THE CREATION OF AN OMBUD OFFICE TO IMPROVE ACCESS TO JUSTICE AND COOPERATION AMONG EDUCATION STAKEHOLDERS

by

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DECLARATIONS

"I, Nadia Alexander declare that the Doctoral Degree research by dissertation that I herewith submit for the Doctoral Degree qualification (LLD-law degree) at the University of the Free State is my independent work, and I have not previously submitted it for a qualification at another institution of higher education."

…………………………………………… …………………………....

N. Alexander **Date**

DEDICATION

This work is dedicated to my sons, Keyaan and Yaqeen Alexander.

I want you to believe deep in your heart that you are capable of achieving anything you put your mind to

that you will

NEVER LOSE

You either win or learn, just go forth and aim for the skies. I can't promise to be here for the rest of your lives but I can promise to love you for the rest of mine.

Love Mom

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> My success can only come from Allah. In him I trust, and unto him I return.
>
> Quran (11:88)

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DRAFT LEGISLATION FOR THE ESTABLISHMENT OF AN OMBUDSMAN FOR EDUCATION IN SOUTH AFRICA 303

ABBREVIATIONS AND ACRONYMS

ABA: American Bar Association

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

ADR: Alternative Dispute Resolution

BELA: Basic Education Amendment Laws Bill

CCMA: Commission for Conciliation, Mediation and Arbitration

CCWC: Commissioner for Children in the Western Cape

CEM: Council of Education Ministers

CESCR: Committee on Economic, Social and Cultural Rights

CRC: Convention on the Rights of the Child

CRPD: Convention on the Rights of Persons with Disability

DBE: Department of Basic Education

DRIP: Declaration on the Rights of Indigenous People

ECD: Early Childhood Development

FEDSAS: Federation of Governing Bodies of South African Schools

GA: General Assembly

HOD: Head of Department

IBA: International Bar Association

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

IOI: International Ombudsman Institution

IRFA: Intergovernmental Relations Framework Act

MEC: Member of the Executive Council

NASGB: National Association of School Governing Bodies

NCC: National Council for Children

NEPA: National Education Policy Act

NNSSF: National Norms and Standards for School Funding

OCA: Ombudsman for Children Act

PAJA: Promotion of Administrative Justice Act

PCF: Provincial Consultative Forum

PDE: Provincial Department of Education

SA: South Africa

SGB: School Governing Body

UCT: University of Cape Town

UN: United Nations

UNDP: United Nations Development Plan

UDHR: Universal Declaration of Human Rights

SUMMARY

This dissertation argues the appropriateness of the creation of an Ombudsman office as a suitable dispute resolution mechanism to improve access to administrative justice, and cooperation among education role-players. The main focus of the dissertation is to determine alternatives to litigation for education role-players, including school governing bodies (SGBs) and provincial departments of education (PDEs) to ensure that cooperative governance principles are realised and to improve access to administrative justice.

KEYWORDS

Right to education – dignity and equality – freedom - conflict and disputes in education – alternatives to litigation - constitutional imperatives – separation of power – rule of law – democracy- cooperative governance principles – ombudsman – active participation – engagement – mediation.

CHAPTER 1
INTRODUCTION

"Education is the most powerful weapon which you can use to change the world."
Nelson Mandela

1. RATIONALE AND BACKGROUND

This dissertation argues the appropriateness of the creation of an Ombudsman office as a suitable dispute resolution mechanism to improve access to administrative justice and cooperation among education role-players, particularly the conflict that arises amongst school governing bodies (SGBs) and provincial departments of education (PDEs). Although there is conflict among other education role-players it will not be considered for the purposes of this thesis. The main focus of this thesis is to determine what alternatives to litigation SGBs and PDEs can use to ensure that cooperative governance principles are realised and to improve access to administrative justice. This exploration is undertaken with reference to the *Constitution of the Republic of South Africa* (*Constitution*),[1] the *National Education Policy Act* (*NEPA*),[2] the *South African Schools Act* (*Schools Act*),[3] case law and applicable international law.

The reason for this research is that, subsequent to South Africa becoming a democratic state, the relationship between school governing bodies (SGBs) and the Provincial Departments of Education (PDEs) has seemingly been rather strained – as is evident from newspaper headlines.[4] The gist of such newspaper articles has been the frequent conflict between the PDEs and SGBs. Case law further highlights that the interests of SGBs can also contribute to conflict in the school environment.[5] In addition hereto is the lack of access to justice for some SGBs as discussed herein below.

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1 1996.
2 27/1996.
3 84/1996.
4 Mere 2022: 1; Central SA OFM 2020: 1; Koko 2020: 1; Damons 2020: 1; Charles 2021: 1; De Vos 2013: 1; Mooki 2015: 1; Areff 2015: 1; Johnson 2013: 1; Gernetzky 2015: 1; Swart 2015: 3; Beangstrom and Phillips 2016: 3.
5 Scheepers v School Governing Body, Grey College Bloemfontein and 2 Others, Case number 2612/2018; Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC); Head of Department, Mpumalanga Department of Education v Hoërskool

South African courts have dealt with numerous cases between the SGBs of the more affluent public schools and the PDEs, particularly on the rights of the SGBs to determine school policies such as admission policies, pregnancy policies, language policies and religious policies.[6] The underlying problem stems from the powers of the PDEs to depart from, or override, policies adopted by SGBs. Courts have been required to strike an appropriate balance between the powers and duties of heads of department (HODs) of PDEs and those of SGBs, taking into account the interests of parents who want to ensure that their children receive a quality education versus the PDEs' obligation to ensure that all learners have access to basic education.

On the opposite side are the SGBs elected to serve schools in the quintiles 1 to 3 category that generally rely on the PDE for funding and do not charge school fees. Notwithstanding the funding provided by the department, it will be demonstrated in this dissertation that the pleas of these SGBs and schools often go unheard by PDEs and they are forced to approach civil society institutions for assistance to bring an application before court.[7]

What is clear from case law is that the courts have resolved many of these cases with reference to the principle of legality and the best interests of the learners concerned.[8]

Ermelo 2010 (3) BCLR 177 (CC); and MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC).

6 Governing Body of Mikro Primary School and Another v Western Cape Minister of Education and Others [2005] JOL 13716 (C); Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC); MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC); Queenstown Girls High v MEC, Department of Education, Eastern Cape and Others 2009 5 SA 183 (CK); Federation of Governing Bodies for South African Schools v The Head of Department, Department of Education, Northern Cape Province and the Member of the Executive Council for Education, Northern Cape Province [2016] ZANCHC 28; School Governing Body, Northern Cape High School and Others v The Member of the Executive Council for Education in the Northern Cape and Others [2016] ZANCHC 14; Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC); Organisasie vir Godsdienste, Onderrig en Demokrasie v Laerskool Randhart and Others 2017 (6) SA 129 (GJ); The Governing Body Hoërskool Overvaal v Head of Department [2018] 2 ALL SA 157 (GP).

7 Section 27 and Others v Minister of Basic Education and Another 2013 (2) SA 40 (GNP); Komape and Others v Minister of Basic Education and Others [2018] ZALMPPHC 18; Equal Education and 3 Others v Minister of Basic Education and 9 Others [2020] 4 ALL SA 102 (GP) and Equal Education and Another v Minister of Basic Education and Others 2019 (1) SA 421 (ECB)

8 Governing Body of Mikro Primary School and Another v Western Cape Minister of Education and Others [2005] JOL 13716 (C); Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC); MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC); Queenstown Girls High v MEC, Department of Education, Eastern Cape and Others 2009 5 SA 183 (CK); Federation of Governing Bodies for South African Schools v The Head of Department, Department of Education, Northern Cape Province and the Member of

From the onset, it is submitted that litigation is counterproductive for SGBs and PDEs. Relationships become strained, which hamper cooperation and the preservation of a sound, harmonious working relationship, both of which are needed if the governance model envisaged for education is to be successful.

From a study of education legislation, it is apparent that no explicit provision is made therein for alternatives to litigation, nor are there alternative forums for those who do not have access to courts. It is further apparent from the literature that limited research has been conducted in this particular area. The Constitutional Court has highlighted the importance of SGBs and PDEs cooperating to find solutions to their problems.[9] To facilitate this, the Constitutional Court has ordered consultation and meaningful engagement between SGBs and PDEs in order to find such solutions.[10] The court alluded to the fact that they should work together, but there are no guidelines on what this cooperation should look like in practice. Cooperation also requires that parties should not litigate against one another but again, no guidelines or mechanisms on alternatives to litigation are provided. For purposes of this dissertation, however, only the conflict arising between the education role-players, for example SGBs and PDEs, will be considered in relation to the functions they are required to execute in terms of education legislation to further determine the feasibility or appropriateness of the ombudsman office.

The dissertation will therefore concentrate on and elaborate on key premises, points of departure and notions, such as "access to justice", "access to administrative justice,"

the Executive Council for Education, Northern Cape Province [2016] ZANCHC 28; School Governing Body, Northern Cape High School and Others v The Member of the Executive Council for Education in the Northern Cape and Others [2016] ZANCHC 14; Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC); Organisasie vir Godsdienste, Onderrig en Demokrasie v Laerskool Randhart and Others 2017 (6) SA 129 (GJ); The Governing Body Hoërskool Overvaal v Head of Department [2018] 2 ALL SA 157 (GP).

9 Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC); MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC); and Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC).

10 Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC): par. 106; MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC): par. 111-116; and Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC): par. 128.

"transformative justice", "cooperative governance imperatives", "ombudsman" and the education environment relating to the conflict and or disputes that arise in this sector.

With the rationale to resolve conflict through other means than litigation, with specific reference to the ombudsmen institution as an alternative, a brief discussion follows regarding the education dispensation prior to 1994 and post-1994, which will serve as the background for this research. The history of education is important and is part of the causes of existing conflict.

1.1 Education before 1994

Before 1994, South Africa had a dual, but interdependent social order shaped by colonialism and apartheid that operated along race, class and gender lines. The social structure of the country consisted of a relatively advanced, globally interconnected political economy dominated by the mainly white, fairly affluent minority, and a relatively underdeveloped socio-economic stratum comprising mainly the black majority.[11] In the education sector, the education policies and practices in South Africa were a reflection of the political dispensation in the country.[12] Black and white learners attended separate schools and also had separate policies regarding the medium of instruction.[13] The effect hereof was that parents of black learners did not have the option of choice in selecting a school.[14]

The structure made no provision for involvement of parents, as the state was in control. Under this dispensation, there was gross inequality in the funding of public schools based on race, with black learners receiving the least funding.[15] Furthermore, the infrastructure at public schools attended by black learners remained underdeveloped and under-resourced compared with that of public schools attended by white learners.

Since 1994, the position has changed and the transition from an apartheid state to a democratic state has had a profound effect on education in South Africa.[16] New

11 Smit 2014: 37.
12 De Wet and Wolhuter 2009: 368; Alexander 2018: 3-4.
13 De Wet and Wolhuter 2009: 368; Alexander 2018: 3-4.
14 De Wet and Wolhuter 2009: 368; Alexander 2018: 3-4.
15 Arendse 2014: 161.
16 De Wet and Wolhuter 2009: 368.

education legislation was rapidly enacted and was designed to progressively align with international standards to ensure the right to basic education for all in South Africa.[17]

1.2 Education in the post-1994 constitutional dispensation

The right to education was included in the *Interim Constitution*[18] and was adopted in the final *Constitution*.[19] In the democratic dispensation, there was a need to heal the divisions of the past. In order for the state to undertake this task, it needed to change the way in which education was structured.

To give effect to this right, changes were made regarding the governance structure of education and various pieces of legislation regulating education were promulgated. This included the *NEPA,*[20] which came into operation in 1996, and the *Schools Act*,[21] which came into effect in 1997. The intention of the latter was to redistribute power to local SGBs as opposed to a centralised approach to power where the PDEs exercised all the power.[22] The Act further intended to establish a cooperative governance relationship between education role-players in line with the constitutional imperatives for cooperative governance. The Act therefore envisaged a dispensation in which there would be power-sharing and cooperative partnerships among the state (in particular, the PDEs and SGBs), educators and parents when formulating and implementing admission policy.[23]

1.2.1 Governance structure of education

Education is a concurrent legislative competence which is regulated by Schedule 4 of the *Constitution*.[24] "Concurrent" in this sense means powers and responsibilities that coincide.[25] Schedule 4 sets out the "functional areas of concurrent national and provincial competence". In this regard, governance structures in education have been

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[17] Coetzee 2014: 6.
[18] 200/1993: sec. 32(a). See also Alexander 2018: 4-5.
[19] 1996: sec. 29. See also Alexander 2018: 4-5.
[20] 27/1996.
[21] 84/1996.
[22] *Schools Act* 84/1996: Preamble.
[23] Smit and Oosthuizen 2011: 59.
[24] 1996.
[25] Bray 2002: 516.

structured with key role-players in mind to transform the education system. These role-players are the Department of Basic Education (DBE), the PDEs and the SGBs. Linked to the PDE is the public school and the principal. It is these role-players that are often engaged in litigation with one another as a result of conflict.

1.2.1.1 The role of the DBE

The DBE is headed by the Minister of Basic Education, who is responsible for all education in South Africa, excluding tertiary education. Under the new democratic dispensation, it is the responsibility of the DBE to develop, maintain and support a school system that can meet the demands of the 21st century. This means equal-access opportunities in respect of education and training to ensure that the quality of life of all citizens is improved.[26] To achieve this, the Minister is obligated to determine specific policies and regulations as required by law.

Education legislation requires that national education policies be drawn up by way of consultation.[27] There is the further requirement that, on the one hand, these policies be published and implemented and, on the other hand, be monitored and evaluated.[28] In this regard, the Minister has determined and published the admission policy for ordinary public schools (the National Admission Policy),[29] minimum norms and standards for school funding (the National Norms and Standards for School Funding or NNSSF),[30] and minimum norms and standards for school infrastructure.[31] It is necessary to pause at this juncture to point out that the provisions relating to the minimum norms and standards were only included in the *Schools Act* in 2011, and that the actual regulations only came into effect in 2013. In addition, the guidelines on admission policy were only published two years after the *Schools Act* came into force, that is, in 1998. Conflict or interpretation of the law resulted in a series of cases being taken to court against the Minister in exercising these powers.[32]

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26 South African Government "Education": http://www.gov.za/about-sa/education. Accessed on 12/10/2015.

27 *NEPA* 27/1996: sec. 2(b).

28 *NEPA* 27/1996: sec. 2(c) and (d).

29 GN 2432/1998.

30 GN 2362/1998 (amended from time to time).

31 *Schools Act* 84/1996: sec. 5A and GN R920/2013.

32 Equal Education and Another v Minister of Basic Education and Others 2019 (1) SA 421 (ECB); Equal Education and 3 Others v Minister of Basic Education and 9 Others [2020] 4 ALL SA 102 (GP); Basic Education

1.2.1.2 The role of the PDE

The political head of the PDE is the Member of the Executive Council responsible for education (MEC for Education), while the HOD is responsible for the overall administration and operations of the portfolio. The MEC must ensure that there are enough schools in each province,[33] and the provincial legislator must allocate sufficient funds for this purpose.[34]

The PDE is responsible for school education and all public schools.[35] This means that the PDE must administer schools in accordance with the needs and priorities of the particular province, but subject to national standards and priorities. District offices are the PDEs' main point of interaction with schools.[36] Much conflict occurs between PDEs and SGBs of the schools located in quintiles 4 and 5.[37]

1.2.1.3 The status of a public school

Public schools have the status of a juristic body.[38] The term "school" is used to include educators, principals, learners and parents.[39] As a juristic body, a public school functions through its SGB.[40]

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for All and Others v Minister of Basic Education and Others 2014 (4) SA 274 (GP); Section 27 and Others v Minister of Basic Education and Another 2013 (2) SA 40 (GNP); Komape and Others v Minister of Basic Education and Others [2018] ZALMPPHC 18.

33 *Schools Act* 84/1996: sec. 12(1).

34 *Schools Act* 84/1996: sec. 12(1).

35 N*EPA* 27/1996: sec. 3(4)(a)-(e).

36 Bray 2007: 14-15.

37 Governing Body of Mikro Primary School and Another v Western Cape Minister of Education and Others [2005] JOL 13716 (C); Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC); MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC); Queenstown Girls High v MEC, Department of Education, Eastern Cape and Others 2009 5 SA 183 (CK); Federation of Governing Bodies for South African Schools v The Head of Department, Department of Education, Northern Cape Province and the Member of the Executive Council for Education, Northern Cape Province, case number 887/2016; School Governing Body, Northern Cape High School and Others v The Member of the Executive Council for Education in the Northern Cape and Others, case number 1981/2015; Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC); Organisasie vir Godsdienste, Onderrig en Demokrasie v Laerskool Randhart and Others, case number 29847/2014; The Governing Body Hoërskool Overvaal v Head of Department, case number 86367/2017.

38 *Schools Act* 84/1996: sec. 15.

39 De Waal and Serfontein 2014: 69.

40 *Schools Act* 84/1996: sec. 16(1).

It is necessary to pause at this juncture to define in this context what a school is. A school is defined as a public ordinary or independent school which enrols learners in various grades from Grade R to Grade 12.[41] Section 12 of the *Schools Act* further defines a public school as an ordinary public school,[42] a public school intended for learners with special educational needs,[43] or a public school that provides education with a specific, specialised focus on talent, including sport, the performing arts or the creative arts.[44]

1.2.1.4 The role of the principal

The professional management at a public school vests in the principal of the school under the authority of the HOD.[45] The principal is thus responsible for ensuring that the policies developed by SGBs are implemented at the school. However, these policies have created much conflict, especially when SGBs fail to take into account the responsibilities of the PDE, which is to ensure that all learners have an adequate place at schools to receive education.[46]

1.2.1.5 The role of the SGB

The SGBs are vested with the overall governance of every public school.[47] In terms of the *Schools Act*, SGBs are democratically elected to represent the educators, parents, learners and staff of schools, which situation is different from that in the previous dispensation. An SGB must promote the best interests of the school and ensure the provision of quality education for all learners at the school.[48] SGBs have to adopt a constitution,[49] recommend the appointment of staff,[50] determine the language policy of schools,[51] determine the admission policy of schools,[52] take measures to ensure

41 *Schools Act* 84/1996: sec. 1.
42 *Schools Act* 84/1996: sec. 12(3)(a)(i).
43 *Schools Act* 84/1996: sec. 12(3)(a)(ii).
44 *Schools Act* 84/1996: sec. 12(3)(a)(iii).
45 *Schools Act* 84/1996: sec. 16(3).
46 Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC); MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC).
47 *Schools Act* 84/1996: sec. 16(1).
48 *Schools Act* 84/1996: sec. 20(1)(a).
49 *Schools Act* 84/1996: sec. 20(1)(b).
50 *Schools Act* 84/1996: sec. 20(1), (eA), (i) and (j).
51 *Schools Act* 84/1996: sec. 6(2).
52 *Schools Act* 84/1996: sec. 5(5).

learner discipline at schools,[53] and take control of school property and financial resources.[54] These powers and functions are exercised in the name of the school and in the best interests of the school and all its learners.[55] For example, SGBs are assigned the power to determine the admission policy, language policy and code of conduct of the schools they serve.[56] Decisions taken by the SGB in relation to these powers and functions are administrative by nature and can create conflict where the SGB exercises these functions to the benefit of the school it serves and fails to take into account the broader interests of the community and the department's responsibility, for example, to ensure that all learners have access to and are placed in an ordinary public school.

This innovative South African governance system in respect of education was intended to enhance democracy by allowing schools greater autonomy to democratise local control over policymaking decisions and to placate South African society in its desire to improve the education system.[57] It signifies the decentralisation of powers from state to school level, which is a manifestation of the separation-of-powers principle. However, public schools remain subject to control by the DBE and the PDEs, in that such schools must comply with the norms and standards set on these two levels.[58] In the implementation of these norms and standards the education role-players must observe and adhere to the cooperative governance principles set in chapter 3 of the *Constitution* and must conduct their activities within the parameters set out in the chapter.[59]

1.2.2 Cooperative governance requirements

Cooperative governance is vital to the theme of the new democratic dispensation.[60] The *Constitution* provides for cooperative governance measures between line

53 *Schools Act* 84/1996: sec. 8, 8A and 9.
54 *Schools Act* 84/1996: sec. 20(1)(g), (2), 36(1), 21.
55 *Schools Act* 84/1996: sec. 20.
56 *Schools Act* 84/1996: sec. 5(5). This determination is subject to provincial and national laws.
57 Serfontein and De Waal 2018: 2.
58 *Schools Act* 84/1996, GN 2432/1998, and, for example, provincial legislation such as the *Gauteng School Education Act* 6/1995 and GN 1160/2012.
59 *Constitution* 1996: ch.3, sec. 40(2).
60 *Constitution* 1996: ch. 3, sec. 40 and 41.

functions.[61] Serfontein and De Waal[62] state that the *Constitution*, through section 41(1)(e) and (h), establishes the framework within which organs of state should have respect for the status, powers and functions of one another in a manner that facilitates cooperation in mutual trust and good faith. They correctly point out that cooperative governance is based on the principles of relationships, fairness and participation.[63]

From the above synopsis of the roles of the various role-players, it is clear that a cooperative relationship is created between the DBE, PDEs (including principals) and SGBs. It is thus important for SGBs and PDEs to fully understand their different legal powers and levels of responsibility.[64] In fact, Serfontein and De Waal[65] have correctly pointed out that a PDE and SGB should in fact be inspiring confidence in each other's ability to make sound, objective and timeous decisions. This should be achieved by engaging with each other, rather than encroaching on the other's sphere of influence.[66] As partners, they must work together in the spirit of the *Constitution* to ensure, *inter alia*, that the right to education contained in section 29 of the *Constitution* is achieved and that resources are adequately shared in order to build the necessary capacity to guarantee quality education services for the public.[67] Collectively, their mandate is to administer education in such a way that a democratic and uniform education system is eventually available and accessible to all.[68] Education role-players should avoid litigating against one another as far as possible. It is trite that this has not been the case, given the cases that have served before the courts. It was discussed above that not all SGBs are on an equal footing to access courts to resolve their disputes, which raises aspects on access to justice.

1.2.3 Access to Justice

Access to justice has been an imperative in South Africa since before 1994. According to Leach,[69] post-apartheid South Africa has not entirely transcended to 'transitional

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61 *Constitution* 1996: ch. 3.
62 Serfontein and De Waal 2013: 54.
63 Serfontein and De Waal 2018: 3.
64 Serfontein and De Waal 2013: 54.
65 Serfontein and De Waal 2013: 54.
66 Serfontein and De Waal 2013: 54.
67 *Constitution* 1996: ch. 3.
68 Bray 2007: 14.
69 Leach 2018: 23.

justice', which aims to address the challenges that confront societies as they emerge from serious conflict and transition from an authoritarian state to a form of democracy.

Inasmuch as South Africa has become a democratic state in 1994, the residues of apartheid continue to haunt contemporary society through its deeply ingrained inequalities and are extremely hard to dispense with. This is not only apparent across education, but is also seen within the realms of access to justice. The reversal of the effects of such a deep-rooted system requires a multipronged approach at multiple levels, with its focus on the empowerment of access to justice for the disadvantaged. Leach[70] is of the opinion that the key to ensuring this empowerment is the systematic identification and removal of barriers to access to justice, thereby empowering the poor and marginalized to influence, access and utilize the mechanisms and institutions that are designed to improve their lives.

Despite the state and civil society institutions working hard to realise access to justice for all, it is trite that very few South Africans can afford legal services, particularly the services required in private civil litigation. This is seemingly the situation in the education sector for public ordinary schools located in quintiles 1 to 3. It must be pointed out from the onset that section 34 of the Bill of Rights determines that everyone has the right to have any dispute resolved "in a fair public hearing before a court, or where appropriate, in another independent and impartial tribunal or forum", by "application of law". The access to justice contemplated here encompasses a wider approach than the ordinary meaning of the notion set out in section 34.[71] Similar provisions are contained in section 33 of the *Constitution* as well as related to just administrative action.

It is common cause that education rights disputes in South Africa have been adjudicated upon over the years up to the highest court in this country and still continues to do so. In this regard, the conventional method of resolving education disputes is by way of civil litigation. This conventional method of resolving disputes amongst education role-players has in many ways become unsuited for these types of disputes, for reasons such as the adversarial nature of the process (win-lose situation) which ultimately affects parties' relationships with one another, the fact that

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70 Leach 2018: 26.

71 Nyenti 2013: 903.

education role-players have a duty to uphold the constitutional imperatives for cooperative governance, the legal costs, and the duration of the process, to name but a few.[72]

It is safe to assume that conventional civil dispute resolution such as the courts exhibit little appreciation for or consideration of alternative and better-suited mechanisms for education role-players to resolve their disputes. The exorbitant costs associated with litigation further facilitates in favour of this dissertation to consider alternative options to litigation. This impacts substantially on the right to access justice by everyone (with specific reference to SGBs elected to serve in quintiles 1 to 3 schools), which the *Constitution* expounds as a fundamental human right as part of the drive to achieve greater social justice. In many instances, civil litigation takes months, even years, to resolve disputes through an often overburdened court system. Ultimately, this situation places financial pressure on the delivery of public education and a further burden on available public financial resources.

Furthermore, the formal process favours the wealthier litigant. In this regard the playing fields are unequal. The SGBs of quintiles 1 to 3 schools in need of relief is either left without any redress, or in an unequal litigating position *vis-à-vis* the opponent.

In contrast to resolving disputes through formal litigation, the creation of an ombudsman office is an alternative mechanism to consider for the education sector. Furthermore, ombudsmen can also utilize techniques of mediation and meaningful engagement, which has been shown to be more affordable and more expedient.[73] It will further be an added benefit in that the relationships amongst education role-players will ultimately be preserved.[74]

Case law has shown that the main motivation for contemplating and initiating civil litigation in the education sector is to stake out who has the final power, in other words, to have the courts pronounce on who is right or wrong – which is a win/lose situation. For example, PDEs and SGBs of the more affluent schools often end up in court

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72 Komape and Others v Minister of Basic Education and Others [2018] ZALMPPHC and Equal Education and Another v Minister of Basic Education on Others 2019 (1) SA 421 (ECB).

73 Batalli 2015: 232-233.

74 *Constitution* 1996: ch.3, sec.41 (1)(h).

regarding their powers and who has the final say when it comes to issues on admitting learners to schools, for instance, or determining school policies. Other examples are where the head of department (HOD) fails to take a decision on whether or not to expel a learner who has been found guilty of serious misconduct[75] as well as the recent spate of cases against the National Minister for Basic Education and provinces that fail to upgrade infrastructure or provide school resources to learners thus impeding on their right to education.[76] It must be pointed out that in this instance, civil society institutions assisted schools in quintiles 1 to 3 to bring their application before court.

The formal method to resolve disputes in the education sector, which is litigation, has become unsuited if one has due regard for the South African constitutional democratic context and does not represent public aspirations of dispute resolution mechanisms. The societal effects of limited access to justice through the formal civil process are far-reaching, and include factors related to public distrust in, or lack of hope that the legal system is helpful to improve the lives of citizens. This dissertation will investigate the establishment of an ombudsman office for education. The point must also be made that many other jurisdictions use ombudsmen to address conflict and that South Africa does not really have a culture of ombudsmen institutions, or limited use of such institutions. The success attributed with these institutions in other countries raise the question whether it will work in South Africa and whether it will assist in improving cooperative governance.

1.3 International practices in other jurisdictions

This research will draw on international sources, as the largest body of literature and in particular have better research on successes, failures and resistance, if any, on the ombudsman. Most states who have implemented international guidance standards have created various ombuds offices for various sectors, for example, states have now created an ombudsman office for children.[77] Examples of such states, to name a few, are Poland, Ireland, Denmark and the Western Cape in South Africa.[78] It is safe to

[75] Maritzburg College v Dlamini and Others [2005] JOL 15075 N.

[76] Komape and Others v Minister of Basic Education and Others [2018] ZALMPPHC and Equal Education and Another v Minister of Basic Education on Others 2019 (1) SA 421 (ECB).

[77] Gregory and Giddings 2000: 1-459, Seneviratne 2002: 1-323, Reif 2020: 1-741.

[78] Reif 2020: 285, Glendenning 2004: 133-144 and Abrahams 2020: 1-2.

state that similar research in South Africa is virtually non-existent, because ombudsman offices in the context of education has gained – albeit limited – recognition as an alternative mechanism to litigation on an international scale.

2. STATEMENT OF THE PROBLEM AND RESEARCH QUESTIONS

In what follows, the statement of the problem and the research questions are addressed, in the process further emphasising the need for, and focus of, this research.

2.1 Statement of the problem

As indicated above, case law related to education reveals that there are various forms of conflict and disputes that have been referred to the courts over the years. This includes disputes between the affluent SGBs and PDEs as well as civil society institutions on behalf of the impoverished SGBs. Affluent or wealthy schools are schools classified in quintiles 4 and 5 in terms of the norms and standards for school funding.[79] This can largely be attributed to the previous education dispensation and the manner in which school funding was distributed then. Researchers argue that the education system still houses separate education systems, as quintiles 4 and 5 schools continue to remain adequately resourced in comparison with schools in quintiles 1, 2 and 3.[80]

The *Schools Act*[81] makes provision for the payment of school fees where parents are able to afford these. Wealthy schools are able to maintain their position of privilege by charging high school fees, which thus enables such schools to operate on the basis of budgets far exceeding those of the poor schools.[82] Schools located in quintiles 1 to 3 are reliant on state contributions and would therefore not be in a position to take issue with the PDE that, for example, imposes additional learners on a school in excess of the learner-teacher ratio, thus further contributing to overcrowding in classrooms. These schools simply do not have adequate financial resources to

79 GN 29179/2006.
80 Arendse 2014: 160.
81 84/1996: sec. 39.
82 Arendse 2014: 161. See also Smit and Oosthuizen 2011: 61.

approach courts of law for relief.[83] What is worse is the fact that in most instances the PDEs fail to capacitate the schools to cater for the increase in learners. The migration of learners from rural schools to urban schools also places pressure on the education system for admissions and can lead to conflict.[84]

Lack of infrastructure is a further problem. Although new infrastructure might alleviate some of the admission issues, this is not the focus of this dissertation and will not be discussed in depth.

It is trite that many people in South Africa continue to live in deplorable adverse conditions and poverty. In the case of parents in this group, it will be extremely difficult to finance education. For many, it might even be impossible. Despite the fact that the state provides for the poor, parents may feel that their dignity is undermined if they have to 'flaunt' their poverty to gain access to education. By this is meant that, even though the law makes provision for exemption from school fees in certain instances, parents may not want to send their children to these schools.[85] In this regard, the Minister has published regulations relating to the exemption of parents from payment of school fees.[86] It is for this reason that the majority of disadvantaged learners will continue to seek access to schools in quintiles 1, 2 and 3, thus leading to issues of overcrowding, creating conflict and disputes. Furthermore, quintiles 4 and 5 schools do not have the capacity to accommodate all the learners in the country.

Research further indicates that the SGBs of schools in quintiles 1, 2 and 3 are often not functional and are unable to fulfil their functions because of, *inter alia*, a lack of training, difficulties in accessing legal resources, especially in poor and rural areas, and the illiteracy of parents on the SGB.[87] Joubert and Bray[88] further indicate that factors related to language, school fees, and the school zoning system have become a most effective instrument in the hands of some of the SGBs of schools in quintiles 4 and 5 to discriminate against learners during admission.

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83 See the discussion on these points in ch. 2: 2.4.1.1.
84 See the discussion in ch. 4: par.6.2.
85 *Schools Act* 84/1996: sec. 40. See also GN 29311/2006.
86 GN 29311/2006.
87 Reyneke 2013: 11.
88 Joubert and Bray 2007: 76.

This, in Arendse's[89] view, will continue to reinforce existing inequality between poor and wealthy schools. There is a dire need for an alternative to adversarial litigation processes that provide for alternative mechanisms to litigation, and ensure that all education role-players have equal access to administrative justice in conflict situations and disputes arising from school policies, practices and the like. As highlighted above, these unlawful practices include decision-making that is unlawful and which often leads to overcrowding that disproportionately affects the poor. Providing alternatives to litigation for PDEs and SGBS will not only benefit quintiles 4 and 5 schools, but also schools across quintiles 1 to 3, thus alleviating the inequalities, as they, too, will have an alternative platform to raise their issues of overcrowding.

A great deal of the litigation referred to stems from the different roles and responsibilities of SGBs and PDEs. The conflict is most evident when the PDEs and their officials usurp powers, thereby restricting and impeding the authority that can be exercised by SGB structures.[90] It is further evident when PDEs fail to deliver on their constitutional mandate to ensure that each child in this country has access to education. In so doing it requires a place at school for every child, in a conducive environment that requires adequate and appropriate infrastructure. This includes transport to school where learners from rural areas have to travel extreme distances, and learning and teaching support material such as textbooks.[91]

Some other points of contention include parents' desire to ensure that their children receive quality education at the school of their choice.[92] Schools, in turn, want to focus only on what is best for the learners who are admitted to a particular school and sometimes do not take into consideration the responsibility of the PDEs.[93] Unlike the school, which focuses on learners' needs and interests, the PDEs need to guarantee that there are enough schools, and sufficient places at schools to accommodate all

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89 2014: 161.

90 Governing Body of Mikro Primary School and Another v Western Cape Minister of Education and Others [2005] JOL 13716 (C); Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC); MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC).

91 Section 27 and Others v Minister of Basic Education and Others 2013 (2) SA 40 (GNP).

92 School Governing Body, Northern Cape High School and Others v The Member of the Executive Council for Education in the Northern Cape and Others, case number 1981/2015.

93 Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC): par. 80.

learners who have applied for admission.[94] This inevitably leads to conflict among the role-players.

Against this background, some authors argue that, although the decentralisation of powers has led to the greater democratisation of schooling, it has also contributed to the perpetuation of inequities among schools.[95] These authors highlight, and argue further, that inequities are now drawn increasingly along class rather than racial lines.

On the one hand it is clear that there is a power play between SGBs and PDEs. On the other hand it is apparent that some SGBs are merely subservient to the PDE, who in certain instances blatantly fail to provide a child with access to education in order to realise the right to education, which is in that child's best interest. It is apparent that courts are constantly tasked with determining whether or not the conduct of HODs of PDEs is lawful where policy provisions have been overridden or departed from. It is also clear that courts are frustrated by these constant power struggles and, in the matters of *Head of Department, Department of Education, Free State Province v Welkom High School and Another* (*Welkom*) and *Head of Department, Department of Education, Free State Province v Harmony High School and Another*[96] (*Harmony*) and *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others*[97] (*Rivonia)* cases, express their dismay in this regard. Nonetheless, in the *Welkom* case, the court commended the PDE for accommodating the pregnant learner. The court stated:

> The accommodation achieved in that regard should have been an indicator to how the dispute should have been determined in the first place, and how similar future problems should be evaded and resolved. Instead, the parties lost patience with each other and rushed to court. The focus then turned into a power play on who has the final say over the conduct of the principals of the schools. Lost in conversion was that the best interests of the children at the schools were of paramount importance and that the powers of the school governing bodies and the HOD were submissive to the children's needs.[98]

[94] *Schools Act* 84/1996: sec. 20(1) and sec. 3(3).
[95] Joubert and Bray 2007: 76.
[96] 2013 (9) BCLR 989 (CC).
[97] 2013 (12) BCLR 1365 (CC).
[98] 2013 (9) BCLR 989 (CC): par. 132.

The court found that the problem is that SGBs and PDEs talk past one another on the main issue, lose patience with one another, and then approach the courts to determine who has the power and the final say on the issue.

Justice Mahlantla correctly stated the following in the *Rivonia* case:

> There are various stakeholders in education with a diversity of interests and competing visions. Tensions are inevitable. But disagreement is not a bad thing. It is how we manage those competing interests and the spectrum of views that is pivotal to developing a way forward.[99]

Cooperative governance imperatives require that the SGB and the PDE avoid conflict with each other and that, where conflict is unavoidable, they resolve it in the prescribed manner in order to avoid costly litigation.

2.2 The need for alternatives to litigation

In this regard, cooperative governance requires cooperation. Cooperative governance further requires that SGBs and PDEs take all reasonable steps to avoid litigation. The courts have ordered meaningful engagement and consultation and have further urged SGBs and PDEs to seek alternatives to litigation if engagement and consultation fail.[100] What is evident from the Constitutional Court cases is that HODs and SGBs have an obligation to uphold the constitutional imperatives concerning cooperative governance as envisioned by section 41 of the *Constitution*. In the *Welkom* case, it was stated:

> The SGB and HOD are organs of state and … as organs of state both are obliged to follow the prescripts of section 41(1)(b) of the Constitution. These prescripts dictate that they should co-operate with each other in good faith and mutual trust, to consult with each other and to avoid litigation proceedings.[101]

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99 2013 (12) BCLR 1365 (CC): par. 2.

100 Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (3) BCLR 177 (CC): par. 106; MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC): par. 111-116; and Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC): par. 128.

101 2013 (9) BCLR (CC): par. 140.

Similarly, in the Constitutional Court judgment in Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo[102] (Ermelo) case, the court said:

> An overarching design of the *Schools Act* is that public schools are run by three critical partners. The national government is headed by the Minister of Education whose key role is to set uniform standards for public schools. The MEC is the political head of the PDE and bears the obligation to establish and provide public schools through principals. Parents of learners and members of the community in which the school is located are represented in the SGB, which exercises defined autonomy over some domestic affairs of the school.[103]

Apart from the remarks made by judges, there is no guidance for these role-players on how effect should be given to cooperative governance principles. As already stated, education legislation fails to provide guidance on how role-players should give effect to the principles of cooperative governance, and what alternative processes can be followed if role-players are in conflict. It is submitted that this guidance is necessary to guarantee that relationships remain intact, which are necessary for safeguarding, protecting, promoting respect and diversity concerning human rights, thus leading to quality learning and teaching.

It is therefore imperative to find alternatives in order to avoid litigation. Role-players need clear guidance on these alternative procedures in order to address conflict. Alexander[104] argues that consultation in the form of meaningful engagement and mediation might be a suitable alternative to consider. This dissertation is an extension of that contribution by further exploring the possibilities of a dedicated ombudsman office for education, which in turn can utilise mediation as a tool to resolve conflict and disputes. By considering the ombudsman as an option will also create a forum for the impoverished schools to seek recourse. The *Basic Education Laws Amendment Bill* (*BELA*)[105] presently under consideration has proposed the inclusion of a dispute resolution clause in the *Schools Act*.[106] The dispute resolution clause in the *BELA* does not include the establishment of an Ombud for education therefore this thesis will

[102] 2010 (3) BCLR 177 (CC).
[103] 2010 (2) SA 415 (CC): par. 56.
[104] Alexander 2018: 1 - 177.
[105] GN 41178/2017.
[106] Schools Act 84/1996.

explore the option of creating an Ombud office for the sector so as to enhance and or improve the proposals in the *BELA*. The aims of this dissertation are set out below.

2.3 Aims of the study

As stated above, there are various aims to this research. The first is that education rights disputes have increased exponentially in South Africa since the inception of the democratic state and that suitable mechanisms need to be found to address the disputes. The second is that there are many alternative forums that could serve as alternatives for litigation. One such forum is a dedicated ombudsman office. This dissertation will investigate the ombudsman office as a worthy and appropriate alternative to litigation. The suitability of an ombud office to improve access to administrative justice and enhance cooperation amongst role-players will thus be investigated.

This dissertation will investigate these possibilities by answering the following primary and secondary questions:

2.4 Research questions

2.4.1 Primary question

Can the creation of an ombudsman office serve as an appropriate dispute resolution mechanism to promote access to justice, just administrative action and improve cooperation among education role-players.

The primary question will be answered by exploring the following secondary questions and sub-questions:

2.4.2 Secondary questions

- What is the current legal position with regard to administrative action in the basic education environment among education role-players?
- Does the existing legal framework that regulates administrative decisions among education role-players accord with the constitutional imperatives on

access to justice, just administrative action and the enhancement of cooperation?

- Can the creation of an ombud office serve as an appropriate alternative forum to deal with conflict and or disputes arising from administrative decisions among education role-players?
- Will the creation of an ombud office respect, protect, promote and fulfil the constitutional imperatives with regard to access to justice, just administrative action and the enhancement of cooperation?
- If the ombuds office is an appropriate alternative to litigation what will draft legislation for the South African Ombudsman provide?

SGBs and PDEs are mandated by the *Constitution* to uphold the principles of cooperative governance.[107] States are required by international standards to ensure that sufficient and adequate forums are in place to ensure that everyone has access to justice.[108] Sections 33 and 34 of the *Constitution* also requires of the state to ensure that all South Africans have access to justice at the courts or any other alternative forum. However, the principles of cooperative governance does require these parties to avoid legal proceedings at all times and to seek alternative ways in which to resolve their disputes.[109] The aim of this dissertation is to investigate the possibility of creating an ombudsman office for education role-players to improve access to justice, enhance cooperation and so avoid litigation.

3. CONCEPTUAL FRAMEWORK

The conceptual framework of this dissertation is based on the following notions of the separation of powers doctrine, the rule of law, transformative constitutionalism, access to justice and participatory democracy. The notion related to the rule of law, separation of powers doctrine, transformative constitutionalism, justice and participatory democracy finds expression in pertinent constitutional provisions.

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[107] *Constitution* 1996: sec. 41.
[108] Argument will be advanced and discussed in ch. 4 and 5 hereof.
[109] *Constitution* 1996: sec. 41(1)(h)(i)-(vi).

3.1 Separation of Powers doctrine

One of the most important mechanisms in the South African constitutional democracy is the notion of separation of powers doctrine.[110] The application of this doctrine seeks to limit the powers of each individual branch of government: legislature, the executive and the judiciary.[111] It is therefore considered that the doctrine is the basis for an institutional, procedural and structural division of public power to create a society in which the abuse of power by government is curtailed.[112] It is, however, noted that the final *Constitution* does not explicitly mention the separation of powers doctrine. However, it was the constitutional principles of the *Interim Constitution* that required the final constitution to ensure that there is separation between the powers of the three branches of government.[113] This doctrine is further associated with the protection of human rights.[114] Linked to the doctrine of the separation of powers is the rule of law aspect which is equally important in a democratic state. This will be discussed below.

3.2 Rule of Law aspect

In South Africa, public authority and functions are exercised by the government officials who are concerned with administrative law.[115] Primarily administrative law is based on the rule of law. Researchers[116] have highlighted the rule of law in three principles. These are *inter alia*: that everyone was subject to and equal before the law, appearing before the ordinary courts of the land (no special courts for specific groups of people); and the rule of law represented the hard-won victories of the ordinary people through court proceedings. It had developed organically from below and was not imposed by authority from above.[117]

110 De Vos 2017: 60.
111 De Vos 2017: 60. Further argument will be advanced on this aspect in ch.2 and 3 hereof.
112 De Vos 2017: 60.
113 200/1993: schedule 4. Principle VI provides: 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' This very same notion finds application amongst the powers of the various education role-players which will be identified and discussed in chapter 2 and 3 hereof.
114 Further argument will be advanced on this aspect in ch.2 and 3.
115 Quinot 2016: 4.
116 Hoexter and Penfold 2021: 181; Quinot 2016: 5-6.
117 Quinot 2016: 5.

What this ultimately means is that the main features of the rule of law aspect overlap extensively with the administrative law principles that no public power may be exercised without the lawful power in law to do so (*ultra vires* principle) and in an acceptably lawful manner.[118] The courts' function as is envisaged in the separation of powers doctrine is that of a politically impartial watchdog over government and to ensure that the state and officials act within the bounds of their powers, and to protect citizens from abuse of power.[119] In the event that a public power acts beyond what is provided for in the law, the action is deemed *ultra vires* and the courts are required to review these decisions to check whether or not government has remained within its bounds and, if not, will set aside such action or decision. This dissertation is further premised on transformative constitutionalism, access to justice that was discussed above, and participatory democracy. Next follows a discussion of these concepts.

3.3 Transformative constitutionalism

Langa[120] states that the core of the new constitutional order should be viewed as a commitment to transform society. Although he points out that there is no single acceptable definition of transformative constitutionalism,[121] he bases his understanding of the term on the conclusion to the *Interim Constitution* where it was provided that a society formerly characterised by discord, conflict and prejudice must be replaced by a future created around the recognition of human rights, democracy and peaceful coexistence, as well as developmental prospects for all.[122] In this regard,

it is considered that transformation comprises the fulfilment of socio-economic rights, but also provision for greater access to education.[123]

Other authors such as Pieterse[124] quote Albertyn and Goldblatt's definition of transformation, which they see as:

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118 Quinot 2016: 6.
119 Hoexter and Penfold 2021: 181.
120 2006: 351.
121 Langa 2006: 351, Moseneke and Levi 2020: 1-7, Moseneke 2015: 1-15 and Arendse 2019: 100-147
122 Langa 2006: 352. Moseneke and Levi 2020: 1-7, Arendse 2019: 100-147 and Moseneke 2015: 1-15. See also *Interim Constitution* 200/1993: Epilogue.
123 Langa 2006: 352. Moseneke and Levi 2020: 1-7, Arendse 2019: 100-147 and Moseneke 2015: 1-15.
124 2004: 701.

> A complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.

Liebenberg[125] indicates that: “Transformative constitutionalism implies fundamental changes to unjust economic and social structures.” She argues that transformative strategies should focus on addressing the underlying structures that create the patterns of material deprivation and status hierarchies. She also indicates that social rights have been framed in in three ways in debates pertaining to law and policies namely social citizenship, equality and participation.

Moseneke[126] provides some practical wisdom and states that the Constitution’s design is “emphatically transformative” in nature. This requires some action and in this regard he states that:

> It is meant to migrate us from a murky an brutish past to an inclusive future animated by values of human decency and solidarity. It contains a binding consensus on or a blueprint of what a fully transformed society should look like.

Also important and relevant is Klare’s[127] definition of transformation:

> Transformative constitutionalism is a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction.

125 2015: 447.
126 Moseneke 2015: 1-15.
127 1998: 150.

Despite the fact that there is no single definition,[128] the understanding of transformative constitutionalism discussed is appropriate considerations for the conceptual framework of this dissertation, which considerations will be elaborated on later.

The *Constitution* is indeed a transformative document adopted to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights in order to improve the quality of life for all citizens.[129]

Section 1 of the *Constitution* contains the founding provisions and confirms that South Africa is a democracy based on the rule of law.[130] Furthermore, the rule of law requires that laws be clear and prospective.[131] In terms of the enforcement of laws, government officials in the various departments of education must, in the course of exercising these public powers and functions conferred on them by legislation, act strictly in accordance with the law. Enforcement should be procedurally fair, as required by the *Constitution*[132] and the *Promotion of Administrative Justice Act* (*PAJA*).[133] The procedurally fair process required when SGBs and PDEs exercise their functions will be highlighted throughout the dissertation. Langa[134] highlights access to justice as a transformation challenge. This dissertation therefore focuses on providing alternatives to ensure that both transformation and access to justice are achieved.

As discussed above, the transformative nature of the *Constitution* is further recognised by the inclusion of socio-economic rights in its Bill of Rights.[135] Several of the fundamental rights enshrined in the *Constitution* have particular significance for

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128 Langa 2006: 351. Moseneke and Levi 2020: 1-7, Arendse 2019: 100-147 and Moseneke 2015: 1-15.

129 Pieterse 2004: 701.

130 *Constitution* 1996: sec. 1 and 2.

131 Beckman and Prinsloo 2006: 483.

132 1996: sec. 33. The section reads as follows:

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must –

(a) provide for review the of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

133 3/2000. Herein, provisions have been enacted to give effect to section 33 of the *Constitution*.

134 Langa 2006: 355, Moseneke and Levi 2020: 1-7 and Moseneke 2015: 1-15.

135 Arendse 2014: 162.

education. The most important of these are equality;[136] human dignity;[137] freedom of religion, belief and opinion;[138] freedom of expression;[139] freedom of association;[140] the rights of children;[141] the right to education;[142] the right to a language and culture of choice; and the right to belong to a cultural, religious and linguistic community.[143]

Basic education as a fundamental right is encapsulated in section 29(1)(a) of the *Constitution*.[144] Linked to this is the important role of section 28 of the *Constitution*, which deals with the rights of children and, in particular, the fact that a child's best interests are of paramount importance in every matter concerning the child.[145] Researchers have reasoned that the status of the right to education cannot be overlooked, since it is a right that liberates people and provides dignity and self-confidence.[146] It is a right on which the materialisation of other fundamental rights depends.[147] It is contended that the right to education was included in the *Constitution*'s Bill of Rights to assist the poor, to protect their fundamental needs and interests, and to transform our society constructed on the pillars of equality, dignity and freedom.[148]

The importance of this right was established by the Constitutional Court in the matter of *Governing Body of the Juma Musjid Primary School v Essay N.O.*,[149] in which it was held that:

> a basic education is a socio-economic right and is focused at promoting and evolving a child's personality, talents, [and] mental and physical abilities to his or her fullest capability and provides a foundation for a child's lifetime learning and opportunities.[150]

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136 *Constitution* 1996: sec. 9.
137 *Constitution* 1996: sec. 11.
138 *Constitution* 1996: sec. 15.
139 *Constitution* 1996: sec. 16.
140 *Constitution* 1996: sec. 18.
141 *Constitution* 1996: sec. 28.
142 *Constitution* 1996: sec. 29.
143 *Constitution* 1996: sec. 30.
144 *Constitution* 1996: sec. 29(1).
145 *Constitution* 1996: sec. 28(2).
146 *Constitution* 1996: sec. 1 and 7. See also Pieterse 2004: 700.
147 Pieterse 2004: 700.
148 Pieterse 2004: 700.
149 2011 (8) BCLR 761 (CC): par. 43.
150 2011 (8) BCLR 761 (CC): par. 43.

Another important concept that informs this research is the theory of participatory democracy. The *Constitution* includes a clear commitment to participatory democracy.[151]

3.4 Participatory democracy

The establishment of SGBs signifies an important decentralisation of power from departmental to local school level, which is an expression of the separation-of-powers principle.[152] As a result, the policy of decentralisation of powers according to participatory democratic theory is a key aspect of the framework for this dissertation. While such decentralisation of powers must surely facilitate an expansion in democratic participation in the governance of schools, decentralisation also comes at a price and poses certain risks to the partnership.[153] At school level, educators, learners, parents and/or other education role-players have needs, interests and expectations pertaining to the right to education that are not necessarily in harmony with government's obligations and policies and with constitutional imperatives.[154]

Related to these are important principles such as responsibility, accountability, transparency and public involvement, which will be highlighted in the relevant chapters of this dissertation.[155] Serfontein and De Waal[156] state that responsibility suggests trustworthiness, capacity, dependability, judgement and choice.[157] Responsibility must be likened to the social and moral responsibilities of those entrusted with executing public functions.[158] Accountability, on the other hand, is linked to answerability, blame, liability and obligation. In this regard, accountability involves a duty on the part of those executing public functions to account for their actions in a transparent way.[159]

Theoretically defined, participatory democracy is a form of direct democracy that empowers all members of society to participate in decision-making processes within

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[151] *Constitution* 1996. See also Smit and Oosthuizen 2011: 60.
[152] Serfontein and De Waal 2018: 2.
[153] Smit 2022: 91-107.
[154] De Waal and Serfontein 2014: 65.
[155] Constitution 1996.
[156] Serfontein and De Waal 2018: 1-16.
[157] Serfontein and De Waal 2018: 6.
[158] Serfontein and De Waal 2018: 6.
[159] Serfontein and De Waal 2018: 6.

institutions, organisations, and societal and government structures.[160] De Vos[161] states that participatory democracy seeks to ensure that members of society are afforded real opportunities to participate meaningfully in decisions that affect their lives. This is what meaningful engagement and mediation aim to do – to transform society for the better by giving effect to the constitutional imperatives. This theory will be used to substantiate the arguments contained in chapters 3 and 7 of this dissertation that favours public involvement and participation in a meaningful manner.

