileged groups, thus prioritize their elimination, paying more attention and focus on funding the human rights of the marginalized. Considering the fact that financial constraints

¹²³⁸ Mbazira, litigating socio-economic rights in South Africa. A choice between corrective and distributive justice, PULP 2009.

remain an obstacle to realizing quality education in many countries including South Africa,¹²³⁹ the study submits that, the South African government should devote its attention to allocating sufficient funding to the educational sector, to provide adequate educational resources. The study recommends that increasing and closely monitoring annual budgetary allocations to schools, departments and ministries of education and other educational institutions. This implies that government must invest in education by funding and developing effective quality education in order to boost the economy.

If state resources are insufficient to cater for the educational needs, it is recommended that the South African government beseech international financial intervention, and an active collaboration with the international community to address educational concerns, as per the provisions of Article 2(1) of the ICESCR. Article 2(1) of the ICESCR provides among others that:

each signatory to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources...¹²⁴⁰ An analogous provision is provided in Article 28(3) of the CRC which stipulate that “signatories shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods.¹²⁴¹

The international financial intervention affords learners opportunities to access and enjoy acquiring quality education. It is worth noting that, whereas basic public education is purported to be free, in the sight of the government, parents still directly or indirectly contribute towards some educational costs, for things like, uniforms, transport and fees for additional lessons. To this end, government is obliged to provide transport to and from schools, where such schools are remote from the learners’ homes, which fact will lessen the parents’ financial responsibility. Left for the parents will be the responsibility to monitor, and ensure that their children or those they care for attend, do their school work and consequently complete schooling as per the provisions of SASA.

¹²³⁹ Taiwo, *The Implementation of the Right to Education in South Africa and Nigeria*, Doctor of Laws Nelson Mandela Metropolitan University 2011 page 369.

¹²⁴⁰ See Article 2 (1) of the ICESCR.

¹²⁴¹ See Article 28 (3) of the CRC.

Beside international intervention, it is worth noting that government alone cannot achieve the fundamental goal of quality education for all, other relevant and interested stakeholders, such as entrepreneurs and the community members must cooperate with the government, for the realization of quality education. The study emphatically submits that, upholding the right to quality and sustainable education, in a democratic country, is an exercise that necessitates that all arms and spheres of government, plus other relevant and interested stakeholders, collaborate closely with each other. For this reason, the study recommends, active financial cooperation between the state and other stakeholders, including private entrepreneurs to boost the financial resources for the educational sector, thus enhance the provision of quality and sustainable education. This will ensure that every learner attends and completes their educational path, irrespective of their financial status.

Moreover, it is trite that quality of the school infrastructural facilities has a direct effect on teaching and learning, including the educational growth of the learners.¹²⁴² Therefore, an important issue to consider is, whether the schools' infrastructural facilities are proper and in a good condition for a conducive, favourable and productive learning environment. As indicated from the preceding discussion, poor infrastructural amenities and other socio-economic services such as dilapidated classrooms, no clean running water supply, lack of textbooks and school furniture, have a negative impact on the teaching and learning output, thus the quality of education. The geographical location of the school and school's educational facilities are among factors that most parents consider before the decision to enroll their children in a particular school. Therefore, it is important for government to continuously improve educational facilities in every school, to draw the attention of the parents. Infact, learners do not perform well if their living conditions are adversely affected.

It is also important to highlight the significant role played by the educators. Educators are important, as they ensure that teaching and learning takes place in schools and educational institutions.¹²⁴³ Therefore, educators need adequate capacitation to

¹²⁴² Taiwo, *The Implementation of the Right to Education in South Africa and Nigeria 2011* (note 1232) page 370.

¹²⁴³ Vegas and Umansky, "Improving teaching and learning through effective incentives: Lessons from education reforms in Latin America" in E. Vegas (Ed.). 2005.

improve the learners' performance. To this end, educators must be the first to receive the necessary educational skills, and competencies, to propel delivery of high quality education to learners. This is because adequacy, quality and motivation of educators, have a profound effect and major contribution towards learners' enrolment, attendance and learners' achievements. Measures such as regular teachers training and workshops, on how to improve post school training and innovation must be put in place, to equip educators to provide good quality education, which in turn capacitates the learners and equips them with the necessary skills and knowledge, to be employable, self-employed, create jobs and employ others.

The study also recommends that, government continuously monitor the enforcement of existing educators' skills development programmes and measures, improve training strategies by ensuring ample compliance with salient laws, and enforce such laws where compliance is failing. Government must also set aside a budget for sustainable regular training, teaching and learning programmes, or educators' skills development programmes aimed at capacitating educators in schools. Attendance and active participation in such training and workshops be compulsory for fulfillment of education objectives.

Government must retain highly motivated and ambitious educators and compensate them well to revitalize their motivation, to produce high quality education. This will revive educators, since they are poorly motivated due to poor remuneration packages. It must also increase the emoluments of educators working in underprivileged and under-resourced remote areas, an added bonus to motivate and elevate their confidence while working under unfavourable conditions, and to prevent migration to urban areas. By so doing, government will be drawing attention of the youth in the teaching profession. This is because in recent times, the teaching profession has lost its appeal to young people. A point to emphasize is that, the successful revitalization of quality education should start by improving the quality of social conditions of those responsible for the provision of the education. These measures are necessary to improve the image of the teaching profession.

Similarly, focus should remain on implementation and enforcement of the provision, access and effective delivery of the education, particularly at foundation stages of

schooling and learning. This means that both access and effective delivery must take place contemporaneously. The implication of this is that learners and graduates be equipped with relevant skills to become more competitive, employable and become entrepreneurs. In turn, the end goal of quality education is achieved, thus effective contribution to the growth and development of the country's overall economy.

Moreover, the study examined the crucial role played by the judiciary, locally and in the international arena. This role includes interpreting the meaning, scope and content of the right to education, as per the provisions of the Constitution and other international instruments comprising the obligations placed on the part of the signatories, or state parties. In addition, the selected case law in this study substantiated that, litigation has proved to be a formidable instrument by which the state mandates prioritizing the realization of quality education. The state also intervened in presenting that textbooks, school furniture and infrastructural amenities are among others necessary in giving effect to the right to quality education. For example, the case of *Juma Masjid and Section 27 v Minister*, set a precedent and sent a robust message regarding the unqualified nature of the right to education, which include the state's obligations in ensuring the provision of educational facilities and matters connected thereto.

This demonstrates a proficient and strong move by the judiciary, in ensuring enforcement and compliance with salient laws. For this reason, the study recommends that government establish a specialized court to work in close cooperation with the Constitutional court, and specifically adjudicate over issues relating to the protection and promotion of quality education. In this manner, presiding officers in that court will be fully equipped with relevant expertise and knowledge to discharge their duties on the subject matter. Where necessary, it is important that such a court must, play a supervisory role in its judgements and pronouncements, to ensure full compliance.

The study further recommends that, the provision of a fee-free educational system, particularly in South Africa's higher educational institutions, such as colleges and universities. However, it would be prudent that, the fee-free education be on merit, and limited to the academically deserving learners, hence be guided by legislation to that effect. That initiative would promote academic excellence and as such, the quality and

standard of the South African education would not be compromised. This study posits that, should education be made completely free without suspensive conditions of merit, the government might be run the risk of compromising the quality of its education, and the economy hence thus defeat the country's end goal of developing high quality education which provides the best building block for a better country.

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