3.5 Just administrative action

The *Constitution* provides everyone with the right to administrative action that is lawful, reasonable and procedurally fair.[162] Provision is also made in the *Constitution* that everyone whose rights have been negatively affected by administrative action has the right to be provided with reasons therefor. This constitutional duty is further given effect to through section 3 of the *Promotion of Administrative Justice Act*,[163] which stipulates that any administrative action that materially and negatively affects the rights or legitimate expectations of any person must be procedurally fair. In this regard, SGBs and PDEs are expected to determine school policies and to administer to school policies in a manner that is lawful, procedurally fair and reasonable and which does not adversely affect the rights or legitimate expectations of any person.

4. RESEARCH METHODOLOGY AND STRUCTURE OF DISSERTATION

Qualitative research relates to meanings, concepts, definitions, characteristics, metaphors, symbols, and the description of things.[164] The approach further emphasises the what, how, when and where of things in trying to determine the essence and ambience of the research project.[165]

In qualitative research, we seek to comprehend and clarify by way of argument, using evidence from data and from the literature, what the phenomenon (or phenomena) is that we review.[166]

This thesis follows a qualitative research approach and is a desktop study. Desk research is a type of research that is based on the material published in reports and similar documents that are available in public libraries, websites, data obtained from surveys already carried out,

160 Smit and Oosthuizen 2011: 60. See also Adams and Waghid 2005: 25.
161 2017: 94.
162 *Constitution* 1996:sec. 33(1) and (2).
163 3/2000:sec. 3(1).
164 Berg 2009: 3.
165 Berg 2009: 3.
166 Henning, Van Rensburg and Smit 2004: 3-4.

etc. Some organizations and institutions also store data that can be used for research purposes. It is a research method that involves the use of existing data. These are collected and summarized to increase the overall effectiveness of the investigation.

It is the most suitable process for determining the content, scope and nature of the Ombudsman office as an appropriate alternative to litigation to improve access to administrative justice by, and cooperation among education role-players who are in conflict with one another.

The aim of this dissertation is ultimately to explore and investigate an alternative mechanism or forum to improve access to administrative justice and enhance cooperation amongst the education role-players.

The *Constitution* will be the starting point regarding the right to education.[167] Broadly, the rights of children with reference to the right to education will be identified and mapped out. Flowing from this, the various education Acts promulgated to give effect to the "the right to education" as enshrined in the *Constitution.* The roles and responsibilities of the various education role-players will be extracted from the education legislation and the importance thereof will be discussed in order to realise the goals set in the *Constitution*.[168]

The judgments in important cases relating to education rights disputes that have made significant contributions to education will be utilised throughout the dissertation. From these, one is able to extract information relating to: the problems that arose between SGBs and PDEs; the manner in which these were dealt with leading up to the court cases; how the courts ruled in these cases; and, most importantly, the expression given by the judges in the cases to upholding and implementing the constitutional imperatives of cooperative governance and the avoidance of litigation by the PDEs and SGBs in order to fulfil their mandate of providing access to education for all.

To further give effect to the legislative provisions and to investigate and explore the Ombudsman office as an alternative to litigation, legal sources such as textbooks, journals, international treaties, reports, legislation, relevant case law, newspaper articles and internet sources will be utilised. Practices of ombudsman offices in other jurisdictions will be considered. This analysis is necessary to discern and seek guidance and possible lessons for the development of an ombudsman office for the education sector.

5. DEMARCATION OF THE THESIS

This research focuses on determining an alternative to litigation among education role-players with particular reference to SGBs and PDEs. It is common cause that conflict and disputes are prevalent in various areas in education for example in the labour relations realm between employer (PDEs) and employees (principals and educators). An ombuds office in this area does not make sense given that there is already a system in place such as bargaining councils to resolve conflict and disputes that arise from

[167] *Constitution* 1996: sec. 29.
[168] See chapter 2 of the *Constitution* on roles and responsibilities.

labour relations. In addition hereto conflict also arises between principals and SGBS and HODs of the PDEs. This conflict will not be explored in too much detail as the focus of this thesis is on SGBs and PDEs. In addition hereto, this thesis explores the creation of an ombudman office for the education sphere. It will become apparent in the thesis later on that various states have established ombudman offices for children. The focus of this thesis is not on the broad remit of children's rights. It is the view of the researcher that education as a sector has its own unique challenges posed to the current educational dispensation in the South African context.

6. STRUCTURE OF THE THESIS (CHAPTER OUTLINE)

Chapter 1: Introduction

The researcher introduces the context of the research. The chapter further sets out the main research question and the subsidiary questions to be investigated and answered. The reasons for the research as well as the departing themes, theories and notions in the South African context in relation to education, cooperation and justice have been set out.

Chapter 2: Conflict and disputes that result from the roles and responsibilities of education role-players

This chapter identifies the various education role-players and the roles and functions they have to perform in the sector. This chapter will focus on the current legal position with regard to administrative decisions in the sphere of basic education. It will discuss typical administrative decisions within the education environment, and how these decisions cause conflict or disputes. The education dispensation will be discussed here with specific reference to education pre- and post-1994, and the roles and responsibilities of education role-players in the new dispensation.

Chapter 3: The constitutional imperative for cooperation amongst education role-players

This chapter will set out and discuss the framework of cooperative governance. It will briefly discuss the constitutional concept of cooperative governance and its application in education law at a national, provincial and school level. The relationship between

SGBs and PDEs will also be focused on in order to establish their responsibilities insofar as cooperative governance is concerned. Further, the constitutional imperatives in relation to cooperative governance will be elaborated on by establishing valid arguments based on research and case law.

Chapter 4: Legal framework for access to justice

This chapter discusses the philosophical framework on access to justice. This exploration will be done based on the international law requirements for access to justice, the *Constitution*, legislation and other applicable guidelines. This chapter establishes the benchmark for access to justice ideals and the lack thereof in so far as it relates to the education sector.

Chapter 5: The right of access to courts and other legal mechanisms to resolve disputes amongst education role-players

Chapter 5 discusses the notion of access to justice with reference to the judicial and non-judicial mechanisms available in the education context for education role-players to resolve their conflict and or disputes. This investigation is done in light of the constitutional requirements set out in section 33 (just administrative action) and section 34 (access to justice).

Chapter 6: An evaluation of the ombudsman office

Chapter 6 undertakes to explore and evaluate the Ombudsman office with reference to a study in various jurisdictions. In so doing it will identify key aspects of various models which is imperative for consideration of the design and model that would best suit education in the South African context.

Chapter 7: The creation of an ombudsman office for education

This chapter will draw on the previous chapters, particularly chapter 6, to identify key aspects for the design and model of the Ombudsman office for education.

Chapter 8: Conclusions and recommendations

The dissertation concludes with chapter 8, which provides a summary of the conclusions reached in the light of the research questions posed. In the process,

various recommendations are also made. It will also provide a draft framework for consideration insofar as it relates to the creation of such an office for education.

7. CONCLUSION

This chapter provides a brief overview of the focus area, which is to explore the creation of an ombudsman office as an alternative for resolving conflict between PDEs and SGBs. It further provides a brief overview of the legislative environment within which the topic falls. It is necessary to give expression to what judges have said in case law by examining alternatives to litigation and, in so doing, upholding the principles of cooperative governance. As indicated above, education legislation lacks sufficient guidance on how to deal with conflict between PDEs and SGBs. There is thus a need to provide guidance to PDEs and SGBs on how to resolve conflict, bearing in mind that they both deal with the rights and interests of children. Education, in particular, is seen as the vehicle to overcome the devastation of apartheid and provide a system of education that will build democracy, equality and human dignity.[169] In this regard, education role-players and in particular the PDEs and SGBs have a mandate to transform and create an education system where everyone has access to education and lifelong learning. The legislative platforms for considering alternative mechanisms to civil litigation were also established. These recommendations are not new to SGBs and PDEs, given the fact that judges constantly reiterate the principles of cooperative governance.

Chapter 2 follows with a discussion on the legal framework pertaining to education rights. The framework is discussed against the background of international law, South African law, and case law. It further highlights the conflict and disputes that arise between SGBs and PDEs in the execution of their powers. This is discussed with reference to case law that served before the courts.

[169] De Wet and Wolhuter 2009: 360.

CHAPTER 2
CONFLICT AND DISPUTES THAT RESULT FROM THE ROLES AND RESPONSIBILITIES OF SCHOOL GOVERNING BODIES AND PROVINCIAL DEPARTMENTS OF EDUCATION

> "Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development."
>
> Kofi Annan

1. INTRODUCTION

The previous chapter orientated the reader with respect to the topic of this dissertation. It provided a brief overview of some of the challenges in the education sector and the conflict that occurs between education role-players, especially amongst school governing bodies (SGBs) and provincial departments of education (PDEs).

This chapter sets out the current legal position regarding the right to education and how exercising particular functions in education has the potential to create conflict and disputes amongst education role-players. The *Constitution of the Republic of South Africa* (*Constitution*)[1] and education legislation will be assessed to determine what the powers and duties of the role-players are in relation to one another. This chapter will establish who some the education role-players are. It will also establish their roles and responsibilities in the delivery of education and how exercising these various roles and responsibilities sometimes leads to conflict. This analysis will be undertaken within the context of the decentralisation of powers as envisaged by the legislative prescripts, and the fact that these powers must be exercised within the prescripts of administrative law principles.

In terms of the Constitution,[2] all citizens enjoy various fundamental human rights. Linked to this dissertation is the right to education, which is closely linked with the right to dignity and other rights.[3] In addition to this is the fundamental imperative for organs

[1] 1996.
[2] 1996: ch 2.
[3] 1996: sec. 9, 10, 15, 28, 29, 30, 31, 33, 34, 36 and 38.

of state to cooperate with one another in mutual trust and good faith.[4] The legal framework will be explored with reference to international and national standards.

2. LEGAL FRAMEWORK FOR EDUCATION

It is important to establish the international law prescripts as well as the South African legal framework pertaining to the right to education.

2.1 International law framework

The international law framework is based on key international instruments that have been ratified by South Africa over the years. In addition, it is a constitutional requirement in South Africa that international law must be considered, and foreign law may be considered when promoting and interpreting the spirit and content of the rights contained in the South African Bill of Rights.[5]

2.1.1 Introduction to international law and the right to education

Most sovereign states have enshrined the right to education in their constitutions.[6] There are numerous international instruments that provide for the right to education. These instruments include the *Universal Declaration of Human Rights*[7] (*UDHR*), the *International Covenant on Economic, Social and Cultural Rights*[8] (*ICESCR*), the *Convention on the Rights of the Child*[9] (*CRC*) and the *African Charter on the Rights and Welfare of the Child*[10] *(ACHPR)*. The Committee on Economic, Social and Cultural Rights (CESCR) published General Comment 13 on article 13 of the *ICESCR* in 1999.[11] The South African government ratified and adopted the *ICESCR* in 2015.[12] Several countries have accepted that education must be recognised as a human right. However, the legal framework for schooling and how the right to education is realised differ from country to country; hence, at an international level, there is no uniform

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4 *Constitution* 1996: sec. 41(1)(h)(i) to (vi).
5 *Constitution* 1996: sec. 39(1)(b) and (2).
6 Joubert 2014: 1.
7 *UDHR* 1948: art. 26.
8 *ICESCR* 1966: art. 13.
9 *CRC* 1989: art. 28 and 29.
10 Achpr.org//public/document/file/English/achpr_instr_charterchild_eng.pdf. Accessed on 28/02/2022.
11 CESCR/GC 13/1999 dealing with the right to education.
12 Veriava, Thom and Hodgson 2017: 18.

prescript on how educational rights should be protected and fulfilled.[13] A discussion on the international imperatives to realise the right to education follows.

2.1.2 International imperatives to realise the right to education

With reference to the specific focus of this study, the *UDHR,* in its preamble, affirms that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[14] Article 26 thereof provides that everyone has the right to education.[15] Education shall be free, at least in the elementary and fundamental stages, of which the elementary stage of education shall be compulsory. It was declared that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.[16] In addition, parents have a prior right to choose the kind of education that shall be provided to their children.[17]

Similarly so does the *CRC* in article 28 and the *ACHPR* in article 11, which require of state parties to recognise children's right to education and in order to realise the right state, parties are further required to make primary education compulsory and freely available to all.[18]

It is interesting to note that, despite the similarities as highlighted above, there are also stark differences. These differences can be attributed to the years in which these declarations were drafted and adopted, and considering the continuous work of the committees there is a realisation and need to issue further declarations to ensure that the right to education is realised. For example, the *UDHR* is silent on aspects of regular school attendance and school discipline, whereas both the *CRC* and *ACHPR* highlight the importance of these two focus areas and declare measures that must be taken by

13 Joubert 2014:3 and 4.
14 *UDHR* 1948: preamble.
15 *UDHR* 1948: art. 26 (1).
16 *DHR* 1948: art. 26(2).
17 *UDHR* 1948: art. 26 (3).
18 *CRC* 1989: art. 28(1) and 28(1)(a). See also *ACHPR* 1999: art. 11 (1) and 11(3)(a).

the state to reduce dropout rates and that when dealing with issues of discipline it shall be done with respect for the inherent dignity of the child.[19]

General Comment 13 on the *ICESCR* captures the essence of the right to a basic education and states:

> 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. Education has a vital role in empowering women, safeguarding children, protecting human rights and democracy. Increasingly education is recognised as one of the best financial investments states can make. The importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.[20]

This implies freedom of choice when choosing a school; that is, freedom to choose on the basis of religious, philosophical or pedagogical convictions or for reasons related to language choice or ethical affiliations.[21]

In terms of international law, the right to education refers not merely to the right to receive education and have equal access to educational institutions funded by the state; it is also a freedom to be protected against any infringement of human personality that might occur in the process of education.[22] For example, language is a bone of contention, which creates conflict, and if education is compulsory but there are not enough quality schools and resources, admission will then become an issue and create conflict.

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19 *CRC* 1989: art. 28(1)(e), 28 (2) and the *ACHPR* 1999: art. 11(3)(d) and 11(5).

20 CESCR/GC 13/1999: par. 1. See also Woolman and Fleisch 2009: 117.

21 Joubert 2014: 4.

22 Joubert 2014: 5. Infringement of human freedoms by way of education could occur through: abuse of power by private organisations; indoctrination by state authorities; prescribing the mission statement of schools; prescribing religious policies to be used by schools; and unfair discrimination on grounds such as race, ethnic origin, sexual orientation and language.

The Committee for Economic, Social and Cultural Rights (CESCR) General Comment 13 (CESCR/GC)[23] prescribes the following interrelated and essential core elements (referred to as "the four As") in realising the right to education:

(a) Availability of education

In this regard, there must be sufficient educational institutions and programmes. Sufficiency in this context refers to factors such as enough buildings, sanitation facilities for both sexes, safe drinking water, trained educators, appropriate teaching materials, a library, computer facilities and digital technology.[24]

(b) Accessibility of education

This element requires that educational institutions and programmes be accessible to all. Accessibility, here, has three separate dimensions:

(i) Non-discrimination: Education must be accessible to all in a non-discriminatory manner, including the most vulnerable groups such as people with disabilities.[25]

(ii) Physical accessibility: Education has to be within safe physical reach, either by attendance at some reasonably convenient geographical location (e.g. a neighbourhood school) or via modern technology (e.g. access to a distance learning programme).[26]

(iii) Economic accessibility: Education has to be affordable for all, with primary education being free to all. State parties are required to progressively introduce free secondary and higher education.[27] This is further in line with other human rights instruments.[28]

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23 CESCR/GC 13/1999: par. 6. See also Woolman and Fleisch 2009: 131.

24 CESCR/GC 13/1999: par. 6. See also CRC/GC 25/ 2021: para. 99 – 105. See also discussion in Woolman and Bishop 2014: ch. 57:19 and 21.

25 CESCR/GC 13/1999: par. 6. See also discussion of Woolman and Bishop 2014:ch. 57: 21 and 24.

26 CESCR/GC 13/1999: par. 6. See also CRC/GC 25/2021: para. 99-105. See also Wooman and Bishop 2014:ch. 57:30.

27 CESCR/GC 13/1999: par. 6.

28 CRC 1989: Art. 28 (1)(b) and (c), *ACHPR* 1999: Art. 11 (3)(b) and (c). See also Wooman and Bishop 2014:ch.57: 24–29.

(c) Acceptability of education

The form and substance of education, including curricula and teaching methods, have to be acceptable to students and parents.[29]

(d) Adaptability of education

Education has to be flexible so that it can adapt to the needs of changing societies and communities, as well as respond to the needs of students within their diverse social and cultural settings.[30]

These human rights instruments are the minimum core elements set internationally that participating states must adhere to when developing and establishing their educational institutions and programmes. Accessibility, in particular, further requires that education must be provided on the basis of equality and non-discrimination. If education is not available, accessible, acceptable and adaptable to address the needs of all, it opens the doors for conflict between the different role-players.[31]

2.2 South African constitutional imperatives for education

Section 1 of the *Constitution*[32] contains the founding provisions and validates the fact that South Africa is a democracy grounded in the rule of law. Specific fundamental rights enshrined in the Bill of Rights have particular significance for education and within the context of this thesis. The most important rights are equality;[33] human dignity;[34] freedom and security of the person;[35] the right to privacy;[36] freedom of

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29 CESCR/GC 13/1999: par. 6.

30 CESCR/GC 13/1999: par. 6.

31 Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others 2010 (3) BCLR 177 (CC); Head of Department, Department of Education, Free State Province v Welkom High School and Another, Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC); MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC); Basic Education for All and Others v Minister of Basic Education and Others 2014 (4) SA 274 (GP) and Madzodzo and Others v Minister of Basic Education and Others [2014] (3) SA 441 (ECM). More recently Equal Education and Others v Minister of Basic Education and Others 2021 (1) SA 198 (GP).

32 1996. See discussion at ch.1: par.3.2.

33 *Constitution* 1996: sec. 9.

34 *Constitution* 1996: sec. 10.

35 *Constitution* 1996: sec. 12.

36 *Constitution* 1996: sec. 14.

religion, belief and opinion;[37] freedom of expression;[38] freedom of association;[39] the rights of children;[40] the right to education;[41] the right to use language and culture of choice;[42] and the right to just administrative action.[43]

It is noteworthy to concede that education is an empowerment right which serves two purposes that are not fulfilled by many other rights in the Bill of Rights. Firstly, education ensures that citizens are able to "set the rules of the game and not merely be assured that the rules are applied as written".[44] Secondly, "it allows the individual to determine the shape and direction of his or her life".[45] If one wishes to understand our laws' basic catchphrase – an "open and democratic society based on human dignity, equality and freedom" – there is no better place than to commence that journey with section 29 on the right to education.

Woolman and Fleisch[46] further argue that empowerment rights such as education, expression, association, equality and socio-economic rights facilitate the enjoyment of other constitutional rights. These rights, relative to the focus of this dissertation, are discussed below. The effect of conflict on the implementation of these rights will be discussed under the heading, 'conflict in education'.

2.2.1 The right to education

Woolman and Fleisch[47] quote Beiter, who ultimately identifies four ways in which education serves as an empowerment right. Firstly, education has the potential to liberate people from oppression. Secondly, education permits people to participate in political life. Thirdly, education is deemed essential for socio-economic development in that only educated people are in a position to secure the basic necessities for survival. Lastly, education enhances a person's ability to participate in the life of a

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37 *Constitution* 1996: sec. 15.
38 *Constitution* 1996: sec. 16.
39 *Constitution* 1996: sec. 18.
40 *Constitution* 1996: sec. 28.
41 *Constitution* 1996: sec. 29.
42 *Constitution* 1996: sec. 30.
43 *Constitution* 1996: sec. 33.
44 Woolman and Fleisch 2009: 117.
45 Woolman and Fleisch 2009: 117.
46 Woolman and Fleisch 2009: 117.
47 Woolman and Fleisch 2014:ch. 57: 7.

given linguistic, cultural or religious community, which in turn enables communities to maintain its preferred way of being in the world.[48]

In the *Governing Body of the Juma Musjid Primary School v Essay N.O.*[49] (*Juma Musjid*) case, the court held that education must be viewed as a socio-economic right, which is an immediately enforceable right. It is necessary to pause at this juncture and point out that, when South Africa ratified the *ICESCR* in 2015, it was a declaration that the South African government would take progressive measures to realise the right to education within its available resources.[50] This is, however, in direct contrast with the findings in *Juma Musjid*. What is of further interest is that the *Constitution* does not state that basic education or primary education should be compulsory or free, as provided for in the international instruments.[51] The right to education cannot be segregated from some of the other rights mentioned in 2.2 above. The right to education is intimately associated with dignity and equality and with children's rights.[52]

Next follows a discussion on the constitutional rights that inform the focus of the study.

2.2.2 The right to dignity

The *Constitution* guarantees and protects the rights of every person to dignity and equality, as well as various forms of freedom, including freedom of expression, association, religion and culture, to name a few.[53] These rights are accepted as being "universal, inalienable and enforceable although they are not absolute".[54]

Human dignity features not only in South African jurisprudence, but also in international instruments, and is explicitly linked to the rights of children with regard to

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48 Woolman and Fleisch 2014:ch. 57: 7 and 8; discussion at ch.1: para. 3.3 and 3.4.

49 2011 (8) BCLR 761 (CC): par. 43. This precedent has been followed in several other education rights cases. *Minister of Basic Education and Others v Basic Education for All and Others* 2014 (4) SA 274 (GP) (textbooks); *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) (school furniture); *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG) (school transport). More recently in *Equal Education and Another v Minister of Basic Education and Others* 2019 (1) SA 421 (ECB) and *Equal Education and Others v Minister of Basic Education and Others* 2021 (1) SA 198 (GP) (Food nutrition program).

50 Veriava, Thom and Hodgson 2017: 18.

51 See 2.1.2 above. South Africa is, however, bound by international law and the ratification of some of these international instruments.

52 Head of Department, Department of Education, Free State Province v Welkom High School 2013 (9) BCLR 989 (CC). See also Reyneke 2013: 332.

53 De Groof and Du Plessis 2014: 61.

54 De Groof and Du Plessis 2014: 61.

education in particular.[55] Section 10 of the *Constitution* provides everyone with the right to inherent dignity and the right to have their dignity respected and protected.[56] In this regard, the state has an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.[57] Reyneke[58] argues that to "respect rights" means that the state has an obligation not to violate rights or to limit rights unlawfully. To "protect rights" requires of the state to take steps to prevent the infringement of rights and thus requires that measures be put in place to prevent such possible infringement. To "promote and fulfil rights" means that the state must put in place measures to make it feasible to exercise education related rights.

2.2.2.1 Conceptualising dignity

'Dignity' proves to be a difficult concept to define, as is evident from the judgment in the matter of *National Coalition for Gay and Lesbian Equality v Minister of Justice.*[59] In that case, it was argued that the right to human dignity protects all South Africans from degrading, exploitive, abusive, and humiliating treatment.[60] In the matter of *Law v Canada,*[61] the Canadian Supreme Court explained human dignity as follows:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context of their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within society.[62]

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55 CRC/C/GC 14/2013: par. 79. See also Reyneke 2013: 332; Reyneke and Reyneke 2020: 63-64.
56 *Constitution* 1996: sec. 10.
57 *Constitution* 1996: sec. 7(2).
58 2010: 74.
59 1998 (12) BCLR 1517 (CC): par. 28.
60 Veriava, Thom and Hodgson 2017: 32. See also Reyneke 2010: 75.
61 1 SCR 497 (1999). See also De Vos 2017: 457.
62 *Law v Canada* 1 SCR 497 (1999): par. 53.

Woolman[63] offers five definitions for dignity. These are discussed below to highlight the relevance to the focus of this dissertation and to further illustrate the complexity of the dignity concept and the importance of this concept when there is conflict:

(a) Dignity 1: Individual as an end-in-herself

Woolman[64] relied on the sentiments of Justice Ackermann that the recognition of every human being's inherent dignity takes the form of an apparent variation on the golden rule, the categorical imperative: "Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end."

There was a clear violation of this right in the education setting when two pregnant learners were excluded from attending school as a result of their pregnancy.[65] In this regard it suggests that the governing body had no regard for the rights of female learners who fall pregnant and how they might feel if they were not permitted back into school to complete their education. Similarly, in the matter of *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others*[66] *(Ermelo),* black English learners were undermined when they were treated like second-class citizens and forced to receive education in a converted laundry room on school premises.[67] Woolman and Bishop[68] opine that single-medium public schools that engage in exclusive and discriminatory admissions practices would also be a violation of the requirements of the rights to dignity.

(b) Dignity 2: Equal concern and equal respect

The second definition for dignity is defined by Kant[69] as: "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim

63 Woolman 2014:ch. 36: 7.
64 Woolman 2014:ch. 36: 7.
65 Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC).
66 2010 (3) BCLR 177 (CC).
67 2010 (3) BCLR 177 (CC): par. 13.
68 Woolman and Bishop 2014:ch. 57: 52.
69 Woolman 2014:ch. 36: 10.

the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."

In an education context, courts have alluded more than once to human conditions as a facet of dignity.[70] In the education setting, these human conditions include adequate school infrastructure (like classrooms), proper electricity and sanitation, adequate teaching staff and school resources, as well as adequate mechanisms for role-players to resolve their conflict effectively.

(c) Dignity 3: Self actualisation

Kant[71] writes, "Act only on the maxim through which you can at the same time will that it should become a universal law." In the matter of *Ferreira v Levin*[72] Justice Ackermann writes:

> Human dignity cannot be valued or respected unless individuals are able to develop their humanity, their 'humaneness' to the full extent of its potential. Each human being is uniquely talented. Part of dignity is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. [73]

A clear violation of this right in an education context is, for instance, the appalling conditions, such as lack of sanitation, in which many learners are sometimes educated.[74] Infringement of human freedoms by way of education could further occur through abuse of power by private organisations; indoctrination by state authorities; and unfair discrimination on grounds such as race, ethnic origin, sexual orientation and language.[75]

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70 Reyneke 2010: 77.
71 Woolman 2014:ch. 36: 11.
72 1996 (1) SA 984 (CC).
73 *Ferreira v Levin* 1996 (1) SA 984 (CC): par.49
74 Equal Education and Another v Minister of Basic Education and Others 2018 (9) BCLR 1130 (ECB).
75 Joubert 2014: 5.

(d) Dignity 4: Self-governance

Citizens' capacity for self-governance – the capacity of (almost) all human beings to reason their way to the ends that gives their lives meaning – is largely what makes democracy the only acceptable secular form of political organisation.[76]

De Kadt[77] correctly states from an education perspective that the poor quality of public education in South Africa blocks the formation of skills and capabilities of people. As a result hereof, poor education condemns people to fewer opportunities, lower incomes and limited capacity for self-determination. She further argues that low-quality education is an injustice to the broader society, causing a loss of enormous human potential. In this regard, Reyneke[78] quotes Beyleveld and Brownsword, who are of the opinion that human beings are recognised not only as having the capacity to make their own choices, but also as being entitled to enjoy the conditions in which they can flourish as self-determining authors of their own destinies.

(e) Dignity 5: Collective responsibility for the material conditions for agency

The emphasis here is not solely on the individual ends in our realm of ends. In this regard, courts also contemplate a connotation of dignity that attaches to the realm as a whole.[79] Dignity is not only a constellation of duties owed by the state to each subject, or a set of entitlements that can be claimed. Woolman[80] states that dignity is that which binds us together as a community, and it occurs only under conditions of mutual recognition. In the matter of *Khosa v Minister of Social Development,*[81] the Constitutional Court developed an understanding of dignity in which:

> Wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.[82]

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76 Woolman 2014:ch. 36: 13.
77 De Kadt: 26-30, at https://hsf.org.za>focus>ed accessed on 19 May 2022.
78 Reyneke 2010: 77.
79 Woolman 2014:ch. 36: 15.
80 Woolman 2014:ch. 36: 15.
81 2004 (5) BCLR 569 (CC).
82 Khosa v Minister of Social Development 2004 (5) BCLR 569 (CC): par. 74.

De Vos[83] quotes former Chief Justice Chaskalson, who referred to the matter of *Law v Canada*[84] concerning the meaning of dignity in this context. In the Canadian case, dignity is explained as follows:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context of their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within society.[85]

In an education context, commentators have argued that the current system for financing education violates both the right to education and that of dignity.[86] The basic structure allows for public ordinary schools to be classified into five quintiles. Quintiles 4 and 5 receive the least funding, while the remaining bottom three receive the most funding from government. In addition hereto, public schools in quintiles 4 and 5 are also entitled to charge school fees if fifty-one percent of the learners' parents agree to it at the budget meeting.[87] The *Schools Act* provides a mechanism of school fee exemption so as to avoid excluding poorer learners from admission to the school. Woolman and Bishop[88] quote Daria Roithmayr, who notes that despite this, schools have not been granting exemptions to parents who cannot afford to pay and have therefore ultimately discriminated against learners who do not pay. In this regard then it can be stated that quintile 4 and 5 schools use admission policies to discriminate against poorer learners. This is not only an infringement to the dignity of the learner but also to the collective dignity of the poorer community if the schools use the policies to exclude learners who are unable to pay school fees from attending the school. The point must also be made that this position is not true for all schools. There has also been recent research on the impact of exemptions, especially when the economy was

83 De Vos 2017: 457.
84 1 SCR 497 (1999).
85 Law v Canada (Minister of Employment and Immigration) 1 SCR 497 (1999): par. 53.
86 Woolman and Bishop 2014:ch. 57: 25.
87 *Schools Act* 84/1996: sec. 39(1) and (2).
88 Woolman and Bishop 2014:ch. 57: 25.

tight and was acutely felt by parents and schools during the COVID-19 pandemic and therefore were unable to pay school fees. Many schools had to write off bad debt and further saw an exponential rise in the number of learners who applied for exemption.[89] In addition, some parents are unwilling to apply for exemption because of embarrassment that accompanies an admission of poverty.

Schools in quintiles 1 to 3 do not have the financial means on their own to challenge PDEs' decisions where there is a clear violation of rights. This is unfair and affects the dignity of the individuals who serve on the SGB and the community of parents whose children attend the schools, including the learners. Access to justice and the courts will be discussed later on in chapter 4 and 5 of this dissertation.

These five definitions of dignity in Woolman's view are a moral awakening; firstly, that others are entitled to the same degree of concern and respect that we demand for ourselves; and secondly, that others are entitled to that equal respect and equal concern because they, like us, are possessed of faculties that enable them to pursue ends, which give their lives meaning. This ability to give our lives meaning and to determine the course by which we give our lives meaning lead to the recognition that we are able to govern ourselves.[90] It is further apparent that the various definitions of dignity somewhat tie in with one another. Next follows a discussion on the application of dignity as a concept.

2.2.2.2 Application of dignity concept

From the above it is apparent that dignity has five different meanings that create five different obligations. Woolman[91] further identifies four applications of dignity within the context of the definitions.

(a) Dignity as a first-order rule

Dignity serves a dual role in that it is not only a founding provision in the *Constitution,*[92] but is also to be considered as a substantive and enforceable right, as required in terms of section 10 of the *Constitution*. The courts utilise dignity to interpret other

89 Du Plessis 2020: 1-9.
90 Woolman 2014:ch. 36: 17 and 18.
91 Woolman 2014:ch. 36: 17.
92 1996.

constitutional rights and values such as equality, but dignity does not need interpretative assistance from other values.[93] It is, in fact, a stand-alone right.[94]

An example hereof is to be found in the matter of *Equal Education and Another v Minister of Basic Education and Others,*[95] where legal argument was advanced that the school infrastructure posed a direct and imminent threat to the health and safety of learners.[96] This threat therefore constitutes a violation of not only learners' rights under section 9 and 10, but also those of the educators.[97] Poor infrastructure can be decommissioned and also in some instances lead to the closure of schools by the Department of Labour – this creates more strain on the education system as far as available schools are concerned.[98] It is noteworthy to concede that most parents will also prefer not to enrol their children at those schools – which can lead to underutilisation of existing infrastructure – which will no doubt place pressure on other schools to accommodate children from other areas.[99]

(b) Dignity as a second-order rule

Dignity as a second-order rule features most prominently in equality cases.[100] Firstly, an impairment of human dignity may determine whether mere differentiation amounts to actual discrimination. Secondly, when attempting to determine whether discrimination amounts to unfair discrimination, the Constitutional Court will ask to what extent the law or the conduct in question re-inscribes systemic patters of disadvantage for – and thus impairs the dignity of – a specific class of persons.[101]

Even though the DBE and PDE provide funding to schools in quintiles 1 to 3, this funding is to ensure that the learners receive an education. SGBs in these schools do not have the necessary resources to have fund raisers nor do they generate fees. As a result hereof it impacts on their ability to access justice to have education related

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93 Reyneke 2010: 75. See also Reyneke 2013: 334. See also Woolman 2014: ch. 36: 19 and 20.
94 McConnachie, Skelton and McConnachie 2017: 33.
95 2018 (9) BCLR 1130 (ECB).
96 Equal Education and Another v Minister of Basic Education and Others 2018: (9) BCLR 1130 (ECB): par.54.
97 Equal Education and Another v Minister of Basic Education and Others 2018: (9) BCLR 1130 (ECB): para.54 and 194.
98 Dyomfana 2022: 1.
99 Dyomfana 2022: 1. This might further lead to conflict with SGBs due to their admission policies which limit the number of learners per school.
100 Woolman 2014:ch. 36: 21.
101 Woolman 2014:ch. 36: 21.

disputes resolved because they simply do not have any additional funding to refer matters to court. This no doubt infringes their substantive equality rights. This further hinders the transformation of the sector and the ability to place these SGBs on a more equal footing with those who serve in quintiles 4 and 5 schools.

Another example will be the two pregnant learners in the *Welkom* case who were also unfairly discriminated against on the basis of their pregnancy.

(c) Dignity as a correlative right

In some respects, dignity functions independently of other rights in constitutional challenges that rely upon multiple rights. For example, in *S v Jordaan*[102] Justices O' Reagan and Sachs note that although the rights to dignity, privacy and freedom of the person intersect and overlap, the challenges brought in terms of these rights cannot be consolidated into a single challenge grounded in some unenumerated right to autonomy. Each challenge based on the specific right must be considered individually.

On the other hand, in the matter of *Ferreira v Levin,*[103] Judge Ackermann's view is that there is a strong correlation between the right to dignity and individual freedom. It further supports the right to equality.[104] In *Prinsloo v Van Der Linde*[105] the court's view was that unfair discrimination means treating people differently in a way that impairs their fundamental dignity as human beings, who are inherently equal in dignity. In *President of the Republic of South Africa v Hugo*[106] the court states that dignity is at the heart of individual rights. In a free and democratic society, equality means nothing if it does not represent commitment to each person's equal worth as a human being, regardless of differences.

(d) Dignity as a value or a grundnorm

Dignity is invoked most often as a value rather than a rule. This comes as a result of the courts' preference for developing the law rather than making it.[107] This is as a result of section 39 in the *Constitution* that states that the various substantive provisions in

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102 *S v Jordaan* 2002 (6) BCLR 759 (CC): para. 52-53.
103 1996 (4) BCLR 1 (CC): par.49.
104 *Prinsloo v Van Der Linde* 1997 (6) BCLR 759 (CC).
105 1997 (6) BCLR 759 (CC): par. 31.
106 1997 (6) BCLR 708 (CC): par. 41.
107 Woolman 2014:ch. 36: 22.

the Bill of Rights, and the Bill of Rights as a whole, must be interpreted to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". In addition and when the law is found to have infringed a fundamental right, the question raised is whether or not the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[108]

It will become apparent in this chapter that rights, including those specific to the education sector, are not exercised in isolation, but within a community. This inevitably results in conflict when competing rights need to be managed. Dignity can play an important role in contributing to crafting boundaries between individual autonomy and the needs of society at large.[109]

2.2.3 The right to equality

Another important constitutional value is equality. As with dignity, equality plays a significant role in both international law and in South African law – even more so after apartheid in order to "heal the divisions of the past".[110] Unlike dignity, however, this right will require interpretative assistance from other rights to give effect thereto.[111] The right to equality is captured in section 9 of the *Constitution*. It states that everyone is equal before the law and has the right to equal protection of the law.[112] Equality includes the full and equal enjoyment of all rights and freedoms.[113] The state may not unfairly discriminate directly or indirectly against anyone on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, and language.[114]

2.2.3.1 Defining Equality

Woolman[115] states that the meaning of equality in any jurisdiction is influenced by the historical, socio-political and legal conditions of the society concerned. An important

108 *Constitution* 1996: sec. 36.
109 Reyneke 2010: 80.
110 Veriava, Thom and Hodgson 2017: 32. See also De Vos 2017: 420.
111 Reyneke 2013: 354.
112 *Constitution* 1996: sec. 9(1).
113 *Constitution* 1996: sec. 9(2)
114 *Constitution* 1996: sec. 9(3).
115 Woolman 2014:ch. 35: 3.

starting point to understanding equality in South Africa is the nature of the inequalities that have characterised its past and still haunt its present.[116] There are still deep-seated racial prejudice and racial disparities in education, health, status and access to justice, to name but a few.[117] The right to equality comprises of two forms of equality namely substantive and formal equality.

(a) What is substantive equality?

Justice Langa identified substantive equality as one of the key measures of transformation.[118] Here he referred to the aspirational value of substantive equality to mean a social and economic revolution in which all enjoy equal access to resources and amenities of life and are able to develop their full human potential.[119] This goal therefore requires the complete dismantling of systemic inequalities, the eradication of poverty and disadvantage, and the affirmation of diverse human identities and capabilities. This notion confirms a strong relationship between substantive equality and the achievement of socio-economic rights.[120]

The matter of *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa and Another*[121] (Western Cape Forum) is illustrative of the extent to which substantive equality and socio-economic rights analyses will be linked as long as the enormous systemic disparities in access to social services remain.[122] Ngwena and Pretorius[123] argue that the most vulnerable people and those who continue to suffer under the worst forms of deprivation must be a special focus of any programme designed to realise access to socio-economic rights.

Substantive equality requires a deeper understanding of equality and focuses on equality of outcome.[124] For instance, in the discipline context of the education environment, substantive equality will be taken into account that although two children

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116 See discussion regarding the nature of equality in ch.1.
117 Woolman 2014:ch. 35: 3.
118 Langa 2006: 351-352; De Vos 2017: 420 and discussion at ch.1: par. 3.3. See also Arendse 2019: 100-147.
119 Langa 2006: 351-352. See also De Vos 2017: 421; De Groof and Du Plessis 2014: 4. See also Arendse 2019: 100-147.
120 Woolman 2014:ch. 35: 5.
121 2011 (5) SA 87 (WCC).
122 Ngwena and Pretorius 2012: 94.
123 Ngwena and Pretorius 2012: 97.
124 Reyneke and Reyneke 2020: 64-65.

might have committed the same transgression the response to the transgression would not necessarily be the same for example receiving the same number of demerits.[125] The focus herein should rather be taking the required actions to teach acceptable behaviour on an equal basis. Substantive equality further requires an individualised assessment of each case to ensure that the best interests of each child are served equally.[126]

Another example is in the context of the funding of quintile 1-3 schools opposed to the funding for quintile 4 and 5 schools. Due to the legacy of apartheid quintile 1-3 schools are not as well resourced as quintile 4 and 5 schools and therefor their subsidies are substantially more than those of quintile 4 and 5 schools to ensure equality of outcome.

(b) What is formal equality?

Formal equality is based on the idea that inequality is irrational and arbitrary. It presumes that all persons are equal and that any different treatment on the basis of arbitrary grounds such as race or gender is suspect and irrational.[127] Formal equality is a formal approach to law in which issues are narrowly defined and abstracted from social life. What this means is that the actual social and economic differences between individuals and groups are not seen to be essential to the legal inquiry.[128]

Equality is not about treating everyone the same, but ensuring that there are equal outcomes. Quintiles 1 to 3 schools are not in an equal position to approach courts when they are in disagreement with, for instance, the PDEs. This is mainly due to financial constraints. More needs to be done to ensure that there are equal outcomes for these schools.

2.2.4 The relationship between equality and dignity and its link with the right to education

There is an inextricable link between equality and dignity. This is indicated in article 1 of the *UDHR,* which states that "all human beings are born free and equal in dignity

[125] Reneke and Reyneke 2020: 64-65, Arendse 2019: 100-147 and 2011:339-360.
[126] Reneke and Reyneke 2020: 64-65, Arendse 2019: 100-147 and 2011:339-360.
[127] Woolman 2014:ch. 35: 6. See also De Vos 2017: 421 and De Groof and Du Plessis 2014: 4.
[128] Woolman 2014:ch. 35: 6.

and rights". The CESCR links dignity to education in General Comment 13, stating that education shall be directed to the human personality's "sense of dignity" and it shall enable all persons to participate effectively in a free society.[129] Any discriminatory practices in school processes will thus be an infringement of the right to dignity and equality as well as the learner's right to a basic education. As discussed further on, the inherent right to dignity of people is often ignored, and this, in turn, creates discrimination and inequality, and infringes on people's dignity.

The DBE and PDEs are thus required to ensure that children have equal-access opportunities to quality education services. The DBE and PDEs must ensure that there are adequate mechanisms in place to monitor the availability of education institutions and the accessibility thereto, to ensure that they uphold the constitutional values and those of international standards. In addition to this, the government also has an obligation to ensure that SGBs of quintiles 1 to 3 schools can be placed on an equal footing with their counterparts and seek redress against PDEs where rights have been infringed.

2.2.5 The best-interest-of-the-child principle

The best-interest-of-the-child principle will now be discussed briefly. The rights of children have a place in the Bill of Rights under section 28. For present purposes, only the relevant part of the section that has a bearing on education rights will be extracted. To this end, section 28 reads as follows:

> (1) … .
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.
>
> (3) In this section "child" means a person under the age of 18 years.[130]

From an education perspective there is sufficient evidence that our courts do not regard the best-interest-of-the-child as a principle only, but as a substantive, enforceable right.[131] Perhaps the most important requirement here is the averment

[129] CESCR/C/GC 13/1999: par. 6. See also 2.1.2 above.
[130] *Constitution* 1996: sec. 28(1)-(3).
[131] *S v Makwanyane* 1995 (2) SACR 1 (CC).

made in section 28(2) that a child's best interests are of supreme importance in every matter concerning the child. From an education viewpoint, children are the primary beneficiaries of the right to a basic education and therefore the main victims of any inadequacies in the system. Section 28(2) is therefore an important aid in interpreting other rights, including education.[132] This interrelatedness of rights can be illustrated with reference to dignity. In this regard, the right to dignity should assist in any determination of what is in the best interests of a child, while treating children with dignity is to be considered to be in their best interests.[133]

This principle must assist SGBs and PDEs to make decisions that will guide and ensure the child's physical, intellectual, moral, emotional and spiritual well-being, and that the best solution is found for any problem that arises in a school context. Courts have continuously had to remind SGBs and PDEs of their constitutional obligations as partners in education to engage in good faith with one another on matters of education before turning to the courts to further ensure that these parties do not lose sight of section 28(2) of the *Constitution*. In this regard, Justices Froneman and Skweyiya with Moseneke, and Van Der Westhuizen concurring, held that disputes between SGBs and PDEs turn into power plays that end up in court. The court lamented on the SGBs and PDEs' failure to apply the best-interest principle and that their powers were subservient to the children's needs. [134]

The Constitutional Court in *S v Makwanyane*[135] gave guidance on how to give effect to the best-interest principle. In this regard, a decision-maker must determine whether the decision that he or she is about to take will impact on a child or more than one child. In the event that a child or group of children will be affected by the decision, the decision-maker has to consider the interests of every child independently.[136] Since the best-interests principle is elevated to a substantive right, it can be limited in

[132] McConnachie, Skelton and McConnachie 2017: 32.

[133] Reyneke and Reyneke 2020: 70.

[134] Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School 2013 (9) BCLR 989 (CC): par.132.

[135] 1995 (2) SACR 1 (CC).

[136] Drum Digital 2014: 1-2 (School toilets in Limpopo are "scary places"), Mvlisi 2013: 1-12 (School toilets in shocking state).

[136] McConnachie, Skelton and McConnachie 2017: 33.

accordance with section 36 of the *Constitution*. Consequently, it means that this right does not trump the rights of others and will need to be balanced in some instances.

2.2.6 Freedom and security of the person

Section 12 of the *Constitution* protects the freedom and security of persons and their right to physical and bodily integrity. The lack of adequate security and the dilapidated conditions at many schools pose a risk to learners' freedom and to security of persons.[137] There is a strong link between this right and the dignity concept, i.e. to be treated as a human being. The focus is on individuals who are at risk of infringements. For example, in *Christian Education South Africa v MEC of Education*[138] it was held that the use of corporal punishment in schools is an unconstitutional infringement of children's section 12 rights. *Komape and Others v Minister of Basic Education*[139] is a case in point where the right to freedom and security of person was compromised, following the PDE's responsibility to ensure appropriate school infrastructure. In this instance, a five-year-old learner had drowned after having fallen into a pit latrine toilet. It must further be noted that had it not been for Equal Education, a non-governmental organisation, this case would likely not have seen the light of day in a courtroom, as the school is located in a rural and impoverished area.

PDEs have the power and resources and then fail to deliver. They simply abuse their power by ignoring the legitimate claims of parents and communities. In hindsight, this constitutes another form of power abuse. It is also an indication of the failure of state officials to engage appropriately with school communities, which is essential to address problems and to avoid conflict and litigation. There are numerous reports on how schools are ignored by the PDEs, especially in the Eastern Cape, Limpopo and KwaZulu-Natal Provinces.[140] There has even been an instance when the Eastern Cape PDE, due to a lack of spending, had to return funds meant for education to

[137] McConnachie, Skelton and McConnachie 2017: 33.

[138] 2000 (10) BCLR 1051 (CC): par.51. See also Woolman 2014:ch. 36: 24.

[139] [2018] ZALMPPHC 18.

[140] Sithole 2022: 1-3(Many KZN schools still reliant on pit toilets), Mahopo 2018: 1–3 (Flushing toilets fail to end horror for pupils), Dayimani 2021: 1-3 (72 Eastern Cape Schools unable to open due to poor sanitation), Biney, Selebalo and Borman 2021: 1-5 (A perfect storm: The struggle for school infrastructure in the Eastern Cape) and Chiguvare 2022: 1-3 (Labour department rules that classrooms at Limpopo school are too dangerous to use).

treasury.[141] This flies in the face of the PDEs' obligation to provide education based on human dignity, equality and freedom.[142] What is worse is that this PDE has failed to respect, protect, promote and fulfil these rights as is required in the Bill of Rights.[143] Evidence suggests that these systemic failures are not new and have been coming along for years.[144]

2.2.7 Privacy

The right to privacy is captured in section 14 of the *Constitution,* which gives learners as well as educators the right not to have their person or property searched, their possessions seized, or the privacy of their communications infringed. These rights are often restricted in the school environment to maintain discipline and safety. In many cases these limitations might be justified, but in some cases the measures might go too far.[145] Conflict can arise in these instances where schools fail to apply the law properly, or where officials are unreasonable in their application of the law.

2.2.8 Freedom of expression and the participation

Transparency, responsiveness, accountability and participation are some of the constitutional values that also define the new democratic dispensation. Freedom of expression is found in section 16 of the *Constitution*. This right plays a central role in the delivery of the right to education. PDEs and SGBs are obliged to create opportunities to allow participation by those affected by the decisions they take. It therefore requires thorough engagement amongst education role-players. Section 10 of the *Children's Act* provides for children's right to participate.[146] Lundy[147] avers that

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141 Nini 2022: 1-2 (Eastern Cape education forfeits unspent R 205m). This funding was meant for construction, maintenance, upgrades and infrastructure rehabilitation.

142 *Constitution* 1996: sec.1 and sec.7.

143 *Constitution* 1996: sec.7 (2).

144 Drum Digital 2014: 1-2 (School toilets in Limpopo are "scary places"), Mvlisi 2013: 1-12 (School toilets in shocking state).

145 McConnachie, Skelton and McConnachie 2017: 33.

146 *Children's Act* 38/2005: sec.10: Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has a right to participate in an appropriate way and views expressed by the child must be given due consideration. See also discussion in Reyneke and Reyneke 2020: 65-68.

147 Lundy 2007: 927-942. See also Alexander 2018: 111-114; Reyneke and Reyneke 2020: 66-67.

to implement the right to participate, attention should be given to the following factors: space, voice, audience and influence.

It is essential that both learners and educators are allowed to express and explore different opinions and ideas. Unjustified restrictions of rights can prevent learners from receiving a basic education. In some instances, unrestricted freedom of expression can also become an obstacle to teaching and learning and therefore a balance must be struck between these rights.[148] The question must be asked is there really freedom of expression for other education role-players when they engage with PDEs. If PDEs refuse to provide information, or there is a lack thereof, it will lead to conflict, as SGBs, for instance, will not be able to make decisions. Another aspect to consider is that if SGBs are not adequately trained on their competencies and how to do a proper budget, this will constitute an infringement of the right to information that eventually can lead to conflict, or even the avoidance of conflict and accountability on the part of the PDE, because if SGBs are not properly trained, then they will not know when and how to hold the department accountable.

Other important constitutional rights such as the right to just administrative action and the constitutional imperatives for cooperative governance will be discussed in chapter 3.

In the following section, the legal framework governing the right to education will be discussed.

2.3 The South African Legislative Framework governing the Right to Education

Inequality in education is exacerbated by unequal public funding, socioeconomic diversity, historical backlogs, geographical dispersal, discrepancies and systemic diversity.[149] In addition, each of the former four provinces and separate black 'homelands' operated its own educational bureaucracy, schools and teacher employment dispensations.[150] With the advent of the new constitutional democracy, the new national and provincial governments had the mammoth task of consolidating

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148 McConnachie, Skelton and McConnachie 2017: 33.
149 De Groof and Du Plessis 2014: 19.
150 De Groof and Du Plessis 2014: 19 and 20.

the fragmented educational structures and systems to equalise education as a constitutional right.[151] In order to achieve this, the following pieces of legislation were promulgated.

2.3.1 The National Education Policy Act (NEPA)

In terms of Schedule 4 of the *Constitution,*[152] Parliament and the provincial legislatures share concurrent legislative competence over primary and secondary school education. To this end, two separate pieces of legislation were enacted, specifying the responsibilities of each sphere of government with reference to the education sector. One such piece of legislation is the *National Education Policy Act (NEPA)*.

The *NEPA* obligates the Minister of Basic Education to determine specific policies as required in terms of the law.[153] The responsibility of the Minister of Basic Education is to ensure that all schools adhere to basic standards with a view to providing an acceptable education for everyone. In this regard, the Minister has laid down policies, norms and standards relating to education such as minimum infrastructure requirements;[154] a language policy for public schools;[155] guidelines to be considered by SGBs when adopting a code of conduct for learners;[156] an admission policy for ordinary public schools;[157] a policy on learner attendance;[158] and a national policy on religion and education,[159] to name but a few.

Another pertinent piece of legislation important for the focus of this study is the *South African Schools Act* (*Schools Act),* which will be discussed below. These two Acts delegate the legal authority to deliver primary and secondary education to the national Minister for DBE, the Member of the Executive Council (MECs) and the respective HODs of the PDEs in the nine provinces. Next follows a discussion on the *Schools Act*.

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151 De Groof and Du Plessis 2014: 19 and 20.
152 1996: schedule 4.
153 *NEPA* 27/1996: sec. 3(4)(i).
154 GN R920/2013.
155 GN 665/1998.
156 GN 776/1998.
157 GN 2432/1998.
158 GN 361/2010.
159 GN 1307/2003.

2.4 The South African Schools Act: Status of public schools and roles of education role-players

In its preamble, the *South African Schools Act*[160] *(Schools Act)* reiterates the values captured in section 1 of the *Constitution*. It acknowledges the need for a new system for schools that will redress past injustices in educational provision, uphold the rights of learners, parents and educators and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the state.[161] The Act further distributes power to local SGBs. A wide range of functions have been allocated to SGBs that used to be the sole responsibility of the department.[162] These functions are set out further below.

The Act further establishes a cooperative governance relationship between the State, learners, educators and parents in the organisation, governance and funding of schools.[163] The Act thus requires of all these role-players to cooperate and work in partnership when executing duties and responsibilities.[164] De Waal and Serfontein[165] demonstrate at least four key role-players involved in exercising direct control over education, namely the PDEs, SGBs, principals and educators.

The following is a discussion on the key-role players, relevant for this study and the functions they perform in terms of the Act.

2.4.1 The legal status of public schools

Every public school is a juristic person with legal capacity to perform its functions in terms of the Act.[166] A public school is able to perform these functions by way of its elected SGB. What this means is that a public school acting through its elected SGB can sue and be sued when conflict arises in the execution of their duties. For the

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160 84/1996.

161 Equal Education and Another v Minister of Basic Education and Others 2019 (1) SA 421 (ECB): par.168.

162 Joubert and Bray 2007: 47. See above at par. 2.3.

163 Head of Department, Department of Education, Free State Province v Welkom High School 2013 (9) BCLR 989 (CC): 36.

164 Smit and Oosthuizen 2011: 59.

165 De Waal and Serfontein 2013: 50.

166 *Schools Act* 84/1996: sec.15.

purposes of this thesis it is necessary to make the point that public schools in South Africa are classified into what is known as a quintile system.

2.4.1.1 Education Quintile Systems

In 2005, the *Basic Education Laws Amendment Act*[167] *(BELA)* amended the *Schools Act* to establish norms and standards for school funding by means of a quintile system that ranks schools according to poverty rating. In 2006, the *National Norms and Standards for School Funding (NNSF)* was gazetted.[168] Quintiles 1 to 3 are classified as the no-fee-paying schools and are schools located mostly in the townships or rural areas serving the poorer, marginalised communities. Quintiles 4 and 5 schools are the fee-paying schools situated mostly in the urban and suburban areas.[169] The funding issue is problematic, to say the least, because government policy to fund all public schools equally turned out to be unfair and biased against historical black schools.[170] The classification of schools into different quintiles is another important aspect of this thesis and forms the basis of the argument that SGBs who are elected to serve the poorer schools do not have the financial resources to challenge the PDEs when there are violations in education.

2.4.2 School governing body and the governance of the school

The ANC government possessed a genuine commitment to 'grassroots participation' or, better stated, 'grassroots democracy' at school level, allowing the people who are directly affected by the right to education to be involved in realising this right.[171] That commitment underwrites the continued control that parents exercise over SGBs. The fragility of the post-apartheid state further necessitated the sharing of decision-making authority over various aspects of school governance, culminating in a wide variety of role-players in education, namely parents, learners, teachers, non-teaching staff, SGBs, principals and PDEs.[172] This diffusion of power enhances the ability of these

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[167] 24/2005.

[168] GN 869/2006. See also Mclaren 2017: 65.

[169] 84/1996: sec. 23(10).

[170] Ndimande 2016: 36.

[171] Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2013 (3) BCLR 177 (CC) and Department of Education, Free State Province V Welkom High School 2013 (9) BCLR 989 (CC). See also Amnesty International 2020: 94.

[172] Woolman and Fleisch 2009: 15.

role-players to make choices that advance their own particular interests and therefore give rise to competition amongst them, which will be displayed further below. In this regard the *Schools Act* makes provision for the election of SGBs.

The elected SGB of a public school is vested with the overall governance of such school.[173] The composition of SGBs comprise parents, educators, non-educators and learners. SGBs are required to cooperate and work together in partnership with the parent community, broader community, educators, non-educator staff and the relevant PDE.[174] The SGB operates at community level and is thus legally responsible and accountable to the school community it serves.[175]

The SGB must draft and implement various policies for the school, for example, admission policies, language policies, pregnancy policies, school-discipline policies (code of conduct), school-fees policies and policies on religious observations. These policies must be fair and must strive to protect and promote the rights of children as required in section 7(2) of the *Constitution.* SGBs also have an obligation to ensure that decisions taken in relation hereto are in line with the rule of law and administrative law prescripts.[176]

The SGB must also support the principal and the staff, but should not interfere in the managerial functions of the principal. To further support the democratic role of SGBs, SGBs have formed provincial and national bodies to coordinate school governance matters and to uphold their interests. Examples of these bodies are the National Association of School Governing Bodies (NASGB) and the Federation of Governing Bodies of South African Schools (FEDSAS).

SGBs act in a fiduciary capacity and are therefore in a position of trust *vis-à-vis* the school.[177] SGBs must not engage in unlawful conduct and should always strive to act in good faith and in the interests of the school and the learners.[178] In fact, every action

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173 *Schools Act* 84/1996: sec. 16(1).
174 *Schools Act* 84/1996: Preamble; Joubert and Bray 2007: 18; Reyneke 2013: 132.
175 Joubert and Bray 2007: 21.
176 *Constitution* 1996: sec.1 and sec.33.
177 *Schools Act* 84/1996: sec. 16(2).
178 Joubert and Bray 2007: x.

of the SGB should be weighed against the question: Is this decision in the best interests of the school it serves.[179]

2.4.2.1 Composition of the SGB

SGBs are made up of *ex officio* members, elected members and co-opted members.[180] By virtue of his or her position, the school principal is an *ex officio* member of the SGB.[181] This means that the school principal acts in his or her capacity as the representative of the HOD when serving on the SGB. People who can be elected to serve on the SGB include parents, educators, non-educators and learners in Grade 8 or higher.[182]

Parents should always constitute the majority of the members and the SGB chairperson must be a parent.[183] This is in keeping with the idea that parents are mainly responsible for the education of their children and have a particular interest in the teaching and learning that takes place at the school.[184] Community members can be co-opted to provide additional expertise and to assist the SGB in executing its functions properly.[185] The term of office for elected members of the SGB is three years. These members are eligible for re-election, provided that they have a child in the school. This has a further advantage in that SGBs can retain experience and skills for the benefit of the school. However, learners in Grade 8 or higher can only be elected to the SGB for one year, but may also be re-elected.[186]

2.4.2.2 Functions of the SGB

As stated above, SGBs are responsible for the overall governance of the school to ensure that school rules and policies are implemented fairly. SGBs are required to have policies that protect and promote learners' rights in areas such as those mentioned above. An effective SGB can, and by law should, contribute to a school's

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179 Joubert and Bray 2007: x.
180 *Schools Act* 84/1996: sec. 23(1)(a) to (c).
181 *Schools Act* 84/1996: sec. 23(1).
182 *Schools Act* 84/1996: sec. 23(2).
183 *Schools Act* 84/1996: sec. 23(9) and 29(2).
184 *Schools Act* 84/1996: sec. 23(10).
185 *Schools Act* 84/1996: sec. 23(6).
186 *Schools Act* 84/1996: sec. 23(4) and sec. 31.

ability to deliver quality education for the enrolled learners.[187]

SGBs have the power to suspend learners, develop a mission statement, administer and control school property, supplement the resources of the school, establish a school fund, maintain a bank account to charge fees and enforce the payment of those school fees. SGBs are responsible for making recommendations to the HOD for the appointment of educators and non-educator staff.[188] Although not a focal point of this thesis, it is worthy to note that the appointment of educators is also an area where much conflict has arisen between SGBs and PDEs.[189] They are further obligated to prepare an annual budget for parent approval, keep financial records of the school and appoint a registered auditor.[190]

Additional functions can be assigned to SGBs on application to the HOD.[191] These functions include the maintenance and improvement of a school's property, buildings and grounds;[192] to determine the extra-mural curriculum of the school and the choice of subject options;[193] to purchase textbooks, educational materials or equipment for the school;[194] to pay for services;[195] and any other functions consistent with the Act and any applicable provincial law.[196]

SGBs can also raise funds to supplement the school's income and ensure a richer education for pupils.[197] In the South African context, wealthy suburban schools (quintiles 4 and 5) can obtain additional local funding that schools in the poorer communities cannot.[198] Quintiles 4 and 5 schools charge high school fees and are able to organise massive fund-raising events where wealthy parents donate funds and

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187 *Schools Act* 84/1996: sec. 20(1)(a) and 36.

188 *Schools Act* 84/1996: sec. 20(1)(i) and (j).

189 Alpha Primary School and Another v Head of Department, Department of Education, Northern Cape and Others [2018] ZANCHC 10, Khathu Primary School and Another v Head of the Department of Education, Northern Cape and Others; Seodin Primary School and Another v Head of Department, NC and Others [2019] ZANCHC 50 and Douglas High School and Another v The Head of Department of Education, NC and Others [2021] ZANCHC 18.

190 *Schools Act* 84/1996: sec. 38, 42 and 43.

191 *Schools Act* 84/1996: sec. 21.

192 *Schools Act* 84/1996: sec. 21(1)(a).

193 *Schools Act* 84/1996: sec. 21(1)(b).

194 *Schools Act* 84/1996: sec. 21(1)(c).

195 *Schools Act* 84/1996: sec. 3(1) and 12(1).

196 *Schools Act* 84/1996: sec. 21(1)(e).

197 *Schools Act* 84/1996: sec. 20(2) and 36.

198 Ndimande 2016: 36.

other school materials, including sufficient funding, to allow the SGB of the school to employ additional educators to cover areas not adequately covered by the full-time educators appointed by PDEs.

It must be emphasised that capacity to do this varies according to the communities that SGBs are elected from. In reality, SGBs from quintiles 1 to 3 schools serving the poorer communities are frequently unable to raise additional funds.[199] The availability of additional funds is what allows SGBs to challenge PDEs on education conflict. Public schools, however, remain subject to control by the DBE and the PDEs, in that such schools must comply with the norms and standards set on these two levels.[200] This can be fertile ground for conflict between the SGB and departments.

2.4.3 Principal and the management of a public school

In terms of section 16(3) of the Act,[201] professional management at a public school must be undertaken by the principal of the school under the authority of the HOD. Principals are an important link in the education chain in that they are the link between education authorities and all other participants in the school.[202] Professional management of a school is defined as the day-to-day administration and organisation of teaching and learning at the school and the performance of the departmental responsibilities prescribed by law.[203]

The difference between SGBs and principals was illustrated in the matter of the *Welkom case,*[204] where it was stated that a principal's authority is executive by nature, being responsible for education under the authority of the HOD for the implementation of applicable policies (whether promulgated by the SGB or Minister or PDE) and the running of the school on a day-to-day basis.[205]

The principal is also an *ex officio* member of the SGB representing the interests of the

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199 Amnesty International 2020: 94. See also Ndimande 2016: 36.
200 GG2432/1998 and GN1160/2012.
201 *Schools Act* 84/1996: sec. 16(3).
202 Watt 2014: 40.
203 Watt 2014: 40.
204 2013 (9) BCLR 989 (CC).
205 Head of Department, Department of Education, free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School: 2013 (9) BCLR 989 (CC): 63.

State.[206] It thus means that the principal must watch over two interests; firstly that of the PDE when functioning as a member of the SGB; and secondly, the interests of the SGB when dealing with the PDE.[207]

The importance of the relationship between the principal and SGB for the proper governance, control and management of school cannot be overemphasised and makes the difference between a functional and dysfunctional school. This relationship can often be impaired by the interference from the PDE acting as the principal's employer.[208] An illustration of this abuse of power is to be seen in the *Welkom, Ermelo* and *Rivonia* cases, to name a few.

2.4.4 Provincial Department of Education (PDE)

The MEC is the political head and within the administration, the HODs are the representatives for education at a provincial level. The MEC and HOD together exercise executive control over public schools through principals. Schooling is primarily a provincial matter, subject to the norms and standards set by the Minister at a national level.[209]

2.4.4.1 Roles and responsibilities of the MEC

The MEC has the obligation to ensure that every child who lives in his or her province can attend school and that public schools are appropriately funded.[210] The MEC is responsible for ensuring that there are enough schools in his or her province. The disputes that arise from admissions, overcrowding and poor infrastructure problems can be linked to the lack of sufficient schools and this function is the sole responsibility of the politicians. This also begs the question on how politicians are held accountable and whether an ombud will be able to address the lacking accountability measures of politicians in the education sector. The MEC also retains the authority to hear appeals

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206 *Schools Act* 84/1996: sec. 16A.

207 Watt 2014: 41.

208 Watt 2014: 41. It somewhat opens the door for abuse of power by the department and actually makes a real partnership/cooperation relationship impossible. The one who pays one's salary will always have an advantage when the principal has to weigh up the interests of the school and SGB against that of the department.

209 National Education Policy Act 27/1996: sec. 2 and 3.

210 *Schools Act* 84/1996: sec. 3(1) and 12(1).

regarding school admissions and learner expulsion,[211] and to promulgate regulations related to suspension and to expulsion.[212] The exercise of all these powers has the influence to lead to conflict between the PDEs and SGBs.

2.4.4.2 Roles and responsibilities of the HOD

The HOD must ensure that all children who are within the compulsory school-going age attend school.[213] The HOD exercises power over the decision to refuse a child admission to a public school;[214] the expulsion recommendations made by SGBs;[215] the appointment of educators and non-educator staff;[216] the allocation of functions to SGBs that have demonstrated their competence;[217] the withdrawal of these functions from SGBs where warranted; and the administration of all financial matters in the PDE.[218] The HOD can further appoint sufficient persons to perform the SGB's functions of a school where it is found that the SGB has failed to perform its functions.[219] Again, this is fertile ground for conflict and the question whether an ombudsman would be better placed to address these issues.

2.4.4.3 Roles and responsibilities of the district offices

In terms of the *NEPA* and the *Schools Act,* the district education offices do not possess original powers. They are best understood as deconcentrated units of the PDE and work closely with public schools. The HOD would ultimately delegate specific powers to district officials to exercise functions on his or her behalf.[220] In this regard, the HOD may delegate any of the functions he is required to perform in terms of the *Schools Act* to various officials, for example, school admissions, the consideration of learner expulsions, and the withdrawal of SGBs powers, to name a few. In *Governing Body Hoërskool Overvaal v Head of Department of Education,*[221] the function to admit

[211] *Schools Act* 84/1996: sec. 5(9) and 9(4).
[212] *Schools Act* 84/1996: sec. 9(3).
[213] Schools Act 84/1996: sec. 3(3) and (5). See also Head of Department of Education and Another v Hoërskool Ermelo 2010 (3) BCLR 177 (CC): par. 56.
[214] *Schools Act* 84/1996: sec. 5(7) and (8).
[215] *Schools Act* 84/1996: sec. 9(1D) and (2).
[216] *Schools Act* 84/1996: sec. 20(1)(j). See also *Employment of Educators Act* 76/1996: sec. 6.
[217] *Schools Act* 84/1996: sec. 21.
[218] *Schools Act* 84/1996: sec. 22. See also *Public Finance Management Act* for the responsibilities of an HOD.
[219] Schools Act 84/1996: sec. 25.
[220] *Schools Act* 84/1996: sec. 62(2) and (3).
[221] [2018] ZAGPPHC 1.

learners was delegated to the respective district directors, which resulted in a dispute regarding admissions between the SGB and PDE. This case is a further illustration of how the district officials abused their powers by strong arming the principal of the school to admit learners when there was more than enough spaces at neighbouring schools.

2.4.5 Educators, learners and parents

The *Schools Act* aims to uphold the rights of all learners, parents/caregivers and educators and to promote acceptance of responsibility for the organisation, governance and funding of schools as equal partners. Broadly put, educators must adhere to the constitutional prescripts regarding human rights and ensure that the best interests of every child are considered in all matters, for example, in instances of discipline.[222] The Act defines an educator as any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services at a school.[223] Educators assume the role of the parent when learners are at school and are therefore seen to act *in loco parentis*. The *Employment of Educators Act* and the personnel administrative measures will further outline the roles and responsibilities of educators to ensure an accountability measure. However, this level of conflict will not be discussed, as there are specific labour forums dealing with an educator's conduct when in breach of the rules.

Parents and learners constitute another set of powerful role-players in that parents have the responsibility to ensure that their children attend school. They have the right to participate in the election of the SGB. Reyneke[224] states that parents must realise that they are firstly and foremostly responsible for the overall discipline of their children. Parents should support the efforts of the school to instil positive values in their children and further to support the SGB and educators who have to deal with unruly learners. Parents are further required by law to care for their child.[225]

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222 Reyneke and Reyneke 2020: 571 and 572.
223 *Schools Act* 84/1996: sec.1 definitions.
224 Reyneke and Reyneke 2020: 572.
225 *Children's Act* 38/2005: sec. 18(2).

In this regard, 'care' is defined as ensuring that the child has a suitable place to live in conditions conducive to the child's health; to provide financial support; to safe-guard and promote the well-being of the child; to ensure the child is protected from abuse, discrimination, any physical, emotional or moral harm; to respect, promote and ensure the fulfilment of a child's rights; and to prevent the violation of rights.[226] This must be done by constantly considering the best-interest-of-the-child principle.

Learners, through their RCLs (representative councils of learners), are entitled to participate in school governance and have the right to be consulted on various aspects of the governance of the school as well as the content of the school code of conduct.[227] A learner is defined to mean any person receiving education or who is obliged to receive education.[228]

2.4.6 Civil society institutions acting on behalf of SGBS for quintiles 1 to 3 schools

Civil society institutions make known the issues faced by, as well as the concerns of, schools and their communities.[229] Examples of such institutions are Section 27 and Equal Education, two non-profit organisations focusing on enhancing socio-economic rights through *inter alia* litigation. They further advocate and offer a new way for schools and their communities to participate in the democratic process. In addition, they bring about transformation in education and society. Although these institutions are not identified as education role-players in terms of the Act, they work with communities, education stakeholders at school level, academics, researchers and the state, based on the belief that the right to equality and education will allow all South Africans to have equality of opportunity in life.[230] The courts take cognisance of this

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226 *Children's Act* 38/2005: sec. 1(1) definitions.

227 *Schools Act* 84/1996: sec. 24(1)(d). See also *Welkom* case where the court held that the views of the pregnant learners should have been considered.

228 *Schools Act* 84/1996: sec.1 definitions.

229 Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM); Basic Education for All and Others v Minister of Basic Education and Others 2014 (4) SA 274 (GP); Section 27 and Others v Minister of Education and Another 2013 (2) SA 40 (GNP); South African National Council for the Blind and Others v Minister of Basic Education and Others (Case number: 72622/2017); Komape and Others v Minister of Basic Education and Others [2018] ZALMPPHC 18; Equal Education and 3 Others v Minister of Basic Education and 9 Others [2020] 4 ALL SA 102 (GP); Equal Education and Another v Minister of Basic Education and Others 2019 (1) SA 421 (ECB).

230 See www.equaleducation.org.za; www.section27.org.za; and www.eelawcentre.org.za.

role that civil society institutions play in promoting access to the courts in order to defend constitutional rights.[231]

As is illustrated above, the fundamental duty of education role-players is to ensure that the right to education is realised for all persons in the country. In terms of the legislation there are key stakeholders as identified above that have a direct role to play in ensuring the realisation of the right. On the other side of the coin, SGBs have a duty to act in the best interests of the school where they are elected to serve, and further to ensure that the learners receive the best possible quality education. These responsibilities amongst role-players tend to clash with one another, which leads to conflict. When conflict is not resolved, it escalates to a dispute, which more often than not plays out in court between the SGBs of affected schools and the PDEs. It is noteworthy that PDEs are always a key party to the conflict. Below is an illustration of the role-players in education. Unions are listed as non-political role-players, but are not discussed in this dissertation. The role they play is limited to the rights of their members who are the educators. Thereafter the conflict is reflected amongst role-players.

[231] Constitution 1996: sec.38. See also Section 27 and Others v Minister of Education and Another 2013 (2) SA 40 (GNP): par. 42.

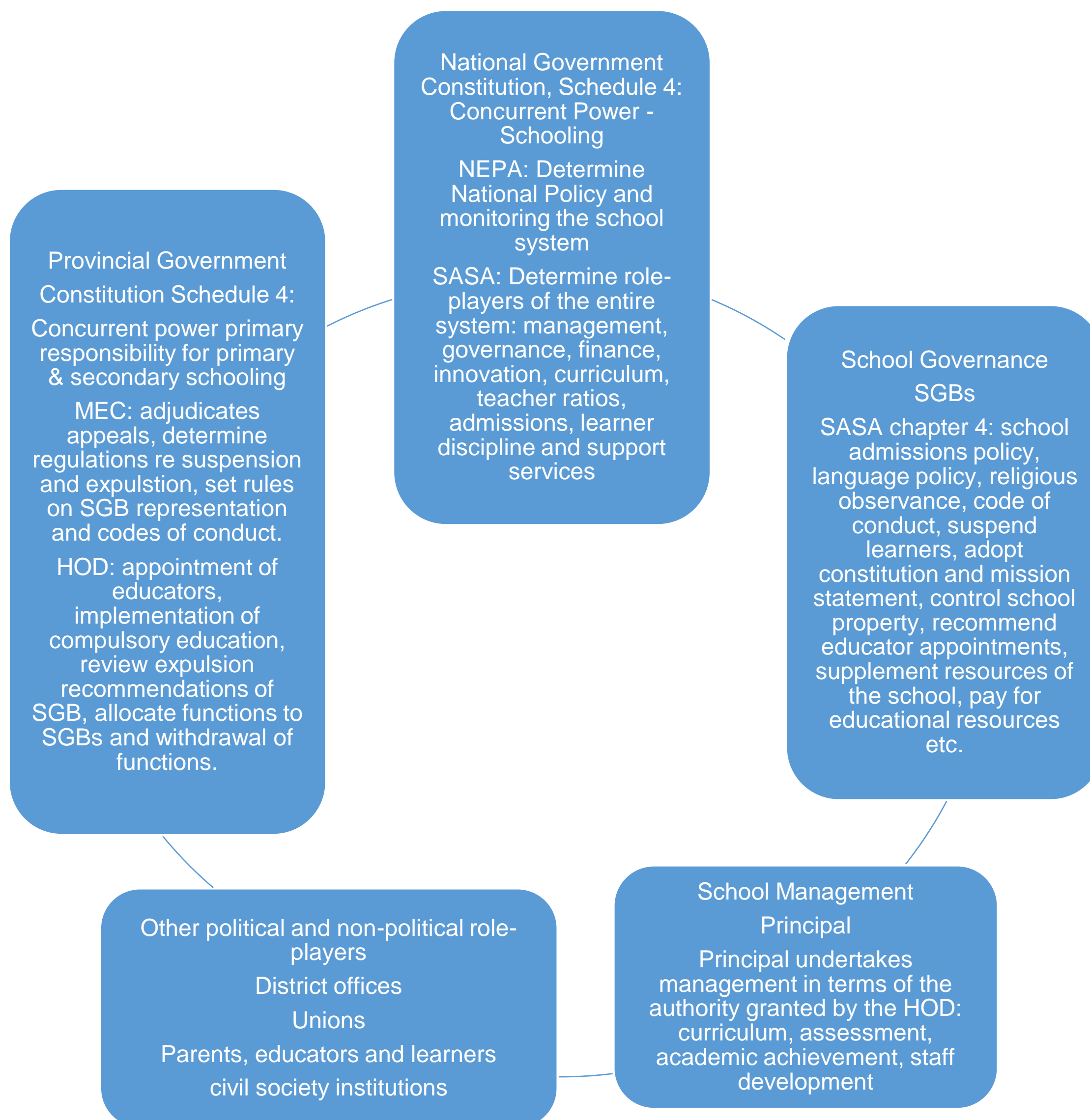

Figure 1: Illustration of the role-players in education:[232]

3. FACTORS THAT LEAD TO CONFLICT AMONGST EDUCATION ROLE-PLAYERS

According to Wiese,[233] disputes originate from conflict. Conflict is an inherent part of human relationships and, in most instances, arises when parties experience a

232 Woolman and Fleisch 2009: 11.
233 2016: 3.

disagreement in their needs and interests.[234] The challenges brought against and on behalf of SGBs reflect the fundamental tension between largely affluent communities attempting to protect their privilege and a state attempting to advance its own interests. Then there is the issue about the state failing to deliver on its education mandate which, as was shown above, violates the rights of South Africa's many disadvantaged learners.[235] As a result hereof, NGOs are forced to assist these schools by seeking declaratory orders in court. There are also several instances where external factors influence or escalate conflict.

In an empirical study conducted by Clase, Kok and Van Der Merwe,[236] it shows that some of these external factors are related to the fact that SGBs have extensive executive powers entrenched in legislation, while the powers at PDE level are now limited to advice and consultation. Another position can be attributed to the role-players' interpretation of legislation. Clase, Kok and Van Der Merwe[237] hold the view that the DBE and PDEs want to contain the power of SGBs unilaterally and that this causes further conflict.[238] A new factor is the lack of service delivery and communities that act through NGOs or protests. In the Northern Cape, for instance, parents, with the assistance of the Department of Labour, closed three schools because they were re unhappy about what happens in education.[239]

Many of the cases that serve before court reflect that certain SGBs and schools are unresponsive to the changes in the education system and focus solely on the interests of their school and learners. Other factors that play a role are the mutual mistrust of one another's motives; lack of knowledge about the content and conditions of the Act; lack of transparency and ill-considered actions by the PDE; lack of support for SGBs; and

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234 Patelia and Chiktay 2015: 3; Wiese 2016: 3.

235 Woolman and Fleish 2009: 169.

236 Clase, Kok and Van Der Merwe 2007: 243-263. These factors have not changed since 2007 since there are still cases that indicates the same factors for example *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR 177 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School and Another, Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC); *Basic Education for All and Others v Minister of Basic Education and Others* 2014 (4) SA 274 (GP) and *Madzodzo and Others v Minister of Basic Education and Others* [2014] (3) SA 441 (ECM). More recently *Equal Education and Others v Minister of Basic Education and Others* 2021 (1) SA 198 (GP).

237 Clase, Kok and Van Der Merwe 2007: 245.

238 See, for example, Draft Basic Education Laws Amendment Bill (GG 45601/2021).

239 Dyomfana 2022: 1.

application of education law in practice is not in accordance with the prescripts of the Act.[240]

Under the *Schools Act*, two things are discerned; firstly, that public schools are run by a partnership involving the DBE and PDE, SGBs and members of the parent community in which the school is located.[241] The interactions between the role-players, in other words, the checks, balances and accountability mechanisms, are closely regulated in the Act. Despite this there is a history of inherent conflict amongst role-players, as will be discussed below. This conflict can be seen in areas of education policy, failure to provide educational resources and other areas such as conflict between the principal and SGB, and administrative decisions taken by the Minister during the pandemic. The blatant abuse of power will also be highlighted in the discussion below. The abuse of power and conflict is discussed with reference to education policy.

3.1 Conflict regarding language policies

Language and cultural freedoms are protected in the Bill of Rights.[242] These freedoms are an intrinsic part of the education of every person and must be respected, protected, promoted and fulfilled by the admission policy of a public school.[243] An admission policy based on language was dealt with in the matter of *Matukane v Laerskool Potgietersrus*[244] (*Matukane*) in 1996. In brief, the facts were that, at that time, the school served as an English and Afrikaans parallel-medium school where 646 learners were Afrikaans-speaking, 64 were English-speaking, and 54 were pre-primary. The school refused to admit three black children. The school's argument was that it was full and that it would also be to the detriment of the black learners to admit them to a school with a Christian Afrikaans culture and ethos. The court held that the school's admission policy was racist and that protecting cultural and language differentiation was merely a pretext.

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240 Clase, Kok and Van Der Merwe 2007: 259. See also recent articles that confirm the challenges in Serfontein and De Waal 2018: 1-17; Liebenberg 2016: 1-43.

241 Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another [2013] 9 BCLR 989 (CC): par. 49.

242 *Constitution* 1996: sec. 15, 30 and 31.

243 Joubert and Bray 2007: 74.

244 1996 (3) SA 223 (T).

In 2002 an important, though ambivalent, judgment was that in the matter of *Middelburg Laerskool v Hoof van Departement, Departement van Onderwys, Mpumalanga*,[245] where the PDE compelled a single-medium Afrikaans school to admit 20 English-speaking learners. Yet again, the issue was politicised by accusations of racism in the media and political activism in the community. The court found the actions of the PDE to be unlawful and in direct contravention of section 6 of the *Schools Act*. However, in effect it 'turned a blind eye' to the unlawfulness of the department's actions by holding that, given the fact that the matter was being heard nine months after the application had been brought, the interests of the 20 learners had to take preference over the violation of the rule of law.[246] This judgment resulted in other PDEs in the Western Cape, the Northern Cape, Mpumalanga, the Free State and Gauteng acting *ultra vires* in similar matters.[247]

In 2005, the court ruled very differently in the Supreme Court of Appeal in *Western Cape Minister of Education v Governing Body of Mikro Primary School* (*Mikro case*).[248] The PDE appealed the decision of the High Court that ruled in favour of the SGB not having to convert to a parallel-medium school. The PDE argued that the school had refused to convert from an Afrikaans-medium school to a parallel-medium school.[249] However, the Supreme Court of Appeal (SCA) dismissed the appeal of the PDE and stated that there were no grounds to interfere with the court *a quo*'s ruling. The court held that the insistence by the department's officials that the learners and their parents attend the school assembly against the wishes of its principal and the first respondent amounted to an unlawful interference by them in the governance and professional management of the school.[250]

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245 (2002) 4 All SA 745 (T): par. 38 at 48.

246 Smit 2014: 44.

247 Western Cape Minister of Education v Governing Body of Mikro Primary School 2005 3 ALL SA 436 (SCA); Seodin Primary School v Northern Cape Department of Education 2006 (4) BCLR 542 (NC); Head of Department, Mpumalanga Education Department v Ermelo High School 2010 (3) BCLR 177 (CC); Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another [2013] 9 BCLR 989 (CC); MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC); and Centre for Child Law v The Governing Body of Hoërskool Fochville 2016 (2) SA 121. See also Smit 2014: 37-63.

248 Western Cape Minister of Education v Governing Body of Mikro Primary School 2005 (10) BCLR 973 (SCA).

249 Western Cape Minister of Education v Governing Body of Mikro Primary School 2005 (10) BCLR 973 (SCA): par. 10.

250 Western Cape Minister of Education v Governing Body of Mikro Primary School 2005 (10) BCLR 973 (SCA): par. 45.

Of interest in this case is the fact that the SCA and court *a quo* found that the constitutional imperatives for cooperative governance did not find application in this instance and held that an SGB is in fact no an organ of state.[251] However, this position was changed by the Constitutional Court in the *Welkom* case.[252]

In 2010, the Constitutional Court provided guidance on how education role-players should conduct themselves in the matter of *Head of Department, Mpumalanga Department of Education, and Another v Hoërskool Ermelo and Another*[253] case (*Ermelo case*) and held that even though school language policy is a devolved function, it does not mean that the SGB's right to determine language policy is absolute and that the HOD is precluded from intervening in both the admission and language policies of schools.[254] The court stated:

> That the governing body of a public school must recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but must also take into account the interest of the broader community in which the school is located.[255]

The court further found that the school had to make decisions regarding its language policy with due regard for the constitutional rights and needs of the broader community in which the school was situated.[256] Thus, the court broadened the role of the SGB to consider not only the immediate rights of learners enrolled at the school, but also the rights of the broader community.[257]

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251 Western Cape Minister of Education v Governing Body of Mikro Primary School 2005 (10) BCLR 973 (SCA): par. 22.

252 Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another [2013] 9 BCLR 989 (CC): par. 152.

253 Head of Department, Mpumalanga Department of Education, and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC): par. 58, 81 and 99.

254 Head of Department, Mpumalanga Department of Education, and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC): par. 58 and 81.

255 Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo 2010 (3) BCLR 177 (CC): par. 80.

256 Head of Department, Mpumalanga Department of Education, and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC): par. 99.

257 Head of Department, Mpumalanga Department of Education, and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC): par. 99.

In the more recent matter in 2018, in the matter of *Governing Body Hoërskool Overvaal v Head of Department of Education (Overvaal* case*)*,[258] the court was required to review the District Director's decision to compel Overvaal Hoërskool, an Afrikaans single-medium school, to admit 55 Grade 8 English learners for the 2018 academic year. The SGB argued that the school was full and that neighbouring English-medium schools in the same school zone had sufficient space to accommodate the learners. The SGB further argued that the District Director's decision was procedurally flawed and *ultra vires* and did not take the school's language policy into account. The dispute centred on admissions and the language policy of the school and whether or not the school had sufficient places to admit an additional 55 learners.

The court held that the PDE did not verify the school's learner capacity in a meaningful way as was required in terms of the admission policy and regulations, which conduct is highly unreasonable and against the spirit of cooperation.[259] Even more disturbing was the manner in which the PDE went about introducing new hand-written affidavits to the court, which purportedly was to explain how the 55 interested learners came about.[260] The court ruled that the conduct of the PDE was an abuse, because no explanation was offered for the failure to present the evidence as part of the opposing affidavits, especially after details of the evidence of the two principals appeared in the founding affidavit. The Judge further stated that he was not informed by the bar that the principals would be submitting two new affidavits for consideration.[261] It is apparent from the evidence submitted to court that the District Director threatened to dismiss the principals of the neighbouring schools if they did not change their version in their first affidavits to indicate that their respective schools were full to capacity.[262]

The conduct of the departmental officials in this case is disturbing. The intimidation and duress on the principals will lead to mistrust and go against the partnership model of the Act. This case is a further example of instances where PDE officials have

[258] Governing Body, Hoërskool Overvaal and Another v Head of Department of Education, Gauteng Province and Others [2018] 2 ALL SA 157 (GP): par. 10 at 2, 5 and 13; par. 20 at 15.

[259] Governing Body, Hoërskool Overvaal and Another v Head of Department of Education, Gauteng Province and Others [2018] 2 ALL SA 157 (GP): par. 20 at 23; par. 20 at 24; par. 20 at 25.

[260] Governing Body, Hoërskool Overvaal and Another v Head of Department of Education, Gauteng Province and Others [2018] 2 ALL SA 157 (GP): par. 10 at 41, par. 20 at 41, 42; par. 10 at 42; par. 20 at 42.

[261] Governing Body, Hoërskool Overvaal and Another v Head of Department of Education, Gauteng Province and Others [2018] 2 ALL SA 157 (GP): par. 10 at 41; 20 at 41.

[262] Governing Body, Hoërskool Overvaal and Another v Head of Department of Education, Gauteng Province and Others [2018] 2 ALL SA 157 (GP): par. 10 at 42; par. 20 at 42; par. 10 at 43; par. 20 at 43 and 44.

misinterpreted the law and have abused their powers in order to compel schools to admit additional learners.

3.1.2 Conflict regarding pregnancy policy

Another case that served before the courts indicating a clear power struggle is the matter of *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another*[263] *(Welkom case).* The court expressed its dismay in the power struggle and stated the following:

> The accommodation of the pregnant learners achieved in that regard should have been a pointer to how the dispute should have been resolved in the first place, and also how future difficulties of the same kind should be avoided and resolved. Instead, the parties lost patience with each other and rushed to court. The focus then turned into a power play: who has the final say over the conduct of the principals of the schools? Lost in translation was that the best interests of the children at the schools were of paramount importance and that the powers of the SGBs and the HOD were subservient to the learner's needs.[264]

The court lambasted both the SGB and the PDE and pointed out that their interactions with each other are supposed to safeguard the best interests of the children and not to win as much possible ground in the battle for power.[265] It was further highlighted that this case and many others should not end up in court and that litigation can and could be avoided if only role-players could focus on their responsibilities. In this regard the court further held:

> An approach which places the learners' best interests as the starting point must contextualise the present dispute within the role-players' duties to engage and

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263 2013 (9) BCLR 989 (CC).

264 Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC): par. 132.

265 Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC): par. 129-132.

co-operate.[266]

Instead of approaching the situation in this spirit, the SGBs and HOD dug in their heels. In this case, the HOD instructed the school to re-admit the pregnant learners in contravention of the school policy and instructed the principals to ignore the unlawful policies. The SGB responded with defiance and litigation. Confusion and misunderstanding turned into mistrust.[267] The court found in this case that both the SGB and HOD of the PDE contributed towards the escalation of the conflict and the eventual litigation and that the role-players could and should have done more to prevent the litigation.[268]

3.1.3 Conflict regarding admission policy

MEC for Education in Gauteng and Other v Governing Body of Rivonia Primary School and Others[269] *(Rivonia case)* is another example of a power struggle that ensued between an SGB and PDE. In this matter, the HOD withdrew the principal's admission function and delegated the power to an official of the department. The learner was eventually taken to a class and was seated at an empty desk reserved for a learner with learning disabilities.[270] Similarly, in the *Ermelo* matter, the PDE withdrew the SGB's powers and appointed a new SGB to introduce the language policy of choice at the school. This is a blatant abuse of power and the actions of the HOD were found to be *ultra vires* in this matter. The illustration of these two cases emphasises the power play between PDEs and SGBs and that the conflict is not only related to issues about language and admission.

The Constitutional Court makes reference in this matter to its judgments in the *Welkom* and *Ermelo* cases insofar as it relates to the relationship between the HOD and SGB.

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[266] Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC): par. 134.

[267] Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC): par. 160.

[268] Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC): par. 78.

[269] 2013 (12) BCLR 1365 (CC).

[270] MEC for Education in Gauteng and Other v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC): par. 14.

This case illustrates the damage that results when role-players fail to accept the general obligation to act in partnership and cooperation seriously. It was the court's view that there was engagement between the parties in the early stages of the tussle, albeit tense. In this regard the court held that the HOD exercised his powers by way of a heavy-handed approach, which would no doubt create antagonism and mistrust.[271] This approach led the governing body to recoil and in order to safeguard its own authority, the school failed to take the learner's interests into account and resorted to litigation instead.[272]

In this case, the court emphasised the duties of cooperative governance and the impact it might have on children. The court held that there is a duty on PDEs and SGBs to cooperate and attempt to reach an amicable solution that is intimately connected to the best interests of the child.[273] In addition to this, the court stated that one organ of state cannot use its entrusted powers to strong-arm others. All role-players are expected to work together in partnership to find solutions to persistent and complex difficulties and resorting to litigation at every skirmish will not assist.[274]

Cooperation will be discussed later on in chapter 3.

3.1.4 Conflict regarding the code of conduct for learners

School discipline related to the learners' code of conduct is another complex area that has given rise to many court cases. Many of the cases that served before court relate to the HODs' refusal to expel learners who were found guilty of serious misconduct during a formal disciplinary hearing.[275] In the event that the HOD decides not to confirm the recommendation of the SGB to expel a learner, he or she must, after consultation with the SGB, impose an appropriate sanction which the SGB is obliged to

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271 MEC for Education in Gauteng and Other v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC): par. 75.

272 MEC for Education in Gauteng and Other v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC): par. 76.

273 MEC for Education in Gauteng and Other v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC): par. 72.

274 MEC for Education in Gauteng and Other v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC): par. 78.

275 *Maritzburg College v Dlamini and Others* [2005] JOL 15075 N. See also De Groof and Du Plessis 2014: 156.

implement.[276] Alternatively, the HOD can refer the matter back to the SGB to impose an alternative sanction, excluding expulsion.[277]

Researchers report that current trends regarding expulsions in schools have created the perception that HODs are unwilling to assist schools in maintaining discipline, because they frequently refuse to confirm the SGB's expulsion recommendations.[278] In some cases, schools have consulted with the HOD to explain the seriousness of the case and request assistance with disciplinary problems, but in vain.[279] This can be viewed as an abuse of power through the omission to assist SGBs. Reasons advanced by HODs include the fact that schools do not provide adequate support measures and structures for counselling as is required by the Act.[280] This raises a further question as to whether or not PDEs indeed provide sufficient financial means to provide support and counselling to SGBs. As a result hereof, some schools have no other option but to approach the court to review the HOD's decision. Yet, very few schools have the financial means to approach the court in this regard, as about eighty per cent of schools in South Africa are no-fee schools.

Since the abolition of corporal punishment, little has been done by the PDEs to assist schools with disciplinary alternatives and adequate support to deal with transgressing learners' behaviour. In addition, there is also no legal obligation on PDEs to address disciplinary problems. All the HOD must do is ensure that where he or she upholds the recommendation to expel, a suitable schooling place be found for the expelled learner if he or she is still of compulsory school-going age. Researchers argue that these systemic issues fly in the face of the constitutional imperatives of cooperation in mutual trust and good faith and finding workable solutions to persistent and complex problems.[281]

Justice O'Regan, in her dissenting judgment in *MEC for Education: KwaZulu-Natal and Others v Pillay*,[282] pointed to the significance of the partnership in the school system and stressed the positive effect that a sound partnership could have on dispute

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[276] *Schools Act* 84/1996: sec.9(8) and (10).
[277] *Schools Act* 84/1996: sec.9(9).
[278] De Groof and Du Plessis 2014: 156.
[279] De Groof and Du Plessis 2014: 156.
[280] De Groof and Du Plessis 2014: 57.
[281] Serfontein and De Waal 2018: 1-17.
[282] 2008 (2) BCLR 99 (CC): par. 121-123.

resolution in the country. She held that the strength of schools would be enhanced only in cases where parents, learners and teachers accept ownership of public schools and take responsibility for their continued growth and success.[283] She held that dispute resolution processes should be available to schools and that all engaged in conflict should act with civility.[284]

3.1.5 Conflict regarding the provision of school resources such as textbooks, nutrition and school infrastructure

Disputes have also arisen amongst SGBs of no-fee schools and PDEs. Civil society institutions have assisted these schools in seeking declaratory orders against the DBE and PDEs for violating children's constitutional right to a basic education by failing to supply public schools with sufficient and appropriate furniture, textbooks and infrastructure, especially in rural communities.[285] In cases such as these, the DBE and PDEs have cited budgetary constraints as being responsible for the relevant state of affairs. This notwithstanding, the courts have reminded the department that the right to education is one that must be realised immediately. The courts ruled that the state's obligation to provide a basic education as guaranteed by the *Constitution* is not confined to making places available at schools, but also encompasses ensuring that there are sufficient educational resources and appropriate facilities.[286]

It is noteworthy that, had it not been for the assistance of these civil society institutions, the schools concerned would not have been in a position to access justice through the courts. The question must then be asked: is it fair towards the learners at these schools where the elected SGBs do not have the means to challenge the PDEs who blatantly fail in their constitutional obligation to provide quality education for all.

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[283] MEC for Education: KwaZulu-Natal and Others v Pillay 2008 (2) BCLR 99 (CC): par.121-123.

[284] MEC for Education: KwaZulu-Natal and Others v Pillay 2008 (2) BCLR 99 (CC): par. 121-123.

[285] Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM); Basic Education for All and Others v Minister of Basic Education and Others 2014 SA 274(GP); Section 27 and Others v Minister of Education and Another 2013 (2) SA 40 (GNP); South African National Council for the Blind and Others v Minister of Basic Education and Others (Case number: 72622/2017); Komape and Others v Minister of Basic Education and Others [2018] ZALMPPHC 18; Equal Education and 3 Others v Minister of Basic Education and 9 Others 22588/2020. See also Nowicki 2022: 1-4 (Eastern Cape parents, teachers, and activists go to court to get education dept to deliver textbooks.)

[286] Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM).

3.1.6 Conflict regarding the phasing in of learners to school amid the COVID-19 pandemic

The Minister's decision to reopen schools and phase in learners was also challenged by various institutions during the COVID-19 pandemic.[287] However, it must be pointed out that, in all these cases, the courts found in favour of the Minister. In the light of such challenges, it is worth considering whether or not the disputes that arose in these cases could have been resolved by way of another mechanism, and at far less cost. Had such a mechanism been available to resolve the disputes concerned, it is possible that the disputes could have been resolved at that level – as opposed to being decided in court – thus saving on costs and avoiding strained relationships between the parties. These funds could have been utilised better, for instance, for teaching and learning and for ensuring a safe teaching environment during the pandemic.

3.1.7 Conflict between the SGB and principal

When power, competency or authority is not properly delineated, circumscribed or exercised, dysfunctionality will reign supreme and schools are not exempt from this truism.[288] In 2018, in another interesting matter, conflict came to the fore between members of the SGB of Grey College, notably the chairperson and the principal. In this case, the SGB contended that their trust relationship with the principal had broken down.[289] This the SGB demonstrated at a duly constituted SGB meeting where the principal was ambushed with several allegations related to his failure to execute various delegated functions to the SGB's satisfaction.[290] The principal requested time to prepare, but was refused. At the meeting the SGB purportedly withdrew the functions to him and appointed another educator to perform the functions. The court ruled in favour of the applicant (principal) and held that the SGB had no authority under law to

287 Teibela Institute of Leadership, Education, Governance and Training and African Institute for Human Rights and Constitutional Litigation v Minister of Basic Education (Case number: 2647/2020); National Association of Parents in School Governance and 1 Other in re The Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and 5 Others (Case number: 19717/2020); One South African Movement v President of the Republic of South Africa and 3 Others (Case number: 98/2020).

288 Woolman and Fleish 2009: 129.[288]

289 Scheepers v School Governing Body, Grey College Bloemfontein and Others [2018] ZAFSHC 210: par. 24 and 25. See Smit 2022: 91-107 and 215-228.

290 Scheepers v School Governing Body, Grey College Bloemfontein and Others [2018] ZAFSHC 210: par. 26. See Smit 2022: 91-107 and 215-228.

strip the principal of his powers the way it did.[291] In addition, the court held that the principal was humiliated by the SGB and was exposed to a hostile situation. The court also emphasised the disrespect that was shown to the principal in front of the learners, which might have eroded the respect that the learners had for the principal.[292] Dissatisfied with the decision with the court of first instance, the SGB took the principal and the PDE on appeal.[293] However, the appeal was dismissed with costs.

3.2 Summary of the academic literature regarding the role/position of SGBs vis-à-vis the other education role-players

From the above discussion and the development in law and the amendments to the *BELA* it is apparent that two schools of thought emerge. On the one hand there is a strong perception that DBE and PDEs are centralising control over education policy for transformation purposes.[294] This is particularly the views of some SGBs in quintile 4 and 5 schools that have the means to challenge the decisions of the DBE and PDEs. This perceived or real continued recentralisation of powers undermines both the principles of democracy espoused in the *Constitution* and the transformation of the education system and creates hostility. On the other hand, quintile 1-3 schools do not have the means to challenge the administrative action of the PDE that adversely affects them. This place them in an inferior position to the PDE and measures are therefore necessary to address any possible abuse of power by the PDE, such as the over enrolment of schools by PDE officials contrary to the admission policy of the school. These perceptions and other actions creates conflict and animosity and hampers the successful cooperation between the PDEs and SGBs.

4. CONCLUSION

[291] Scheepers v School Governing Body, Grey College Bloemfontein and Others [2018] ZAFSHC 210: par. 96. See Smit 2022: 91-107 and 215-228.

[292] Scheepers v School Governing Body, Grey College Bloemfontein and Others [2018] ZAFSHC 210: par. 99. See Smit 2022: 91-107 and 215-228.

[293] School Governing Body Grey College v Scheepers and Others [2019] ZAFSCHC 25. See Smit 2022: 91-107 and 215-228.

[294] Bray 2002: 516; Smit and Oosthuizen 2011: 62.

As is illustrated above, the powers and duties of education role-players vary from one to another. An SGB in particularly quintile 1-3 schools is in a position of inferiority to education authorities and provision should be made in the law to place them on a more equal footing so that they can challenge administrative action by the PDE when necessary[295] In many cases courts confirmed the powers of SGBs that were trampled on. In law they have the power, but in practice, it is often not recognised by the PDE. PDEs can litigate with taxpayers' money, whereas SGBs from affluent schools utilise the funds they raise. SGBs from poorer schools are reliant on either their governing body associations or civil society institutions.

In addition, part of this vulnerability of SGBs for the misuse of power is a lack of knowledge on their part and the fact that there is in law no consequences for state officials that misuse their powers. Perhaps Zondo, the commissioner in the state capture inquiry, has a point to say that the abuse of state power should be seen as a criminal act.[296] On the other hand, SGBs of wealthier schools are in a far superior position to their counterparts at no-fee schools and provision should also be made to place these SGBs on a more equal footing. Woolman and Fleish[297] further state that after the end of apartheid, South Africa has two education systems. The first is well resourced, consisting of former model-C schools now classified as quintiles 4 and 5 schools. These schools enrol children of the elite, white-middle and new black middle-classes.[298] The second school system enrols the vast majority of working-class and poor children. Woolman and Fleish[299] are of the view that these children bring their health, family and community difficulties into the classroom and as a result hereof the second system struggles to ameliorate young people's deficits at institutions that are themselves less than adequate.

As a result hereof and from case law, it is apparent that most of the conflict that ensues between education stakeholders that end up in court is brought by the SGBs of the well-resourced schools in quintiles 4 and 5 and not the vast majority of poor schools in quintiles 1 to 3. It is submitted that the minority of quintiles 4 and 5 schools have used this power well and that the majority of poor schools have struggled, as the chances of

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[295] Watt 2014: 46.
296 Savides 2022: 1-4. https://www.timeslive.co.za accessed on the 28/02/2022.
297 Woolman and Fleish 2009: 129.
298 Woolman and Fleish 2009: 129.
299 Woolman and Fleish 2009: 129.

them having well-educated and professionally qualified SGB members who have knowledge of the law or the rights of the SGB are slim.[300] This in turn leads to a greater power differential situation amongst the role-players.

The next chapter discusses the constitutional imperative for cooperation amongst education role-players.

300 Watt 2014: 47.

CHAPTER 3
THE CONSTITUTIONAL IMPERATIVE FOR COOPERATION AMONGST EDUCATION ROLE-PLAYERS

"Good governance is the art of putting wise thought into prudent action in a way that advances the well-being of those governed".

Diane Kalen-Sukra

1. INTRODUCTION

The preceding chapters introduced the topic of this dissertation, set out the legal framework governing matters related to education, examined the governance functions of school governing bodies (SGBs) with respect to school policies, and indicated the disputes that arise from the execution of their functions. The courts have pronounced that the relationship between education role-players must be characterised by cooperation, amongst other aspects.[1]

The present chapter now explores the constitutional imperatives relating to requirements of cooperation that need to be complied with when addressing conflict and resolving disputes between SGBs and provincial departments of education (PDEs). In order to do this it is necessary to provide an overview of the nature and development of cooperative governance with reference to the education environment.

With this as background, this chapter evaluates the notion of school governance against the objectives of the cooperative governance requirements of chapter 3 of the *Constitution*.[2] In the process of such evaluation, the following aspects will be dealt with: the relationship between management and governance; the meaning of governance and cooperative governance; the objectives of cooperative governance; the challenges SGBs and PDEs face when implementing cooperative governance, thus impacting on the level of their cooperation with each other and the lessons learned from case law on aspects of cooperative governance and cooperation. This will be explored with the underlying philosophy of the separation of powers, rule of law

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[1] *Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) and *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR 177(CC).

[2] *Constitution* 1996: ch.3.

and participatory democracy.[3] These dimensions will assist in justifying the legal argument for the creation of an ombud in the education sector.

1.1 The underlying philosophy of cooperative governance

Cooperative governance is a popular theme of governments around the world. It is also not a new concept in South Africa.[4] Cooperative governance is one of the most important democratic principles that underlie the South African constitutional dispensation.[5] It is premised on the notion of participatory democracy and is one of the lenses through which various constitutional rights are examined.[6]

The significant transformations resulting from this form of governance are to be seen in the education system with the decentralisation of school governance functions from central government to local school level through national and provincial legislation.[7] Nationally, primary and secondary education (Grades R to 12) functions are administered by the Department of Basic Education (DBE).[8] Although at a provincial (macro) level each of the nine provinces has its own PDEI; school governance is not confined to the DBE and PDE.[9] At a micro-level, power is devolved to elected SGBs that play a significant role in the running of their schools as part of a broader decentralisation of power.[10]

Next follows a discussion on the meaning of cooperative governance.

2. MEANING OF "COOPERATIVE GOVERNANCE"

Looyen[11] argues that cooperative governance within the education context must be understood as an interactive, participatory approach to school management and school governance. On the one hand, it affords parents, educators and learners the

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3 See discussion on conceptual framework in ch.1: para.3.1, 3.2 and 3.4.
4 Looyen 2000: 61.
5 Oosthuizen, Botha, Roos, Rossouw and Smit 2015: 305.
6 Serfontein and De Waal 2018: 2.
7 *South African Schools Act* (*Schools Act*) 84/1996, *Gauteng School Education Act* 6/1995 and *Northern Cape Schools Education Act* 6/1996.
8 Serfontein and De Waal 2018: 2. See also ch. 2 for discussion on the functions of the Minister at DBE.
9 Serfontein and De Waal 2018: 2.
10 Serfontein and De Waal 2018: 2; see discussion at ch.1: para.1.1 and 1.2, 3.1-3.3 and ch.2: par.2.4.2.
11 2000: 16.

opportunity to serve on the SGB and, in so doing, allows them to participate in the decision-making processes at schools and to take responsibility for such decisions.

It can be contended that cooperative governance aims at finding a balance between the roles played by the DBE, PDEs, SGBs, school and school community. The powers, responsibilities and duties of each of these role-players focus on participation, making education possible and accessible, ensuring accountability, restructuring the system to enhance efficiency, developing a network that will lead to school improvement and ensure equality of resources. It is therefore safe to assume that cooperative governance is based on the following important assumptions. These are, *inter alia,* democracy, devolution of powers, shared decision-making, participation, freedom to accomplish quality education, empowering education role-players, restructuring, accountability, developing constructive partnerships and the equity of resources.[12]

3. ASSUMPTIONS OF COOPERATIVE GOVERNANCE

The principles of cooperative governance are pivotal, as they not only require of the DBE and PDEs to meet regularly and to cooperate with one another, but also require this at the level of PDEs and SGBs. Such principles serve as a mechanism for managing conflict between key role-players that render services to the public. The assumptions highlighted above are discussed below.

3.1 Democracy

The notion that communities should have a say and be empowered to exert direct influence in decisions that would impact on their social, material and environmental well-being is virtually undisputed in the development and democratisation debate, to the point of becoming accepted as a basic need and democratic right.[13] This notion is made possible through the *Constitution's* Preamble. The *Constitution* promotes a form of democracy that is representative and participatory.[14] The state must ensure that people's right to participate is made possible.

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[12] Looyen 2000: 19. See also Serfontein and De Waal 2018:1-17, Matshe and Pitsoe 2013: 643-651 and Smit and Oosthuizen 2011: 55-73.

[13] Matshe and Pitsoe 2013: 643.

[14] *Constitution* 1996: Preamble.

The underlying philosophy of participatory and deliberative democracy is therefore fundamental to the new constitutional dispensation and the idea of grassroots decision-making.[15]

The political system in South Africa before 1994 did not allow participation of education role-players on matters of school governance and this was the case with black schools.[16] The education system then was designed according to which management was hierarchical from top to bottom and very authoritarian.[17] The new ANC-led government possessed a genuine commitment to grassroots participation in local political institutions.[18] That commitment underwrites the continued control that parents exercise over SGBs. The fragility of the post-apartheid state necessitated the sharing of decision-making authority over various aspects of school governance with a wide variety of role-players.[19]

This diffusion of power would therefore enhance the ability of these role-players to make choices that advance their own particular interests. It is the manner in which the law channels the pursuit of these interests that give rise to conflict, as was set out in chapter 2 hereof.

3.1.1 Participatory democracy

The *Constitution* includes an unequivocal commitment to representative and participatory democracy, incorporating the concepts of accountability, transparency and public involvement.[20] Participatory democracy is defined as a form of direct democracy that enables all members of society to participate in decision-making processes within institutions, organisations, societal and government structures.[21] Adams and Waghid[22] regard participation, community engagement, rationality,

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Smit and Oosthuizen 2011: 60-61.

Matshe and Pitsoe 2013: 643 and 644.

17 Matshe and Pitsoe 2013: 644.

18 Woolman and Fleish 2009: 15.

19 Woolman and Fleish 2019: 15. See also discussion at ch. 2: par.2.4, 2.4.1-2.4.6 and the illustration of education role-players.

20 *Constitution* 1996; Smit and Oosthuizen 2011: 60; discussion at ch.1: par.3.4.

21 Smit and Oosthuizen 2011: 60.

22 Adams and Waghid 2005: 25.

consensus, equality and freedom as the requisite principles of South African democracy.

3.1.2 Deliberative democracy

Smit and Oosthuizen[23] view deliberative democracy as the most recent of theories that suggest an improved form of democracy through the implementation of deliberative principles based on Habermasian discourse ethics. Deliberative democracy refers to the notion that legitimate political decision-making emanates from the public deliberation of citizens.[24] Again, as illustrated above, Adams and Waghid[25] regard participation, community engagement, rationality, consensus, equality and freedom as constitutive principles of deliberative democracy in South Africa.

These democratic theories have become a key aspect for education restructuring in the international arena, according to Smit and Oosthuizen.[26] The success of these theories, from a public administration perspective, will be measured by the extent to which the provision of educational services and goods is more efficient, flowing from delegation and devolution of educational authority.[27] From a political perspective, the success of decentralisation is measured by the extent to which political involvement and participation are enhanced and again the extent to which the state redistributes authority and power.[28]

3.2 The devolution of powers

The process of devolution of powers in the education sector should not only be seen as an end in itself, but should ideally promote improvements of quality teaching and learning. As a democratic system, cooperative governance is based on the principles of relationships, equity and participation, which are successful schools.[29]

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23 Smit and Oosthuizen 2011: 60-61.
24 Smit and Oosthuizen 2011: 61.
25 Adams and Waghid 2005: 61.
26 Smit and Oosthuizen 2005: 60.
27 Sayed 2002: 35.
28 Sayed 2002: 35-36.
29 Serfontein and De Waal 2018: 3.

In this regard, the establishment of democratically elected SGBs in the country is a worthwhile achievement in extending participation and entrenching democracy. To democratise education and transform schools, the *South African Schools Act*[30] *(Schools Act)* not only signals the devolution of school governance, but the effective democratic functioning of such bodies also hinges on members' rational appreciation of what democratic principles comprise.[31]

The DBE, PDEs and SGBs derive their powers and responsibilities from legislation and it is mandatory to exercise these in line with the rule of law or, rather, in a procedurally fair manner. The *Schools Act* and the *National Education Policy Act*[32] (*NEPA*) provide prescripts on what PDEs and SGBs are responsible for.[33] Exercising powers beyond the provisions of what is required in terms of legislation can be considered an abuse of power and is *ultra vires.*[34]

In an empirical study conducted by Clase, Kok and Van der Merwe,[35] it is argued that the *Schools Act* only provides guidelines regarding the distribution of power and that a strict legal approach to the distribution of responsibilities and functions will not have the desired outcome. This thus confirms that roles and responsibilities are not defined clearly enough in legislation. It is not only the provisions in legislation that are not clearly defined, but the ability and opportunity to implement the provisions also become an issue for education role-players.

Adams and Waghid[36] view school-based decision-making as the lynchpin in school restructuring efforts. In this regard, they highlight the fact that each education stakeholder would want to enhance its own interests, which could possibly occur at

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30 *Schools Act* 84/1996: preamble and sec. 16.

31 Serfontein and De Waal 2018: 3. See also Adams and Waghid 2005: 25-26.

32 27/1996.

33 See also the discussion on these roles and responsibilities in ch. 2: para.2.4.2-2.4.4.

34 *Federation of Governing Bodies for South African Schools v Head of Department for Education, Northern Cape and Another* (887/2016) , *Governing Body Hoërskool Overvaal v Head of Department of Education* [2018] ZAGPPHC 1, *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC), *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) and *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR 177(CC).

35 2007: 249.

36 2005: 27.

the expense of those of another stakeholder. This would undoubtedly result in the decision-making process becoming an arena of strife, struggle and conflict.[37]

Courts have had to deal with a never-ending stream of litigation regarding an array of education rights disputes and with having to resolve the issue of power location, matters that are important to the DBE, PDEs, SGBs, and the community at large.[38] Education functions, it must be pointed out, are issues which, in terms of legislation, are intended to be a shared responsibility between these partners.[39]

3.3 Shared decision-making and responsibilities

Shared decision-making is rooted in the belief that the ideals of a democratic society are fulfilled when all citizens are given equal opportunity to participate in decisions that affect them. It is expected that, through cooperative governance, SGBs and PDEs will cooperate and participate with each other to strengthen and improve their services in education. For example, aspects on school policies, discipline and teacher appointments can be considered a shared responsibility. The coordination of policy implementation is critical for achieving a basic education for all. It is thus important for SGBs and PDEs to understand that they do not only share responsibilities, but they also depend on each other for the successful fulfilment of those obligations, and they must ensure appropriate coordination of school policy as well as the proper alignment of their activities in this regard.[40]

It can be argued that, although the DBE determines policy at a national level, it is the obligation of the PDEs and SGBs to ensure implementation at school level and to further ensure that, when SGBs determine school policies, this is done within the prescripts of national and provincial laws.[41] Since the PDEs are entrusted with the funding and resources to implement national and provincial policy, this further emphasises the need for cooperation. From a reading of case law it can be deduced that there was some form of engagement/participation/consultation, albeit tense, that

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[37] Adams and Waghid 2005: 27.

[38] Beckman and Prinsloo 2006: 494.

[39] DBE 1995: ch. 4: par. 11.

[40] Example of school policies are the admissions policy, language policy and the recent pregnancy policy to name a few.

[41] See also the discussion in ch.2 on roles and responsibilities of education stakeholders.

took place prior to going to court, but that the extent and level thereof were clearly insufficient.[42]

This shared responsibility further gives rise to aspects of coordination and cooperation. It sometimes happens – and it is also clear from case law – that, for the sake of expediency, PDEs act outside the law and then tend to dictate to SGBs "what to do" and "how to do it" when it comes to matters of education, which are tantamount to usurping powers and responsibilities of parents and school governing bodies. To prevent this from happening, PDEs should thus ensure that there is proper coordination of its activities with SGBs and other role-players.

3.3.1 Coordination of activities

As an example, admissions are managed and directed at three different levels, namely at the levels of the DBE, PDE and SGB, with each level having its exclusive powers and authority. As mentioned, this shared responsibility can cause confusion, underutilisation of resources and duplication, and result in the non-alignment of activities.

Although there appears to be a certain measure of consultation between PDEs and SGBs, coordination as one of the important aspects of cooperative governance is less obvious. It is thus critical that PDEs and SGBs create workable coordination mechanisms. For instance, SGBs have formed provincial and national bodies to coordinate school governance matters and uphold their common interests, for example, the National Association of School Governing Bodies (NASGB) and the Federation of Associations of Governing Bodies of South African Schools (FEDSAS).[43] Moreover, the HOD, out of the funds appropriated, must provide training to newly elected SGBs[44] and must ensure that continuous training is also offered to SGBs in order to promote the effective performance of their functions and so enable

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42 *Governing Body Hoërskool Overvaal v Head of Department of Education* [2018] ZAGPPHC 1, *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC), *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) and *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR 177(CC).

43 Joubert and Bray 2007: 21. See also *FEDSAS NC* case [2016] ZANCHC 28: par. 53.

44 *Schools Act* 84/1996: sec. 19(1)(a).

them to assume additional functions as provided for in the *Schools Act*.[45] The HOD may further request a SGB association to assist with the training of SGB members.[46] To facilitate this arrangement, the HOD must enter into an agreement with the SGB association.[47]

Other structures include the Provincial Consultative Forum (PCF), a forum established by PDEs to consult with SGBs and schools and their respective associations on education matters. Of prime importance is the need for SGBs and PDEs to coordinate their activities and programmes properly and to consult adequately and constructively with each other, activities which such forum seeks to facilitate.[48]

3.3.2 Cooperation

The envisaged partnership between the DBE, PDEs and SGBs cannot succeed without mutual trust. To this end, cooperation, participation and accountability must exist between them so that they are able to work together to achieve the best interests of schools as well as the provision of quality education.[49] Mutual trust requires that SGBs and PDEs act in good faith, carry out their duties and functions diligently, and do not engage in unlawful conduct.[50]

For example, the duties and functions pertaining to admissions are clearly an area where these partners are expected to act in good faith and not engage in unlawful conduct. The most recent matter of admissions in *Governing Body Hoërskool Overvaal v Head of Department of Education*[51] *(Overvaal)* is another typical example of the PDE at district level not acting in good faith and engaging in unlawful conduct. It is noteworthy to concede that case law where school policies are contested has always included aspects pertaining to the unlawful administrative conduct of PDEs when

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45 84/1996: sec. 19(1)(b).

46 *Schools Act* 84/1996: sec. 19(4)(a).

47 *Schools Act* 84/1996: sec. 19(4)(b)(i).

48 See how failure to adhere to the procedures adopted by PDEs and SGBs in the PCF resulted in admissions conflict in the matter of *Federation of Governing Bodies of South African Schools v The Head of Department, Department of Education, Northern Cape Province and the Member of the Executive Council for Education, Northern Cape Province,* case number 887/2016.

49 *Schools Ac* 84/1996: sec. 20(1)(a).

50 Joubert and Bray 2007: 19.

51 [2018] ZAGPPHC 1. See also the discussion in ch. 2: par.3.1.

exercising their powers.[52] On the flip side is the unlawful administrative conduct of PDEs where they fail to take administrative decisions.

It is evident that, while partnerships forged through legislation may provide PDEs and SGBs with a powerful voice in the management and governance of school affairs, this does not necessarily lead to democratic participatory practices. The ongoing struggle between these two has consequently had an adverse effect on the relationship of trust and mutual support.

3.4 Freedom to accomplish quality education

Elected SGBs of public schools must have a vision based on what learners in schools need in addition to what communities want. The Constitutional Court stated that cooperative governance requires an interactive approach and accordingly accentuated the need for checks, balances and accountability mechanisms concerning interactions between education partners.[53]

While the DBE primarily sets uniform norms and standards for public schools, the MEC for the PDE is obligated to establish and provide public schools and the HOD of the PDE exercise executive control over schools through their principals. Parents and the community are represented by the SGBs whose primary function is to look after the best interests of schools and provide quality education to its learners.[54] It therefore means that while schools have the freedom to make important decisions regarding educational matters, they operate under the umbrella of broader provincial policies and regulations.

Since 1996, commentators[55] have argued that there is a trend amongst PDEs and its officials to abuse their power towards gaining a superior position concerning education, by controlling the statutory authority that school governance structures may

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52 *Head of Mpumalanga Department of Education and Another* v *Hoërskool Ermelo and Others* 2010 (3) BCLR 177 (CC); *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC); and *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another; Head of Department, Department of Education, Free State Province* v *Harmony High School and Another* 2013 (9) BCLR 989 (CC).

53 Smit and Oosthuizen 2011: 62.

54 GG 45601/2021.

55 Serfontein and De Waal 2018:7-8, Prinsloo 2006:355-366 and Smit and Oosthuizen 2011:61, 62, 67 and 68.

exercise. Examples hereof are unacceptable activities by PDE HODs and officials taking illegal actions against schools, officials not carrying out school duties and the PDE interfering unlawfully in school management and governance.[56] Sayed[57] and others have raised doubts as to whether decentralisation or devolution of powers indeed engender a transfer of power. They point out that it is mainly professional and middle-class parents who benefit from the devolution of powers. Smit and Oosthuizen[58] also argue that centralising control of the education policy causes conflict between the PDE and SGBs, which diminishes the SGBs' freedom to accomplish quality education. This is apparent with the recent amendments proposed in the *Basic Education Laws Amendment Bill.*[59] This continued state interference affects the smooth cooperation of school governance, resulting in parents (SGBs) taking PDEs to court.

3.5 Empowerment factor

The democratising of society has heightened the role of the school in shaping society. Educational devolution of power redistributes, shares and extends power and enhances participation by removing centralised control over educational decision-making. This can be seen with the devolution of powers to parents through the SGB and is also in keeping with the international law standards that empower parents to take charge of the education of their children. This expansion in the jurisdiction of the education role-players affords them, and in particular the parents, the opportunity to participate in school affairs. This, however, requires that education role-players be empowered to be in a position to contribute towards school activities and ultimately improve performance. Adams and Waghid[60] highlight the importance of SGBs undergoing training as part of a programme established by the HOD of a PDE aimed to enable them to perform their tasks.[61] In addition hereto, serving SGBs should be provided with the opportunity of ongoing training.[62] In this regard, inadequate or a lack

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56 See discussion on conflict at ch.2: par.3.

57 Sayed 2002: 37. See also Serfontein and De Waal 2018: 7-8, Prinsloo 2006: 355-366 and Smit and Oosthuizen 2011: 61, 62, 67 and 68.

58 Smit and Oosthuizen 2011: 62.

59 GG 45601/2021.

60 Adams and Waghid 2005: 25-26.

61 *Schools Act* 84/1996: sec. 19(1)(a).

62 *Schools Act* 84/1996: sec. 19(1)(b).

of training will affect the level of cooperation amongst SGBs and PDEs. A lack of adequate and continuous training for SGBs, especially those elected to serve quintiles 1 to 3 schools, will impact their ability to participate in meaningful decision-making.

3.6 Restructuring

The learned Judge Moseneke, in the matter of *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others*[63] *(Ermelo),* stated that apartheid has left us with many scars. The worst of these is the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain, including public education. The judge further highlights that whilst much remedial work has been done since the advent of democracy, the deep social disparities are still with us.[64]

The *Constitution* ardently demands that this social unevenness be addressed by radical transformation of society and in particular education. This is what the various pieces of legislation set out to achieve by the devolution of powers. This restructuring of the education system must affirm educators, parents and other role-players in undertaking their new roles, duties and responsibilities with the view to improve education.

3.7 Accountability

Accountability and democracy are inextricably intertwined with the principles of democracy. As shown above, democracy and accountability are key aspects of endeavours to involve people, especially parents, fully in the affairs of a school. For parents and SGBs to be fully accountable to the broader community, they need to have a clear and thorough understanding of their roles, duties and functions. This is what is intended by the cooperative governance measures.

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[63] 2010 (3) BCLR 177 (CC): par. 45.

[64] *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR 177 (CC): par. 45.

Serfontein and De Waal[65] hold the view that accountability incorporates transparency – a duty to show responsibility for someone/for some action, being answerable, obliged and willing to accept responsibility, taking action founded on answerability to oneself and others concerning compliance with policy standards of quality. All education role-players are required to accept responsibility and accountability for the powers bestowed upon them. This would ultimately imply that they are participating in school activities. In the matter of *Head of Department, Department of Education, Free State Province v Welkom High School and Another, Head of Department, Department of Education Free State Province v Harmony High School and Another*[66] *(Welkom)* the court confirmed that the interactions between education role-players – the checks, balances and accountability mechanism – are closely regulated in the *Schools Act*.

3.8 Developing constructive partnerships

Cooperative governance ideals intend to facilitate the development of partnerships amongst role-players in the education sector. New and revitalised partnerships at all levels will be necessary, for example, partnerships between the state and non-state organisations, local communities, religious groups and families.[67] This implies that the PDE needs to partner with schools and their constituent communities to which new power has been devolved.[68]

Such partnership entails democratic participation by taking decisions based on thorough partner deliberations.[69] In *Welkom,*[70] the court stated that public schools are run by a partnership involving the state, parents of learners and members of the community in which the school is located. It further highlighted that this relationship is rooted in each partner representing particular relevant interests and bearing corresponding rights and obligations towards education. Genuine partnerships contribute to the planning, implementing, managing and evaluating of education programs.

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65 Serfontein and De Waal 2018: 6.
66 2013 BCLR 989 (CC): par. 49.
67 Matshe and Pitsoe 2013: 648.
68 Serfontein and De Waal 2018: 4.
69 See the following cases: *Mikro Primary School v Minister of Education*, *Western Cape* 2005 (3) SA 504 (C) and *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).
70 2013 BCLR 989 (CC): par. 49

3.9 Equality of resources

The successful implementation of cooperative governance measures would ultimately require equality of resources. Many schools and communities they serve continue to live with the consequences of the political and economic decisions that were taken during apartheid.[71] Education in South Africa has one of the most unequal school systems in the World and therefore there is no equality of resources.[72] This is the case despite the fact that pro-poor equity measures and policies were put in place by government to ensure improved resource allocation to the poorer communities. To illustrate the point, Amnesty International[73] reported that children in the top 200 schools achieve more distinctions in maths than children in the 6 600 others schools combined that present the subjects. It was highlighted that three-quarters of children aged 9 cannot read with meaning and in some provinces this percentage is higher. For example, the rate is 91% in Limpopo and 85% in the Eastern Cape. What is daunting is that out of a 100 learners that start school, 50–60 will make it to matric; 40–50 will pass matric; and only 14 will go on to university.[74] In 2018, it was reported that out of 23 471 public schools, 19% had illegal pit latrines for sanitation, with another 37 schools having no sanitation facilities at all; 86% had no laboratory; 77% had no library; 72% had no internet access and 42% had no sports facilities.[75] Another 239 schools lacked any electricity, while 56% of educators were of the view and reported that a shortage of physical infrastructure hindered the schools' capacity to provide a quality education for learners.[76]

From the above it can be assumed that the novel South African governance model was therefore designed to allow schools greater autonomy to manage resources and improve the quality of education for all learners.[77] One of these values entails running schools democratically in order to enable parents, educators and the school community to share in the decision-making process in matters pertaining to the school environment. School policies, for example, admission, language and pregnancy

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71 Amnesty International 2020: 7.
72 Amnesty International 2020: 7. See also the discussion in ch. 2: par.2.2.3.
73 Amnesty International 2020: 7. See also further reports made at pages 8-12 of the report.
74 Amnesty International 2020: 7.
75 Amnesty International 2020: 7.
76 Amnesty International 2020: 7.
77 DBE 1995: ch. 4. See also Serfontein and De Waal 2018: 2.

policies, to name a few, must be in line with the *Constitution* and the requirements set out in national and provincial laws and policies.[78] Another important value is that the Department of Basic Education (DBE), PDEs and SGBs should encourage participation, engagement, cooperation, accountability, and partnership in all features of democratic decision-making.[79] From the above it is also apparent that there are still major challenges in the sector and more needs to be done to ensure that all role-players are able to cooperate effectively.

The state should seek to do this in a way that applies its human rights obligations – both constitutional and international – as a means of monitoring progress and ensuring effective participation, transparency and accountability, whilst tackling inequality and discrimination. Amnesty International recommends that the state should make use of human-rights-compliant monitoring tools that encompass appropriate indicators and benchmarks would be an important means of achieving this.[80]

With the assumptions for cooperative governance determined, the following section is an exploration of the legal framework for cooperative governance within the education context.

4. THE LEGAL FRAMEWORK IN RESPECT OF SCHOOL AND COOPERATIVE GOVERNANCE

As a result of apartheid, there were huge disparities in access to education for learners across South Africa.[81] Moreover, in the past, schools were governed by the state, with minimal involvement by parents.[82] The new democratic dispensation, however, required a new structure of school organisation and governance that would be flexible in addition to being transformative.[83]

4.1 Laws and policies on school governance

The new structure referred to above are captured in various policies and legislative

[78] *Schools Act* 84/1996: sec. 5; GN 2432/1998: par. 7; and GN 1160/2012: par. 3.
[79] Adams and Waghid 2005: 25.
[80] Amnesty International 2020: 12.
[81] Amnesty International 2020: 7.
[82] Sayed 2002: 35-36. See also Matshe and Pitsoe 2013: 644.
[83] DBE 1996: par. 1.7.

instruments and will be discussed in the following section.

4.1.1 The Constitution

The *Constitution* guarantees equal access to a basic education for all.[84] The *Constitution* also affirms the notion that South Africa is a democratic state where everything is executed through the lens of participation and cooperation.[85] Preceding the *Constitution* were important provisions contained in the *Interim Constitution*,[86] the White Paper 1 on Education and Training,[87] and White Paper 2 on the Organisation, Governance and Funding of Schools.[88]

4.1.2 Education White Papers and governance

The right to education for all was first expressed in section 32 of the *Interim Constitution*, with four very distinct rights being established. These rights were: the right to a basic education, to have equal access to educational institutions, to choose the language of instruction, and to establish educational institutions of a particular character.[89] These rights are of significance within the context of this thesis.

To achieve these rights, a new system of school governance was ultimately required – a system that would produce the conditions for developing a coherent, united and flexible education system for bringing about redress, democratic governance, and school-based decision-making.[90] The only way to achieve this new structure in a democratic dispensation was by way of "negotiated change" procedures based on the notion that public schools would operate in partnership with the PDEs and the local school communities they served.[91]

To this end, the general theme espoused in these policy documents was that parents or guardians would have primary responsibility for the education of their children. Parents would have the right to be consulted by state authorities regarding education

84 *Constitution* 1996: sec. 29(1)(a) to (b) and sec. 9.
85 *Constitution* 1996: preamble. See also Matshe and Pitsoe 2013: 648.
86 200/1993.
87 DBE 1995: ch. 1-13.
88 DBE 1996: par. 1-7.
89 DBE 1995: par. 9-10.
90 DBE 1996: par. 1.1.
91 DBE 1996: par. 1.1.

matters and would take part in the governance of a school by being elected to serve in governing body structures.[92] What is worth noting, however, is that parents and SGBs would have no right to question the curriculum, as this did not form part of their functions.[93]

The policy document further required that the principle of democratic governance be reflected progressively in every level of the system through a process of consultation and appropriate decision-making between the DBE, PDEs, SGBs, educators, learners, and the broader school community.[94] In this regard, school governance should symbolise shared responsibility between not only PDEs and SGBs, but also between parents, teachers, learners, and the school community in general. The intention of the policy documents was thus to reduce the influence of government in particular areas, which is in keeping with the notion of the separation-of-powers doctrine.[95] The details of how the DBE, PDEs, SGBs, principals, educators, learners, and the local school communities should collaborate were captured in school governance requirements of education legislation, namely the National Education Policy Act (NEPA) and the *South African Schools Act (Schools Act)*.[96]

4.1.3 The National Education Policy Act and governance

The relevant directives are captured in sections 4(m) and 4(b) of the *National Education Policy Act (NEPA)*[97] and encompass the democratic requirement that the DBE ensures that there is broad public participation in the development of education by including all stakeholders in the decision-making process of the education structure.[98] They further direct that policy be developed to include the advancement of democracy in the education system by decentralising powers to SGBs and PDEs.[99]

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[92] DBE 1995: ch. 4, par. 3; DBE 1996: par. 1.10.

[93] *Schools Act* 84/1996: sec. 20 and 21. Sections 20 and 21 set out the governance functions of SGBs, but do not include those functions pertaining to the determination of curriculum matters.

[94] DBE 1995: ch. 4, par. 11.

[95] See the discussion on the separation of powers in ch. 1: par.3.1. See also the discussion on the roles and responsibilities of the DBE, PDEs and SGBs in ch. 1: para. 1.2.1.1-1.2.1.5 and ch.2: para.2.4.1-2.4.6.

[96] *Schools Act* 84/1996: Preamble.

[97] 27/1996. See also Smit and Oosthuizen 2011: 58 and 59; and Oosthuizen, Botha, Roos, Rossouw and Smit 2015: 305.

[98] *NEPA* 27/1996: sec. 4(m).

[99] *NEPA* 27/1996: sec. 4(b).

4.1.4 The South African Schools Act and governance

The *South African Schools Act* (*Schools Act*), in its Preamble, refers to the notion of partnership between the DBE, PDEs, SGBs, parents, educators, and learners.[100] Various roles and responsibilities are demarcated in the *Schools Act* concerning the funding,[101] governance,[102] and daily running of schools.[103] The roles and responsibilities of the DBE, PDEs and SGBs are captured in the Act and in chapters 1 and 2 of the present thesis.[104] For the purposes of this chapter, it will not be necessary to elaborate any further on the responsibilities of the various role-players, the legal status of schools, or the composition of SGBs, as these aspects were discussed in chapter 2 of the thesis.[105]

To ensure the success of the partnership referred to, a cooperative approach is needed in which a climate of democracy, accountability and ownership is enhanced. This cooperative approach is set out in education legislation and is in keeping with the standards of cooperative governance as laid down in section 41(1)(h) of the *Constitution*, and will be elaborated on below.

In what follows, the meaning of governance and management and the principles that must be taken into account when exercising governance and management functions are discussed.

4.2 Management and governance

The administration of a school is the duty of the principal, who is also an *ex officio* member of the SGB.[106] Management may be defined as the process of organising, leading and supervising the efforts of the organisation's members and using all organisational resources available in order to achieve the stated organisational

[100] *Schools Act* 84/1996: Preamble.
[101] *Schools Act* 84/1996: ch. 4, sec. 34 to 44.
[102] *Schools Act* 84/1996: sec. 16(1) and 20.
[103] *Schools Act* 84/1996: sec. 16(3) and 16A. See also Serfontein 2010: 94.
[104] See the discussion on roles and responsibilities in ch.1: para. 1.2.1.1-1.2.1.5 and ch.2: para.2.4.1-2.4.6.
[105] See the discussion on roles and responsibilities in ch.1: para 1.2.1.1-1.2.1.5 and ch.2: para.2.4.1-2.4.6. See also the discussion on the status of public schools and the composition of SGBs in ch.1: par. 1.2.1.3 and ch.2: par.2.4.1.
[106] *Schools Act* 84/1996: sec. 16(3) and 16A.

goals.[107] In this regard, the principal is responsible for the daily running of the school and must ensure, by virtue of his or her position, that the policies crafted by the PDE and SGB are implemented successfully at school level.

The governance of a school, on the other hand, is entrusted to the elected SGB of the school.[108] Governance is a concept recognised all over the world and is one that is possibly understood in similar ways. Skae[109] states that governance is a process of governing; it is not about controlling, manipulating or tampering with facts and events. Governance includes balancing the powers of the members of an organisation (the DBE, PDE and SGB) and holding them accountable and, at the same time, dealing with the legitimate needs, interests and expectations of role-players (the DBE, PDE, SGB, educators, learners, and the school community).

FEDSAS[110] holds that good governance is fundamentally about effective leadership. In fact, FEDSAS has drawn up a guide on governance in public schools based on the King Report on Corporate Governance in South Africa and on the King Code of Corporate Governance Principles for South Africa of 2009 (King III).[111] The King Report comprises values and recommendations and is applicable to all institutions, regardless of their size and nature.[112] The extent of its applicability will, however, differ from one institution to another. Within the school context, governance can thus be used as a mechanism to create applicable processes, systems and controls as well as bring about appropriate behaviour to ensure sustainability and long-term continuity at a school.[113] In addition, sound governance helps to ensure that decisions are made in the best interests of learners.[114]

Makara[115] states that governance is not merely about decentralisation; it is a broad background of how the state and society relate to ensure respect for human rights,

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107 Joubert and Bray 2007: 19.
108 *Schools Act* 84/1996: sec. 16. See also ch.2: par.2.4.2.
109 2017: 1.
110 FEDSAS 2015: 3.
111 FEDSAS 2015: 3. See also the King III Reports at http://www.iodsa.co.za/page/KingIII.
112 FEDSAS 2015: 3.
113 FEDSAS 2015: 3.
114 FEDSAS 2015: 3.
115 Makara 2018: 23.

participation and voice, effective and efficient administration that is capable of delivering services.

Joubert and Bray[116] state that governance deals with the processes and systems by which an organisation or society operates, where government is established to administer these processes and systems. Serfontein and De Waal[117] indicate that governance is based on the core democratic values of representation, participation, collective decision-making, responsibility and accountability. These values or principles are of paramount importance in acting in a school's best interests and in providing quality education.[118] To realise these values, they state that SGBs must appreciate that delivery of a quality education can only be achieved by applying quality education policies effectively. It must also be acknowledged that governance is not about ruling schools, but about removing barriers that prevent successful education and the delivery of sound education policies in a cooperative manner.[119] Having established the link between governance and governing cooperatively, the laws and policies that govern cooperative governance within the context of SGBs and PDEs' powers and functions relating to school policies will now be discussed.

Within the context of SGBs and PDEs, the general view has been that educational decentralisation redistributes, shares and extends power and also enhances participation by removing centralised control over educational decision-making.[120] The decision of SGBs to participate in government policy is complex, because the term 'participation' has different meanings for different people.[121]

4.2.1 Types of participation

Researchers have highlighted and distinguished between four types of participation that can be observed in the governance and management of schools.[122] Apart from the types of participation that can occur, the various levels at which this participation occurs must also be considered in order to determine whether or not the participation

116 2007: 19.
117 2018: 4.
118 2018: 4.
119 Serfontein 2010: 108.
120 Sayed 2002: 37.
121 Clase, Kok and Van Der Merwe 2007: 247.
122 Clase, Kok and Van Der Merwe 2007: 247.

is effective.

4.2.1.1 Community participation

Community participation entails the creation of opportunities to enable all community role-players to contribute actively to and influence the policy-development process.[123] At the school level, parental participation through elected SGB members is essential to the success of education.[124] Community participation extends to educators, principals, PDEs, the DBE, learners, and the parent community of the school. It should also extend to the broader community, especially when crafting policy, as was required by the Constitutional Court in Ermelo.[125] It is apparent from the relevant case law that the broader community was not consulted when the SGBs drafted and implemented the language policy at Hoërskool Ermelo and the pregnancy policies at Welkom and Harmony High Schools.[126]

4.2.2.2 Participation as partners

Participation as partners implies that legal partners obtain the right to participate in the educational process.[127] Education legislation in particular contains provisions governing the relationships between the DBE, PDEs, principals and SGBs. It makes it clear that public schools are run by a partnership involving all stakeholders, especially during the process of admissions.[128]

4.2.2.3 Regulated (cooperative) participation

Regulated participation implies that stakeholders must participate and cooperate where they are required to do so by law. This is important, given that SGBs and PDEs as partners represent a particular set of interests and have corresponding rights and obligations concerning the provision of admission. These interactions are closely

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[123] *NEPA* 27/1996: sec. 4(a)(m). See also Pitsoe 2016: 645.

[124] Pitsoe 2016: 645.

[125] *Head of Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR (CC): par. 80.

[126] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 8 and 9. See also *Head of Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR (CC): par. 80.

[127] Clase, Kok and Van der Merwe 2007: 247.

[128] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 36. See also the discussion in ch. 3: 2.1.4.

regulated by legislation, which provides checks, balances and accountability mechanisms, as discussed in chapter 2.[129]

4.2.4.4 Weighted participation

Weighted participation entails situations where certain groups of participants have more rights than others, for instance, the parent component on the elected SGB represents the majority. In this regard, the parents will have a greater say in the content of the admissions policy.

Therefore, adequate training of SGB members is essential to ensure that they understand their rights and responsibilities. What the SGB must be reminded of is that, whilst it has a duty to promote the school's best interests when admitting learners, it also has a responsibility to ensure that the broader community's interests are taken into account to ensure that there are equal access-opportunities for all learners. On the flip side is the power imbalance that is created between SGBs and PDEs flowing from their roles and responsibilities.[130] For example, in the case of admissions, although SGBs have the power to determine a school's admission policy, the HOD retains the final decision pertaining to learner admissions.[131]

4.2.2 Levels of participation between SGBs and PDEs

In terms of Arnstein's[132] "ladder of citizen participation", the higher the rung on the ladder, the higher the level of participation. This is illustrated in the following figure:

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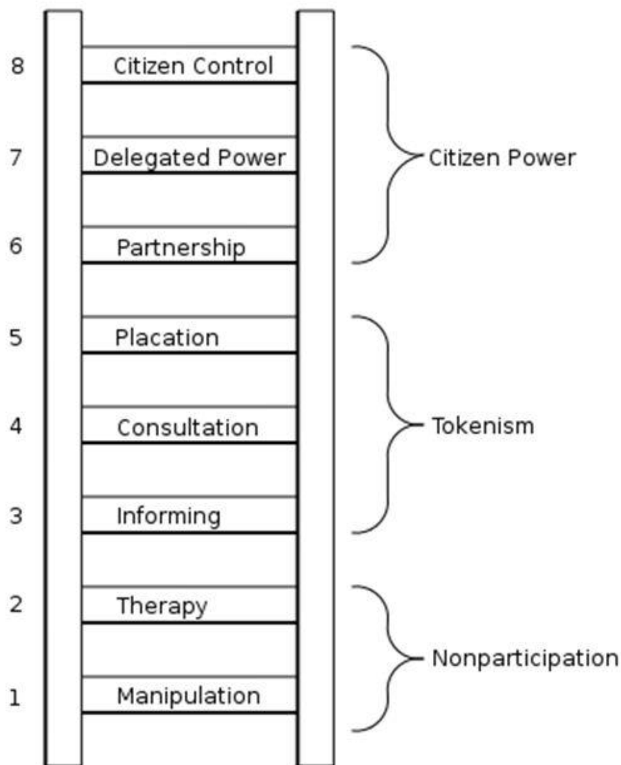
129 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 49.

130 See ch. 2.

131 *Schools Act* 84/1996: sec.5.

132 1969: 217.



Arnstein’s ladder of citizen participation

Figure 2 Arnstein’s ladder of participation[133]

4.2.2.1 Non-participation levels

Arnstein[134] views levels 1 and 2 as non-participation levels. At these levels, the aim is rather to educate the participants. The DBE and PDE are expected to ensure that their officials are adequately trained regarding their powers and their roles and responsibilities relating to admissions. PDEs, on the other hand, are required in terms of the *Schools Act* to train SGBs in their governance functions.[135] If this does not happen, the non-participation levels are non-existent, and this might lead to conflict or abuse of power. In this regard, SGBs and PDEs must work hand in hand to facilitate

[133] 1969: 217.
[134] 1969: 217.
[135] *Schools Act* 84/1996: sec. 19.

cooperation between each other when executing their various functions in terms of education legislation.

4.2.2.2 Tokenism

Tokenism occurs at level 3 (informing), level 4 (consultation) and level 5 (placation). Arnstein[136] regards these levels as important, but still views them as a window-dressing ritual. For instance, Arnstein[137] considers consultation at level 4 to be merely an act of seeking information or advice from others. This corresponds with Chenwi and Tissington's definition of consultation.[138] Placation, on the other hand, allows people to be selected onto committees. Thus SGB members are selected to serve the needs of the school by exercising functions such as determining a school admission policy, a language policy, and a code of conduct or pregnancy policy.[139] However, the SGB still has to account to the PDE regarding the legitimacy of the functions exercised.[140]

4.2.2.3 Citizen power

Partnership, according to Arnstein,[141] arises where power is distributed through negotiation between citizens and power holders. Legislation in the education context required of SGBs and PDEs to work in partnership with each other. Power in the form of roles and responsibilities is distributed to PDEs and SGBs through legislative provisions. It is expected at this level that the planning, implementation and decision-making responsibilities associated with the administration of admissions will be shared between SGBs and PDEs. For example, in the *Ermelo* case, the court was of the view that it was imperative for the SGB to consult the *Constitution* and national and provincial laws when determining its admission policies. In so doing, the court stated,

[136] 1969: 217.
[137] 1969: 217.
[138] See the discussion at 2.1 above.
[139] *Schools Act* 84/1996: sec. 5, 6 and 8.
[140] *Schools Act* 84/1996: sec. 5(5).
[141] 1969: 217.

the needs of the broader community must be taken into account.[142] The court's supervisory order consequently placed emphasis on this level of participation.[143]

It is accordingly submitted that any form of participation between SGBs and PDEs will be the most effective when implemented at Arnstein's highest participation levels. This will ensure that adequate opportunity is created for all education stakeholders to take part in the service delivery processes and in decisions relating to education. The Constitution provides that the state must ensure that people's right to participate is realised and made possible.[144] The platform for participation is created through the cooperative governance requirements in the form of consultation. This consultation should be approached with a view to meaningful engagement.[145]

In the next section, the laws and policies on cooperative governance in the education context are discussed.

4.3 Laws and policies on cooperative governance

Cooperative governance measures are prescribed in a separate chapter of the *Constitution* dedicated specifically to such governance.[146] Organs of state such as PDEs and SGBs are obliged to implement and comply with these measures when dealing with matters pertaining to education.[147] Education legislation, in particular, has also set out measures to give effect to cooperative governance. This is explored below.

4.3.1 The cooperative governance relationship in education legislation

The *NEPA*[148] creates channels of communication between the DBE and PDEs to enable the expansion of the education system in accordance with the aims and values

142 *Head of Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR (CC): par. 99.
143 *Head of Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR (CC): par. 102 and 106.
144 Chenwi and Tissington 2010: 6.
145 Meaningful engagement will be discussed in chapter 7 of this dissertation.
146 *Constitution* 1996: ch. 3.
147 *Constitution* 1996: sec. 239.
148 27/1996: sec. 3(4)(p), sec. 4(m), sec. 5 and sec. 6.

provided for in the Act. The objective of the Act requires of the Minister to consult with relevant role-players prior to the determination of policy.[149]

The DBE and PDEs are required to coordinate and share opinions on national education and matters involving various facets of the Act.[150] For example, the Minister is responsible for determining national education policy, subject to the provisions of the *Constitution* and the *NEPA*.[151] The Minister may determine policy to ensure the cooperation between the DBE and other state departments, PDEs, local government and non-government organisations with a view to advancing education.[152] In this regard, the Minister has not made any determination, despite the fact that courts have pronounced on this very important issue as an imperative to resolve conflict and avoid litigation.

The Minister has, however, promulgated national policies relating to admission to ordinary public schools,[153] on HIV/AIDS in respect of learners and educators in public schools,[154] on the management of drug abuse by learners in public and independent schools,[155] to religion and education[156], and to learner attendance.[157] It is further worth noting that these policies have not been amended since their promulgation, despite constitutional developments.

The national admission policy[158] will be discussed as an example to illustrate the cooperative governance relationship required by SGBs and PDEs. In terms of this policy, the roles, responsibilities and coordination are provided for in the national admissions policy,[159] where the HOD of a specific PDE is responsible for the determination of the process for admitting learners to a public school.[160] The SGBs, in

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[149] 27/1996: sec. 2(b), sec. 3(p), sec. 5 and sec. 6.

[150] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Head Department of Education, Free State Province v Harmony High School and Another* 2013 BCLR 989 (CC): par. 145. See also *NEPA* 27/1996: sec. 3(4)(p).

[151] 27/1996: sec. 3(1) and (2).

[152] 27/1996: sec. 3(p).

[153] GN 2432/1998.

[154] GN 1926/1999.

[155] GN 3427/2002.

[156] GN 1307/2003.

[157] GN 361/2010.

[158] GN 2432/1998.

[159] GN 2432/1998.

[160] GN 2432/1998: par. 6.

turn, are responsible for determining a school's admission policy.[161] It is incumbent upon the HOD to coordinate the provision of schools and the administration of the admission of learners to public schools with SGBs to ensure that learners of school-going age are accommodated.[162] The *Schools Act*[163] contains the same provisions, and this reinforces the provisions of the *Constitution* that indicate that cooperative governance entails recognition of the distinct, interdependent and interrelated features between the levels at which SGBs and PDEs operate.[164] Despite this there are still problems in the relationship between PDEs and SGBs and their cooperation and coordination is still lacking – as is evident from case law on admissions.[165]

4.3.2 The cooperative governance relationship in the Constitution

The final *Constitution* lay out principles designed to promote coordination rather than competition between the various spheres of government and organs of state.[166] Section 40(1) of the *Constitution* establishes that government in South Africa is constituted at national, provincial and local spheres of government, which are distinctive, interdependent and interrelated, and enjoins them to "cooperate with one another in mutual trust and good faith".[167] This means that with this cooperative relationship there needs to be a clear understanding of each sphere of government's powers and functions to ensure that a sphere of government or organ of state "does not encroach on the geographical, functional or institutional integrity of government in another sphere". In addition to the *Constitution*, various legislation governs. Given the overlap of concurrent competencies of the DBE and PDEs, the *Constitution* and the *NEPA* make provision for a system of coordination in order to manage potential conflict and disputes between the DBE and PDEs.[168]

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161 GN 2432/1998: par. 7.
162 GN 2332/1998: par. 8.
163 84/1996: sec. 5.
164 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Head Department of Education, Free State Province v Harmony High School and Another* 2013 BCLR 989 (CC): par. 147.
165 Govender 2022: 1. (Court rules in favour of Gauteng education department in placement dispute).
166 Woolman and Roux 2014: 14-1.
167 *Constitution* 1996:sec. 40(1)(a).
168 De Vos 2017: 273.

Woolman and Roux[169] state that the Constitutional Court suggests that this new philosophy of cooperative government is governed by two principles; one that an organ of state may not use its powers in such a way to undermine the effective functioning of another;[170] and secondly, the actual integrity of each sphere of government and organ of state must be understood in the light of the powers and the purpose of that entity. In this regard, although the *Constitution* demands mutual respect, an organ of state may be entitled to determine the objectives of another organ of state and to dictate the means by which those objectives are achieved.[171] Sections 40 and 41 require of the different spheres of government or organs of state to exhaust all means of dispute resolution before turning to the courts.[172] Section 41 of the *Constitution* states that all spheres of government and all organs of state within each sphere of government must, *inter alia*:

- Have regard for the constitutional status, institutions, powers and functions of role players in a service delivery contest;[173]
- Not exercise any power or function, except those bestowed on them in terms of the *Constitution*;[174]
- Not exercise their powers and perform their functions in a way that impinges on another's powers and functions;[175] and
- Cooperate with one another in mutual trust and good faith.[176]

In order to achieve these standards, the spheres of government – including all organs of state[177] – must cooperate with one another in mutual trust and good faith by: encouraging friendly relations in matters of education;[178] assisting and supporting one

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169 Woolman and Roux 2014: 14.8.
170 Woolman and Roux 2014: 14.8.
171 Woolman and Roux 2014: 14-8. See also *Premier, Western Cape v President of the Republic of South Africa* 1999 BCLR 382 (CC): par. 54-55.
172 Woolman and Roux 2014:ch. 14: 7.
173 *Constitution* 1996: sec. 41(1)(e). See also De Vos 2017: 273.
174 *Constitution* 1996: sec. 41(1)(f). See also De Vos 2017: 273.
175 *Constitution* 1996: sec. 41(1)(g). See also De Vos 2017: 273.
176 *Constitution* 1996: sec. 41(1)(h). See also De Vos 2017: 273.
177 An organ of State is defined in the Constitution as (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution – (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer. See also Smit 2022: 91-107 and Smit 2022: 215-228 on contrasting views regarding schools as organs of state.
178 *Constitution* 1996: sec. 41(1)(h)(i).

another;[179] apprising one another of, and consulting one another on matters of mutual interest (for example, school admissions);[180] coordinating their activities pertaining to the education related processes with one another;[181] adhering to agreed procedures;[182] and avoiding legal proceedings against one another.[183] Woolman and Roux[184] state that the principles set out in section 41(1) stand for two basic propositions. Firstly, cooperative government does not diminish autonomy of any given sphere, but it recognises the place of each sphere within the whole and the need for coordination and cooperation to make the whole work.[185] Secondly, sections 41(1)(e), (g) and (h) reinforce the notion that each sphere of government is distinct.[186]

Within the context of PDEs and SGBs, this means that education legislation has clearly earmarked the key stakeholders that will be involved in this governance area. Legislation has assigned each key stakeholder certain powers, roles and responsibilities and, at the same time, has required that these stakeholders work together in fulfilling their respective responsibilities to ensure that basic education is accessible to all.[187]

What is also implied is that these role-players do not have to agree with one another on each and every aspect. It does, however, mean that each of the role-players must execute their respective responsibilities meticulously and in harmony with the *Constitution* and with national and provincial laws. SGBs and PDEs should not deceive or demoralise each other when executing their duties envisaged in the *Schools Act* by strong-arming each other when they are in disagreement regarding school policies. Where a dispute arises, the role-players should first try to find an amicable solution in a spirit of cooperation, using mechanisms and procedures provided for that purpose, and must exhaust all other remedies prior to approaching the courts.[188] In fact, if a court is not satisfied that the stakeholders have made all reasonable attempts to

179 *Constitution* 1996: sec. 41(1)(h)(ii).
180 *Constitution* 1996: sec. 41(1)(h)(iii).
181 *Constitution* 1996: sec. 41(1)(h)(iv).
182 *Constitution* 1996: sec. 41(1)(h)(vi).
183 *Constitution* 1996: sec. 41(h)(i) to (vi). See also *NEPA* 27/1996: sec. 3(4)(p)(i) to (iv).
184 Woolman and Roux 2014:ch. 14: 14.
185 Woolman and Roux 2014:ch. 14: 14.
186 Woolman and Roux 2014:ch. 14: 15.
187 See discussion ch.2: par. 2.1.2.
188 *Constitution* 1996: sec. 41(3).

resolve their dispute amicably, it might refer the matter back to them.[189] However, although the *Intergovernmental Relations Framework Act*[190] (*IRFA*), which was promulgated only in 2005, was intended to provide the above-mentioned mechanisms and procedures, it is not applicable to PDEs and SGBs in conflict with each other.

This was confirmed in the matter of *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School and Another*[191] (*Mikro*). The Supreme Court of Appeal found the requirements of section 41 irrelevant to disputes concerning SGBs and reasoned that SGBs were not subject to executive control insofar as the determination of language and admissions policies is concerned.[192]

However, the Constitutional Court rejected this reasoning and confirmed in the matters of *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others*[193] (*Rivonia*) and the *Welkom*[194] matter that the requirements of section 41 of the *Constitution* relating to cooperative governance are indeed applicable to the relationship between SGBs and PDEs. The court held that:

> Education governance and management is thus pre-eminently an area where the constitutional principles of co-operative government must apply.[195]

Every public school is considered to be an organ of state in the sense that it is a functionary or institution exercising public powers and performing public functions in terms of legislation.[196] Within this context, public schools perform typical administrative actions in the day-to-day management and governance of the school and its domestic policies.[197] Even though a public school (and SGB) is considered an organ of state, it does not form part of the spheres of government, with the result that the provisions in the *IRFA*[198] do not apply to a school or SGB for the purposes of intergovernmental relations. It is therefore important to determine what cooperation entails outside of

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189 *Constitution* 1996: sec. 41(4).
190 13/2005.
191 2006 (1) SA 1 (SCA): par. 22.
192 2006 (1) SA 1 (SCA): par. 22.
193 2013 (12) BCLR 1365 (CC): par. 77.
194 2013 (9) BCLR 989 (CC): par. 140.
195 2013 (9) BCLR 989 (CC): par. 152.
196 Bray 2007: 14.
197 Bray 2007: 14. See also *Promotion of Administrative Justice Act* (*PAJA*) 3/2000: sec. 1.
198 13/2005. See also Smit 2022: 91-107 and Smit 2022: 215-228 on contrasting views regarding schools as organs of state.

IRFA and what measures (for example, an ombud) should be followed to ensure cooperation in line with section 41 of the Constitution.

The relationships between PDEs and SGBs, as constitutionally defined, require cooperation with one another in a spirit of mutual trust and good faith by assisting, supporting and consulting with one another and coordinating their activities, by adhering to agreed procedures, and by avoiding litigation.[199] These are the key principles that define what the relationship should look like. Stewart[200] states that it is undoubtedly easier to foster good relations in order to assist and support when there are structured relationships to work with. On the face of it, the relationships between SGBs and PDEs are structured, in that their roles and responsibilities are legislated, but perhaps not clearly enough. In addition, there is no provision in education legislation directing SGBs and PDEs how to deal with their disputes.

The fact that PDEs and SGBs have often resorted to courts of law to resolve their disputes regarding various education matters points to relationships between some SGBs and PDEs currently being somewhat strained and to there being a lack of cooperation, support and consultation when it comes to coordinating their actions.[201] In the light of this, it is clear that there is a sense of mistrust between these two partners.

It must therefore be acknowledged that cooperative governance is a complex concept to grasp and one that proves to be even more difficult to apply in practice. There are many challenges with the implementation thereof and this, in turn, causes conflict. For example, the DBE, PDEs and SGBs are used to doing things independently and without the obligation of cooperating when executing their functions. Furthermore, there is a perception that there is a strong tendency on the part of the DBE and PDEs to centralise control over education policy for transformation purposes.[202] This continued recentralisation of powers undermines both the principles of democracy espoused in the *Constitution* and the transformation of the education system.

199 *Constitution* 1996: sec. 41(h)(i) to (vi).
200 2009: 41.
201 Clase, Kok and Van der Merwe 2007: 251.
202 Bray 2002: 516; Smit and Oosthuizen 2011: 62; Smit 2022: 91-197; 2022a:215-228.

Next follows a discussion on the lessons to be learnt from case law insofar as it relates to cooperative governance.

5. CHALLENGES IN IMPLEMENTING COOPERATIVE GOVERNANCE AT AN SGB AND PDE LEVEL

In the empirical study conducted by Clase, Kok and Van der Merwe,[203] they identify the following core challenges experienced by SGBs and PDEs in applying cooperative governance principles: mutual mistrust of each other's motives; lack of knowledge about the content and provisions of education legislation; inadequate communication and misinterpretation of education legislation and policies; lack of transparency and ill-considered actions by PDEs; lack of adequate support structures for SGBs; misapplication of education laws and policies; SGB fears of PDE interference with their powers; and, in some instances, the deliberate refusal of SGBs to adapt to the new changes in the education system.[204] All of these challenges no doubt contribute to any power struggle that may ensue.

A further challenge is that education legislation requires of PDEs and SGBs to form a partnership.[205] The problem with this is that there are no standardised mechanisms and procedures in place for SGBs and PDEs to facilitate the formation of partnerships which, in turn, creates conflict. The Constitutional Court as the upholder of the *Constitution* has the duty to promote a culture of cooperative governance and to compel organs of state to adhere to these principles.[206] This it did in the *Rivonia* and *Welkom* cases. Notwithstanding these cases there has still been a steady stream of education rights disputes adjudicated by courts over the years. This is indicative that role-players, for what it is worth, do not view these constitutional objectives as important, or the requests for cooperation fall on deaf ears. It is apparent that both DBEs and PDEs have not made provision in legislation for alternatives to litigation, nor have they introduced any mechanisms to foster cooperation.

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[203] 2007: 250.
[204] Clase, Kok and Van der Merwe 2007: 259.
[205] *Schools Act* 84/1996: Preamble.
[206] Bray 2007: 520.

6. LESSONS FROM CASE LAW ON THE CONSTITUTIONAL IMPERATIVES REGARDING COOPERATIVE GOVERNANCE

Cooperative governance is a key value in the effective management of school governance to ensure that learners' needs and interests are put first. All the partners are required by law to resolve conflict in good faith and to engage meaningfully with one another. It further dictates that these partners must exhaust all internal remedies before turning to the courts for relief.[207] In the light of this, litigation must be the very last resort. Several researchers[208] have, however, criticised court judgments concerning education rights and school governance matters, arguing that the courts concerned dealt merely with matters related to procedural fairness and power struggles. Despite this, there is a strong cooperative governance theme reflected in the judgments delivered in the highest court in South Africa.

6.1 Lessons on cooperation in MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC)

6.1.1 The facts of the case

The imperatives pertaining to cooperative governance featured prominently in this particular case. The underlying dispute in the matter was a power struggle that emanated between the SGB and the PDE as to who had the right to the final determination of learner admissions and the capacity of the school. The school further challenged the lawfulness of the instructions issued to the principal of the school by the PDE when intervening in the matter.

6.1.2 Discussion of cooperative governance by the court

In this matter, Justice Mhlantla (with six others concurring) went beyond the specified procedural fairness flaws of the case and deemed it essential to place the emphasis on the fact that the DBE, SGBs and PDEs all have a direct interest in the quality of

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[207] *Constitution* 1996: sec. 41(1)(h)(vi).
[208] Serfontein and De Waal 2018: 1 – 17.

learners' education and to this end must act in a spirit of cooperation.[209] It was also held that such cooperation is rooted in the shared goal of ensuring that the best interests of learners are furthered and that the right to a basic education is realised.[210]

The systemic capacity issues between SGBs and PDEs centre on the fact that SGBs have an immediate interest in the quality of learners' education at their particular schools, whereas PDEs are obligated to ensure that there are sufficient school places for every child to attend a school.[211] The court recognised that, although SGBs play an important part in improving the quality of education by supplementing the PDEs' limited resources with school fees, the needs and interests of other learners cannot be ignored.[212] The court cited the *Ermelo* matter in this regard where it was indicated that SGBs must acknowledge that they are entrusted with a public resource that must be managed not only in the interests of the learners in attendance at their schools, but also with regard to the broader communities in which the schools are situated. Consequently, where a PDE is required to admit learners in excess of the limits of the school admissions policy, there must be cooperation and proper engagement.[213]

This case further illustrates the harm that results when SGBs and PDEs fail to act in partnership and cooperation. The way in which the PDE exercised its powers in the present instance and the SGB's inflexible stance in order to safeguard its own authority[214] both culminated in failure to consider the best interests of the learner involved.

The court emphasised that the duty of cooperation in order to reach an amicable solution was intimately associated with the best interests of the child, and that it was probable that the dispute had had a stressful effect on such a young learner.[215] The

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209 Liebenberg 2016: 31.

210 *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC): par. 69. See also Liebenberg 2016: 31.

211 *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC): par. 70.

212 *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC): par. 71.

213 *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC): par. 72.

214 *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC): par. 74.

215 *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC): par. 74

court further indicated that the principle of cooperative governance was not only a tool to facilitate credible intergovernmental relations, but also a means to protect the very people whom SGBs and PDEs serve.[216]

Given the obligation of PDEs and SGBs to operate within the realms of cooperation, the court in its main judgment indicated that both parties could have gone "the extra mile" in avoiding litigation and that one organ of state cannot use its powers to coerce another.[217] A different approach was adopted in the minority judgment, where it was held that the PDE had taken suitable steps to cooperate with the school and that it was rather the principal and the SGB that were in violation of their constitutional obligation to take measures to cooperate in the spirit of cooperative governance.[218]

6.2 Lessons on cooperation in Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School 2013 (9) BCLR 989 (CC)

6.2.1 The facts of the case

The *Welkom* case is another significant matter that served before the Constitutional Court in which the importance of cooperative governance was affirmed. The legal dispute was outlined as a power struggle as to whether it was the HOD or the SGB who had the final say over the design and implementation of school policies.[219] In this instance, the policy dealt with the exclusion of pregnant learners from being admitted to schools.

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216 *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC): par. 77. See also Liebenberg 2016: 32.

217 *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC): par. 78. See also Liebenberg 2016: 32.

218 *MEC for Education in Gauteng Province and Others* v *Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC): par. 113-117.

219 *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC)

6.2.2 Discussion of cooperative governance by the court

In the main judgment, Justice Khampepe, with Justices Moseneke and Van der Westhuizen concurring, stated that cooperative governance is a foundational tenet of the *Constitution,* which has been incorporated in the *Schools Act* through the provisions of section 22.[220] As a result, SGBs and PDEs are required to act as partners in pursuit of the objects of the *Schools Act*.[221]

The court in the *Welkom* case further stated that the *Schools Act* has crafted a partnership relationship between the DBE, SGBs and PDEs.[222] This relationship, the court indicated, should be informed by intimate cooperation, which recognises one another's distinct, but interrelated functions.[223] Thus, the relationship should be characterised by consultation and cooperation in a spirit of mutual trust and faith.[224]

In the separate concurring judgment, Justices Froneman and Skweyiya further expanded on the imperative of cooperative governance in resolving disputes between SGBs and PDEs.[225] They held that there was indeed a constitutional duty on these two partners to engage in good faith on education matters before turning to the courts, and stated that the importance of participation and engagement finds particular recognition in the constitutional imperatives of cooperative governance.[226] The justices pointed out that the two partners had failed to live up to the expectations of cooperation and had failed to safeguard the best interests of the learners in their interactions leading up to litigation.[227] The justices further stressed the importance of timely, organised and sustained cooperation as a powerful barrier to disputes relating to

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220 *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 121. See Smit 2022: 215-228 where he states that part of the issue of cooperative governance is the court's definition/description of the role and functions of the role-players.

221 84/1996: Preamble.

222 *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 124-126.

223 *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 124-126.

224 *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 124-126.

225 *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 139-141.

226 *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 139-141.

227 *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 154-166.

policy, and that the obligation to cooperate, engage and communicate in good faith must continue even in a crisis requiring immediate redress.[228]

In a dissenting judgment, Justice Zondo (with three other justices concurring) rejected the proposition that the case should be determined according to the principles of cooperative governance, holding that the matter of cooperative governance had never been raised by the parties to the dispute in their legal papers.[229] Justice Zondo therefore held that deciding the matter on this basis denied the HOD an opportunity to be heard on a vital issue, which he viewed as contrary to the principles of the *audi alteram partem* rule.[230]

However, in the end, the order issued by the court was one based on the principles of cooperative governance and meaningful engagement.[231]

6.2.3 Conclusions to be drawn from the court's discussion on cooperative governance

These positive obligations in respect of cooperative governance cannot be undervalued and cannot be ignored.[232] They are fundamentally important norms in a democratic dispensation that underlies the constitutional structure and that has been entrenched in education legislation as an organising principle for the provision of access to education.[233]

An expansive justification of the role of cooperation was provided in the *Welkom* case. It was reasoned that cooperation in mutual trust and good faith is a key aspect of the partnership model envisaged by the *Schools Act* regarding school governance. It serves as an alternative mechanism to litigation and provides an organised process

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228 *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 166.

229 *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2013 (9) BCLR 989 (CC) (CC): par. 264.

230 *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2013 (9) BCLR 989 (CC) (CC): par. 264.

231 *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 128.

232 *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 123.

233 *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 123. See discussion on the Promotion of Administrative Justice and administrative decisions in ch.1 and ch.5.

for remedying unconstitutional policies.[234] The concurring judgments further emphasised the connection between cooperation in good faith and institutional processes for giving effect to constitutional imperatives.[235] Cooperation in good faith must be patient and persistent in order to enhance good school governance and further ensure that learners' best interests are protected.[236]

6.3 OTHER CASES WHERE COOPERATIVE GOVERNANCE PRINCIPLES WERE DISCUSSED

It is worth noting that the imperative pertaining to cooperative governance between SGBs and PDEs was highlighted in other cases.

6.3.1 Lessons on cooperation in Schoonbee and Others v MEC for Education, Mpumalanga, and Another 2002 (4) SA 877 (TPD)

The cooperative mandate encapsulated in the *Schools Act* was also described in the matter of *Schoonbee* case. In *Schoonbee*, it was stated that the *Schools Act* intended that, in the new education system, there should be four major stakeholders, namely the state (through the DBE and PDEs), the parents (through SGBs), educators and learners, and that these stakeholders be required to enter into a partnership in order to promote specified objectives around schooling and education.[237] The purpose of the *Schools Act* is therefore to facilitate the migration from a system where schools were entirely dependent on the largesse of the state to a system entailing the assumption of greater responsibility and accountability, not just by learners and teachers, but also by parents.[238]

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[234] *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 125.

[235] *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 139.

[236] *Head of Department, Department of Education, Free State Province* v *Welkom High School and Another* 2013 (9) BCLR 989 (CC): par. 164-166.

[237] *Schoonbee and Others v MEC for Education, Mpumalanga, and Another* 2002 (4) SA 877 (TPD): par. 833 E-G.

[238] *Schoonbee and Others v MEC for Education, Mpumalanga, and Another* 2002 (4) SA 877 (TPD): par. 833 E-G.

6.3.2 Lessons on cooperation in MEC for Education, KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC)

Justice O'Regan, in her dissenting judgment in the *Pillay* case, highlighted the importance of the partnership within the school system and the effect that such cooperation could have on dispute resolution in the country. She stated that the strength of schools would only be enhanced if parents, learners and teachers accept that they all own public schools and assume responsibility for their continued growth and success.[239] She held that processes should be available to schools for the resolution of disputes and that all engaged in such conflict should act with civility.[240]

Numerous court cases have dealt with this important aspect relating to cooperative governance, and the courts continue to emphasise its importance and the fact that SGBs and PDEs have a constitutional mandate to adhere to the relevant principles. In fact, courts are considering it as the new philosophy.[241] Given that the courts have had to adjudicate on this issue, it is apparent that education legislation lacks clear guidance on the implementation of the constitutional cooperative governance principles.[242]

It is trite that the success of PDEs and SGBs, in working towards the realisation of their common goal, namely guaranteeing equal access to education for all children, is determined by the quality of their relationship. This relationship must further be defined within the context and level of their cooperation, power relations, shared responsibilities, and coordination of activities which are therefore pertinent objectives to ensure effective cooperative governance.

7. CONCLUSION

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239 *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (2) BCLR 99 (CC): par. 121-123.

240 *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (2) BCLR 99 (CC): par. 121-123.

241 Bray 2002: 518; *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

242 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

Cooperative governance was consciously chosen as a scheme of governance in South Africa in order to address the systemic challenges created by the previous regime. In the context of education, in particular, its intention is, *inter alia*, to guarantee that everyone is afforded equal access to a quality basic education that improves the standard of life.

The success of the working relationship between PDEs and SGBs is determined by their level of cooperation, by their power relations, by their shared responsibilities, and by the coordination of their activities. It is clear, however, that SGBs and PDEs do not apply the principles of cooperative governance properly.[243] It is also apparent that it is easier to build relationships of trust and confidence between SGBs, principals, learners and educators than with PDEs.[244] In this regard, greater effort is needed to sustain their relationship. This must be achieved through possible, reasonable and constructive mechanisms that can further enforce and ensure participation amongst these role-players in an attempt to resolve their disputes, without having to approach a court. If these mechanisms fail, the option is to approach a court of law, but the question then leads back to the limited access that some SGBs have to approach courts. The following two chapters will discuss the requirements for access to justice with particular reference to access to courts where there are breaches in administrative law as a result of decisions taken by education role-players.

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[243] See discussion at ch.3:par. 5.

[244] FEDSAS 2015: 27. See also Smit 2022: 91-107 and 215-228.

CHAPTER 4
LEGAL FRAMEWORK FOR ACCESS TO JUSTICE

> "Good government requires justice and justice ultimately requires that people be governed by their friends in a democracy, where we govern each other, we must all be friends, or the system will become oppressive."
>
> Michael Austin

1. INTRODUCTION

The previous chapter provided the backdrop to the roles and responsibilities that education role-players execute in terms of legislation and how exercising these roles and responsibilities can create conflict. The focus of this dissertation is to find an alternative to litigation for education role-players. This alternative will ultimately improve access to justice to ensure that there is equal, just administrative action options for education role-players, which will ultimately enhance the constitutional imperatives for cooperation. In the light hereof, the legal framework relating to the concept of justice and access to justice will be discussed in this short chapter.

This will be done within the context of a philosophical framework on justice, international law, the *Constitution*, legislation, case law and applicable guidelines. This discussion will be with reference to the basic education sector and specific challenges in this regard.

Next follows a discussion on the concept of justice, what it is and the legal framework on justice with reference to access to justice. This chapter commences by exploring the philosophical framework on access to justice.

2. PHILOSOPHICAL FRAMEWORK ON ACCESS TO JUSTICE

No discourse on the right to access justice is complete without addressing the concept "justice". Since ancient times, philosophers have tinkered with the notion of justice.[1] The formulations of these concepts of justice have been influenced by the principles of a particular government system over time.[2] The result hereof is that the modern

1 Edor 2020:179.
2 Edor 2020: 79.

view of justice has evolved from its traditional conceptions. These ideas are explored below.

2.1 Concept of Justice

In the traditional concept of justice, it is concerned with the development of a just man, in other words, the development of a virtuous man.[3] In this regard, the traditional concept takes on the approach of a psychologic dimension. The more modern concept of justice, according to Edor,[4] focuses on a just society that is concerned with the allocation of resources. Modern concepts seem to approach the concept of justice from a political perspective. Leach[5] views justice as equity. Equity, in turn, is described as fairness, which is described as justice. Addressing the concept "justice" in this dissertation is not aimed at bringing clarity and certainty, but rather to provide this dissertation with a functional definition of the justice concept and provide the context within which justice is to be considered for the purposes hereof. In order to do this, due consideration should be had for some of the traditional schools of thought moving on to the more modern views.

2.1.1 Traditional views on justice

Western philosophy on the subject embodies theories of Ancient Rome and Greece, which were enunciated by Cicero, Aristotle and Plato.[6] Medieval Christianity was expressed by Augustine and Aquinas, as well as early modernist theorists such as Hobbes and Hume.[7] More recent modernists such as Kant and Mill and the contemporary theorists represented by Rawls provide an impressive body of knowledge.[8] Not all theories will be discussed below, as it might side-track from the

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3 Edor 2020: 80.

4 Edor 2020:179.

5 Leach 2018:20.

6 Pomerleau WP. Western Theories of Justice (2013), *Internet Encyclopedia of Philosophy,* available at http://www.iep.utm.edu/justwest/ (accessed on 6 March 2022). See also Leach 2018:20.

7 Pomerleau WP. Western Theories of Justice (2013), *Internet Encyclopedia of Philosophy,* available at http://www.iep.utm.edu/justwest/ (accessed on 6 March 2022). See also Leach 2018:20.

8 Pomerleau WP. Western Theories of Justice (2013), *Internet Encyclopedia of Philosophy,* available at http://www.iep.utm.edu/justwest/ (accessed on 6 March 2022). See also Leach 2018:20.

importance of this dissertation. Instead, only the important theories relevant to this dissertation have been extrapolated and will be discussed.

2.1.1.1 Ancient Greece: Aristotle and Plato

In the traditional concept of justice, justice was considered as being concerned with the development of a just man. Plato was one of the philosophers who adopted this view and argued that justice constitutes individual virtue.[9] This therefore implies that members of society should perform their duty to society. Plato focused on answering the question "what sort of person should I be?" by averring that a just person is he whose desires are governed by reason.[10]

Aristotle also maintained the same line of reasoning as that of Plato in relation to justice, but with slight modifications.[11] Both philosophers saw justice as virtue and as answering the question of "what sort of person should I be". Aristotle goes a step further to suggest that "justice is a perfect virtue because its possessor can practice his virtues towards others". This train of thought is the main difference between the two philosophers.

Aristotle further argued that justice refers to fairness and that the word "just" refers to "that which [is] lawful and that which [is] equal or fair".[12] For him justice should be understood as the "mean" between good and evil – hence injustice means "taking too much of good things and too little of the bad things".

Edor[13] argues that justice in this context presupposes the existence of equality rather than proportionality. In this regard, equity must precede justice. Aristotle's concept of justice took up the character of distributiveness. In this regard, what is just is that which is proportionate; "unjust is that which violates proportion".

For Aristotle the goal of justice is to produce a just person and also to preserve happiness that which is lawful and equal or fair within the political community.[14] This disposition of Aristotle constitutes the traditional justice concept, which aimed to

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9 Edor 2020:180.
10 Edor 2020:180.
11 Edor 2020:181.
12 Edor 2020:181.
13 Edor 2020:181.
14 Edor 2020:181.

produce a just society by producing just individuals to populate society.[15] In the modern era, the concept of justice was altered to focus on a just society rather than the individual. This will be discussed below.

2.1.1.2 Recent Modernity: Mill, Marx and Kant

In the modern era, the concept of a just society is determined in terms of resource allocation.[16] Therefore, it is safe to say that the modern conception concerns itself with who gets what, how and why.

Two leading traditions that characterized this era include utilitarianism represented by Mill and Marxism by Marx. Marx's conception of justice coincides with the conception of justice in socialism.[17] In this regard, socialism is viewed as a theory of just distribution. The principle of distributive justice requires that people be treated justly in their relation to other people as well as institutions.[18] It was highlighted in the preceding chapters that education is unequal in many aspects. One such aspect relates to the fact that schools in quintiles 1 to 3 do not have any additional funding to challengePDEs, who breach their obligations to ensure education for all,in the courts, and the second is the limited or lack of access to justice for school governing bodies (SGBs) elected to serve in these schools.

Another modernist philosopher is Kant. For Kant,[19] justice is bound up with obligations with which we can rightly be required to comply. By this he meant that if we have duties of justice to other persons it indicates that they have rights against us. We then need to perform these duties so that duties of justice and rights are correlative. He goes on to state that three conditions must be met to apply the concept of justice. These are that firstly, we must be dealing with external interpersonal behaviours; secondly, it

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15 Edor 2020:181.

16 Edor 2020:181.

17 Edor 2020:182.

18 Edor 2020:182. There are four principal elements upon which socialist distribution is based: equal distribution per head, distribution according to service rendered to community, distribution according to needs, and distribution according to merits.

19 Pomerleau WP. Western Theories of Justice (2013), *Internet Encyclopedia of Philosophy,* available at http://www.iep.utm.edu/justwest/ (accessed on 6 March 2022).

must relate to willed action and not merely to wishes; and thirdly, that desires and needs and the consequences intended are not morally relevant.[20]

Kant's[21] theory is further based on his view that there is only one innate human right possessed by all persons; that is the right to do what one wishes to do freelyas long as that is compatible with the freedom of everyone else in accordance with a universal law. This means that one person's right to act freely cannot infringe upon (or violate) the rights of others. This ultimately led to Kant's universal principle of justice, which reads as follows: "Every action is just (right) that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with universal law."[22] These various views, in turn, led to the development of the concept of justice as fairness by Rawls.

2.1.1.3 Contemporary philosophers: Rawls

Rawls[23] pronounced that the principles of justice are regarded as formulating restrictions as to how practices (social institutions) may define positions and offices and assign power and liabilities, rights and duties thereto. He further stated that justice should not be confused with an all-inclusive vision of a good society and that it is only one part of any such conception.[24] In addition hereto, he further stated that justice cannot be summarized as distributive without taking its wider connections into account.[25] The position of Rawls is contrary to the views of Aristotle, who viewed justice not as part of virtue alone, but the whole of virtue. His view also differs from the position of the socialists who view justice as distributive.

To this end, Rawls[26] defined the concept of justice in the form of two principles: Firstly, each person is to have an equal right to the most extensive of equal basic liberties compatible with a similar scheme of liberties for others. Secondly, social and economic

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20 Pomerleau WP. Western Theories of Justice (2013), *Internet Encyclopedia of Philosophy,* available at http://www.iep.utm.edu/justwest/ (accessed on 6 March 2022).

21 Pomerleau WP, Western Theories of Justice (2013) *Internet Encyclopedia of Philosophy,* available at http://www.iep.utm.edu/justwest/ (accessed on 6 March 2022).

22 Pomerleau WP, Western Theories of Justice (2013), *Internet Encyclopedia of Philosophy,* available at http://www.iep.utm.edu/justwest/ (accessed on 6 March 2022).

23 Rawls 1985:164; See also Edor 2020:182.

24 Rawls 1985:165; See also Edor 2020:182.

25 Rawls 1999:6; See also Edor 2020:183.

26 Rawls 1989:53; See also Edor 2020:183.

inequalities are to be arranged so that they are both reasonably expected to be to everyone's advantage and attached to positions and offices to all.

For Rawls, justice as fairness rested on a few basic assumptions that "society [is] a fair system of cooperation between free and equal persons".[27] In his view, the basic structure of society is the existence of social inequalities that are beyond the rational decisions of the individual in it. Rawl's therefore argued that "citizens do not join society voluntary but are born into it", yet are free and equal persons.[28] Cooperation is key for Rawls. This means then that the notion of fairness in the conception of justice as fairness is only properly meaningful within the context of the concept of social cooperation the basis of equality and liberty.[29] Rawls' concept of cooperation in relation to his notion of fairness can be understood by its three specific elements. These elements are, firstly, that cooperation is guided by publicly recognized rules, which those cooperating accept as properly regulating their conduct and are distinct from activity coordinated by an order issued by a central authority; secondly, cooperation involves fair terms of cooperation, including basic rights and duties, which each and all participants reasonably and mutually accept; and lastly, cooperation requires of each and all participants the rational advantage in terms of the good they want to achieve when viewed from their own standpoint.[30]

Considering the nebulous nature of the concept for access to justice this dissertation, instead of embarking on voluminous tautology, it will now be considered how the quest for justice manifests from an international perspective to the South African society within the context of the education sector. Important facets emanating from the above discussion and central to the argument for the creation of an ombud later on is the philosophical underpinning of the justice concept relative to justice as fairness and equality and justice as fair distribution of available resources.

3. INTERNATIONAL STANDARD ON ACCESS TO JUSTICE

The importance of access to justice cannot be overstated. Access to justice is fundamental to the establishment and maintenance of the rule of law, because it

27 Rawls 1985b:231. See also Edor 2020:184.
28 Rawls 1985b:233. See also Edor 2020:184.
29 Edor 2020:185.
30 Rawls 1985b:232. See also Edor 2020:185.

enables people to have their voices heard and to exercise their legal rights, whether those rights derive from constitutions, statutes, the common law or international instruments.[31]

In a discussion at the United Nations General Assembly, it was reported that in 2020, 1.5 billion people could not obtain justice for civil, administrative or criminal justice legal issues; 253 million people lived in extreme conditions of injustice; and that altogether 5.1 billion people all over the world – two thirds of the world's population – faced at least one of these justice issues.[32] This situation is daunting, to say the least. Access to justice is closely linked to poverty reduction, since being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making.[33] Access to justice should be a core concern of the state.

Next follows a discussion on the legal framework for access to justice from an international standpoint, which will then be followed by the South African framework.

3.1 International Legal Framework for Access to Justice

The international legal framework is based on key international instruments that have been ratified by various countries and in particular South Africa. In addition, it is a constitutional requirement in South Africa that international law must be considered, and foreign law may be considered, when promoting and interpreting the spirit and content of the rights contained in the South African Bill of Rights.[34]

3.1.1 International law on the right to access justice

A number of international instruments established principles and minimum rules on the administration of justice and offer fairly detailed guidance on human rights, in particular justice. For the purposes of this dissertation, only the relevant articles pertinent to the structure of this dissertation will be highlighted in the discussion below.

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31 Beqiraj and McNamara 2014:8.
32 United Nations General Assembly 11th discussion paper 2020:1-2.
33 United Nations Development Plan on Access to Justice 2004:3.
34 *Constitution of the Republic of South Africa* (*Constitution*) 1996:sec. 39(1)(b) and (2).

3.1.1.1 Access to Justice in the United Nations Charter

There is no specific reference to access to justice in the United Nations Charter.[35] The purpose of the charter is to maintain international peace and security by applying principles of justice and international law. The purpose is further for member states to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian nature and to promote and encourage respect for human rights and fundamental freedoms.[36] As a result of this reaffirmation for fundamental human rights the General Assembly (GA) of the United Nations proclaimed the Universal Declaration of Human Rights (UDHR) in year 1948.

3.1.1.2 Access to Justice in terms of the Universal Declaration of Human Rights

Firstly, the UDHR affirms that all human beings are born free and equal in dignity and rights.[37] It affirms that everyone is entitled to all the rights and freedoms set forth in the declaration.[38] All people are deemed equal before the law and are entitled to equal protection of the law without any discrimination.[39] In addition, everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him or her by the constitution or by law of a state party.[40] Article 10 states that everyone is entitled to full equality and to a fair and public hearing by an independent and impartial tribunal in the determination of his or her rights and obligations.[41] Article 21 declares that everyone has the right to equal access to public service in his or her country.[42]

Furthermore, no definitions are provided for what is intended by an independent and impartial tribunal. Chapter X of the UDHR establishes the Economic and Social Council, which is responsible for making and initiating reports with respect to international economic, social, cultural, educational, health and related matters and to

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35 UN 1945: available at https://www.un.org/en/about-us/un-charter/full-text (accessed on 5 April 2022).
36 UN 1945: Art.1.
37 UDHR 1948: Art.1.
38 UDHR 1948: Art.2.
39 UDHR 1948: Art.7.
40 UDHR 1948: Art.8.
41 UDHR 1948: Art.10.
42 UDHR 1948: Art.21.

make recommendations to the GA of the United Nations.[43]

The United Nations also established the United Nations Development Program (UNDP) in 1965 to help countries eliminate poverty and achieve sustainable human development, an approach to economic growth that emphasizes improving the quality of life of all citizens.[44] In this document, emphasis has been placed on access to justice for marginalised groups to eradicate poverty and ensure equal redress mechanisms.[45] Provisions have also been stipulated in the International Covenant on Civil and Political Rights (ICCPR).

3.1.1.3 Access to Justice in the International Covenant on Civil and Political Rights

This covenant makes provision for access to justice and requires that state parties ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.[46] It further requires of state parties to ensure that any person claiming such remedy shall have the right thereto to be determined by competent judicial, administrative or legislative authorities, or by any other competent authority and further to ensure that these authorities shall enforce such remedies when granted.[47]

3.1.1.4 Access to Justice in the United Nations Convention on the Rights of the Child

Access to justice has also been recognized in the United Nations Convention on the Rights of the Child (UNCRC).[48] One of the satisfying results of the adoption and almost universal ratification of the UNCRC have been the development of a wide variety of new child-focused and child-sensitive bodies at the heart of government.[49]

Amongst these are children's ombudsmen and children's rights commissioners. The emergence hereof at the very least indicates a change in the perception of the child's place in society, a willingness to give political priority to children and an increasing

[43] UN 1945: Chapter X. Art.61. and 62.
[44] UNDP available at undp.org (accessed on 6 April 2022).
[45] UNDP available at undp.org (accessed on 6 April 2022).
[46] ICCPR 1966: Art.2(3).
[47] ICCPR 1966: Art.2(3).
[48] UNCRC 1989: Art. 37 and 38.
[49] CRC/GC/2003/5:point number 9 on page 3.

sensitivity to the impact of governance on children and their human rights.[50] Central to this dissertation are Articles 3(1) and 12 of the UNCRC dealing with actions taken by a public or private institution, for example, courts, National and Provincial Departments of Education (DBE and PDEs), school governing bodies (SGBs), other administrative institutions, or legislative bodies affecting children. These institutions must take the best-interests-of-the-child principle into account. Article 12, which highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights, applies equally to all measures adopted by states to implement the UNCRC.[51] Other recent instruments with a common theme on access to justice are the Declaration on the Rights of Indigenous People (DRIP),[52] the Convention on the Rights of Persons with Disabilities (CRPD),[53] while the African Charter on the Rights and Welfare of the child (ACRWC) also makes provision for access to justice.[54]

3.1.1.5 The African Charter on the Rights and Welfare of the Child

The ACRWC in Article 17 makes provision for administration of juvenile justice, albeit in relation to criminal proceedings.[55] What is, however, interesting in this Charter, is captured under Article 4 in relation to the best interests of the child. Herein it is stated that in all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard, either directly, or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of the appropriate law.[56] These provisions are similar to those espoused in the UNCRC.

3.1.1.6 Access to Justice in the International Covenant on Economic, Social and Cultural Rights

The initial International Covenant on Economic, Social and Cultural Rights[57] (ICESCR) does not contain provisions on access to justice. It is, however, noteworthy that in

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50 CRC/GC/2003/5: point number 10 on page 3.
51 CRC/GC/2003/5: Art.12.
52 UN 2007 A/61/295: Art.40.
53 CRPD 2008: Art.13.
54 ACRWC 1990.
55 ACRWC 1990: Art. 17.
56 ACRWC 1990: Art. 4.
57 ICESCR 1966.

2005, the Committee on Economic, Social and Cultural Rights (CESCR) provided General Comment 16, titled 'Substantive issues arising on the implementation of the of the ICESCRs', and provided further recommendations to member states on how to implement the content of the General Comment effectively.

General comment 16 relates to the equal right of men and women to the enjoyment of all economic, social and cultural rights. A further obligation was set upon state parties to establish appropriate venues for redress such as courts and tribunals, or administrative mechanisms that are accessible to all, especially the poorest and most disadvantaged and marginalized men and women.[58]

In further recognizing and recalling all these instruments, the United Nations further adopted a resolution titled Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of gross violations of international human rights law and serious violations of international humanitarian law in 2005 (Res/60/147).

3.1.1.7 Res/60/147

The main purpose of this resolution is to give effect to the instruments mentioned to identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law.[59] The resolution requires of member states to respect, ensure respect for and implement international human rights law. In so doing, member states must ensure that their respective domestic laws are consistent with international law standards.[60] The scope of this obligation includes the member states' duty to take appropriate legislative administrative and other appropriate measures to prevent violations;[61] to investigate those violations effectively, promptly, thoroughly and impartially; and where appropriate, to take action against the perpetrators, as well as provide those who claim to be victims of human rights violations with equal and effective access to justice,[62] and to provide effective remedies to these victims.[63]

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58 CESCR 2005 E/C.12/2005/4: Part II (B)(3)(21).
59 UN General Assembly 2005 A RES/60/147 2005: 3 (preamble).
60 UN General Assembly 2005 A RES/60/147 2005: 4 (Part I).
61 UN General Assembly 2005 A RES/60/147 2005: 4 (Part II).
62 UN General Assembly 2005 A RES/60/147 2005: 4 (Part II).
63 UN General Assembly 2005 A RES/60/147 2005: 4 (Part II).

Chapter VIII of the resolution provides further guidelines on access to justice. Herein it requires that a victim shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies as well as other mechanisms or proceedings provided for in the domestic law.[64] States must further ensure that there is an adequate, effective and prompt remedy for gross violations of human rights.[65] In 2012, member states to the United Nations reaffirmed their solemn commitment to the principles of the 1945 United Nations Charter and the 2005 resolution by adopting an additional resolution, namely Res/67/1.[66]

3.1.1.8 Res/67/1

The 2012 reaffirmation of the principles in the Charter further recognizes that the rule of law applies to all States equally and that respect for and promotion of the rule of law and justice should be the guiding tool to member States' activities and to legitimize their actions.[67] The following principles are applicable to the scope of this dissertation and are set out below:

[a] To uphold the resolution of disputes by peaceful means and in conformity with the principles of justice and international law and respect for human rights and fundamental freedoms.[68]

[b] States have a duty to settle their disputes by peaceful means *inter alia* by way of negotiation, enquiry, good offices, mediation, conciliation, arbitration and judicial settlement, or other peaceful means of their own choice.[69]

[c] States reaffirm that human rights, the rule of law and democracy are interlinked and mutually reinforcing.[70]

[d] States reaffirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public

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64 UN General Assembly 2005 A RES/60/147 2005: 6–7 (Part VIII).
65 UN General Assembly 2005 A RES/60/147 2005:7 (Part VIII).
66 UN General Assembly 2012 A/RES/67/1. This resolution includes a statement on the importance of rule of law and access to justice.
67 UN General Assembly 2012 A/RES/67/1: Part I (2).
68 UN General Assembly 2012 A/RES/67/1: Part I (3) and (6).
69 UN General Assembly 2012 A/RES/67/1: Part I (4).
70 UN General Assembly 2012 A/RES/67/1: Part I (5) and (7).

services pertaining to the rule of law including civil and administrative justice.[71]

[e] States reaffirm and are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law.[72]

[f] States emphasize the right of equal access to justice for all, including members of vulnerable groups and to provide fair, transparent, effective services that promote access to justice for all.[73]

[g] States acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution and that everyone, particularly those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms.[74]

[h] States further recognize the importance of the rule of law for the protection of the rights of the child.[75]

[i] State parties further stress the importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice and provide remedies and promote the rule of law. Those who investigate patterns of past violations of international human rights are important tools that can complement judicial processes.[76]

In the light of the above, access to justice is a basic principle of the rule of law. The United Nations' activities in support of member states' efforts to ensure access to justice are a core component in the area of the rule of law. What is important to note from the above is that states have a duty to settle disputes by way of negotiation, mediation, judicial settlement, or any other peaceful means of their own choice.

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71 UN General Assembly 2012 A/RES/67/1: Part I (12).
72 UN General Assembly 2012 A/RES/67/1: Part 1 (13).
73 UN General Assembly 2012 A/RES/67/1: Part I (14).
74 UN General Assembly 2012 A/RES/67/1: Part I (15).
75 UN General Assembly 2012 A/RES/67/1: Part I (17) and (18).
76 UN General Assembly 2012 A/RES/67/1: Part I (21).

This is important for this dissertation within the context of the ongoing legal battles between SGBs and PDEs (for schools located in quintiles 4 and 5), in the light of the fact that these key stakeholders are constantly reminded by the courts of their duty to uphold the constitutional cooperative governance duties. Inasmuch as any state is responsible for ensuring that it has an independent and impartial judicial system, so too, must the state take cognizance of the fact that litigation is expensive and not always an option to marginalized and vulnerable groups. This is the case with the group of parents who are elected to serve on SGBs of schools in quintiles 1 to 3.

In this regard, the state is expected to consider and establish informal justice mechanisms, for example, an ombudsman, to promote access to justice by providing an alternative dispute resolution mechanism to assist with administrative abuses in the form of human rights violations. The challenges and/or human rights abuses that occur at an education level were elaborated on in chapter 2 and 3 hereof. International instruments also consider access to justice from a human-rights-based approach. This clarity is provided herein below.

3.2 Access to Justice from a Human-Rights-based approach

From a human-rights-based perspective, access to justice refers to

> the ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through formal and informal justice systems, for grievances in accordance with human rights principles and standards.[77]

There this approach requires:

> An assessment of both claimholder and duty-bearer on three aspects, namely: capacity, accountability and empowerment. Capacity refers to the ability of both stakeholders to solve problems, perform functions and set and achieve objectives. Consequently, capacity development requires both the accountability and empowerment of both stakeholders. Claimholders need to strengthen their capacities to become accountable in the exercise of rights;

77 UN General Assembly Discussion Paper 2020.

> duty-bearers often need to be empowered to be able to fulfil their obligations more effectively.[78]

Within the context of this dissertation, claimholders and duty-bearers would refer to the various education stake-holders that were identified in chapter 2 of this dissertation. For example, and depending on the context of the issue at hand, learners and educators would be claimholders, and the duty-bearers would be SGBs and PDEs. It can also be that there are instances where the SGB, for instance, would be a claimholder and the PDE the duty-bearer. It can therefore be said that assessment of rights-based access to justice includes dimensions of capacity, accountability, good governance and empowerment. Access to justice is indeed a basic principle of the rule of law.

3.3 Access to Justice and the Rule of Law

The importance hereof cannot be understated. The absence of access to justice results in people not being able to have their voices heard, to exercise their rights, to challenge rights violations, or to hold-decision makers accountable, which are aspects central to the focus of this dissertation to investigate and recommend an appropriate alternative institution to ensure these aspects are realised.[79] The Office of the United Nations High Commissioner for Human Rights (OHCHR) describes the relationship as follows:

> Access to justice is a core element of the rule of law. It is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights. Access to justice encompasses the right to a fair trial, including equal access to and equality before the courts, and seeking and obtaining just and timely remedies for rights violations. Guaranteeing access to justice is indispensable to democratic governance and the rule of law as to combat social and economic marginalization.[80]

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78 UN General Assembly Discussion Paper 2020:3. See also www.undp.org.

79 Un General Assembly Discussion Paper 2020:4. See discussions in ch.1, 2 and 3.

80 OHCHR A/HRC/37/25:3 available at https://www.ohchr.org (accessed on 7 April 2022). See also UN General Assembly Discussion Paper 2020:4.

The GA too declared the importance of the right to access justice within the rule of law as highlighted above. The World Justice Project's 2019 report describes access to justice as "a fundamental component of the rule of law". The failure of justice systems to meet justice needs will compound and continue to perpetuate inequality, erode trust in institutions, and render societies vulnerable to a populist backlash against the core rule of law norms.[81]

It is apparent from the international requirements that it is each state's responsibility to ensure that citizens have access to justice. It is further the state's responsibility to ensure that it takes measures to guarantee that it prevents and investigates rights violations and provide effective remedies. What is key throughout the international instruments that make provision for access to justice is the fact that whatever mechanisms states employ to achieve access to justice, it must be equal and accessible. With the international framework firmly established, the next consideration is how these principles feature in the new democratic state of South Africa.

3.4 Access to Justice and accountability, capacity and empowerment

Access to justice and legal empowerment are important responses to the rule-of-law approaches that have focused on the top-down reform of legislation and state institutions. Since 2008, De Meene and Van Rooij[82] have advocated the importance of access to justice and legal empowerment by making the poor central in legal development cooperation. They highlight that research on the functioning of law and legal systems in developing democratic states have found that legal reforms, even when they do aim to benefit the poor, do not always produce the expected results, as asymmetric power relations work to their disadvantage.[83] Therefore, access to justice and legal empowerment calls for mechanisms that will address problems of access and empower the marginalized groups. One such mechanism that can be considered is the Ombudsman.

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81 The World Justice Project, World Justice Forum Report 2019:5. See also UN General Assembly Discussion Paper 2020:4.

82 De Meene and Van Rooij 2008:1-23. See also Leach 2018:8-9.

83 De Meene and Van Rooij 2008:9-10. See also Leach 2018:8-9.

3.4.1 Empowerment and capacity

Unequal power relations undermine the vulnerable people's ability to exercise and protect their rights, to access services and institutions like the courts, and to participate in economic, political and social processes.[84] Efforts at legal empowerment focus on the lack of power, opportunities and capacities that impede the marginalized group's use of law and legal tools to take control of their lives and improve their livelihoods. In this regard, civil society institutions like Equal Education plays an important role, as it relates to access to justice and legal empowerment for the poor. This is equally true for the dire situation in the education sector, where the pleas of SGBs serving schools in quintiles 1 to 3 for better services such as infrastructure and learner support materials are ignored. Access to justice barriers will be discussed in more detail in chapter 5.

3.4.2 Accountability and good governance

As highlighted above in the international law framework, various concepts have evolved in international law and policy in response to states that have adopted democratic forms of government. The international law instruments, however, do not explore the range and characteristics of domestic government institutions, civil society actors and associated legal, economic and social reforms that may be needed for states to strengthen and consolidate democratic governance.[85] In this regard, states are left to their own devices to decide on these institutions and social reforms. Reif[86] suggests that a well-developed democratic state includes a government composed of separate legislative, executive/administrative and judicial branches, with well-balanced spheres of power; an independent judiciary; other state institutions that serve as an accountability mechanism; comprehensive application of the rule of law; the protection of human rights; freedom of press and other media; and the development of a strong civil society.

Government officials must be accountable to the public for the fair, honest and open exercise and implementation of legislation. This therefore requires due process in

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84 De Meene and Van Rooij 2008:15.
85 Reif 2004:56.
86 Reif 2004:57.

administrative decision-making, which provides the interested public with access to information, protection of privacy, notice of decisions that will significantly affect them, opportunities for hearings, and reasoned decisions from public officials.[87] In a democratic state, an ombudsman can serve as a mechanism also to improve the accountability of the administrative branch of government such as the DBE and PDEs.

Next follows a discussion on the national legal framework on access to justice in South Africa.

4. NATIONAL LEGAL FRAMEWORK ON ACCESS TO JUSTICE IN SOUTH AFRICA

Leach[88] holds the view that access to justice in part is measured by the knowledge, values and attitudes that are conducive to ensuring access. The South African *Constitution* indicates that the content, scope and limitations of the rights that are enshrined in the Bill of Rights should be determined through the prism of five fundamental values that animate the new democratic order.[89] These five values are openness, democracy, human dignity, equality and freedom.[90] The fact that these values feature not only in the preamble and founding provisions, but are also given expression to in the text of the *Constitution,* highlights the importance thereof.

The following section examines the manner in which these aspects fashioned a human-rights-based approach to access to justice in South Africa.

4.1 Human Dignity

Woolman[91] moves from the premise that dignity is grounded in the understanding that "justice consists of the refusal to turn away from suffering". He refers to dignity as "a set of rules that dispose of specific disputes in a court of law". Human rights are interrelated and interdependent. Woolman[92] concludes that dignity operates as a first-order rule, a second-order rule, a correlative right, a value, and a grundnorm, of which

87 Reif 2004:59.
88 Leach 2018:52.
89 *Constitution* 1996:sec. 39(1). See also Leach 2018:52.
90 *Constitution* 1996:sec. 1(a) and (d), sec. 9, sec. 10 and sec. 12.
91 Woolman 2014:ch. 36:1.
92 Woolman 2014:ch. 36:1-74.

sometimes all of them are combined. The importance of access to justice and human dignity have been discussed above. Further discussions on human dignity can be found in chapter 2.

4.2 Freedom

Freedom is a complex concept. Justice Ackerman, in the matter of *Ferreira v Levin,*[93] attempted to ground a disjunctive reading of the right to freedom and security of person, in what Bishop and Woolman describe as the "Berlinian conception of 'freedom' as negative liberty".[94] Justice Ackerman defined the right to freedom as the right of individuals not to have "obstacles to possible choices and activities" placed in their way by the state.[95] Leach[96] quotes Petit and considers this school of thought, freedom as non-interference, as a "diluted form of agency-freedom" that results from a failure to focus decisively on either freedom as non-limitation, or freedom as non-domination. Freedom as non-interference "holds that freedom is a function of how much choice someone is more or less intentionally (or negligently) left by other individuals and groups".[97] Freedom as non-limitation is viewed as "a function of how much choice a person is left by his or her overall context, human and natural".[98] Lastly, freedom as non-domination is considered to be "a function of how far the person can live and choose beyond the arbitrary power of others".[99] Leach[100] further argues on behalf of Petit that social freedom should be understood as option-freedom or agency-freedom. In this regard, option-freedom relates to the character of options that are accessible to the agent as well as the character of access to these options that the agent enjoys. Leach[101] correctly states that vulnerability to influences affects the capacity of agents to exercise their freedom of choice and therefore affects the access that agents have to the full complement of choices on offer that impedes access to justice for vulnerable groups, for example, SGBs governing quintiles 1 to 3 schools, and learners who attend schools that are classified as quintiles 1 to 3 whose right to

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93 1996 (4) BCLR 441 (CC).
94 Bishop and Woolman 2014:ch. 40:1. See also Leach 2018:56.
95 Leach 2018:56.
96 Leach 2018 56.
97 Leach 2018:56-57.
98 Leach 2018:56.
99 Leach 2018:56.
100 Leach 2018:57.
101 *Ferreira v Levin NO and Others* 1996 (4) BCLR 441 (CC).

education is abused when there is a failure on the part of the PDE to ensure adequate educational resources. Further aspects of freedom are discussed in chapter 2.[102]

4.3 Equality

Albertyn and Goldblatt[103] confirms that the achievement of equality is a constitutional imperative of the first order. They further argue that equality as a value allows for discourse on the nature and ambitions of social transformation, unencumbered by institutional impediments.[104] To understand equality, a distinction must be drawn between formal and substantive equality.[105] It is worthy to mention that at the heart of an inquiry into equality insofar as it concerns the legal process (procedural justice), is a comprehension of the nature of the inequality, discrimination and deprivation that permeated South African society in the past and continue to plague its present.[106] Anything less would fail to provide an effective remedy for the harm caused by the social and economic conditions that fashioned and reinforced the inequalities.[107] It is thus imperative that all role-players, including the state, are mandated to embrace transformative constitutionalism by balancing the restorative justice imperative with the right to equality and equal protection and benefit of the law. The state's failure to provide adequate redress mechanisms to resolve education rights disputes is a breach of the international imperatives to provide adequate and alternative mechanisms to resolve disputes by way of informal means and accessible to all.

The aspects of openness and democracy from human dignity, freedom and equality are entrenched in the preamble and the founding provisions of the *Constitution*, which according to Leach,[108] constitute important waymarks in the interpretation of the *Constitution*.[109] These aspects are discussed below.

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102 Discussion at ch.2:par.2.2.8.
103 Albertyn and Goldblatt 2014:ch. 35: 1.
104 Albertyn and Goldblatt 2014: ch. 35:1-62. See also Leach 2018: 60.
105 See the discussion on this aspect in Chapter 2.
106 Leach 2018: 61.
107 Leach 2018: 61.
108 Leach 2018: 61.
109 *Constitution* 1996.

4.4 The South African *Constitution*

In South Africa, the *Constitution*[110] is the starting point and the domestic law instrument that determines how international standards should apply. Herein its purpose is not only to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, but also to lay the foundations for a democratic society in which the state (government) is based on the will of the people and every citizen is equally protected by law.[111]

4.4.1 The preamble

In the latter aspect above, the preamble makes reference to two forms of justice, namely social and procedural justice. In recognition of the horrific injustices under the pre-1994 apartheid government under the new *Constitution,* the Republic of South Africa is a democratic state founded on the supremacy of the *Constitution* and the rule of law.[112] In this regard, any law or conduct inconsistent with the *Constitution* is invalid and the obligations imposed by the *Constitution* must be fulfilled.[113] The preamble contains features directed to ensure that citizens and communities are in a position to claim the protection of the law and access legal systems in order to transform their social and economic situations.

4.4.2 The founding provisions

The founding provisions of the *Constitution* are encapsulated in section 1.[114] In terms hereof, the Republic of South Africa is declared as one sovereign, democratic state founded on values of human dignity, equality and human rights and freedoms,[115] non-racialism and non-sexism,[116] supremacy of the *Constitution* and the rule of law,[117] and universal adult suffrage, a national common voters roll, regular elections and a multi-

110 *Constitution* 1996.
111 *Constitution* 1996:preamble.
112 *Constitution* 1996:sec. 1(c).
113 *Constitution* 1996:sec. 2.
114 *Constitution* 1996:sec. 1.
115 *Constitution* 1996:sec. 1(a).
116 *Constitution* 1996:sec. 1(b).
117 *Constitution* 1996:sec. 1(c).

party system of democratic government to ensure accountability, responsiveness and openness.[118]

Not only are the values of human dignity, equality and human rights and freedoms entrenched, but so too are key concepts of the rule of law and the supremacy thereof. The rule of law dictates that the state provides the necessary mechanism to enable citizens to resolve disputes that arise between them and the State.[119]

Within the context of this dissertation, it means that the state must ensure that there are the necessary mechanisms to enable School Governing Bodies (SGBs) and other role-players (parents, educators and learners) with mechanisms to resolve their disputes. This obligation therefore creates the expectant right that every person residing in the jurisdiction of South Africa has the right to have access to the courts and any other dispute-resolution mechanisms.

Leach[120] argues that this approach to the rule of law has the potential to produce unjust results. Having meaningful access to these adjudicating mechanisms – in the face of various barriers (inequalities) in South Africa – gives rise to the question of what other mechanisms the state can consider to ensure that marginalized citizens are able to have their violated rights resolved by a mechanism that is accessible.

In the next section the concept of access to justice itself and what it means are discussed.

5. ACCESS TO JUSTICE: WHAT IT MEANS

Reyneke[121] quotes the philosophical school of thought from Rawls, who grounds his ideas on justice on two principles. The first includes the fair distribution of economic goods, inclusive of opportunities, power and self-respect. For Rawls it is important that citizens be equitably provided with basic materials and goods to correct inequalities in life opportunities.[122] In his view it is about the fair distribution of primary goods that will secure and make possible the creation of equal opportunities. This includes amongst

[118] *Constitution* 1996:sec. 1(d).
[119] OHCHR AHRC/37/25: 3 available at https://www.ohchr.org (accessed on 7 April 2022).
[120] Leach 2018: 63.
[121] Reyneke 2020: 150.
[122] Reyneke 2020: 150.

others, rights, liberties, powers, opportunities and adequate resources for conditions of self-respect. These rights could include the right to be heard at an appropriate available forum, the right to be treated with respect, the right to be given a fair chance, and the right not to be discriminated against.[123] The second principle links to socio-economic justice and focuses on correcting imbalances in society and realising equity.

Other researchers premise access to justice on three principles.[124] The first principle states that all people must be treated equally and that we are all equal before the law. In this regard, no-one is above the law, or exempted from the law, including government officials at any level. Adherence to and respect for the rule of law is important for the purposes of ensuring the protection of the rights contained in the Bill of Rights. The rule of law would be meaningless if those with power abuse the powers allocated to them in terms of the law or simply ignore it. For example, the *South African Schools Act (Schools Act),*[125] as a result of the new constitutional law order, has devolved power to various education role-players. It was shown earlier on how the exercise of these powers lead to disputes amongst these role-players, in particular when the State (the National or Provincial Education Departments) DBE or PDEs exercise its powers contrary to what the law provides.[126]

The second principle of the rule of law limits the power of government. In this regard, the government and its officials can only act and execute functions in terms of the law. They should not act arbitrary and where an official does act arbitrarily and above the law, their actions can be declared invalid by a court.[127]

Thirdly, the rule of law is further protected by independent, fair, public and transparent court processes.[128] Courts, or rather the judiciary, are independent, as is required in terms of the separation of powers doctrine. Judges, when deciding cases, must apply the law without fear, favour or prejudice. This is where the problem lies in accessing courts, as not everyone has access to the courts. This brings us to the concept of access to justice.

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[123] Reyneke 2020: 150.
[124] See discussion above at 2.1.1.1 to 2.1.1.3.
[125] 84/1996.
[126] Discussion at ch.2: para.2.4.2-2.4.6.
[127] *Promotion of Administrative Justice Act 3/2000*.
[128] See discussion at ch.1:par.3.2.

The next paragraphs will deal with access to justice in the narrow and broad sense.

5.1 Narrow concept of access to justice

In a narrow sense, "access to justice" is assumed based on the existence of legal rights, processes and procedures.[129] It symbolises the situation where legal systems are organised to guarantee every person access to legal processes of redress, irrespective of their social or economic capacity, and guarantee that every person receives just and fair treatment under the legal system.[130] Nyenti[131] correctly states that such an interpretation of the concept focuses only on the operation of the dispute resolution system. For example, Lord Woolf's[132] review of access to justice was concerned only with the civil justice system and the problems it faced. It is only in a narrow sense, therefore, that access to justice for all is achieved. The narrow concept of access to justice is limited and confined to individuals' ability to access courts.

5.2 Broad concept of access to justice

In a broader sense, this is not the case. Over the years, the concept of access to justice has developed from the above narrow definition. In an interview with Deputy Judge President Mojapelo, the judge pointed to the fact that, in terms of the United Nations Development Programme, access to justice encompasses more than being able to obtain legal representation and to have access to the courts.[133] In his view, access to justice is the ability to seek and obtain a remedy in respect of a grievance through either a formal or informal institution.[134]

De Meene and Van Rooij[135] view access to justice as an approach to legal development that focuses on the needs of the poor and marginalised. Reforms informed by these approaches support poor and marginalised people in their efforts to seek and obtain justice.[136] This view is of particular importance for SGBs performing

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129 Nyenti 2013: 903.
130 Nyenti 2013: 903.
131 2013: 903.
132 1996: 773-796. See also Nyenti 2013: 903.
133 Ramatsho 2018: 2.
134 Ramatsho 2018: 2.
135 De Meene and Van Rooij 2008: 6.
136 De Meene and Van Rooij 2008: 6.

their functions in public schools located in quintiles 1 to 3. It has been established that SGBs in quintiles 1 to 3 are deprived of the ability to enjoy and protect their rights.[137]

Numerous other potential avenues are available for the pursuit of justice, among them appeal tribunals, ombud offices, and employing alternative methods of dispute resolution such as conciliation, mediation and arbitration.[138] This view of access to justice is confirmed by researchers.[139]

6. CONCLUSION

This chapter commenced by exploring the importance of the philosophical contributions made by theorists towards understanding the concept of justice and how these contributions shape and feature in the current law dispensation today. The benchmarks set in this chapter is that state parties must settle their disputes by way of negotiation, mediation, or through a court of law. This is the state's commitment to the principle of good governance and further commitment to ensuring an effective, just, non-discriminatory and equitable delivery of public services to the rule of law (with particular reference to children) and administrative justice. Where courts are not accessible, the state has a duty to acknowledge the role of informal justice mechanisms to ensure that vulnerable groups are able to enjoy full and equal access to justice redress mechanisms such as an ombudsman for education. The nexus between the conceptualisation of justice and the central argument of this thesis that an Ombudsman-office should be established for SGBs and PDEs will become apparent in the chapters to follow and the conclusions of the study.[140]

From an international standing, South Africa has signed and ratified various International Charters, Covenants, Conventions and Protocols.[141] The South African state, in so doing, has committed itself to be bound by the principles contained therein and to adhere to the requirements set out in these instruments. It is, however, evident that adopting these instruments does not amount to an automatic incorporation of the

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137 See discussion in chapter 2.

138 Quinot 2016: 4. See also Wiese 2016: 1, and the international law instruments highlighted above in this chapter.

139 Beqiraj, Garahan and Shuttleworth 2018: 7.

140 The purpose of this ch.4 is where the issues of access to justice are raised and will be answered in ch.6.

141 See above at par. 3.

principles into domestic law. The international instruments require of state parties to undertake effective legislative and other administrative measures to adopt other measures to give effect to the rights contained in those instruments. What has been firmly entrenched in the *Constitution* are the fundamental values discussed above.

The South African *Constitution* informs us of the content, scope and application that are captured in the Bill of Rights. It was further established that the Bill of Rights must be determined through five fundamental values that are central to the discussion on the ombudsman for this dissertation.

The concept of access to justice was further explored from a narrow and broad approach with researchers, thus preferring the broader approach over the narrow approach. In the education sector, disputes amongst role-players (reference to PDEs and SGBs) are resolved at the level of the courts. This therefore suggests that education laws do not include or make provision for other adequate measures to resolve disputes. As was shown, not all role-players have the means to access courts.

For education role-players, access to justice in relation to rights violations is through the courts. The next chapter will therefore explore the right of access to the courts. It will further explore other mechanisms that the state has put in place to address rights violations such as the right to education. The discussion will include whether or not these mechanisms are adequate for the sector, or if the state can do more to ensure that there are further measures to resolve disputes amongst these stakeholders.

CHAPTER 5
ACCESS TO COURTS AND OTHER LEGAL MECHANISMS TO RESOLVE DISPUTES AMONGST EDUCATION ROLE-PLAYERS

> "Equal justice in law…it is perhaps the most inspiring ideal of our society. It is one of the ends of which our entire legal system exists … it is fundamental that justice should be the same, in substance and availability, without regard to economic status."
>
> US Supreme Court Justice Lewis Powell, Jr.

1. INTRODUCTION

The fundamental right to access to the courts and other dispute resolution mechanisms is the instrument that enables anyone to enforce a substantive right to which they have a claim. As a result hereof, it can be argued that this right is therefore related to all other rights contained in the Bill of Rights. The focus of this study is most closely related to litigation alternatives as not all education role-players have access to courts.

The substantive legal framework of access to justice in South Africa is informed by a mandate of social transformation, with the central focus on making the law work for everyone, but more so for the poor and marginalized.[1] It is common cause that section 34 of the *Constitution* contains the general right of access to procedural justice in civil matters. However, it does not function in isolation, but in collaboration with a series of other constitutional provisions in the Bill of Rights, such as the right to education and the right to just administrative action. This chapter will explore both sections 33 (right to just administrative action) and 34 (right to access to court) and its key constitutional provisions, as well as the nature, content and application in academic literature and through the courts, with specific reference to the education sector. The link between the two sections will be established and is of particular importance for the context of this dissertation. This chapter will further confirm the limited access that education role-players have in enforcing a substantive right to which they may have a claim in courts, thus paving the way for consideration of alternative mechanisms in the sector to address these disputes. These alternative mechanisms can be viewed and

[1] UNDP 9/3/2004 available at undp.org (accessed on 6 April 2022).

considered as non-judicial safeguards. One such considered mechanism is the ombudsman institution.

2. SECTION 34 AND ACCESS TO COURTS

Brickhill and Friedman[2] opine that the right of access to courts is a prerequisite for the enjoyment of other constitutional rights and that without it, the extensive protections and guarantees provided for in the Bill of Rights would be meaningless. This dissertation focuses on the aspect of access to courts as is contained in section 34 and it reads as follows:

> Everyone has the right to have any dispute that can be resolved by the application of law in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.[3]

Brickhill and Friedman[4] found it appropriate to focus on the four aspects of the right which are: the right of access to courts; the right to a fair public hearing before such courts; the right, where appropriate, to have one's dispute resolved in another independent and impartial tribunal and forum; and the right to enforcement of an effective remedy. The first three components are explicitly captured in the text of the section in the *Constitution,* whereas the last component arises from interpretation of this section by the Constitutional Court.[5] For the purposes of this dissertation, the first, third and last components are of particular significance, as will be discussed below.

2.1 Section 34 and related constitutional provisions

In the context of this dissertation, it is appropriate to consider section 34 within the matrix of related constitutional provisions, both within the Bill of Rights and outside it.

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[2] Brickhill and Friedman 2014:ch. 59:61.
[3] *Constitution* 1996:sec.34.
[4] Brickhill and Friedman 2014:ch. 59:1.
[5] Brickhill and Friedman 2014:ch. 59:1.

2.1.1 The relationship between the founding provisions and section 34 of the Constitution

In relation to the underlying values of the *Constitution*, section 34 is related to the provisions of section 1(c) of the *Constitution*. Section 1(c) recognizes the founding values and supremacy of the *Constitution* and the rule of law. Section 34 concretizes the higher-level value of the rule of law.[6] Section 34 has been held to be the "corollary" of the "first aspect of the rule of law", the obligation on the state to provide mechanisms to resolve disputes.[7]

2.1.2 The relationship between section 34 and 33 of the Constitution

Researchers argue that section 34 forms part of a three-piece cluster of rights with section 32 (right to access information)[8] and section 33.[9] Access to courts is considered a leverage right, as it allows litigants to enforce their other substantive rights for example the right to education. Therefore, if the underlying dispute constitutes a breach of the right to education, section 34 is the constitutional tool that allows a person who is affected by the breach to vindicate the particular right in question. It is therefore confirmed that section 34 is related to all the rights in the Bill of Rights. Section 32 and 33 are also deemed leverage rights.[10] Section 32 does not form part of the scope of this dissertation and will not be considered further.

Section 33 is also a substantive rights-determining tool, as it confirms the right to fair administrative action. It thus ensures that a fair process must be followed in taking administrative decisions that invariably affect other substantive rights such as education rights. It is common cause that section 34 as a leverage right provides for procedural guarantees rather than rights to specific entitlements. All presuppose the existence of another, independent, substantive right. Brickhill and Friedman[11] caution against this procedural nature and state that it should not be overemphasized. In this

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6 Brickhill and Friedman 2014:ch. 59:3; see the discussions at ch.1:par.3.2 and ch.4:par.3.3.

7 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC): par.39. Hoexter and Penfold 2021: 23.

8 *Constitution* 1996:sec.32 (the right of access to information). Hoexter and Penfold 2021: 19; Leach 2018: 122–123 and Brickhill and Friedman 2014:ch. 59:3.

9 *Constitution* 1996:sec. 33 (the right to just administrative action). Hoexter and Penfold 2021: 19; Leach 2018: 122–123 and Brickhill and Friedman 2014:ch. 59:3.

10 Brickhill and Friedman 2014:ch. 59:3.

11 Brickhill and Friedman 2014:ch. 59:3.

regard, they state that the element of meaningful access to courts for administrative action is the remedy that lies at the end of the road.[12]

The intricate relationship between sections 34 and 33 have been established clearly in the writings of Brickhill and Friedman. They quote Currie and De Waal, who argue that section 34 applies to disputes that may be resolved by the application of the law, which include disputes in respect of administrative action, but only after the relevant administrative decision has been taken, because only then does the dispute arise.[13] It is noteworthy to concede that the requirements, as will be set out further along in this chapter for section 33, apply to administrative action at the time of the decision. In education it is common cause that the decisions taken by PDEs and SGBs are administrative by nature and would ultimately constitute administrative action in terms of section 33, which decisions, if not taken properly, would give rise to a dispute capable of resolution by the application of law, such as to engage section 34.

This seems to be the case when one has consideration for the plethora of education rights dispute cases that have served before courts.[14] On the flip side is school governing bodies (SGBs) of poorer marginalized schools that do not have the financial means to have their disputes argued in the courts.[15] A lack of access to courts is essentially non-compliant with the international standards, which require of state parties to ensure that there are adequate opportunities for a child to be heard in any judicial and administrative proceedings affecting the child.[16] The right to be heard applies to judicial and administrative proceedings that are initiated by the child as well as those initiated by others.[17]

However, one of the consequences of the relationship between section 33 and section 34 is that if administrative review to another independent and impartial forum is available to the litigants in respect of their legal dispute, then procedures that exclude the courts' jurisdiction may not infringe section 34.[18] Although there are forums such

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12 Brickhill and Friedman 2014:ch. 59:3.
13 Brickhill and Friedman 2014:ch. 59:4.
14 See the discussion at ch.2:3.
15 International law prescripts were discussed in ch.4 setting out participating States' obligations to ensure access to justice mechanisms at para. 3.1.1, 3.1.1.1–3.1.1.7.
16 CRC/C/GC/12: par. 32. Examples of such typical administrative proceedings include decisions about children's education amongst other things.
17 CRC/C/GC/12: par.33.
18 Brickhill and Friedman 2014:ch. 59:4.

as the Public Protector and the Human Rights Commission as alternative options to litigation, education disputes are often more than not referred for resolution to these two forums. The reasons why will become apparent in further discussions in chapter 6 hereof.

Another dimension to consider in this intricate relationship is the fact that section 33 envisages a judicial-review power in respect of administrative action, as is embodied in the *Promotion of Administrative Justice Act (PAJA).*[19] As a result hereof, section 33 bolsters section 34 and guarantees a right of access to courts in respect of the review of administrative action.[20] Section 33 will be discussed later in more detail.

Next follows a discussion on the relationship with other constitutional provisions like section 38, section 39 and section 7.

2.1.3 The relationship between section 38 and 34 of the Constitution

Section 38 of the *Constitution* makes provision for the enforcement of constitutional rights and empowers the courts to grant the appropriate relief.[21] The matter of *President of the RSA v Modderklip Boerdery (Pty) Ltd (Modderklip)*[22] paved the way for this important relationship and the entitlement in terms of section 38 (enforcement of rights) to approach a court for appropriate relief when a right in the Bill of Rights has been threatened or infringed.[23]

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19 3/2000.

20 Brickhill and Friedman 2014:ch. 59:4.

21 Hoexter and Penfold 2021: 20. Section 38 states that anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

22 2005 (5) SA 3 (CC). This case arose from the occupation by a group of 40,000 unlawful occupiers of a portion of privately owned farmland. The landowner, Modderklip Boerdery (Pty) Ltd, applied in the High Court for an eviction under the *Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (PIE)* 19 of 1998*.* The Constitutional Court identified two broad obligations. Firstly, that the state has an obligation to provide the necessary mechanisms for citizens to resolve disputes that arise between them and secondly,that the state is obliged to take reasonable steps to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of orders.

23 Brickhill and Friedman 2014:ch. 59:6.

2.1.4 The relationship between section 39 and 34 of the Constitution

Section 39 of the *Constitution* provides for the interpretation of the Bill of Rights. In terms hereof, a court, tribunal or forum is required to consider international law when interpreting the Bill of Rights. In the context of this dissertation it ultimately requires of courts to have regard for the analogous rights of access to courts of an international standard when interpreting section 34.[24] The section further makes provision that a court may consider foreign law for interpretation of the Bill of Rights.[25]

2.1.5 The relationship between section 7 and 34 of the Constitution

Section 7(2) requires of the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Therefore the state is responsible for ensuring fulfilment of the right to access courts and other forums, as is imposed by section 34. This has been confirmed in the matter of *Modderklip* where the Constitutional Court identified two broad obligations.

The first obligation is to provide the necessary mechanism for citizens to resolve disputes that arise between them: institutions such as courts and other institutions or forums) and infrastructure to facilitate the execution of court orders.[26] Secondly, the court requires of the state to take reasonable steps to ensure that large-scale disruptions in the social fabric do not occur in the process of the execution of court orders that would ultimately undermine the rule of law.[27] By this it is expected that state institutions like the DBE will implement court orders when a matter is pronounced on in a court, notwithstanding the fact that the PDE or DBE might be cash strapped. There have been instances where courts have further issued orders against PDEs that required of them to report back to court regarding the steps taken in remedying a breach in education to ensure that all learners have access to education.[28] With the relationship of section 34 firmly established in relation to other constitutional

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[24] Brickhill and Friedman 2014:ch. 59:6. See also chapter 4 discussion on international law instruments.

[25] *Constitution* 1996: sec. 39(1)(c). See also the discussion at Brickhill and Friedman 2014:ch. 59:8-9.

[26] *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC): par. 39 and 41. See also Brickhill and Friedman 2014:ch. 59:23.

[27] *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC): par. 43. See also Brickhill and Friedman 2014:ch. 59:24.

[28] *Equal Education and 3 Others v Minister of Basic Education and 9 Others* [2020] 4 ALL SA 102 (GP) and *National Council for the Blind and Others v Minister of Basic Education and Others* case number: 72622/2017.

provisions, it is further necessary to consider the content of this right with specific reference to just administrative action contained in section 33 of the *Constitution* and which the Constitutional Court has described as lying "at the heart of our transition to a constitutional democracy".[29] In this regard, the content of section 33 will be considered next.

3. SECTION 33 AND THE RIGHT TO JUST ADMINISTRATIVE ACTION

Constitutional rights to administrative justice are captured in section 33 of the *Constitution,* which provides as follows:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights has been adversely affected by administrative action has a right to be given written reasons for such action.
>
> (3) National legislation must be enacted to give effect to these rights, and must –
>
> (a) provide for review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote efficient administration.

The predecessor of section 33 was section 24 of the *Interim Constitution,*[30] which conferred similar rights by way of more calibrated and complicated wording. Section 33 had a somewhat curious status in that Item 23 of Schedule 6 to the *Constitution* suspended its operation for a period of three years, or until such time that national legislation was enacted to give effect to it.[31] In this regard, the right to administrative justice was not the right contained in section 33 itself, but rather the right as set out in

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[29] *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC): par. 45.

[30] 200/1993:sec.24 reads as follows: "Every person has the right to – (a) lawful administrative action where any of his or her rights or interests is affected or threatened; (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened; (c) be furnished with reasons in writing for administrative actions which affects any of his or her rights or interests unless the reasons for such action have been made public; and (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

[31] Hoexter and Penfold 2021:20.

item 23(2)(b) of Schedule, 6 which is essentially the same right as is contained in section 24 of the *Interim Constitution*.[32]

In the event that national legislation was not enacted within the three-year period, the provisions contained in Schedule 6 would have fallen away and the rights contained in section 33 would come into operation automatically.[33] Parliament did, however, deliver on its mandate and the *PAJA*[34] was promulgated, which is the direct result of section 33. The Constitutional Court has held that section 33 is the entrenchment of the right to administrative justice.[35] Section 33 plays an important role in relation to the decisions taken by SGBs and PDEs executing their functions order to in realize the right to education. The roles and responsibilities empowering SGBs and PDEs to take decisions are legislated in the *South African Schools Act (Schools Act)* and are administrative in nature.[36] It was shown in chapter 2 how exercising these roles and responsibilities can lead to conflict that ends up in court.[37]

The relationship between section 33 with other rights contained in the *Constitution* will be discussed next, as well as a brief discussion in order to confirm the link between administrative action and justice.[38]

3.1 Section 33 and related constitutional provisions

Section 33 is entrenched in the *Constitution* and, as highlighted above, applies to all law and binds all organs of state.[39] Like any other right in the *Constitution,* it requires a two-thirds majority vote for its amendment,[40] and may only be limited in terms of section 36 of the *Constitution,* which is the limitation provision aimed at ensuring that any limitation is reasonable and justifiable in an open and democratic society based

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32 200/1993.

33 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC): para 82-83.

34 3/2000.

35 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC): par. 135.

36 See the discussion at ch.1 on administrative action.

37 See the discussion at ch.2:3.

38 See further discussion at 4 below regarding administrative action in the education environment.

39 *Constitution* 1996:sec. 8(1). Hoexter and Penfold 2021: 21.

40 *Constitution* 1996:sec. 74(2) which reads that the Bill of Rights may be amended only with the support of at least two-thirds of the National Assembly and at least six of the provinces in the National Council of Provinces.

on human dignity, equality and freedom.[41] Other significant constitutional provisions are discussed below.

3.1.1 The relationship between the founding values and section 33

Section 1, which is the founding provisions of the *Constitution,* is another significant provision in the context of administrative action and justice. As previously highlighted, these provisions inform the interpretation of the *Constitution* and other laws and further set the standards with which all law must comply in order for it to be valid.[42] In addition hereto, the values of accountability, responsiveness and openness are of particular significance to administrative action and has repeatedly been emphasized by the Constitutional Court.[43]

A further purpose of administrative justice is to involve individuals in the ongoing process of decision-making, which impacts upon their lives and thereby promotes participatory democracy.[44] Researchers[45] state that the insistence on furnishing reasons as required by section 33(2) above serves to reinforce the notion that public officials are answerable to the public and further that this right invites public participation in the administration, thereby promoting participatory democracy.

These rights have a definite impact on the educational environment, with specific reference to the manner in which the PDEs and SGBs perform their functions. Section 33 is applicable to all administrative action and therefore PDEs and SGBs are bound thereto. In essence this means firstly that the DBE, PDEs and SGBs may perform only actions that have been authorized by law. Secondly, it means that the exercising of these administrative decisions must be reasonable, and thirdly, that the action must

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41 *Constitution* 1996:sec.36 (1) further lists factors that must be taken into account by courts in this particular balancing exercise, namely: "(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". Hoexter and Penfold 2021: 21.

42 Hoexter and Penfold 2021: 22. See also the discussions at ch.2:2.2.

43 *Constitution* 1996:sec. 1(d). Examples in case law: *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC): para. 43-46 and *Khumalo v MEC for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC): para. 29 and 35.

44 Devenish, Govender and Hulme 2001: 16; see discussions at ch.1:par.3.4; ch.3:2, 3.1.1–3.1.2 and 4.2.1.

45 Devenish, Govender and Hulme 2001: 16.

be procedurally fair. A great deal of conflict resulting in disputes between these parties (PDEs and SGBs) are administrative by nature.[46]

Even more important is the link between section 33 and the rule of law as contained in the founding provision. It is common cause that the various founding values are not rights in itself, Hoexter and Penfold,[47] however, argue that it may be regarded as "matched" to particular rights in the Bill of Rights. For example, the rule of law is matched *inter alia* by section 33, by section 9 (right to equality), and by section 29 (the right to education).[48]

It is necessary to pause at this juncture to define what administrative action is in the context of education, which is the theme of this dissertation. It is further important to consider the link between just administrative action and administrative justice.

4. ADMINISTRATIVE ACTION IN THE CONTEXT OF EDUCATION RIGHTS DISPUTES

Administrative law governs 'administrative action' and other conduct of the public administration. Public administration entails the multifarious functions associated with government providing services such as education, which was discussed in chapter 2 hereof. It is noteworthy to concede that South Africa's history of administrative law and practice is littered with instances of abuse of power, particularly in the context of apartheid laws.[49] The constitutionalisation of the right to administrative justice amounted to a radical break in the arena of administrative law under in the *Interim* and *Final Constitutions*.[50] Administrative action bears several meanings and its definition according to research has changed over time and continues to develop.[51]

4.1 Definition of administrative action

An administrative action is generally defined with reference to section 33 of the

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46 See the discussion at ch.2:3 and further discussion at 4 below regarding administrative action in the education environment.

47 Hoexter and Penfold 2021: 22-23.

48 Hoexter and Penfold 2021: 23.

49 Klaaren and Penfold 2014:ch. 63:2.

50 *Interim Constitution* 200/1993: sec.24 and *Constitution* 1996:sec. 33.

51 Quinot 2016: 66 and 70.

Constitution and means any decision by an organ of state that adversely affects the rights of any person and that has a direct, legal effect, but does not include the constitutional powers or functions of the national and provincial legislatures and municipal councils.[52] In this regard, a decision or the failure to take a decision is defined as a decision of an administrative nature made, proposed to be made, or required to be made, under an empowering provision.

Hoexter and Penfold[53] describe administrative acts as those that implement or give effect to a policy, a piece of legislation or a judgment. This is viewed as the operational side of the state, since policies, laws and judgments are not self-executing and must be put into operation by the public officials responsible for administering it.

The *PAJA,*[54] on the other hand, encompasses a wide-ranging definition of administrative action. Administrative action is defined as any decision taken, or any failure to take a decision by an organ of state when exercising a power in terms of the *Constitution,* or exercising a public power or public function in terms of any legislation, which affects the rights of any person adversely and which has a direct, external legal effect.

This definition has been described by our courts as "unwieldy" and "cumbersome".[55] As a result hereof, the courts developed a useful framework to break the definition down into constituent parts and to test for compliance with these parts.

The Constitutional Court identified in the matter of *Military Veterans v Motau and Others*[56] the following elements for administrative action. These are *inter alia* that a decision must be of an administrative nature, by an organ of state or a natural or juristic person, exercising a public power or performing a public function, in terms of any legislation or an empowering provision that adversely affects rights; that has a direct, external legal effect; and that does not fall under the list of exclusions. A decision in the education context would include official decisions by the DBE, PDEs, SGBs,

[52] Malherbe 2001: 68. See also Quinot 2016: 72; *President of RSA v SARFU* 2000 (1) SA 1 (CC).
[53] Hoexter and Penfold 2021: 73.
[54] 3/2000:sect. 1(a)(i) and (ii).
[55] Quinot 2016: 76. See also *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC): par 33 and *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA): par 21. See also Klaaren and Penfold 2014:ch. 63:20-25.
[56] 2014 (5) SA 69 (CC): par 33.

principals or staff members in the execution of their functions prescribed by law for example learner admissions, language policies, pregnancy issues, learner discipline.[57]

Next follows a discussion that links administrative action to education.

4.2 The link between the right to just administrative action and education

The *Constitution* provides everyone with the right to administrative action that is lawful, reasonable and procedurally fair.[58] Provision is also made in the *Constitution* that everyone whose rights have been affected negatively by administrative action has the right to be provided with reasons for that. This constitutional duty is further given effect to through section 3 of the *Promotion of Administrative Justice Act*,[59] which stipulates that any administrative action that affects the rights or legitimate expectations of any person materially and negatively must be procedurally fair. In this regard, SGBs and PDEs are expected to determine school policies like admission, language, school safety policies and the learner code of conduct and to determine and administer these policies in a manner that is lawful, procedurally fair and reasonable and which does not affect the rights or legitimate expectations of any person adversely. It is also important within the context of this study to establish the link between administrative action and administrative justice, which follows next.

4.3 The link between just administrative action and administrative justice

As discussed above, section 33 of the *Constitution* entrenches the right to administrative action that is lawful, reasonable and procedurally fair, which includes the right to be given reasons. The right to just administrative action is, as the Constitutional Court determined "a fundamental right like any other".[60] Hoexter and Penfold[61] held the submitted view that the right to administrative justice was a deliberate and salutary acknowledgment of the dire impact of administrative justice on affected individuals and groups.

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57 See the discussion at ch.2:3 and ch.3:6.1.1; 6.2.1, 6.3.1 and 6.3.2.
58 *Constitution* 1996:sec. 33(1) and (2).
59 3/2000:sec. 3(1).
60 *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC): par. 24.
61 Hoexter and Penfold 2021: 26.

Justice Froneman, in the matter of *Naken v MEC for Department of Education, Eastern Cape Province,*[62] held that while administrative justice rights serve the public interest in accountable, participative, responsive, transparent and efficient administration, they are further underpinned by the "fundamental constitutional values of human dignity, the achievement of equality and advancement of human rights and freedoms". It is noteworthy to concede that in advancing these values, administrative justice would ultimately serve the public interest and protect the interests of those individuals or groups who are at the sharp end of the unlawful, unreasonable or procedurally unfair public decision-making. Hoexter and Penfold[63] quote Jowell's view that the right to administrative justice is an essential democratic right:

> At its core [administrative justice] is the right to be treated lawfully and with due regard to the proper merits of a person's cause. Failure to provide that treatment diminishes a person's sense of individual worth. In a democracy properly so-called everyone has the right to equal respect, and it is this respect and dignity which administrative injustice denies. We are all aware of the frustration, irritation, anger or sense of desperation that we feel when we are not properly listened to by those who wield public power, or when we are treated in a fashion that does not permit redress for decisions that vary from the arbitrary, gratuitously offensive to the unnecessarily oppressive. In a constitutional democracy we must have a right not be treated that way by those who exercise power on our behalf.

Sections 33 and 34 impose a duty on the state to give effect to the rights contained in both sections of the *Constitution*. Failure to do so can be viewed as a constitutional breach. Before delving into how administrative action is regulated in the education environment, it is also important to provide a brief overview of the content of the right to access courts with reference to sections 33 and 34, which follows next.

5. THE CONTENT OF THE RIGHT TO ACCESS TO COURTS IN RELATION TO SECTION 33 AND 34 OF THE CONSTITUTION

There are two distinctive models of judicial supervision when it relates to administrative

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62 2008 (6) SA 320 (Ck): par. 34. Hoexter and Penfold 2021: 26-27.

63 Hoexter and Penfold 2021: 27; see the discussion at ch.4:para.2.1.1.1-2.1.1.3 the philosophical ideals on access to justice requirements.

action. The first tends to be found in the administrative law systems based on English law, which includes South Africa. Its definitive feature is that administrative bodies, for example SGBs and PDEs, are subject to supervision and control by ordinary courts.[64] In the second model, which is to be found in French law and other civil-law systems, for example in Australia, administrative authorities are subject to supervision by special administrative courts, rather than the ordinary courts.[65]

Up to now, South Africa fits into the first model in that the task of reviewing the legality of administrative decisions has always fallen to the superior courts, while the task of assessing the merits has fallen on the organs within the executive or the legislature. This means, for example, that the HOD or MEC of a PDE will have appeal powers to assess the merits of a decision, which is taken either by the HOD or MEC, depending on the function being exercised. The legislature has determined chapter 9 institutions, which serve as watchdogs over the administration. Notwithstanding the creation of these institutions, it will become apparent later on that there is indeed a need for a similar institution to deal specifically with education rights.

Sections 33 and 34 of the *Constitution* opened the door to a review of administrative decisions by a court or, where appropriate, an independent and impartial tribunal. This has been taken up in *PAJA,* which provides for several references to review by a court or tribunal. This provision echoes section 34 of the *Constitution,* which also confers a right of access to a court or, where appropriate, another independent and impartial tribunal and forum.

5.1 Access to courts in terms of section 33 and 34

In South Africa, the superior courts have always played a crucial role in supervising the activities of education stakeholders (administrative bodies). Dugard[66] argues that inasmuch as the courts are the best possible avenue to have breached substantive rights vindicated, the capacity of courts to serve as an accessible forum for the poor is contrary to the dictates of both sections. She states that in order to reach the court

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64 Hoexter and Penfold 2021: 81.

65 Hoexter and Penfold 2021: 81. In Australia established in an Administrative Appeals Tribunal, or AAT is regarded as part of the administrative system and serves as an appeal mechanism with ordinary courts still retaining power of review over the AAT’s decisions.

66 Dugard 2006: 261-262. See also Brickhill and Friedman 2014:ch. 59:54.

through the ordinary process, starting in the High Court (with specific reference to education matters) and then possibly appealing to the Supreme Court of Appeal up to the Constitutional Court, if need be, requires significant financial resources.[67]

The role that legal costs play in inhibiting access to courts cannot be denied. The manner in which SGBs litigate is a clear indication thereof, in that the SGBs of poor, marginalized schools are not in a position to challenge Provincial Departments of Education (PDEs) in court without the assistance of civil society institutions.[68] On the other hand, the constitutional imperative of SGBs and PDEs is to adhere to the cooperative principles provided for in chapter 3 of the *Constitution* and their duty to avoid litigation.

More remarkable is that in spite of the introduction of a range of other safeguards since 1994, such as the Public Protector and South African Human Rights Commission, judicial review has retained its prominence amongst education stakeholders. This can further be attributed to the lack of alternative institutions for education stakeholders to refer their disputes to. More depressingly, there has been no shortage of official conduct deserving of challenge. For example, South Africans are coming to terms with a decade of 'state capture,[69] a feature of the disastrous presidency of Jacob Zuma and the failure of political institutions to restrain from corruption and nepotism with that era. The courts, obviously the only effective bulwark against such evils, were called upon again and again to fill the resulting accountability vacuum.[70] It would therefore seem unlikely that the significance of judicial review will decline in the foreseeable future. It is, however, common cause that the state has an obligation to consider less expensive avenues to resolve disputes.

Sections 33 and 34 in the *Constitution* make further provision for disputes to be resolved, where appropriate, by another independent and impartial tribunal or forum.

Next follows a discussion on what an independent and impartial tribunal or forum is

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67 Dugard 2006: 261-262.

68 See discussion on this point in chapter 2. The role of civil society institutions.

69 Hoexter and Penfold 2021: 84. See also Public Protector State Capture Report 6 of 2016/2017. The report required a commission of inquiry to be launched into the state capture which was eventually appointed under the leadership of Deputy Chief Justice Raymond Zondo.

70 Hoexter and Penfold 2021: 84.

within the context of these sections, with reference to academic writings.

5.2 Independent and impartial tribunal or forum in terms of section 33 and 34

These features in law are headed by an independent authority whose competence is empowered through legislation to adjudicate disputes in an impartial manner. Leach[71] therefore argues that there are three main components to consider, namely the tribunal or forum that must be established by law; it must be competent, and it must be independent and impartial. The meaning of independent and impartial tribunal or forums will be explored from an international and national standard.

5.2.1 International standards for independent and impartial tribunals and forum

The United Nations Human Rights Committee (UNHRC)[72] advised as follows on the concept of a tribunal:

> A tribunal designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.[73]

With this understanding it is therefore clear that the tribunal must be established by law; it must be independent and impartial. In other words, it must be established by a regular law-making body that has the authority to enact statutes, such as parliament in South Africa. The competence, independence and impartiality of the tribunal are absolute and cannot be limited.[74] Competence of a tribunal can be considered from a jurisdiction aspect (in other words, the geographical area it services), and qualifications and experience of people employed therein. Independence and impartiality will no doubt refer to the presiding officer of the tribunal insofar as it relates to his or her appointment, as well as freedom from political interference by the executive and/or from the legislature.[75]

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[71] Leach 2018: 86-87.
[72] UNHRC General Comment 32/2007.
[73] UNHRC General Comment 32/2007:par. 18.
[74] UNHRC General Comment 32/2007:par. 19. See also Leach 2018: 87.
[75] Leach 2018: 87. See also UNHRC General Comment 32/2007.

5.2.2 National standards for independent and impartial tribunals and forum

As stated above, sections 33 and 34 of the *Constitution* make provision for the review of administrative decisions by a court or, where appropriate, an independent and impartial tribunal. Insofar as it relates to section 33, this aspect has been taken up in the *PAJA,* which contains several references to review by a court or tribunal.

A tribunal has been defined in section 1 of the *PAJA* as "any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of the Act". The *PAJA* therefore creates the foundation for what might in time become a system of special administrative courts or a further type of non-judicial review mechanism. Brickhill and Friedman[76] hold the view that tribunals are best understood as administrative decision-makers whose decisions may constitute administrative action. In South Africa, chapter 9 of the *Constitution* establishes certain institutions whose functions include investigation and adjudication of complaints. These include institutions such as the Public Protector and the South African Human Rights Commission.

The following section discusses how administrative action is regulated in the education sector.

6. REGULATING ADMINISTRATIVE ACTION IN EDUCATION

In the South African Administrative law setting there are very few non-judicial mechanisms to resolve disputes; judicial review is therefore the main mechanism that dominates the regulatory framework. This is disappointing, to say the least, given that education stakeholders are also required by law to avoid litigation and uphold the constitutional imperatives envisioned in chapter 3 of the *Constitution*. In this regard, education role-players are expected to seek alternatives to resolve their conflict, as opposed to litigation.

The *Children's Act*[77] in particular also prescribes the principles to any legislation dealing with children and requires that in any matter concerning a child the approach should always be conciliatory and problem-solving and that confrontational methods

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[76] Brickhill and Friedman 2014:ch. 59:95.

[77] 38/2005.

should be avoided.[78] The *Children's Act* further requires of everyone (DBE, PDE and SGBs at school level) to apply the best-interests-of-the-child standard when dealing with matters of the child. In terms hereof, the best-interest standard also requires that litigation be avoided as far as possible.[79] Despite these provisions, there are hardly any other avenues available in education but to litigate or appeal to the HOD or MEC.

In South Africa, not enough attention is paid to the other alternative mechanisms that are available; instead, there is way too much focus on judicial review through the courts, which are not always accessible.

Next follows a discussion on the current legal mechanism utilized within the education context to resolve conflict and disputes.

6.1 Judicial review to regulate administrative action in education

In South African administrative law, the courts have the constitutional mandate to review administrative action based on sections 33 and 34 of the *Constitution*.[80] It is undeniable that the judiciary has played a significant and pivotal role in the realisation of substantive rights in cases dealing with the right to education by laying down general principles for adjudication of the right to education.[81] The judiciary therefore plays an important role in ensuring that government and other duty bearers are held legally accountable for human rights violations and unlawful administrative action.

6.1.1 The nature and purpose of judicial review

A breach of the right to just administrative action in section 33 of the *Constitution* entitles the aggrieved party to appropriate relief.[82] In *Fose v Minister of Safety and Security*[83] Justice Ackerman emphasised the entitlement to appropriate relief as an effective remedy. He further explained the following:

78 38/2005:sec. 6(4)(a).
79 38/2005:sec. 7(1)(n).
80 Quinot 2016: 106-107.
81 Mbiada 2017: 2. See the discussion on the lessons from case law in ch.3: para. 6.1-6.3.
82 Quinot 2016: 238.
83 1997 (3) SA 786 (CC).

> … without effective remedies for breach, the values underlying the rights entrenched in the Constitution cannot be properly upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through courts, it is essential that on those occasions legal processes does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.[84]

The remedy must be fair to those affected by it and yet vindicate the rights being violated effectively. It must be just and equitable in light of the facts, the implicated constitutional principles, if any, and the controlling law.[85] South African law remedies are simple and are reflected in section 8 of the *PAJA* titled 'remedies'. Other remedies worthy of consideration is an ombudsman.

6.1.2 Remedies available to the judiciary for administrative breaches in the education context

Section 8 of the *PAJA* provides that the court may grant any order that is just and equitable and provides an open list of the type of orders that the court may grant. For instance, the court may direct the administrator to give reasons or to act in the manner in which the court requires,[86] or to prohibit the administrator from acting in a particular manner,[87] setting aside the administrative action and either remitting the matter back for reconsideration to the administrator or, in exceptional cases, the court can substitute, vary or correct the defect,[88] declaring the rights of the parties in respect of any matter to which the administrative action relates,[89] granting a temporary interdict or other temporary relief,[90] and/or to grant costs.[91]

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84 1997 (3) SA 786 (CC): par. 69.

85 *Allpay Consolidated Investment Holdings (Pty) ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC): par. 29-34. See also Quinot 2016: 239.

86 3/2000:sec. (1)(a)(i) and (ii).

87 3/2000:sec. (1)(b).

88 3/2000:sec. (1)(c)(i) and (ii)(aa) and (bb).

89 3/2000:sec. 1(d).

90 3/2000:sec.1(e).

91 3/2000:sec. 1(f).

In the education context judicial review is the current legal mechanism utilised by the SGBs of the more affluent public schools, as well as by PDEs and the DBE. It is prudent at this junction to state that schools located in quintiles 1 to 3 have limited access to the courts to remedy breaches of administrative nature, unless assisted by civil society institutions. Deputy Judge President Mojapelo stated in an interview with Ramotsho[92] that, despite the good work done by these institutions, there are still gaps. For example, although civil society institutions assist schools, SGBs, parents and learners to launch a court application, it can only be done after gathering sufficient evidence to prove failure on the part of the DBE or PDE in the exercise of their constitutional duties. It can take up a considerable amount of time to prepare a case. Apart from this there are further limitations that must be considered when it comes to judicial review.

6.2 Challenges with judicial review in the education context

SGBs elected to serve schools in quintiles 1 to 3 lack the financial resources to challenge PDEs, for example, in instances where excess learners are admitted to public schools and where the PDE fails to provide adequate resources to cater for the increases. The point must be made that there is a general tendency for children from the more rural areas in Limpopo and Mpumalanga to migrate to schools in Gauteng,[93] and children from the Eastern Cape are sent to attend schools in the Western Cape.[94] Recent reports reveal that some schools are faced with staggering learner-to-teacher ratios such as 1:67, 1:51, 1:85 and 1:72.[95]

Such overcrowding is prevalent in both rural and urban settings. PDEs, particularly in urban areas, cannot, or do not, build an adequate number of schools fast enough. This creates tension between the demand for and availability of quality education and leads to disputes concerning admissions. In some instances, these learners are ultimately admitted and PDEs simply fail to provide appropriate resources such as school

92 Ramotsho 2018: 2.

93 HSRC 2022: https://www.hsrc.ac.za/en/media-briefs/fact-sheets/factsheet-1 (accessed on 20 April 202(2.

94 Ground Up 2018: https://www.thesouthafrican.com/overcrowding-at-western-cape-schools/ (accessed on 20 April 2022).

95 Ground Up 2018: https://www.thesouthafrican.com/overcrowding-at-western-cape-schools/; Van Zyl 2016: http://mobserver.co.za/42196/overpopulated-schools-overcrowded-classrooms-and-empty promises/ (accessed on 20 April 2022).

furniture, school infrastructure, learning and teaching support material and educators, which again will lead to conflict and disputes that end up in courts. Some principals have reported that they are afraid of losing their jobs if they attempt to expose these irregularities.[96]

Today it can be said that citizens have a better understanding of the courts' role in enforcing the constitutional duty of the legislative and executive branches to "respect, protect, promote and fulfil"[97] the rights promised in chapter 2 of the Bill of Rights. This is equally important, considering the aftermath of public corruption during the presidency of Jacob Zuma, where it is apparent that only the judiciary lived up to its constitutional mandate by asserting the rule of law, while the legislature remained supine.[98] Even more recently is the shameless profiteering of public office-holders at the expense of public health during the COVID-19 pandemic, which has reinforced the sense that the judiciary can be trusted.[99] Notwithstanding the important role that the courts do indeed play, the courts are also constrained in several aspects, which will be discussed below.

6.2.1 Separation of powers as a limitation

Notwithstanding its prominence in our system, Hoexter[100] notes that the very nature of judicial review has some limiting characteristics. The scope of review limit its potential effectiveness as a mechanism for controlling administrative action and providing relief to aggrieved individuals.[101] For example, judicial review supplies only one type of control and is only part of the solution to the need for better administrative decision-making. Insofar as it concerns the judiciary, the courts view themselves as being constrained in their enforcement role by the separation of powers doctrine.[102] As a result hereof, a court's role is limited to ensuring that the administrative body concerned abides by its mandate and performs its functions in compliance with the

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96 Van Zyl 2016: http://mobserver.co.za/42196/overpopulated-schools-overcrowded-classrooms-and-emptypromises/ (accessed on 22 April 2022).

97 *Constitution* 1996:sec. 7(2).

98 Hoexter and Penfold 2021: 189.

99 Naidoo 2020: 1.

100 Hoexter and Penfold 2021: 191; 213-214. See also and Hoexter 2011: 60-61.

101 Hoexter and Penfold 2021: 213.

102 Mbiada 2017: 2, Hoexter and Penfold 2021: 213.

law.[103] It is not the task of the courts to enquire whether such body took the correct decision, but only to ensure that the decision is in fact lawful.[104] If what the complainant in a matter actually wants is a favourable administrative decision, an appeal to another administrative body is a more direct way of seeking it. However, currently in education even the appeals processes provided for are limited, as will become apparent below.

Another point of debate in South Africa centres on the relationship between the courts exercising their function and the administration fulfilling its constitutional mandate in taking administrative decisions.

6.2.2 Deference theory as a limitation

This theory calls for the development of principles that can guide the courts in deciding whether, or whether not to intervene when scrutinising administrative action. This notion has been taken up by courts, for example, in *Logbro Properties CC v Bedderson NO and Others*[105] *(Logbro),* the Supreme Court of Appeal held that a court should be careful to interfere with the decision-maker's judgment in view of the fact that the decision-maker will generally be in a better position to evaluate all relevant considerations. In the leading case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[106] *(Bato)*, Justice O'Regan stated as follows:

> A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision.[107]

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103 Quinot 2016: 107; Kohn 2017: 4; Hoexter 2011: 61 and Hoexter and Penfold 2021: 213-214.

104 Quinot 2016: 107. See also Kohn 2017: 4.

105 2003 (2) SA 460 (SCA): par. 21.

106 2004 (4) SA 181 (CC).

107 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 181 (CC): par. 48.

"Deference" is therefore about respect for the role of another branch of the state governed by the separation-of-powers doctrine. As the Supreme Court of Appeal indicated in the *Logbro* case, certain decisions are such that it is very difficult or even impossible for a court, having limited expertise and ability, to investigate matters and to judge on substance.[108] In *Basic Education for All and Others v Minister of Basic Education and Others*[109] counsel agreed that the content of the right to a basic education is not unrelated to the resources available to the state, and that any determination in this regard requires political and policy choices which the courts are notoriously ill-equipped to deal with. Apart from the above challenges regarding judicial proceedings, there are other barriers hampering access to justice.[110]

6.2.3 Legal constraints as a limitation

The *PAJA* itself creates a legal constraint for litigants to bring review applications before court. This constraint can be found in section 7(1), which requires of a litigant to bring proceedings for judicial review within six months. Another noteworthy provision is the strict duty to exhaust internal remedies where such internal remedies have been determined.[111]

6.2.4 Other practical considerations as limitations

Further major drawbacks is the expense associated with review, which effectively puts it beyond the reach of most South Africans, for example SGBs serving the poorer schools. Hoexter[112] points out that review is not the sort of proceeding that allows large numbers of various complaints to be resolved cheaply and speedily. Nyenti[113] shares these views and lists specific barriers, including poverty, the geographic location of the courts, the physical inaccessibility of the courts, a lack of knowledge concerning one's rights (also due to illiteracy), inappropriate internal dispute resolution proceedings and

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108 *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA): par. 21.
109 2014 (4) SA 274 (GP): par. 43.
110 Beqiraj, Garahan and Shuttleworth 2018:7. See also Cotton 2016: 592; Kirby 2017: 502; Nyeti 2013: 913–916.
111 3/2000:sec. 7(2).
112 Hoexter 2011: 61.
113 Nyenti 2013: 913-916.

mechanisms, procedural hurdles, and time delays in resolving matters before a court of law.[114]

Not everyone has the time, commitment and above all the financial resources required to litigate. Hoexter and Penfold[115] state that there is no way of knowing how many potential applicants for judicial review are prevented from challenging administrative action in court by these constraints, but it seems likely that only a tiny portion of possible claims end up in court. This comment is true for SGBs elected to serve quintiles 1 to 3 schools. Most judicial review applications are launched by SGBs of schools in quintiles 4 and 5 that have the financial resources to do so. It should also be kept in mind that not all quintiles 4 and 5 schools have the money to litigate. It is perhaps only those in the most affluent areas that can do that from their own budgets. In many instances they also have to rely on Governing Body Associations such as the Federation of Associations of Governing Bodies of South African Schools (FEDSAS) to assist with the costs of such litigation.

Schools that can charge school fees also need to make decisions on where to spend the limited school funds – on litigation to address infringements by the PDE, or on necessities to realise the education rights of children. All quintiles 4 and 5 schools are not in a financial position to litigate extensively and up to the Constitutional Court. In this regard they too will benefit from alternatives.

Another issue is, for instance, that schools will rather back down in cases where the HOD has refused to expel the child and rather direct that SGBs and schools to deal with child and allow the child to finish school than to litigate.

Litigation is sometimes so time consuming and protracted that children have already left school by the time that the case can be heard – in this regard it is justice delayed being justice denied.[116] It is evident that money is not the only reason schools decide to litigate or not.

[114] Nyenti 2013: 913-916.

[115] Hoexter and Penfold 2021: 215.

[116] *Kwazulu-Natal and Others v Pillay* 2008 (2) BCLR 99 (CC) and *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA).

In this regard, judicial review is essentially a reactive or backward-looking safe-guard.[117] It ultimately means that courts only hear and adjudicate matters that are brought before it by litigants. This ultimately results in incremental and sporadic decision-making, since the judge's power to decide obviously depends on the limited range of issues before him or her.[118]

Moreover, judicial review proceedings focuses upon immediate interests of the parties involved, often to the exclusion of broader policy and public-interest issues. In this regard, judicial review proceedings can be considered an inappropriate tool for resolving polycentric problems, especially the challenges DBE and PDEs find themselves in in relation to education rights disputes. Furthermore, the adversarial nature of the process also means that there is limited scope for compromise, which is contrary to the manner in which education stakeholders are required by law to engage with one.[119]

These aspects generate the following pertinent questions. Is review an effective method of changing and improving administrative practices and attitudes in the state administration? Do administrators or decision-makers learn from their mistakes and case law? From an education sector perspective, the answer is no, and as a result thereof, this lessens the value of judicial review as a promoter of good administration and a safeguard against bad administration.[120]

It is noteworthy to concede that in some instances, proceedings such as engagement or mediation may address and resolve substantive issues in dispute more effectively.[121] In other cases, the investigation and reporting functions of the Public Protector, for instance, are better suited to resolving conflict and disputes between an affected individual and parties and the state.

While it is important to be clear-sighted about the limits and limitations of judicial review, Hoexter[122] reminds us that it should not be taken as arguments against the

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117 Hoexter and Penfold 2021: 214.

118 Hoexter and Penfold 2021: 214.

119 See ch.3 and ch.4: 3.1.1.4 and 3.1.1.5 and the *Children's Act* 38/2005.

120 Various cases in the education sector have served across the superior courts in South Africa on issues related to admissions, language, discipline, post disputes and pregnancy to name a few.

121 Hoexter and Penfold 2021: 214.

122 Hoexter 2011: 61.

proceeding. It should rather be seen as arguments for an integrated system in which review can play an appropriate role. To this end, Hoexter[123] argued that to achieve the twin aims of controlling administrative power and improving the decision-making skills of administrators, review must be combined with other procedures that can supply the missing elements or make up for disadvantages relating to expense, time and formality.[124]

The two are often equated in South Africa due to the fact that judicial review has indeed played a prominent role in the context of South African administrative law, but they are not identical.[125]

It encompasses both judicial and non-judicial safeguards against the breach of constitutional rights. Kohn[126] argues that administrative law in the constitutional era makes provision for a variety of alternative forms to regulate administrative action. It must be acknowledged that by utilising alternatives it may further incentivize good governance and administration in the education sector proactively, rather than reactively.

Next follows is a discussion on non-judicial alternatives to judicial review litigation.

7. CONSIDERATION OF NON-JUDICIAL SAFEGUARDS

According to Hoexter,[127] general administrative law can be described as "the regulation of regulation". She quotes Baxter, who defines the term as the general principles of law that regulate the organization of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction.[128]

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[123] Hoexter 2011: 61.

[124] It is evident from case law that not all decision makers in the PDEs have the necessary knowledge and skills and the same "mistakes" are often made in different provinces. This obviously is not in the best interests of children and can be avoided.

[125] Hoexter 2011: 9.

[126] Kohn 2017: 24.

[127] Hoexter 2011: 9.

[128] Hoexter 2011: 9.

As stated above, administrative law is concerned with non-judicial as well as judicial safeguards against poor decision-making. In contrast, judicial review focuses on the diagnosis of what administrators have done wrong, whereas administrative law focuses on a more positive side in that it is concerned not merely with tracking down instances of bad administration, but with the empowerment of administrators, the facilitation of administration and with methods of encouraging good decision-making.[129]

There are various mechanisms in law that serve to regulate administrative action in South Africa.[130] These include legislative regulation, for example, the internal control mechanisms (that are provided for in terms of the *Schools Act* as an example) are usually prescribed in terms of legislation, specialized legislative oversight bodies, alternative dispute resolution in administrative law and of course judicial oversight. Legal frameworks should not be regarded as static and unchangeable texts; rather, it should accompany the evolution of countries' needs and enshrine fundamental principles applicable to all.[131]

7.1 Internal controls as a means to regulate administrative action

Internal controls or remedies are mechanisms within the administration aimed at addressing administrative failures. To this end it provides the administration with the power to correct their own mistakes.[132]

Generally, in South Africa, there is no uniform, internal legal mechanism to resolve disputes. In some other countries, however, there are now extensive internal mechanisms.[133] Quinot[134] points out that there is no right to an internal remedy or, conversely, a duty on a particular administration to have internal remedies. It all depends on the specific legislative framework in terms of which the administrative action is taken.[135] As a result, one finds an assortment of different mechanisms in legislation that do in fact provide an aggrieved person with some form of internal

129 Hoexter 2011: 9-10.
130 Kohn 2017: 3.
131 Kohn 2017: 3.
132 Quinot 2016: 100.
133 Quinot 2016: 100.
134 Quinot 2016: 100.
135 Quinot 2016: 100.

remedy. For example, in South African law, one such internal control is administrative appeals. Administrative appeals allow for the reconsideration of administrative decisions by a higher authority. Such appeals are established to challenge the merits of a particular decision.[136] The person or body to whom the appeal is made will step into the shoes of the original decision-maker and decide the matter anew.[137] Such a system can also be found in the *Schools Act*.

Quinot,[138] for instance, has his reservations in the application of these mechanisms. According to him, appeal mechanisms have their own limitations in that the Minister or MEC will not necessarily be more accessible than the courts, nor will either of them have greater levels of expertise in the technical matters at issue. In addition, it must be noted that the *Schools Act* only makes provision for parents to appeal to the MEC regarding certain rights violations relating to, for instance, admissions or expulsion. A school or an SGB has limited access to appeal processes if it is in disagreement with an administrative decision taken by the department.[139]

Further, in terms of sections 22 and 25 of the *Schools Act*, an HOD can either withdraw the functions of SGBs or appoint a sufficient number of persons to perform governing body functions where SGBs have ceased to perform their functions.[140] From an evaluation of the *Schools Act*, there appears to be insufficient internal legal mechanisms for education stakeholders to consider other than approaching a court of law. The point must be made that the interpretation and application of these sections created much conflict and PDEs skewed these remedies in their favour and acted *ultra vires*.[141]

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136 Hoexter and Penfold 2021: 137. Appeal is appropriate where it is thought that the decision-maker came to a wrong conclusion on the facts or the law. It is concerned with the merits of the case, meaning that on appeal the second decision-maker is entitled to declare the first decision right or wrong. Review, in contrast, is traditionally not concerned with the merits of the decision, but whether it was arrived at in an acceptable fashion.

137 Hoexter and Penfold 2021: 85.

138 2016: 102.

139 *Schools Act* 84/1996:sec. 18A(6); 21(5) and 22(5) are examples provided for in the Schools Act where an SGB can appeal. The SGBs have no appeal powers where the admission policy, language policy or where they recommended expulsion and the HOD overturns the decision.

140 *Schools Act* 84/1996:sec. 22 and sec. 25.

141 See the following cases: *Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC), *MEC for Education in Gauteng Province and Others*

The *Basic Education Laws Amendment Bill* (*BELA*)[142] presently under consideration has proposed the inclusion of a dispute resolution clause in the *Schools Act,* but there is no indication as to when this will be finalised. From the above it is clear that there is a lack of clear and adequate internal control mechanisms in the *SASA* to safeguard the interests of the stakeholders. Another option is of course the role played by special oversight bodies, or the chapter 9 Constitutional Institutions which will be discussed next.

7.2 Special legislative oversight bodies to regulate administrative action

Parliamentary and judicial controls are regarded as complementary external checks on administrative power. As discussed above, judicial control addresses the legality of administrative action and legislative oversight is directed at the merits of the action taken.[143] Modern constitutions often provide for the appointment of an ombudsman whose principal function is to protect citizens from government maladministration.[144] The office of an ombudsman has several well-established characteristics such as:

7.2.1 It is not a private office but an official one, a constitutional mechanism designed to monitor the use of government power;

7.2.2 Its incumbent is an independent, high-level public official who is responsible to the legislature and not the executive;

7.2.3 The jurisdiction of the ombudsman is to receive and investigate complaints from the public about government maladministration and he has an important policing function;

7.2.4 An ombudsman should also be empowered to investigate suspected cases of maladministration on his or her own initiative;

v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC), *School Governing Body of Grey College v Head of Department of Education Free State Province* 2019 ZAFSHC 200, *School Governing Body of Grey College, Bloemfontein v Scheepers* 2020 3 All SA 704, *Büchner v Head of Department of Education, Free State* 2021 JDR 0488 (FB) and *Büchner v Head of Department of Education, Free State* SCA, case no 1418/2020, unreported

[142] GN 41178/2017.

[143] Hoexter and Penfold 2021: 93.

[144] Hoexter 2011: 87.

7.2.5 The investigations of the ombudsman are officially sanctioned and enforced. This aspect is essential for the success of the institution that the ombudsman be backed by the authority of the state and equipped with powers of investigation and inspection; and

7.2.6 The ombudsman takes no remedial action; instead, it issues reports and makes recommendations, usually to the legislature. [145]

In South Africa, the *Constitution* established two such institutions with similar characteristics. These institutions are the Public Protector and Human Rights Commission.[146] Quinot[147] notes that the main advantage of these institutions is linked to the fact that they do not fit into the classical separation of powers doctrine and that they are both administrative and judicial by nature. Safeguards like these two offices are easily accessible for ordinary people, complaints are processed fairly and swiftly and does not depend on the existence of a justiciable dispute.[148] These aspects are a central theme to the context of this dissertation, which is to enhance access to justice in the education context.

A further advantage is that the institutions operate independently from the state. In the instances of the Public Protector and the South African Human Rights Commission both institutions have a broad mandate. For example, the Public Protector may investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper.[149] The South African Human Rights Commission, on the other hand, has the broad mandate to promote and protect all human rights as envisaged in the *Constitution*.[150] Although these two institutions have a role to play in the education sector, their specific mandate is not education only

[145] Hoexter 2011: 87-88. See also the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC): par. 47.

[146] *Constitution* 1996:sec. 181 and sec. 182.

[147] Quinot 2016: 103.

[148] Hoexter 2011: 61.

[149] *Constitution* 1996:sec. 182(1)(a).

[150] *Constitution* 1996:sec. 184.

and will therefore not be in a position to service all provincial PDEs or SGBs at grassroots levels.[151]

In addition hereto, Hoexter and Penfold[152] have demonstrated how the Public Protector's legislative oversight has become more acute in the ensuing decade. This is as a result of the 'state capture' period where the legislature time and again proved either unable or unwilling to confront evidence of corruption in state-owned enterprises such as Eskom and Transnet and other areas of governance. This illustration is in reaction to the conduct of the National Assembly when it was presented with a report from the Public Protector detailing the improper enrichment of President Zuma and his family at their Nkandla homestead.[153] For the most part, the Public Protector is constantly dealing with corruption in government. It will became apparent throughout the dissertation that a separate institution is needed to assist with matters of education due to its complexity and daily challenges.

8. CONCLUSION

This chapter explored sections 33 and 34 and their key constitutional provisions, including the nature, content and application of the sections within the context of this dissertation. Through academic literature the link between the two was established. This link is that administrative action can lead to disputes, and disputes must be resolved either by way of the courts or another independent and impartial forum. It was established that in South Africa and in the education context, role-players have no alternative means to resolve their disputes other than in a court of law. The question then becomes: what about the marginalised governing bodies that do not have sufficient funding to have disputes resolved in a court of law?

The chapter considered alternative non-judicial safe-guards for the education sector. In the following chapter, the ombudsman as a special legislature oversight body within the context of education will be investigated and considered as an appropriate institution to resolve conflict for education role-players. This exploration will be

151 Public Protector Annual Performance Plan 2020–2021: available at http://static.pmg.org.za/Public_Protector_Annual_Performance_Plan_2020-2021.pdf (accessed on 22 April 2022).

152 Hoexter and Penfold 2021: 95-96.

153 Public Protector Secure in Comfort Report 25 of 2013/14 and Hoexter and Penfold 2021: 95.

undertaken with reference to practices from other international jurisdictions to inform the establishment of a context specific ombudsman office suitable for the South African education context.

CHAPTER 6
AN EVALUATION OF THE OMBUDSMAN OFFICE

> "It is during these challenging times that high standards of good administration are needed to give as much reassurance as possible to citizens about measures taken"
>
> Emily O'Reilly

1. INTRODUCTION

Chapter 2 of this dissertation established the framework for the education environment in South Africa with reference to international law requirements. The chapter identified the various education stakeholders and set out their respective roles and responsibilities in terms of the *South African Schools Act* (*Schools Act),* as well as how exercising the roles in particular can lead to conflict and disputes. The law and case law require that these stakeholders exercise their roles and responsibilities in partnership with one another, more so in terms of the constitutional imperatives for cooperative governance. On the other hand, it highlighted the fact that the playing field in education is not equal for some stakeholders in that these stakeholders have limited access to justice and courts, as was discussed in Chapters 4 and 5. Chapter 5 established the possibility of non-judicial mechanisms to improve access to justice, as well as to maintain relationships important for cooperation. One such mechanism identified is the ombudsman.

The notion of 'ombudsman' spread continuously throughout the world during the course of the 20th century. The constitutional concept of independent, easily accessible and 'soft' control of public administration through highly reputable offices or institutions is inextricably linked to the principles of democracy and the rule of law, as it is an essential contribution to the efficiency of those principles. Ombudsmen's increasing significance for the protection of human rights and the liability of administration is recognized worldwide.[1] Ombudsman institutions are an inherent feature in all kinds of legal orders.

Next follows a discussion on the origins of the ombudsman, concretizing the establishment thereof in the world. This chapter sets out to evaluate the notion of an ombudsman office, with reference to its historical origin and how the models of this

[1] Glusac 2019: 6; Reif 2020: 1.

non-judicial mechanism have changed over the years. This chapter will explore various international standards and references to other countries. The chapter starts with a discussion on the origin and history of the ombudsman.

2. THE HISTORY OF THE OMBUDSMAN

The word 'ombudsman' is considered a powerful brand name used to describe a model of institution which originates from the 1809 Swedish Parliamentary Ombudsman (Riksdagens Ombudsman).[2] About 213 or so years ago, the institution of an ombudsman was confined to a handful of countries and the word 'ombudsman' meant nothing to most people outside of Scandinavia.[3] The word 'ombud' in Swedish means representative, agent, intermediary and delegate.[4] It is noteworthy to concede that parallels of the ombudsman have been found in the Roman, Chinese and Islamic systems. However, the modern roots of the ombudsman are to be found in the Swedish example.[5] The concept and institution have indeed become a worldwide phenomenon.

2.1 Establishment of ombudsman institutions in the world

Today ombudsmen are both global in operation and multifaceted by nature, existing on every continent, at various levels of government, across both public and private sectors. In Stuhmcke's[6] view, ombudsmen are ever evolving, and the expansion of the ombudsman institution is not just one of scale, but also one of scope. One such important development is the changing focus of the classical ombudsman model from primarily providing redress to individuals' complaints to placing more emphasis upon systemic investigations and expanding functions and monitoring, with the primary goal to improve the overall quality of public administration. It is important to highlight the establishment of ombudsman institutions around the world.

2.2. The First-Generation or Classical Ombudsman

As highlighted above, the term was used for the first time in Sweden in 1809, when

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[2] Stuhmcke 2012: 83.
[3] Reif 2020: 2-3; Gregory and Giddings 2000: 1 and Reif 2011: 269.
[4] Batalli 2015: 233.
[5] Reif 2004: 4-5.
[6] Stuhmke 2012: 83.

the Swedish Office of Special Parliamentary Commissioner for the Judiciary and Civil Administration (*Justitieombudsmannaambetet*) was established by the Swedish Constitution.[7] The Swedish Constitution defined the separation of powers between the King and Parliament.

2.2.1 Defining the first-generation or classical Ombudsman

The meaning of the ombudsman was briefly highlighted above with reference to the corresponding meaning in Sweden. In English language dictionaries, an ombudsman may be defined as an official appointed to investigate complaints against public bodies, government departments or their employees.[8] In early academic research the definition of the term was confined to its ordinary dictionary terms as an independent referee, without power of sanction or appeal, between citizens and the government and its administration.[9]

Reif[10] defines the classical ombudsman as an office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, and who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his own motion and who has the power to investigate, recommend corrective action and issue reports.

2.2.2 Explanation of the model and the powers attributed

The Swedish Constitution of 1809 included the novel institution – the *justitieombudsman* – appointed by parliament with the powers to supervise the public administration and judiciary and to prosecute those who failed to fulfil their official duties.[11] The ombudsman was therefore considered a public-sector office. This is due to the fact that the ombudsman was appointed as a public official by the legislature, which guaranteed its independence from the executive.[12] The classical or first-

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7 Wiese 2016: 203 and Reif 2020: 11-12.

8 https://dictionary.cambridge.org, https://www.britannica.com and https://www.collinsdictionary.com (accessed on 8 June 2022).

9 Gregory and Giddings 2000: 2

10 Reif 2004: 2-3 and Reif 2020: 2.

11 Reif 2004: 5 and Reif 2011: 269-270.

12 Batalli 2015: 233.

generation ombudsman therefore investigates government administration to determine whether or not there has been illegal or unfair conduct. It can make recommendations for rectifying any wrongdoing uncovered, but does not have an express mandate to inquire into human rights breaches by the government.[13]

Since then, the Swedish model has been considered as the classical administrative ombudsman or first-generation ombudsman. This remained the only ombudsman for a considerable time.

2.2.3 The proliferation of the classical ombudsman

The next country to adopt an ombudsman was Finland, back in 1919, on a similar model as the Swedish one, although with more extensive powers.[14] The Finnish Ombudsman's powers was extended to include the initiation of criminal proceedings against the chairmen of the supreme and administrative courts and to be a public prosecutor over the highest officials of the state, which was intended to serve as a watchdog not only against the chairmen of the supreme and administrative courts, but also the highest officials in the state.[15] The Finnish Ombudsman ensured that there was access to justice and the courts. Shortly after the Second World War, the idea of ombudsman institutions took off and spread across Europe. A variety of more elaborate definitions for the institution are to be found in literature on the ombudsman and will be set out herein below. The definitions basically flow from the type of models of the institution that have proliferated over the years, as will be further shown below.

2.2.4 Expansion of the definition for a classical or first-generation ombudsman

Gregory and Giddings[16] quote Rowat (1968), who defines a classical ombudsman as an independent and non-partisan officer of the legislature. The appointment of the ombudsman is usually provided for in a country's constitution and he or she supervises the administration. The classical ombudsman deals with complaints from the public against administrative injustice and maladministration. This ombudsman in particular has the power to investigate and to criticize the administration's decisions, but not to

[13] Reif 2016: 28.
[14] Glusac 2019: 6; Batalli 2015: 234 and Reif 2020: 13.
[15] Batalli 2015: 234.
[16] Gregory and Giddings 2000: 3.

reverse it. Rowat, as quoted by Gregory and Giddings,[17] further argues that the use of the term 'ombudsman' should be restricted to institutions that has these unique criteria. It is clear from the onset and the reasons for the establishment of such an office that it would assist in bringing justice to people who do not have access to costly litigation.

In 1974, the International Bar Association in Vancouver provided the following definition of a classical ombudsman:

> The ombudsman is an office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.[18]

A further attempt to incorporate these distinguishing characteristics in a comprehensive definition is to be found in the by-laws of the International Ombudsman Institution (IOI) established in 1978.[19] In this regard, the ombudsman is defined as:

> The office of a person whether titled Ombudsman, Parliamentary Commissioner or like designation who has been appointed or elected pursuant to an Act of a legislature and whose role includes the following characteristics:
>
> 1. to investigate grievances of any person or body of persons concerning any decision or recommendation made, or any act done or omitted, relating to a matter of administration, by an officer, employee or member or committee of members of any organization over which jurisdictions exists;
> 2. to investigate complaints against government or semi government departments and agencies;
> 3. a responsibility to make recommendations resulting from investigations to organisations under jurisdiction;
> 4. to discharge the role and functions of an officer of the legislature or on behalf of the legislature in a role which is independent of the organisations over which jurisdiction is held; and

[17] Gregory and Giddings 2000: 3
[18] International Bar Association Resolution, Vancouver 1974.
[19] See discussion above at par.2.2.

5. to report the legislature or Parliament either directly or through a Minister on the results of its operations or any other specific matter resulting from an investigation.[20]

This, however, was not the end for the ombudsman. The institution continued to prosper so that many countries emerging from a totalitarian form of government saw the advantages of fitting the institution into their respective new constitutional regimes.[21] Denmark established an ombudsman model in 1953; so too, did New Zealand in 1962 and the United Kingdom in 1967.[22] This was an important landmark, opening the gates for the English-speaking world to the ombudsman concept. Gregory and Giddings[23] quote Sir John Robertson, a former New Zealand Chief Ombudsman and President of the IOI, who saw the value of the ombud institution as a valuable insurance against the reversion back to a period where human rights were seriously and inhumanely curtailed. These observations will become apparent in the discussion on the further generations of ombudsman.

2.3 The Second-Generation Ombudsman

It was ultimately Denmark that initiated the ombudsman offices or institutions' increasing popularity, by creating a new legal structure in the mid-1950s, which became the ultimate role model for its further development.[24] The Danish model is often referred to as the second-generation model in that it abandoned the strict Swedish legal approach and introduced a far less formal complaint structure, which will be set out in more detail below.[25] The main difference between the two is that the Swedish ombud acted as a prosecutor, whilst the Danish model was an ombudsman whose role was that of an investigator.[26]

In this regard, the decisions of a wide range of public authorities could be challenged, but never the ordinary legal courts.[27] These investigations result in recommendations

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20 International Ombudsman Institute, Membership By-Laws, Edmonton, Alberta, 1978; Seneviratne 2002: 9.
21 Gregory and Giddings 2000: 2; Reif 2011: 272.
22 Reif 2020: 13 and Seneviratne 2002: 1-2.
23 Gregory and Giddings 2000: 1-3.
24 Glusac 2019: 6 and Reif 2020: 3.
25 Glusac 2019: 6. Countries such as Norway, the Netherlands and United Kingdom adopted the Danish model. Countries such as New Zealand, Canada and Australia have also adopted Ombudsman institutions.
26 Lane 2000: 144; Reif 2011: 270.
27 Lane 2000: 144; Reif 2011: 270.

to the authorities, including parliament. This office ultimately developed into the chief institution for handling complaints against the public authorities.[28] In 1978, Edmonton[29] established the IOI to promote the office through research, education programmes and international conferences. Ombudsmen constituted the subject of interest for IOI at Alberta, Canada and the European Ombudsman. However it is noteworthy to concede that most powers of the second generation were also restricted to the classical models.[30]

2.3.1 Defining the second-generation ombudsman

The second-generation ombudsman draws on the definition of the first or classical ombudsman. However, to further draw on the aspects of investigations the IOI declared in the early 1980s, the following:

> The ombudsman is an independent and non-partisan officer (or committee of officers) often provided for in the Constitution, who supervises the administration. He deals with specific complaints from the public against administrative injustice and maladministration. He has the power to investigate, report upon, and make recommendations about individual cases and administrative procedures. He is not a judge or a tribunal, and he has no power to make orders or to reverse administrative action. He seeks solutions to problems by a process of investigation and conciliation. His authority and influence derive from the fact he is appointed by and reports to one of the principal organs of state, usually parliament or a chief executive.[31]

This implies that the institution needs considerable independence in order to fulfil its responsibilities effectively. In addition, the ombudspersons should be appointed by and answerable to the legislative branch of government in order to augment the institution's independence.

The next section discussed the proliferation of the second-generation ombudsman institution.

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28 Lane 2000: 145; Reif 2011: 270.
29 Edmonton AB Canada 1978 International Ombudsman Institution. See also Batalli 2015: 234 and Marshall and Reif 1999: 217.
30 Seneviratne 2002: 9.
31 Gregory and Giddings 2000: 4.

2.3.2 The proliferation of the second generation of ombudsman

During the course of the next three decades, the office multiplied rapidly at national, provincial and municipal levels of government. The concept spread throughout the liberal democracies of Western Europe, North America, the Caribbean, Australia and the Pacific region, and also reached parts of the Middle East, Africa and the Indian sub-continent.[32] Over and above the adoption of the institution in liberal democracies around the world, a third generation of ombudsmen institutions started emerging in the late 1970s. Since this period, governments have established hybrid or third-generation ombudsmen by giving one institution multiple mandates.[33] These additional mandates include the protection of human rights, fighting corruption and ensuring ethical conduct by elected public officials.[34] It is noteworthy to concede that, since the 1970s, many ombudsman institutions have been given human rights-related duties, and the classical or first-generation ombudsman institutions are increasingly transformed through the conferral of constitutional or legislative mandates also to protect human rights.[35]

2.4 The Hybrid/Third-Generation Ombudsman

The third generation of ombudsman was introduced by Portugal and Spain as hybrid or human rights ombudsman fighting maladministration.[36] This ombudsman is dubbed as hybrid, because it has a dual mandate.[37] This dual mandate includes both the power to focus on human rights violations as well as maladministration, which entails investigating poor government administration and claiming that government authorities have violated the states' human rights obligations.[38]

This model is prevalent in countries where there has been a collapse from authoritarian regimes to a democratic state. Sweden today, for instance, is governed by its 1974 Constitution and has four Parliamentary Ombudsmen, one of whom is a

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32 Gregory and Giddings 2000: 7. See also Reif 2004: 6-7.
33 Reif 2020: 14-20 and also Reif 2011: 271.
34 Reif 2020: 14-20 and Reif 2011: 271.
35 Rief 2020: 14-20 and Rief 2011: 271-272.
36 Glusac 2019: 6.
37 Reif 2011: 28 and Reif 2020: 14 -16.
38 Reif 2004: 8; 2011: 28.

Chief Parliamentary Ombudsman.[39] The Parliamentary Ombudsman has a dual mandate: on the one hand, he or she is responsible for supervising the rule of law in the public administration and the judiciary, and ensuring that the fundamental rights and freedoms of citizens are not encroached upon in the public administration.[40] The ombudsmen are further instructed to examine the observance of the human rights provisions contained in the Swedish Constitution, which therefore makes the ombudsman institution a form of human rights ombudsman.

With this approach, ombudsman institutions have been inaugurated as a human rights mechanism. By combining the concepts of the rule of law and human rights, hybrid ombudsmen have elevated the entire ombudsmen concept to a new level.[41] Over the course of the next decades, the proliferation of this most recent stage in the development of the ombudsman institution has been associated with numerous regime transformations, such as emerging democratic states.[42]

Countries in Latin America, the Caribbean, Central and Eastern Europe, Africa, Asia and the Pacific region have all introduced a hybrid human rights ombudsman in order to establish and strengthen democratic governance structures.[43] The first ombudsman in Africa was established by Tanzania in 1966, followed by a few more in the 1980s.[44] The popularity of ombudsmen only increased in Africa in the 1990s. This is also the case for South Africa when it became a democratic state in 1994.

2.4.1 Defining the hybrid ombudsman institution

Seneviratne[45] describes the definitions attached to the classical and second-generation ombudsman as comprehensive and unwieldly. In her view, it is not an appropriate description for the hybrid models that developed after the establishment of the ombudsman model of Denmark. She further argues that these definitions in fact disguise the fact that it must be remembered that there are significantly different interpretations of an ombudsman and what their functions are in the global

39 Reif 2004: 6.
40 Reif 2004: 6; 2011: 271.
41 Glusac 2019: 6.
42 Gregory and Giddings 2000: 7.
43 Reif 2004: 8; Reif 2011: 273-274.
44 Glusac 2019: 6; Reif 2011: 273-274.
45 Seneviratne 2002: 8.

community.[46] For example, in the UK the focus is on maladministration, whereas in some countries, the emphasis is on human rights. In South Africa there is the Public Protector for maladministration and the South African Human Rights Commission for human rights violations.[47]

Ombudsmen with a focus on human rights are often adopted by countries with emerging democracies. The reason for this is that ombudsman are seen as instruments that can develop democratic accountability and build good governance. [48] Ombudsmen are protectors of human rights and leaders in the fight against corruption, which is endemic in many developing and transitional economies. [49] In this regard, Seneviratne[50] quotes Hill's definition of an ombudsman to mean:

> A reliable person who for the purposes of legal protection of individuals as well as parliamentary control supervises almost all administrative bodies and civil servants. He or she cannot correct their decisions, but – based on submitted complaints or on own initiatives – he may criticize them.

Reif[51] argues that it has been recognized that even the first-generation or classical ombud plays a role in both human rights protection and in the implementation of the state's domestic and international human rights obligations. Thus, one way of looking at the human rights ombudsman is an adaptation of the classical ombudsman model.

It is, however, difficult to make a worldwide comparison, as it is further dependent on the extent to which procedures exist for the resolution of disputes before a formal complaint is lodged. In a well-established ombudsman system, the ombudsman is at the apex of a pyramid of grievance resolving machinery and is the last port of call when other procedures are exhausted.[52] It is further difficult, because not all those who fit the definition are called ombudsmen. The title of 'ombudsman' has been used by many nations when they established the institutions. However, as the models have been transplanted into and adapted by countries over the world, the name has often been changed to ensure a more gender-neutral name. Others take on the name relative to

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46 Seneviratne 2002: 8.
47 *Constitution* 1996: sec. 181(1)(a) and (b), respectively.
48 Seneviratne 2002: 8; Reif 2004: 8.
49 Seneviratne 2002: 8; Reif 2004: 8.
50 Seneviratne 2002: 8-9.
51 Reif 2011: 281.
52 Seneviratne 2002: 9.

their characteristics and powers.[53] For example, in Africa, some former French colonies have ombudsmen, but were called *mediateurs*, while in Botswana and South Africa the term 'public protector' is used.[54] Latin American countries have names such as *Provedor De Justica* (Provider of Justice) of Portugal and Public Defender for Jamaica and Commissioner for Human Rights of Poland.[55]

2.4.2 Explanation of the model and powers attributed to the hybrid/third-generation ombudsman

While the hybrid or third-generation ombudsman are provided with limited, classical powers, which may be effective, Reif[56] argues that governments should further bestow their human rights ombudsmen with as many additional functions and powers as their institutional and legal systems permit to support the institution's human rights mandate. In addition hereto, the hybrid or third-generation ombudsman often has additional powers and functions, for example, to take legal matters to constitutional courts for binding resolutions.[57]

2.4.3 The proliferation of the hybrid/third-generation ombudsman

The forces responsible for the growth of human rights ombudsmen include democratization, public institution building, comparative law influences, limited state resources, international and regional movements to establish national human rights institutions, and recent adoption of human rights treaties, along with other initiatives that would rely on national human rights institutions for domestic implementation of international human rights obligations.[58] In this regard, Reif[59] holds the view that the

53 Rief 2020: 10-11.
54 Glusac 2019: 5. Similarly, in Europe they have different names for the ombudsmen, for example, Peoples' Advocate (Albania), Chancellor of Justice (Finland) and Mediatore Europero (Italy).
55 Reif 2020: 10.
56 Reif 2011: 272.
57 Reif 2016: 28.
58 Reif 2011: 272. In South Africa the South African Human Rights Commission was established to serve this purpose.
59 Reif 2011: 272.

hybrid ombudsmen should engage in appropriate institutional practices to maximize their ability to protect and promote human rights.

It has been established that ombudsman institutions can be described as being classical or hybrid by nature, with most of the latter taking the form of the human rights ombudsman.[60] Whilst both models have some identical powers such as those of complaints, investigation, recommendation, public reporting and sometimes own motion investigation and inspection of facilities.[61] In South Africa, two separate institutions are borne out of Chapter 9 of the *Constitution*, one such institution responsible for overseeing the administration, namely the Public Protector and the second institution taking the form of a human rights commission responsible for human rights violations.

Next follows a discussion on the popularity of the worldwide ombudsman office, which led to the proliferation of the office.

3. POPULARITY OF THE OMBUDSMAN

As to why the practice of the ombudsman has flourished and multiplied, part of the explanation, it would seem, is to be found in the perceived need, increasingly acknowledged in democratic states, to promote accountable administration in an era of big governments.[62] In this regard, and as will become apparent through arguments later on, researchers demonstrate that democratic governments see an advantage in finding some means to make governments more accountable to the people they serve and to eliminate the political fallout resulting from maladministration at the periphery of government activity.[63] This was envisaged by softening the relationship between the governed and the government in order to create a fair and just government, which is considered an important element in the search for a modern democratic state.[64]

The classical or first generation ombudsman is an institution that uses 'soft powers' of persuasion and cooperation to control conduct, rather than coercive or adjudicative

[60] Reif 2004: 393; Reif 2016: 27.
[61] Reif 2011: 28.
[62] Gregory and Giddings 2000: 1; Reif 2011: 281.
[63] Gregory and Giddings 2000: 1; Reif 2011: 281-282.
[64] Gregory and Giddings 2000: 1; Reif 2011: 270.

means.[65] Reif[66] further states that there are schools of common thought amongst the research fraternity that common law and administrative law refer to the ombudsman as a non-judicial alternative for overseeing public administration.[67] Comparative law scholars reference the ombudsman in discussions of comparative administrative law, thus using it as an example of a public sector institution that has successfully been transplanted in different legal systems around the world to enhance and improve not only accountability, but also access to justice.[68]

Against this background, governments in countries around the world were searching for constitutional devices that would improve citizens' rights and their ability to enforce accountability in the political and administrative processes. There has been an exponential spread in the institutions around the world, and by the 1980s, the ombudsmen idea had been accepted by almost every country in Western Europe. By the end of the 1990s, more than 90 countries around the world had ombudsman offices, including South Africa.[69]

With the emergence of any new democratic state, there are concerns regarding the protection of human rights and for the growth of public education and participation. This has been identified in the previous chapters where the importance of international law instruments were highlighted.[70] With these new concerns, ombudsmen came to be seen as useful in modern growing democratic states, with the increase of powers given to the state (government).[71] This resulted in a need for additional protection against possible administrative arbitrariness, particularly as there was often no redress for those aggrieved by administrative decisions.[72]

Not only has the number of countries in which an ombudsman operates grown substantially over the years, but there has also been an exceptional diversification of ombudsman offices. It is this diversification of the abovementioned models that is important for the focus of this dissertation, insofar as it relates to the exploration of

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65 Reif 2011: 270.
66 Reif 2011: 270.
67 Reif 2011: 270.
68 De Meene and Van Rooij 2008: 1-23. See also Bonturi and O'Reilly 2018: 1-39; Reif 2004: 1-433.
69 Seneviratne 2002: 1.
70 See discussions in ch. 1, 2, 3, 4 and 5.
71 Seneviratne 2002: 10-11.
72 Seneviratne 2002: 11.

improved access to justice, enhanced cooperation and an alternative to litigation for administrative action breaches for education stakeholders.

The popularity of these offices are further attributed to the fact that it is free for the users thereof, and in terms of the volume of cases they deal with they are more cost effective for the government or institution that creates and funds the office.[73] In the light hereof, ombudsmen would therefore present good value for money for the parties involved, as the costs would be kept to a minimum because, unlike the courts, legal representation is neither required nor advantageous.[74]

Ombudsmen are useful for filling the gaps in traditional court systems for improving access to justice and addressing administrative failures and the protection of human rights.[75] The popularity of the institution can be seen from the way this intended public sector body has been copied in the private sector as well. In South Africa, universities, much like schools, are the perfect breeding ground for conflict and disputes. In 2011, the University of Cape Town (UCT) was the first university to establish an ombuds office as a specialist conflict resolution mechanism to receive confidential complaints, concerns or inquiries from students, parents and staff about possible improprieties and broader systemic problems within the institution.[76] The ombud is also required to identify gaps in policies and provide feedback to the university in order to point out urgency to any hotspots identified by the office.[77] Since then, six other universities across South Africa have established ombuds offices. The advantages of ombudsmen mirror the disadvantages with a traditional dispute resolution forum, the courts.[78] In this regard, court processes are notoriously slow and expensive and do not always provide an effective remedy. Ombudsman institutions can provide these alternative remedies.

Seneviratne[79] argues that the problems associated with the civil justice system can be side-stepped by the use of an ombudsman as a non-judicial mechanism.[80] With this

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73 Seneviratne 2002: 11; Gregory and Giddings 2000: 15-18.
74 Seneviratne 2002: 11; Gregory and Giddings 2000: 15-18.
75 See discussions at ch.4 and ch.5:6.
76 Mguqulwa 2015: 1-3.
77 Mguqulwa 2015: 1-3. Report by the UCT ombud that every varsity should have an ombud.
78 Seneviratne 2002: 11. See also Gregory and Giddings 2000: 15-18.
79 Seneviratne 2002: 11. See also Gregory and Giddings 2000: 15-18.
80 See discussion in ch. 5.

argument in mind, it is safe to say that ombudsmen therefore present an attractive alternative to the courts. Not only would they be in a position to overcome the procedural hurdles associated with litigation; they also provide remedies where none may be available in the courts.[81] Ombudsmen would further be of assistance to those who do not have the funding to approach the courts. For example, and as will be illustrated below, ombudsmen in the public sector are concerned with issues about the administration where there is no legal remedy when things go wrong. Ombudsmen with human rights functions are also considered as non-judicial mechanisms protecting individuals from government or private actors from violating their rights.[82] In this sense, ombudsmen can be considered as genuine alternative dispute mechanisms to the courts. It must also be noted that not all the ombudsman institutions are officially named 'ombudsman', despite their common structural and functional characteristics as set out above.

Next follows a brief discussion on the diversification of the ombudsman model, which is important to highlight.

4. DIVERSIFICATION OF THE OMBUDSMAN INSTITUTION

Gregory and Giddings[83] highlight in their research the diversification of ombudsman offices over the years. One such significant diversification is the government single-purpose ombudsmen, which is an important model to consider in the context of this dissertation. It is noteworthy to concede that the idea of an ombud in a specific sector will ensure better knowledge and understanding of the needs of the public, but also the challenges to provide for the needs in a specific sector; thus the notion of expert knowledge of a field and how it will enhance access to justice.

Take, for instance, the CCMA, with so many cases in the labour sector that call for specialisation or technical issues such as motors, cars and the motor car ombuds or the consumer protection as a specialist field. The main focus should be on specialisation in a core area that is advantageous to the public and children in particular. Children, for instance, are often affected by what happens during litigation

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81 See discussion in ch. 5:6.1, 6.1.1-6.1.2 and 6.2, 6.2.1-6.2.4.

82 Reif 2011: 273.

83 Gregory and Giddings 2000: 8-10.

proceedings, but are not party to the process and therefore there is no explicit focus on their best interests. The question then arises whether an ombud would be in a position to ensure a dedicated focus on the best interests of children in disputes pertaining to education – e.g. between the PDEs and SGBs?

4.1 Government Single-Purpose Ombudsmen

Government single-purpose ombudsmen is a type of ombudsman office that is considered as a dedicated, special mandate or specialty ombudsman.[84] Instead of dealing with the whole spectrum of government like the current role of the Public Protector in South Africa, its mandate is limited to a specific area of administration, or it is responsible for protecting the interests of only one category of complainants. Such examples are the Military Ombudsman in Norway, Prison Ombudsman in Canada and the Police Complaints Commission in Canada.[85] Sweden and Norway have established the Children's Ombudsmen.[86] In South Africa these are the Chapter 9 constitutional institutions established to focus on specific mandates, for example, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,[87] the Commission for Gender Equality,[88] the Auditor-General,[89] and the Electoral Commission.[90] Another example of specialist ombudsmen established are those created by universities (Higher Education Institutions) in South Africa to deal with conflict at the level of the university.[91]

The international instruments has promoted the establishment of national human rights institutions for children in particular, primarily ombudsmen for children, since the 1990s.[92] One such important instrument is the United Nations Convention on the

84 Gregory and Giddings 2000: 8.
85 Gregory and Giddings 2000: 8.
86 Gregory and Giddings 2000: 9.
87 *Constitution* 1996: sec.181(1)(c)
88 *Constitution* 1996: sec.181 (1)(d).
89 *Constitution* 1996: sec. 181(1)(e).
90 *Constitution* 1996: sec. 181 (1)(f).
91 Naidu 2021: 1-9; Mguqulwa 2015: 1-3. See also University of Cape Town Ombuds Office Annual Report 2019: 1-18.
92 See discussion at ch. 2: 2.1.2 and ch. 4: 3.1.1.4, 3.1.1.5 and 3.1.1.8. See also Reif 2004: ch 9. 289-331.

Rights of the Child, which was adopted on 20 November 1989, and came into force on 2 September 1990.[93]

The omission in this Convention is that there is no express provision calling for the establishment of ombudsmen for children or other national human rights institutions. Notwithstanding the lack of an express provision, many nations thought it pertinent to establish a children's ombudsman to serve as a non-judicial mechanism to monitor and assist in the domestic implementation of the international requirements on the rights of the child.[94] Such an institution that can address the human rights and needs of children can act as a mechanism to process complaints against the state concerning the latter's treatment of children. Reif[95] argues that the establishment of such institutions and the strengthening thereof using appropriate criteria will assist states in fulfilling their article 4 obligations in terms of the Convention.

Effective since 2021, the Western Cape Provincial Government in South Africa has established an Ombudsman office for children through its Provincial Constitution, known as the Western Cape Commissioner for Children.[96] Various others countries such as Canada,[97] Denmark,[98] New Zealand[99] and Ireland[100] have established ombudsman offices specifically mandated to deal with challenges related to children.[101] It is noteworthy to concede that these institutions do not have an express

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93 CRC 1989. The CRC includes important rights linked to the child which includes the right to: life (art. 6(1)), freedom of expression (art. 13), freedom of thought, conscience and religion (art. 14), freedom of association (art. 15), privacy (art. 16), freedom from torture or other cruel, inhuman or degrading treatment or punishment (art. 37). Further economic, social and cultural rights in the CRC include the right to: health (art. 24) and education (art. 28 and 29). State Institutions who adopted the CRC must use the "best interests of the child" as their primary consideration in all actions concerning children. See further discussion at ch. 2 of this dissertation.

94 Reif 2004: 295.

95 Reif 2004: 295.

96 *Constitution of the Western Cape* 1/1998: ch. 9. The Western Cape Commissioner for Children is a chapter 9 institution in terms of the Provincial Constitution and is therefore similar to the Chapter 9 institutions of the *Constitution*.

97 Canadian Council of Child and Youth Advocates accessible at http://www.ccya.ca/content/index.asp?langid=1 accessed on 12 September 2020.

98 The National Council for Children accessible at https://www.boerneraadet.dk/english (accessed on 12 September 2020).

99 Commissioner accessible at https://www.govt.nz/organisations/childrens-commissioner/ (accessed on 12 September 2020).

100 Glendenning 2004: 133-143.

101 The European Network of Ombudspersons for Children include a specific model which was adopted by European countries: Austria, Belgium, Iceland, Norway and Sweden accessible at https://www.humanrights.gov.au/our-work/childrens-rights publications (accessed on 12 September 2020).

specialist mandate on education, but cover a broader scope to ensure it covers all rights of children as is envisaged in international law instruments, save for the Education Ombudsman established in Ohio.[102]

Government, single-purpose ombudsmen for children make sense, given the complex challenges in states that affect children. Reif[103] quotes Brent Parfitt, a former British Columbia Deputy Ombudsman for Children and Youth, who states that

> [c]hildren and youth who are affected fundamentally by government decisions are frequently without a choice in the process of that decision making and without a voice if the decision affects them adversely.

The United Nations Committee on the Rights of the Child occasionally recommends to states without a specific national institution for children that they establish one to implement the international requirements domestically. These recommendations have become more frequent since 1996, with the committee giving positive recognition to the states that have established an ombudsman or equivalent institution for children.[104]

The committee took it a step further and in October 2002, issued General Comment No. 2 on the role of national human rights institutions in the promotion and protection of the rights of the child.[105] In this regard, General Comment 2 requires of states to introduce a single-sector human rights ombudsman specific for children, apart from the ordinary other institutions established to deal with human rights.[106]

General Comment 2 does, however, take cognizance of the fact that it may be financially difficult for certain states to establish separate ombudsmen for children and therefore requires of a state's general human rights institution to include a specific focus on the rights of children.[107] This would therefore permit states to use their human

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102 Coles 1997: 1-2.
103 Reif 2004: 294.
104 Rief 2004: 296.
105 Committee on the Rights of the Child, The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, GC 2, UN Doc. CRC/GC/2002/2.
106 CRC/GC/2002/2: par. 7. It is the view of the committee that every state needs an independent human rights institution with responsibility for promoting and protecting children's rights. The committee's principal concern is that the institution, whatever its form is able to monitor, promote and protect children's rights independently and effectively. It is essential that promotion and protection of children's rights is "mainstreamed" and that all human rights institutions existing in a country work closely together to this end.
107 CRC/GC/2002/2: par. 6.

rights ombudsman or commission or the classical ombudsman to cover children's rights protection. However, in this regard, the committee for the CRC cautions that an identifiable commissioner or ombudsman specifically responsible for children's rights, or a specific division or section responsible for children should be created within the institution.

With this being said, it is necessary to pause at this juncture to point out the following. In South Africa, the Public Protector and the South African Human Rights Commission are established in terms of the *Constitution*. The Public Protector serves as the classical ombudsman tasked to monitor and play an oversight role over the broad administration (all government departments in South Africa). The mandate is broad and it is argued that, given this broad mandate, there is minimal opportunity to engage a specific target group such as children, let alone the education sector's numerous challenges.[108] The South African Human Rights Commission is tasked with the broad mandate for all South African citizens where there are human rights violations. As highlighted above, the mandate is broad and not designated specific to children's rights. Only the Western Cape Province in South Africa has created an ombudsman specifically for children. In this regard, South Africa is non-compliant with the international law standards required for children.[109]

It is further argued that even if the South African government were to establish an ombudsman specific for children, the mandate of the ombudsman would yet again be broadly focused on all rights of children, which are vast. Over the years, education has evolved and is considered a specialist field, with challenges specific to the sector that

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[108] With corruption and state capture and all the investigations that follow from the changes are even less that there will be a specialised focus on the rights of children/education rights. However, the poor educational outcomes in general require that there should be an explicit accountability mechanism to ensure that focused attention is given in the sector and that those responsible for the realisation of right can be held accountable – outside the political domain – e.g. MECs cannot be held accountable in terms of the *SASA* – because they are political appointments. Similarly so with sexual abuse of children and use of corporal punishment – teachers are protected, and parents and the community do not know whom to approach, seen in the light of the light sentences given by the courts and failure to suspend/fire educators. Failure by the administration to deal with these issues is an area that can be investigated by an ombudsman office.

[109] Commissioner for Children in the Western Cape accessible at https://westerncape.gov.za/news/commencement-commissioner-children-western-cape (accessed on 12 September 2020). This article highlights that this type of office is the first of its kind in South Africa unique to the Western Cape Province only.

require to be addressed. This has been discussed across Chapters 2 to 5 of this dissertation.

The trend in the development of ombudsmen institutions worldwide relates to the evolution of the model and the functions performed. Along with the increase in the number and the types of offices globally there have also been significant changes and additions to the functions originally associated with classical ombudsmen.

According to Glusac,[110] the two most recognizable ombudsman models are those that have an administrative and human rights function, which are some of the functions and powers attributed to ombudsman offices dealing with children.

Next follows an analysis of the ombudsman office for children with specific reference to the role they play in education in Denmark, Ireland and Poland. A further brief exploration of the Western Cape Ombudsman office will also be undertaken. However, given that this is a fairly new office, limited information is available. An exploration of the various ombudsman models for children will be discussed next.

4.1.1 The Ombudsman for Children in Ireland

In 2003, Ireland appointed its first Ombudsman for Children.[111] The Ombudsman was signed into office by the President of Ireland for a term of six years pursuant to the *Ombudsman for Children Act.*[112] One of the purposes of the Ombudsman for Children is to promote the rights and welfare of children by encouraging public bodies, schools and voluntary hospitals to develop policies, practices and procedures to promote the rights and welfare of children.[113] Ireland recognized the need for an independent person to act as an advocate for children, thus promoting their welfare and rights reflecting the consensus that children can be holders of certain rights enforceable by law.[114] A further need for the office is due to the fact that the Public Services Ombudsman, who operates much like the Public Protector in South Africa, is empowered to investigate action taken in the performance of administrative functions across the public sector, whereas the Ombudsman for Children is to promote the rights

[110] Glusac 2019: 7. Reif 2004: 1-433. See also Reif 2011: 269-310, and Reif 2016: 27-52.
[111] Glendenning 2004: 133-143.
[112] 22/2002.
[113] 22/2002: sec. 7(1)(a)-(b).
[114] Glendenning 2004: 133.

and welfare of children, to investigate individual complaints made by, or on behalf of children, arising in the course of the administration of public bodies, schools and/or hospitals.[115]

4.1.1.1 Ireland's ombudsman for children dealing with education

Ireland's Education (Welfare) Act of 2000 provides for the entitlement of every child in the State to the constitutionally guaranteed certain minimum education. Notwithstanding the commencement of this Act, it was estimated that approximately one thousand primary school-going children fail annually and are unable to access any form of second-level schools.[116] In an attempt to eradicate these challenges, the *Ombudsman for Children Act*[117] was enacted in Ireland.

4.1.1.2 Broad functions of the Ombudsman for Children

As stated above, this ombudsman has a dual function in promoting children's rights and welfare and to examine and investigate complaints against public bodies, voluntary hospitals and schools.[118] In promoting children's rights and welfare, the ombudsman may, *inter alia*, advise the Minister of Health and Children or other Ministers of the Government on policy development and coordination relating to children.[119] The ombudsman is required to encourage the development of policies, practices and procedures designed to promote the rights and welfare of children and promote public awareness amongst members of the public.[120] The Ombudsman is further required to collect and disseminate information on matters relating to the rights and welfare of children,[121] to promote awareness among members of the public relating to the rights and welfare of the children and how rights can be enforced,[122] to highlight issues relating to the rights and welfare of children and to exchange information and cooperate with other ombudsmen for children (by whatever name they

[115] Glendenning 2004: 133.
[116] Glendenning 2004: 1345
[117] 22/2002.
[118] 22/2002: sec. 7(1)(a)-(b).
[119] 22/2002: sec. 7(1)(a).
[120] 22/2002: sec. 7(1)(b).
[121] 22/2002: sec. 7(1)(c).
[122] 22/2002: sec. 7(1)(d).

are called) from other states[123] and to monitor and review legislation affecting children.[124]

A further important function of the Irish Ombudsman is to establish structures to consult regularly with groups of children that he or she considers to be representative of children and to give weight to the views of children in accordance with their age and understanding of the issue.[125] The Ombudsman may further undertake, promote or publish research into the rights and welfare of children,[126] and may at his or her own initiative, or at the request of any Minister of the Government, give advice on any matter, including the implementation of legislation relating to the welfare and rights of children.[127]

4.1.1.3 Scope of the Ombudsman's powers in schools in Ireland

With reference to schools in Ireland, the Ombudsman may investigate any administratively deficient action taken by a school in connection with that school's performance of its functions under section 9 of the *Ireland Education Act* of 1998, if the action affected the child in question adversely and provides that the internal grievance procedures, as envisaged in section 28 of the Act, have first been exhausted.[128] The Ombudsman for Children may investigate administrative action

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123 22/2002: sec. 7(1)(e) and (f).

124 22/2002: sec. 7(1)(g) and (h).

125 22/2002: sec. 7(2)(a) and (b).

126 22/2002: sec. 7(3).

127 22/2002: sec. 7(4).

128 22/2002: sec. 9 provides: A recognized school shall provide education to students that is appropriate to their abilities and needs, without prejudice to the generality of the foregoing, it shall use its available resources to (a) ensure that the educational needs of all students, including those with a disability or other special educational needs, are identified and provided for; (b) ensure that the education provided by it meets the requirements of education policy as determined from time to time by the Minister including requirements as to the provision of a curriculum as prescribed by the Minister in accordance with section 30; (c) ensure that students have access to appropriate guidance to assist them in their educational and career choices; (d) promote the moral, spiritual, social and personal development of students and provide health education for them, in consultation with their parents, having regard for the characteristic spirit of the school; (e) promote equality of opportunity for both male and female students and staff of the school; (f) promote the development of the Irish language and traditions, Irish literature, the arts and other cultural matters, ensure that the parents of a student, or in the case of a student who has reached the age of 18 years, the student have access in the prescribed manner to records kept by that school relating to the progress of that student in his or her education; (h) in the case of schools located in a Gaeltacht area, contribute to the maintenance of Irish as the primary community language; (i) conduct its activities in compliance with any regulations made from time to time by the Minister under section 33; (j) ensure that all the needs of personnel involved in management functions and staff development needs generally in the school are identified and provided for; (k) establish and maintain systems whereby the efficiency and effectiveness of its operations can be assessed, including the quality and effectiveness of teaching in the

taken by or on behalf the school in terms of section 9 if the action has or may have affected a child adversely, and the actions were, or may have been taken without proper authority, taken on irrelevant grounds, the result of negligence or carelessness, based on erroneous or incomplete information, are improperly discriminatory based on an undesirable administrative practice or otherwise contrary to fair or sound administration.[129]

Following the investigation and where the Ombudsman has found that an action or decision has affected the rights of a child adversely, the Ombudsman can make recommendations to the school concerned, namely that the matter in regard of which the action was taken be further considered, that measures or specified measures be taken to remedy, mitigate or alter the adverse effect of the action, or that the reasons for taking the action be supplied to the Ombudsman.[130]

The Ombudsman may not investigate matters related to the rights and welfare of the child where civil legal proceedings have been instituted, or where a statutory right of appeal to a court exists, or where the child affected by the action has a right of appeal, reference or review to, or before a person other than a public body or, if appropriate, the school.[131] The reason for this stems from the internal appeal procedure as envisaged by Section 29 of the *Ireland Education Act* of 1998, which provides for an appeal to an Appeals committee, which comprises an inspector and any such other persons as the Minister may deem appropriate.[132]

school and the attainment levels and academic standards of students; (l) establish or maintain contacts with other schools and at other appropriate levels throughout the community served by the school; and (m) subject to this Act and in particular section 15(2)(d), establish and maintain an admissions policy which provides for maximum accessibility to the school.

129 22/2002: ch. 4, sec. 8.

130 22/2002: ch. 5, sec. 13(3).

131 22/2002: sec.11 (1)(a)(i) to (iii).

132 *Ireland Education Act 1998*: sec. 29 provides: Where a board of management or a person acting on behalf of a board: (a) permanently excludes a student from a school; or (b) suspends a student from attendance at a school for a period to be prescribed; or (c) refuses to enrol a student in a school; or (d) makes a decision of a class which the Minister, following consultation with patrons, national associations of parents, recognized school management organisations, recognized trade unions and staff associations representing teachers, may from time to time determine be appealed in accordance with this section; the parent of the student, or in the case of a student who has reached the age of 18 years, the student may, within a reasonable time from the date that the parent or student was informed of the decision; and following the conclusion of any appeal procedures provided by the school or the patron, in accordance with section 28, appeal that decision to the secretary general of the Department of Education and Science and that appeal shall be heard by a committee appointed under subsection (2).

4.1.1.4 The independence of the office of the Ombudsman for Children

As stated the above, the President appoints the Children's Ombudsman and it is intended for the office to be independent in the performance of his or her functions under the *Ombudsman for Children Act.*[133] The independence of the office is, however, compromised by the provisions of section 11(4) of the Act, which strikes at the very core of the main characteristic of any ombudsman office, i.e. the independence of the office.[134]

The appointment of an Ombudsman for Children was indeed a significant step forward for Ireland. The Ombudsman has a valuable opportunity to engage with schools, teachers and other school staff in their mutual concerns for children's rights and to encourage policies, practices and procedures to promote children's rights and welfare. It is noteworthy to concede that the manner in which schools are run in Ireland differs from the South African school context, where the *Schools Act* envisages a partnership relationship between all education stakeholders.

4.1.2 The National Council for Children in Denmark

The National Council for Children (NCC) in Denmark works to safeguard the rights of children and young people in Denmark.[135] The United Nations Convention on the Rights of the Child lay an important foundation for the NCC in respect of children's rights and interests in society.[136] As a result hereof, the Denmark (Danish Law) saw the need to embody the spirit and letter of the Convention. The NCC was initially established in 1994 for a trial period of three years. In 1997, the Danish Parliament elected to make the NCC a permanent feature. The NCC was established in

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133 22/2002.

134 22/2002:sec. 11(4) provides Where a Minister of the Government so requests in writing (and attaches to the request a statement in writing setting out in full the reasons for the request), the Ombudsman for Children shall not investigate, or cease to investigate, an action specified in the request, being and action of: (e) a Department of State whose functions are assigned to that Minister of the Government, or (f) a public body (other than a department of state) whose business and functions are comprised in such a department of state or in relation to which functions are performed by such a department of state.

135 National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).

136 National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).

pursuance of Section 88 of the *Danish Act*[137] on the Rule of Law and Administration in Social Areas.

4.1.2.1 Broad functions of the National Council for Children in Denmark

The NCC assesses the conditions under which children in Denmark live in relation to the United Nations Convention on the Rights of the Child. The Council also speaks out on behalf of children in public debate and focuses particularly on factors that may have an unhealthy influence on children's lives and development.[138] Where legislation or practice directly ignores or fails to accommodate children's needs, the NCC voices its concerns and brings it to the government's attention.

The NCC further holds the view that children have their own opinions and that a child's description of their thoughts, opinions and experiences are important contributions to the development of society's view of children and their involvement as citizens with rights.[139] The NCC states that children's attitudes, views and recommendations can inform the policy decisions and make policy more relevant to children.

Of interest is the fact that the NCC panel consists of around 2 500 children (aged approximately 13) from across the country who volunteer their opinions on a variety of subjects taken by the Council. A similar panel of approximately 1 000 children aged between 4 to 6 years was established in 2012 to provide insights into the opinions, perspectives and experiences of pre-school children.[140]

The NCC has actively been working together with children on aspects of children in the psychiatric healthcare system, children placed in alternative care, children affected by their parents' divorce, the influence of media on children, bullying, physical punishment, sexual abuse, the physical school environment and inadequate parental care and control. The NCC disseminates the views of children to the public at large, for example, child experts, politicians, children and others with an interest in the field

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137 *Danish Act* 453 of 1997.

138 National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).

139 National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).

140 National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).

of children's issues and rights.[141] The NCC closely monitors the developments of the international standards, and in the Danish reporting process, they contribute to the United Nations Committee on the Rights of the Child assessment of Danish conditions by providing supplementary reports to the committee based on the knowledge and insights into the conditions under which children in Denmark live.[142]

4.1.2.3 Scope of powers for the National Council for Children in schools

Like the Irish Ombudsman for Children, the NCC deals with all aspects of children's lives; it is not limited to education only. As highlighted above, the NCC's approach is to obtain the opinions and views of children and to disseminate it to the public at large. For instance, issues that would arise in school that children face are, for instance, smoking in school, the school environment, sexual abuse, physical punishment and bullying.

4.1.2.4 Independence of the National Council for Children

The NCC is politically independent and acts on its own decisions. The Council is linked administratively with the Ministry of Children, Gender Equality, Integration and Social Affairs.[143] In connection with legislative or other initiatives significant to children, the NCC is available for consultation. The NCC can request that public authorities account for decisions and administrative practice in the NCC's focal areas. However, the NCC does not have a mandate to deal with individual complaints. The NCC has an interdisciplinary composition consisting of a chairperson and six members.[144] The chairperson is appointed by the Ministry for Social Affairs and the six other members are nominated by organisations that work in the area of children's affairs and are selected by the Minister for Social Affairs.[145] The term of appointment is a period of three years.

[141] National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).
[142] National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).
[143] National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).
[144] National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).
[145] National Council for Children accessible at https://www.boermeraadet.dk/english (accessed on 12 September 2020).

4.1.3 The Ombudsman for Children in Poland

The Ombudsman for Children in Poland has been present in the Polish domestic legal system since 1997 and has gone a long way towards the point where it is now perceived as one of the most effective ombudsmen for children in the world.[146] The Ombudsman for Children, previously modelled on the Norwegian model, did not survive even a decade in that form.[147] The Ombudsman for Children is provided for in the *Constitution of the Republic of Poland*[148] *(Pol. Konstytucja Rzeczypospolitej Polskiej)*. An ombudsman for children is expressly provided for in the Polish *Ombudsman for Children Act* (OCA),[149] which provides for the protection of rights of the child as set forth in the Polish Constitution and the CRC.

4.1.3.1 The independence of the Ombudsman for Children in Poland

The Ombudsman for Children is designed to be independent, which can be inferred from article 7(1) of the *OCA*.[150] Even though the majority of the provisions concerning the Ombudsman for Children are statutory by nature, its independence is further concretized by the Polish Constitution. This underlines the permanence of the institution, as the constitutional amendment process is specifically designed to prevent frequent amendments.[151]

4.1.3.2 The powers of the Ombudsman for Children in Poland

At first the Ombudsman was equipped with powers that would follow an alternative dispute resolution approach, such as the right to make recommendations and

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146 Piechota 2009: 391-392.

147 Piechota 2009: 404.

148 2/1997: Art. 72. (1) The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. (2) A child deprived of parental care shall have the right to care and assistance provided by public authorities. (3) Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, as far as possible, give priority to the views of the child. (4) The competence and procedure for appointment of the Ombudsman for Children shall be specified by statute.

149 6/2000: Art. 3(2). The Ombudsman acts to protect the rights of the child, such as the right to life and the right to healthcare, the right to grow up within a family, the right to adequate social conditions and the right to education.

150 According to this provision the institution shall be independent from other state authorities and responsible exclusively to the Sejm on terms prescribed by law.

151 Piechota 2009: 400.

requests.[152] The institution is not entitled to use legal powers, such as the ability to initiate proceedings before competent authorities (such as the Polish Constitutional Tribunal, administrative courts or other courts), or to appeal against final court judgments and administrative decisions.[153] These powers remained exclusively with Poland's 'general' Ombudsman.[154] It was, however, possible for the Children's Ombudsman to transfer cases to the 'general' Ombudsman in cases where there is a need for legal powers in the form of the courts. It was only after the amendment of the Polish *Ombudsman for Children Act* in 2008 that it extended some these powers to the Ombudsman.[155]

The *OCA* requires that the Ombudsman for Children, while executing its functions, must have regard and take into account the best interests of the child.[156] The Ombudsman for Children is entitled to take actions in a manner compatible with the relevant provisions of the *OCA* to ensure the full and harmonic growth of the child with respect for its dignity and subjectivity.[157] According to article 9 of the Act, the Ombudsman for Children may take actions on its own motion, taking into account any information coming from citizens or their organizations that indicate the violations of the rights or the welfare of the child.[158] The Ombudsman for Children is required to inform individuals and organizations that serve as a source of information about the outcome of the case.[159]

Since the amendment of the *OCA,* the institution has had several powers at its disposal. For example, it may conduct an investigation without any prior notice.[160] It is also entitled to demand from authorities, organisations or institutions both an explanation and information, as well as providing it with relevant documentation, including documents covering personal data.[161] The body may also initiate civil

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152 Piechota 2009: 395.

153 Piechota 2009: 393-395.

154 Piechota 2009: 395.

155 24/2008: Art. 10(1)3. The Ombudsman for Children is authorized to institute civil proceedings and to participate in pending proceedings, executing the same powers as the public prosecutor.

156 Ombudsman for Children Act 6/2000: Art. 1(3).

157 Ombudsman for Children Act 6/2000: Art. 1(3).

158 Ombudsman for Children Amendment Act 24/2008: Art. 10(1)1.

159 Ombudsman for Children Amendment Act 24/2008: Art. 10(1)2.

160 Ombudsman for Children Amendment Act 24/2008: Art. 10 (1)1. In South Africa cognizance will have to be taken of the recent implementation of the provisions related to the Protection of Personal Information Act 4 of 2013 when dealing with personal information of individuals.

161 Ombudsman for Children Act Amendment 24/2008: Art. 10 (1)2.

proceedings, or may participate in pending civil proceedings, therefore exercising similar functions to a public prosecutor.[162] The body is also entitled to initiate administrative proceedings, make complaints to the administrative court and to participate in pending proceedings.[163]

Apart from these powers, the Ombudsman for Children is further empowered to conduct research in preparation of his or her own expertise or the making of an opinion for his own purpose.[164] Important is that the demand for confidentiality of alleged victims and informers is protected, as the Ombudsman is not allowed to disclose the information that could lead to revealing the identity of the complainant, if this would be necessary to protect freedoms, rights and interests of individuals.[165]

The amended version of article 10a(1) of the *OCA*[166] further empowers the Ombudsman to make a request to competent authorities, organizations or institutions for undertaking necessary actions for the benefit of the child that would be within the scope of the authority, organization or institution. The Act further requires that the authorities to which such a request is made must undertake such actions, but must also immediately inform the Ombudsman no later than thirty days about the action or the position taken.[167] In the event that the institution or authorities refuse or fail to take the necessary action, or if the Ombudsman does not share the institution or authorities' position, it may refer the matter to the competent body, asking for it to take the necessary action.[168]

Further powers relate to incidents where the Ombudsman is of the view that the rights or welfare of the child was infringed by the above-mentioned entities. In this case, the Ombudsman is entitled to demand disciplinary proceedings or imposition of regulatory sanctions.[169] Authorities, organizations and institutions are obliged to cooperate with the Ombudsman by, *inter alia,* providing the office with access to their case files and

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[162] Ombudsman for Children Act Amendment 24/2008: Art. 10 (1)3 and 4.
[163] Ombudsman for Children Act Amendment 24/2008: Art. 10 (1)5.
[164] Ombudsman for Children Act Amendment 24/2008: Art. 10 (1)7.
[165] Ombudsman for Children Amendment Act 24/2008: Art. 10 (2).
[166] 24/2008.
[167] Ombudsman for Children Amendment Act 24/2008: Art. 10a(3).
[168] Ombudsman for Children Amendment Act 24/2008: Art. 1 0a(4). This position is similar to the view of the South African courts that the Public Protectors findings must be implemented unless set aside by a court of law.
[169] Ombudsman for Children Amendment Act 24/2008: Art. 10a(5).

facilitating it with relevant information and explanations, including the ones concerning the factual and legal basis for their decisions.[170]

In addition hereto, the Ombudsman is also tasked to cooperate with societies, civil society movements, other associations and foundations acting for the rights of the child.[171] The Ombudsman will present his evaluations and conclusions to the competent authorities that aim at securing effective protection of the rights and welfare of the child and further to improve the procedures adopted by the above-mentioned authorities, organizations and bodies.[172]

Another important power is that the Ombudsman is entitled to make a referral to the competent authorities, demanding them to execute their legislative initiative powers, as well as to encourage them to pass new laws or amend existing laws.[173] In turn, the authorities are required to provide their views towards the Ombudsman's request within a thirty-day period.[174]

To ensure accountability of the office, the Ombudsman is required to report annually to the *Sejm* and senate with information concerning the activities undertaken, as well as any remarks regarding the observance of the rights of the child.[175] This report is also distributed to the public.[176]

The indicated powers since 2008 make the institution of the Polish Ombudsman for Children unique compared to other states that have similar bodies for children.

4.1.4 The Commissioner for Children in the Western Cape

The Commissioner for Children in the Western Cape (CCWC) took up office on 1 June 2020.[177] This is as a result of the Western Cape government's demonstration to the commitment for children's rights as is required in the International Law standards and

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170 Ombudsman for Children Amendment Act 24/2008: Art. 10b.
171 Ombudsman for Children Amendment Act 24/2008: Art. 11a.
172 Ombudsman for Children Amendment Act 24/2008: Art. 11(1).
173 Ombudsman for Children Amendment Act 24/2008: Art. 11(2).
174 Ombudsman for Children Amendment Act 24/2008: Art. 11(3).
175 Ombudsman for Children Amendment Act 24/2008: Art. 12 (1).
176 Ombudsman for Children Amendment Act 24/2008: Art. 12 (2).
177 Commissioner for Children in the Western Cape accessible at https://westerncape.gov.za/news/commencement-commissioner-children-western-cape (accessed on 12 September 2020).

established South Africa's first-ever Commissioner for Children.[178] The appointment of the CCWC is pursuant to provisions in chapter 9 of the *Constitution for the Western Cape*.[179] The Commissioner took up office at a very trying time, whilst the world was besieged with the global COVID-19 pandemic and when schools were set to reopen in South Africa.[180] The role is further necessary, considering that child disappearances, murders and deaths in gang-related crossfire are prevalent in the Western Cape.[181] Unfortunately, the mandate of the CCWC does not extend to intervene directly in such cases.

4.1.4.1 Broad functions of the Commissioner for Children in the Western Cape

The office is fairly new and the CCWC undertook within the first one hundred days of her appointment in 2020 to focus on five strategic initiatives guided by the core values she established.[182] This is in line with her credibility where the CCWC undertook to set up an independent institution to promote and protect the rights of children. Secondly, and from a holistic point of view, the CCWC undertook to make referrals to the appropriate government departments when concerns are raised about children in need of support; thirdly, to engage all stakeholders to shape the mission of the office; fourthly, to enable child government monitors to act as a reference group and to connect with the realities of children; and lastly, to foster relationships within the government to promote a child-rights approach to governance.[183]

4.1.4.2 Scope of powers of the Commissioner for Children in the Western Cape in schools

As stated above, the CCWC took up office on 1 June 2020 when schools across the

[178] Commissioner for Children in the Western Cape accessible at https://westerncape.gov.za/news/commencement-commissioner-children-western-cape (accessed on 12 September 2020).

[179] Constitution of the Western Cape 1/1998.

[180] Commissioner for Children in the Western Cape accessible at https://westerncape.gov.za/news/commencement-commissioner-children-western-cape (accessed on 12 September 2020).

[181] Isaacs 2021: 1 to 6 accessible at https://ewn.co.za (accessed on 11 September 2022).

[182] Commissioner for Children in the Western Cape accessible at https://westerncape.gov.za/news/commencement-commissioner-children-western-cape (accessed on 12 September 2020).

[183] Commissioner for Children in the Western Cape accessible at https://westerncape.gov.za/news/commencement-commissioner-children-western-cape (accessed on 12 September 2020).

country reopened amidst the pandemic. In this regard, the emphasis of the CCWC was on ensuring that schools have measures in place to ensure the physical safety of teachers and learners in the classroom.[184] This was achieved by reaching out to children on virtual platforms to obtain their opinions and views and further included the appointment of child government monitors who worked alongside the CCWC to advocate children's rights.[185] There is much scope for the CCWC to participate in matters related to education; however, the jurisdiction will be limited to the PDE, SGBs and schools in the Western Cape.

4.1.4.3 Independence of the office for the Commissioner for Children in the Western Cape

The CCWC operates independently from the government and is required to advocate children and guard their rights.[186] The office serves as a watchdog and oversight mechanism over government services working in the social cluster, which includes education, health and social development.[187]

Next follows a summary of the observations made in relation to the above discussion on the ombudsman offices for children.

4.1.5 Observations made regarding ombudsman offices for children discussed above

As society is constantly developing, adhering to the rights of children as enshrined in the United Nations Convention on the Rights of the Child places a constant demand on politicians, public authorities and professionals working with children.

It was shown in the above discussion that South Africa, with the exception of the Western Cape Provincial administration, is completely non-compliant insofar as it relates to an alternative mechanism to deal with children's issues. In addition hereto,

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184 Commissioner for Children in the Western Cape accessible at https://westerncape.gov.za/news/commencement-commissioner-children-western-cape (accessed on 12 September 2020).

185 Commissioner for Children in the Western Cape accessible at https://westerncape.gov.za/news/commencement-commissioner-children-western-cape (accessed on 12 September 2020).

186 Isaacs 2021: 1 to 6 accessible at https://ewn.co.za (accessed on 11 September 2022).

187 Isaacs 2021: 1 to 6 accessible at https://ewn.co.za (accessed on 11 September 2022).

and for the most part Ombudsman for Children, these types of offices deal with the entire broad spectrum of children's' rights and the powers are limited in terms of the nature and function the office is required to perform. It was shown in the South African context that the education environment is a specialist environment and, given the systemic issues and on-going legal battles between SGBs and PDEs, there is a dire need for an alternative to litigation, not only to ensure that these stakeholders adhere to the cooperative governance principles, but also to ensure that those who do not have access to the administrative courts are able to seek administrative justice on other platforms. It is submitted that the creation of an ombudsman office for education might be that alternative.

Next a discussion on the powers allocated to ombudsman offices, which is important for consideration in the following chapter when the model for education is designed or considered.

5. POWERS OF OMBUDSMEN

As discussed above, the main criterion for a distinction between the administrative or public sector ombudsman versus the hybrid ombudsman is based on the functions allocated to it. Ombudsmen in general have the same powers across the board and utilize similar methods of work, as was displayed above.

5.1 Administrative Justice and Human Rights Powers

Reif's[188] examination of these institutions reveal that many combine administrative justice duties with responsibilities for protecting and promoting human rights, but there can be considerable differences in emphasis, depending on the institution's constitutional or legislative mandate and its unique political and economic context.[189] Some of the government single-purpose ombudsmen have mandates similar to those of a human rights commission, which focuses on the protection and promotion of human rights and lacks an express ability to oversee administrative justice.[190] Some institutions have only investigation, reporting and recommendation functions, while

[188] Reif 2011: 275.
[189] Reif 2011: 275. See also the *Constitution* 1996: ch.9. The establishment of chapter 9 institutions:
[190] Reif 2011: 275.

others also have stronger powers, like the right to inspect facilities, to bring review actions before Constitutional Courts, to participate in administrative court proceedings, or to prosecute or recommend the prosecution of public officials.[191]

Historically, in the South African context, our highest courts have ruled that findings, decisions or remedial actions taken by the Public Protector may not be ignored.[192] In this regard, the Constitutional Court commented that if compliance with remedial action taken by the Public Protector were optional, then very few culprits, if any at all, would allow it to have any effect.[193] The affected person or institution may, however, take such a finding, decision or action taken by the Public Protector on review. With this said, the inference that can be drawn from this is the fact that the government has a duty to implement the findings, decisions or action recommended by the Public Protector. Failing this, the matter must be taken on review. It therefore suggests that the findings and recommendations of the Public Protector in South Africa have some binding effect. It therefore suggests that if an ombud is established for the education sector, the effect hereof is that the PDE and DBE will be obliged to implement such findings, decisions or actions.

Education resides in the public sector; therefore this dissertation will focus on aspects of a government single-sector ombudsman and will explore the powers of all three generations' ombudsmen in considering the creation of one unique for the education sector.

5.2 Legality Control Powers

Glusac[194] indicates that the main purpose of an ombudsman is to control the legality and regularity of the work of public administration. By doing so the ombudsman determines whether the conduct of the public administration body in question was in accordance with the law, while the regularity aspect covers compliance with the principles of good administration (governance). Glusac notes that while there are

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191 Reif 2011: 275.

192 *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA): par. 52 and *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

193 *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC): par. 56.

194 Glusac 2019: 7.

different definitions of good administration, in general, the notion of good administration covers all efforts to improve the individual's procedural position *vis-â-viz.* the administration by promoting the adoption of rules, which would ensure fairness in the relations between citizens and the administrative authorities.[195]

The following core principles in Glusac's[196] view are important for an efficient administration: administration through law, non-discrimination, proportionality, legal certainty, the protection of legitimate expectations, and the right to a hearing before an adverse decision is taken by a public authority. This ultimately means that every person should have the right to have access to a forum to be heard before a public administration, in order to have his/her affairs handled impartially and fairly and within a reasonable time; to be heard before any individual measure is taken that would affect the person adversely; the obligation to provide reasons in writing for all decisions; and the right of access to documents.

To achieve these core principles, the public administration must be service minded, be in a position to indicate the remedies available to all persons concerned, to notify all persons of a decision that concerns them, to keep records and registers, and to document all administrative processes. Ombudsmen can initiate investigations on maladministration, improprieties and systemic problems, either on a complaint from the citizens concerned, or on their own initiative.[197]

It is noteworthy to concede that growing numbers of the classical ombudsman in both developed states (such as Ireland, some Australian and Canadian states) and developing states are given additional or secondary duties such as overseeing freedom of information, privacy and/or whistle-blower protection laws in places.[198] Reif[199] notes that hybrid institutions have been created when ombudsman offices have been given a corruption fighting mandate. She further notes that there are indeed several other types of accountability bodies that countries establish to fight and combat corruption, such as the courts and anti-corruption commissions, but that some

195 Glusac 2019: 7.
196 Glusac 2019: 7.
197 Wiese 2016: 204.
198 Reif 2004: 9.
199 Reif 2004: 9-10.

countries do not have these alternatives and instead endow their ombudsman with the additional anti-corruption mandate. [200]

Some ombudsmen have been given mandates to enforce the leadership codes of conduct that are binding on elected and senior public officials covering matters such as misuse of government funds, conflicts of interest and nepotism.[201] These institutions can be found in South Africa (Public Protector), Uganda, Trinidad and Tobago and St Lucia, to name but a few. For example, the Uganda Inspectorate of Government can prosecute wrongdoers; the Public Protector has classical ombudsman powers; while the ombudsman in Trinidad, Tobago and St Lucia can only investigate general conditions surrounding corruption.

Next follows an exploration undertaken on the advantages and disadvantages of how the ombudsman institution can act as a mechanism to promote human rights and ultimately international human rights. This exploration will be undertaken with reference to democratic accountability, the rule of law, good governance, access to justice and cooperation, and will be linked to the education system in South Africa.

6. THE ADVANTAGES AND DISADVANTAGES OF AN OMBUDSMAN OFFICE FOR THE EDUCATION ENVIRONMENT

The advantages of an ombudsman are to be seen and linked with the powers attributed to it. It is trite that since the 1960s, and as states around the world have grown, nations perceived an ombudsman as a useful mechanism for controlling administrative misconduct and human rights breaches.[202] As many nations were faced with the challenge of both ensuring administrative justice and guarding against human rights violations, many established ombudsmen as horizontal and vertical accountability mechanisms in their new governments.[203] Furthermore, ombudsmen are there to ensure that the fundamental rights and freedoms of citizens are not encroached upon by the public administration.[204]

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[200] Reif 2004: 9.
[201] Reif 2004: 10.
[202] Reif 2011: 273. See also discussion above.
[203] Reif 2011: 274. See discussions above on the third generation/hybrid institutions.
[204] Reif 2011: 276.

Further discussions on the advantages of an ombudsman office are linked to the advantages in favour of arguing for an education-specific ombudsman. These advantages include the promotion of accountability, ensuring access to justice, the enhancement of the rule of law, good governance, cooperation, and to act as a preventative strategy. These points will be discussed with specific reference to education.

6.1 An ombudsman as a preventative strategy for education

Wright[205] states that the best approach to a potential legal issue is to prevent it from happening at all. This approach is sometimes aimed at assessing risks before there is an issue and putting safeguards in place to reduce the risk.[206] For an ombudsman office, preventative law would ultimately mean that it is a way of approaching a matter from a preventative perspective, aiming not to put structures in place to win a lawsuit, but to keep it from happening altogether. An ombudsman is able to do this in that he/she can conduct investigation on their own motion and make recommendations to the legislature directly as well as to the PDE in question. A method such as this will greatly assist SGBs for most schools when their cries for assistance to PDEs go unanswered.

Mary Robinson,[207] former United Nations High Commissioner for Human Rights, states the following:

> I have become increasingly convinced of the necessity to focus on *preventative* strategies. This has convinced me of the importance of creating strong, independent national human rights institutions to provide accessible remedies, particularly for those who are most vulnerable and disadvantaged. Frequently these institutions are "human rights commissions," but in many countries, drawing on traditions originating in Sweden, they are related to or identified as human rights "ombudsman" or "ombudsperson" …. It is precisely the

205 Wright 2010: 73-74.

206 Wright 2010: 73.

207 Robinson 1998: First Annual Day Hammarskjold lecture, "Human Rights: Challenges for the 21st Century accessible at ohchr.org/en/statements/2009/10/human-rights-challenges-21st-century-first-annual-dag-hammarskjold-lecture-mary (accessed on 11 September 2022).

> Ombudsman's capacity to contribute substantially to the realization of individual human rights which makes independent institutions so significant.

An ombudsman can also publicise and use its reports in particular cases to persuade the administration to change law and/or policy.[208] This could be particularly beneficial in the education sector where laws and policies are not updated regularly, thus leading to litigation such as admission and language policies.[209]

6.2 The ombudsman and access to administrative justice in education

It is common cause that the courts are the prime forum for the protection of human rights where these have been violated by the administration or other stakeholders.[210] The reason is simply because the courts' powers are binding, with its decision-making backed up by the enforcement mechanisms of the state and the independence of the institution. In this regard, the judicial process may be a reasonable and effective avenue. However, as was discussed throughout this dissertation, the courts in South Africa, given the economic and political circumstances, have their limitations. In addition hereto, the judiciary is a repressive control type in that the decision-making is reactive, coercive and imposed unilaterally.[211] In this regard, there is a winner and a loser in litigation, contrary to the lessons learned by the justices adjudicating education disputes.[212]

Civil litigation for education is too expensive and there are no legal aid programmes. Low-income and vulnerable individuals like school governing bodies (SGBs) serving the poorer schools, who in fact rely on the government for social services for their

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208 Reif 2011: 307.

209 GN 1701/ 1997 (Norms and standards for language policy in public schools); GN 776/1998 (Guidelines for the consideration of governing bodies in adopting a code of conduct for learners; GN 1010/2001 (Regulations for safety measures at public schools); GN 2432/1998 (Admission policy for ordinary public schools); GN 1307/2003 (National policy on religion and education); GN 3427/2002 (National policy on the management of drug abuse by learners) and GN 361/2010 (Policy on learner attendance) are examples of policies that were gazette by the National Minister and have never been amended to bring it in line with development in the education law as a result of changes to the *Schools Act* and court judgments over the last 25 years. The only policy that is in the process of being revisited is GN 2432/1998. See case law on admissions and language policies such as *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) and *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC). See also discussion ch. 2.

210 See discussion in ch. 5.

211 Reif 2004: 19.

212 See discussion at ch. 3: par. 6.

basic needs, may find that an ombudsman institution is their only recourse. Ombudsman institutions can provide simpler, cheaper, and quicker outcomes and are generally more flexible procedurally, as opposed to courts.[213]

In this regard, ombudsmen can play a supplementary or complementary role to that of the courts. The ombudsman can play an even more important role where judicial intervention is unavailable or unrealistic. A former Human Rights Ombudsman in Slovenia, Ivan Bizjak,[214] states that ombudsmen in a new democracy can often draw attention to unacceptable or outdated laws and laws that are inconsistent with the Constitution or other domestic laws, including international laws, go to court to request a binding decision on the constitutionality of a law, have a preventative effect in reducing poor administrative behaviour, which flows from the offices' presence and monitoring activities, and help to change the attitude of the administration by establishing the principle that the state exists to serve its people. The ombudsman generally uses a more reflexive type of control in reports and negotiations, including engagement and mediation, to try and persuade the administration to implement the institution's recommendations.[215]

6.3 The ombudsman and the enhancement of cooperation in education

Ombudsman institutions have the power to launch investigations on their own motion.[216] In this regard they need not wait for an actual complaint. An ombudsman can be more proactive in monitoring events in his or her jurisdiction to enhance the protection of human rights. In addition hereto, the ombudsman has the power to investigate facilities and make recommendations to the state on improving its service delivery.

These own-motion investigations can benefit the vulnerable and further enhance cooperation amongst education stakeholders so as to avoid costly litigation and to preserve relationships. Own-motion investigations will further serve as a preventative strategy, as mentioned in 6.1 above. Further aspects of ombudsmen are the reports they generate, which provide useful information and assistance to the public. Annual

213 Reif 2004: 90.
214 Reif 2004: 100.
215 Reif 2004: 19.
216 Reif 2004: 302.

and special reports provide information on important investigations undertaken, which may increase the public's understanding of the office's role; thus enhancing further cooperation.[217] The reports may further enhance the public's perception of the usefulness of the institution.

The fact that an ombudsman may have the powers to make recommendations for changes in law and policy can enhance cooperation amongst education stakeholders like the PDEs and SGBs, whose conflict related to school policies has for the most part opted to approach the courts for determination on who has the power and final say on school policies. This function will further enhance the cooperative governance requirements as are envisaged in chapter 3 of the *Constitution* and Chapter 3 of this dissertation on matters related thereto.

Ombudsman institutions can play a vital role in training as well as establishing partnerships with universities, civil society institutions or the government to provide continuous training.[218] It was identified in the education sector that a lack of training and/or partnerships between stakeholders can be considered as part of the reason for the struggle to implement cooperative governance measures. Bonturi and O'Reilly[219] hold the view that ombudsmen could further provide strategic guidance to developing transparent government practices and initiatives of the institution to strengthen their transparency, integrity, accountability and stakeholder participation.

6.5 The ombudsman and the promotion of accountability in education

One of the key cornerstones of democracy is the notion that government actors and political representatives are subject to accountability.[220] A legislative ombudsman can serve as a control mechanism of horizontal accountability for government in a democratic state, because it is an entity that is part of the state governance structure, but external to the executive and administrative arm, and independent of all branches of government.[221]

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217 Reif 2011: 307.
218 Bonturi and O'Reilly 2018: 11.
219 Bonturi and O'Reilly 2018: 10.
220 Kuwali and Silungwe 2022: 5.
221 Reif 2004: 17. See also Kuwali and Silungwe 2022: 1-23. See discussion at ch. 4: 3.4.2.

The ombudsman also serves as a vertical accountability mechanism between citizens and the government, thus allowing members of the public to complain about the government administration and have their concerns investigated, assessed and presented to the government as critical feedback.[222] A disadvantage of the office is attributed to the fact that the office does not have the power to make decisions that are legally binding on the administration. However, the administration is free to implement, in whole or in part, or ignore the ombudsman recommendations, which is a common criticism amongst scholars. However, Reif[223] and Oosting hold the view that if the ombudsman were to be given such powers, the institution would become another type of court and tribunal which the state already has in place. The importance of the legal and institutional aspects of the office is the authority of the ombudsman, which is essential to the strength of the institution.[224]

This position has changed insofar as the Public Protector's findings and recommendations are concerned in South Africa.[225]

Reif[226] considers that the quality of the work of the ombudsman, the political support for the institution, public access to its work through the media and the character and expertise of the office-holder are the main building blocks of the authority of the ombudsman. The soft, non-coercive powers of recommendation and reporting given to the ombudsman are optimal to its working environment. [227]

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[222] Reif 2004: 17-18. See also Kuwali and Silungwe 2022: 1-23.

[223] Reif 2004: 18; Oosting 1995: 10.

[224] Reif 2004: 18.

[225] *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) and *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

[226] Reif 2004: 18.

[227] Reif 2020: 24-26. Reif 2004: 18. Quotes Stephen Owen who states: It may be that this inability to force change represents the central strength of the office and not its weakness. It requires that recommendations must be based on a thorough investigation of all facts, meticulous consideration of all perspectives and vigorous analysis of all issues. Through this application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause reluctant change in a single decision or action, per definition it creates a loser who would be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking, and the result endures to the benefit of potential complainants in the future. If genuine change is to take place as a result of ombudsman action, the office must earn and maintain the respect of government through its reasonableness. Without this, it will be at best ignored and, at worst, ridiculed.

6.5.1 The value of soft, non-coercive powers

It might be trite to say that the ombudsman institution is a different legal animal to that of the courts. The ombuds institutions have soft powers that give it more flexibility than adjudicative forms of dispute resolution, including the ability to rely on extra-legal principles and address issues that are nonjusticiable.[228] The Supreme Court of Canada has stated that the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot resolve effectively.[229]

The different styles of legal control that can be applied to obtain compliance with the law or to achieve the desired behaviour highlight the advantages of the soft powers of the ombudsman institution. Examples of the different styles of control can be engagement and mediation, which are also ultimately measures to improve and enhance access to justice.

6.6 The ombudsman and the rule of law and good governance in education

The concepts of the rule of law and good governance are important aspects for accountability as well. A central question regarding the exercise of public duty such as in the instance of exercising education functions is the extent to which public officials can be held accountable by those affected by their decisions taken in the discharge of their public duties. A related question is: what must be the consequence of a failure to exercise a public duty as defined by law? These concepts have been discussed in Chapters 1, 2 and 3, with specific reference to the education sector.[230] What is important to note is that an ombudsman, as part of his/her functions, can ensure compliance with the rule of law and enhance good governance between education stakeholders, which is a requirement of the democratic South Africa. The ombudsman can further utilize engagement and mediation to resolve conflict and disputes which, if successful, will improve access to administrative justice. It was also established that our courts have indicated that the recommendations of the Public Protector cannot be

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[228] Reif 2020: 25.

[229] *BC Development Corp v Friedmann* [1985] 1 WWR 193 (SCC): par. 206.

[230] Discussions at ch. 2: par. 2.2 and ch. 3: para. 4.1.3, 4.1.4, 4.2 and 4.3.

ignored and must first be set aside by a court of law. If similar status is given to an ombudsman for education, if will further enhance access to justice.

7. CONCLUSION

This chapter has evaluated the notion of an ombudsman office globally. In so doing, the chapter explored in brief the history and origins of the ombudsman and the establishment of these offices around the world. The different model generations, with reference to the expansion of the offices, the functions and powers, were discussed and explored to ascertain a model suited for the education sector. The popularity of this institution, along with the diversification thereof, was also discussed and it was shown that over the years, the popularity has grown from country to country where specific ombudsman offices are created to deal with sector-specific challenges. For example, some countries have established single-sector ombudsman offices with a classical and human rights approach designated for children. This model will be explored in the following chapter and discussion and recommendations for an ombudsman for the education sector. The advantages and disadvantages were highlighted in this chapter, with the advantages and the need for such an office far outweighing the disadvantages.

CHAPTER 7
THE CREATION OF AN OMBUDSMAN OFFICE FOR EDUCATION

> "Where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob, and degrade them, neither persons nor property will be safe."
>
> Frederick Douglas

1. INTRODUCTION

The preceding chapters established the benchmarks for the principles traditionally associated with the concepts of good governance in the education environment, the broad and narrow concept of access to justice, and the observance or lack thereof when it comes to human rights and the rule of law. It further benchmarked the fact that judicial intervention in the form of litigation is not the most suitable form of dispute resolution for education role-players in that not everyone has equal access to courts for administrative review. This therefore impedes on the right of access not only to justice but also to administrative justice. Non-judicial mechanisms in the form of an ombudsman office as an appropriate alternative were explored in Chapters 5 and 6.

The ombudsman system is one of the institutions essential to a society under the rule of law, a society in which fundamental rights and human dignities are respected. Human rights are not protected simply by constitutions or legislation, by guarantees or speeches, by proclamations or declarations, but primarily by the availability of remedies. The ombudsman system is one of the remedies that seek to preserve human rights.[1]

This chapter will proceed to formulate recommendations that emanate from the research undertaken and the conclusions drawn by this dissertation to create an ombudsman office for education. These recommendations are a more practical approach of the recommendations set out in the attached Appendix A.[2]

Like cloth that can be cut to almost any size, the ombudsman concept can be adapted to a wide variety of systems and cultures. This can be seen from the discussions in Chapter 6 regarding the proliferation of these offices over the years. The focus point

[1] American Bar Association 1974: Appendix I: par. 2.
[2] Appendix A: Draft model for the Ombudsman for Education.

of the office was limited to public government institutions, given that education in South Africa is a public government function.[3]

The single-sector government ombudsman has been used to provide a monitoring, protective and accountability device for specific categories of individuals who come into contact with government. The single-sector ombudsman was identified and discussed in Chapter 6 and is the design selected for the education sector, as it will focus specifically on challenges in the sector and has a specific target group in mind.

Next follows a discussion on the creation of an Ombudsman office for Education. The design of an Ombudsman office for Education will be drawn from the strengths of the institution that was identified in Chapters 5 and 6. These strengths can be summarised in various features, which in theory give the Ombudsman office its particular strength to enable it to carry out its assigned remit, and to fend off attacks from likely critics such as politicians, interest groups and journalists. These strengths and features will be discussed with reference to challenges that the education sector experiences and will offer an alternative approach to that of litigation.

2. CREATION OF OMBUDSMAN FOR EDUCATION

The first generation (classical), the second generation, and third generation or hybrid ombudsman were identified and discussed in the previous chapter. From that discussion it seems logical to consider the aspects of these various generations in order to design a model unique for education. What is, however, of critical importance is that the Ombudsman for Education will very likely require functions pertaining to human rights. Reif[4] cautions that states who have created a classical or hybrid ombudsman is not an indication that it will automatically be effective in improving government administration, building good governance and protecting human rights. The success an ombudsman will have in improving these aspects is contingent upon the realisation of interrelated legal, political, financial and social factors.[5] In this regard, the United Nations Commission for Human Rights (UN Commission for Human Rights)

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[3] Reif 2020: 2-3. The core mission of all public sector ombudsman institutions is supervision of administrative authorities through impartial investigations, reports and recommendations, with the objective of promoting the rule of law and justice.

[4] Reif 2004: 395-396.

[5] Reif 2004: 396. These factors are applicable to all ombudsman institutions, both newly and long established, in developed and developing nations.

has also provided factors that are essential to classical, hybrid and single-sector ombudsmen.[6] These factors are the same strengths addressed in Chapters 5 and 6 and include *inter alia* democratic governance of the state; independence of the institution from government; defined jurisdiction of the institution; the extent and adequacy of the powers given to the institution; accessibility of the office to members of the public; level of cooperation of the institution with other bodies; operational efficiency (level of financial and human resources); accountability and transparency of the institution; and the personal character and expertise of the person appointed to head the institution.[7] This section therefore starts with the minimum features an Ombudsman office for Education should have.

2.1 Democratic governance of the state

Classical and hybrid ombudsmen serve as an accountability mechanism and would not be able to fulfil their functions effectively in states that do not have some level of democratic governance.[8] Oosting[9] argues that it would be inconceivable for an ombudsman to exist and perform his or her task properly within any system other than a democracy governed by the rule of law. To state it differently, an ombudsman presupposes a political and administrative system that is and wants to be and remain a democracy governed by the rule of law, with all the appropriate mechanisms of external accountability this entails.[10] South Africa has been a democratic state since 1994 and therefore the environment for the establishment of an Ombudsman for Education exists.[11]

2.2 Independence of the Ombudsman Office from Government

Independence underpins impartiality to ensure an ombudsman's neutrality with

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6 United Nations, *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, 1995, HR/P/PT4, available at: https://www.refworld.org/docid/4ae9acb7289.html (accessed 17 October 2022).

7 United Nations, *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, 1995, HR/P/PT4, available at: https://www.refworld.org/docid/4ae9acb7289.html (accessed 17 October 2022).

8 Reif 2004: 397 and Reif 2020: 20-32.

9 Oosting 1995: 6-7; Reif 2004: 397 and Reif 2020: 20-32.

10 Reif 2020: 20-32.

11 See discussion at ch.1: par. 3.1-3.4.

respect to the complainant and those complained against.[12] Maximizing the independence of an education ombudsman from a government is therefore crucial for its effectiveness. Independence can be divided into three categories: institutional, personal and functional independence.[13]

2.1.1 Institutional independence

Institutional independence relates to the processes followed in establishing the office. Most ombudsmen offices, for example the Public Protector, are created in a country's Constitution or a law of the jurisdiction to establish its permanence. Gottehrer and Hostina[14] opine that ombudsmen established in a jurisdiction's constitution are more likely to be permanent features, since the process for amending a Constitution is often involved and designed to prevent frequent amendments. Similarly so in the Western Cape Province's Constitution, provision was made therein for the creation of a sector-specific Ombudsman office for Children in terms of Chapter 9.

Ombudsmen can also be established solely by law. What this means is that a country's legislature can pass a law pertaining to ombudsman law and what sectors should have ombudsmen, as was done in Ireland.[15] Sadly in South Africa, there is no such similar legislation, nor are there any such provisions in the *Children's Act* or the *South African Schools Act (Schools Act)* for this purpose. The international requirements to have such an office was discussed in the preceding chapters highlighting that the General Comment 2 document requires states to introduce a single-sector human rights ombudsman specific to children.[16]

The more difficult it is to change the legal basis for an ombudsman office, the more likely the office will be established permanently.[17] Permanency therefore creates stability for the office and credibility among the public. An ombudsman is free to criticize without fear that the office will be abolished or unnecessarily restricted.[18] This

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12 Giddings 2000: 400; American Bar Association 2004: 1–22 and International Ombudsman Institution 1978 – definition of an ombudsman.

13 Reif 2004: 399.

14 Gottehrer and Hostina 2000: 403. See also Piechota 2009: 400 and the discussion at ch.6: par. 4.1.3 and 4.1.3.1.

15 See discussion at ch.6:par. 4.1.1.

16 See discussion at ch.6: par. 4.1; ch.4: para 3.1.1.1-3.1.1.8.

17 Piechota 2009: 400.

18 Giddings 2000: 450-460.

is of paramount importance if one has due regard for the atrocities that occur in the education environment where learners attend school without the requisite resources.

To therefore ensure its permanency, it would be recommended that similar provisions, as contained in the Polish Constitution, be considered for adoption in the South African Constitution.[19] In the event that it is not provided for in the country's Constitution, the legislature can consider bringing about an amendment to the *Children's Act* by including this aspect with specific reference to which sectors should have such an ombudsman. If this fails, the inclusion can be brought about in the *Schools Act*. To ensure that it is indeed a permanent feature, the legislature should then consider concluding similar legislation to provide for the *Ombudsman for Education Act* as Poland has done with the *Ombudsman for Children Act*.[20] The prescripts provided for in statutory law will thus ensure the independence of the office.[21] The independence of this institution can further be guaranteed insofar as it relates to the appointment process, impartiality and fairness objectives and the issue on privacy or confidentiality.

2.1.1.1 Appointment of the ombudsman

The best ombudsman appointment processes are designed to yield one candidate, broadly approved by political parties representing a super majority of the legislative body. Giddings[22] alludes to three different methods of appointment of which in his view appointment by the legislature is arguably the preferred mode when appointing a classical or first generation ombudsman. The second method of appointment is by the head of state or head of government.[23] The third mode of appointment is where both the head of state and the legislature have a significant role and are involved in the process. This is the case in South Africa insofar as it relates to the appointment of the Public Protector. [24] The same process is followed in Poland where the Ombudsman is appointed by the *Sejm* with the approval of the Senate on the proposal.[25]

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19 See ch. 6:par.4.1.3.
20 See Appendix A: Draft model for the Ombudsman for Education.
21 Reif 2004: 399.
22 Giddings 2000: 460. For example in Sweden, Finland and the Netherlands.
23 Giddings 2000: 460. For example in the United Kingdom and France the head of state and head of government makes ombudsman appointments.
24 The *Constitution* 1996: ch.9. The Public Protector is appointed by the President on the recommendation of the National Assembly for a non-renewable period of seven years.
25 Piechota 2009: 400-401.

The appointment process of an ombudsman is also important to ensure its independence from the administration it is expected to oversee. In this regard it is pertinent for the purposes of an education ombudsman that a similar process is included for the appointment to ensure transparency.[26]

2.1.1.3 Removal from office

The removal process is the reverse of the appointment process and ombudsman can be removed for specific reasons.[27] For example, the Public Protector can be removed on grounds of misconduct, incompetence and incapacity. In this regard, the President will only act on the finding of a committee of the National Assembly supported by at least two-thirds of its members. There is also a provision for removal from office by the Assembly if the ombudsman is found to have a conflict of interest or is unable to fulfil his or her duties for more than ninety days, is convicted of certain criminal offences, becomes otherwise unworthy of his or her office, or dies. Similarly so with the Polish Ombudsman for Children the term of office terminates in instances of death or where the Ombudsman has been removed from office.[28]

2.1.1.4 Impartiality and fairness of the ombudsman

Ordinarily the qualifications to serve as an ombudsman are generally imposed and are designed to select an ombudsman widely respected among different political groups as impartial and fair.[29] In addition hereto they are also further restricted from earning another income. Gottehrer and Hostina [30] hold the view that in the event that an ombudsman has an additional income, it could be used to influence him or her and therefore it is strictly prohibited. According to article 7(3) of the *Ombudsman for Children Act of Poland* (OCA), the Act states that the incumbent holding the position cannot occupy any other position or post, except for holding a position of university professor. These aspects are important to ensure that professional considerations do not influence the appointed ombudsman to perform his or her duties.

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26 See Appendix A: Draft model for the Ombudsman for Education: sec. 4(2).

27 Ombudsman for Children Amendment Act 24/2008: Art. 8(2)–(4). See also Appendix A: Draft model for the Ombudsman for Education: sec. 3(4)(a) and (b).

28 Ombudsman for Children Amendment Act 24/2008: Art. 6(2). See also Appendix A: Draft model for the Ombudsman for Education: sec. 3(4)(a) and (b).

29 Gottenhrer and Hostina 2000: 406.

30 Gottenhrer and Hostina 2000: 407. Similar restrictions are extended to the staff of ombudsman as well.

Other relevant safeguards regarding the appointment of an ombudsman would be the criteria for appointment. For example, article 1(4) of the OCA requires that the Ombudsman for Children in Poland be a Polish citizen, exercising full capacity to undertake legal transactions and enjoying all public rights, without a prior criminal record concerning intentional offences. In addition hereto, the Ombudsman is expected to have master's degree, with at least five years' experience in working with or for the benefit of children.[31] The incumbent should also be of a blameless character in that he or she is expected to be exemplary in moral character and social concerns.[32] It must, however, be noted that the there is no requirement for the Ombudsman to possess a legal qualification or to be an admitted advocate. The emphasis was more on moral values and a pro-child approach than on a professional background.[33]

Given that education is a specialist field on its own, it would be important to consider including the requirement that the candidate should also possess a legal qualification and having worked in the sector in order to understand the intricacies of the sector, as well as be in a position to interpret and apply the laws. Being admitted as an advocate would be an added advantage.[34] The ombudsman should be a leader in his office and the incumbent should be able to energise the institution. In the case of dealing with children's issues, particular at school level, child-orientated leadership is also vital for gaining acceptance and trust for the institution in the eyes of children.[35]

2.1.1.5 Confidentiality

Complainants may bring matters to the ombudsman that are confidential by law, delicate or about which they wish the ombudsman to do nothing. Ombudsmen have the power to maintain the confidentiality of complainants where that is needed. There will also be instances where an investigation would require or inevitably result in disclosure. Ombudsman may determine not to investigate when the complainant will not release the office from the requirement of disclosure.[36] Officials who are subject to a complaint may also warrant protection during the investigation. Confidentiality of the

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31 *Ombudsman for Children Amendment Act 24*/2008: Art. 1(4).
32 *Ombudsman for Children Amendment Act 24*/2008: Art. 1(4).
33 Piechota 2009: 402.
34 See Appendix A: Draft model for the Ombudsman for Education: sec. 3(3)(a)–(g).
35 Piecthota 2009: 403.
36 Gottenhrer and Hostina 2000: 410.

investigation process allows it to proceed without publicity and speculation. Ombudsmen have the discretion to make investigations public along with other information that does not violate confidentiality requirements by law or disclose the complainant's identity without authorisation. Complainants could be subjected to persecution, intimidation, retribution, or withholding of benefits by a department or government agency. Confidentiality protects a complainant from such abuse.[37] Confidentiality in education is required where complainants are children, or even educators or principals who fear intimidation from PDEs.[38]

2.1.2 Personal Independence

Personal independence is increased by giving the ombudsman security of tenure. What this means is that the law that establishes the ombudsman must provide that the ombudsman is appointed for a specified number of years and that an ombudsman cannot be removed from office early, unless specified exceptional circumstances exist.[39] Researchers[40] advise that the term of office be at least a year or more than the term of legislative members. The possibility of being reappointed moderates any tendency of the ombudsman to make pronouncements that extend beyond the facts and law discovered in investigations. In South Africa for instance, the Public Protector is appointed for a non-renewable term of seven years. The Ombudsman for Children in Poland is appointed for a period of five years to ensure that the period does not overlap with the four-year term of Parliament.[41] Moreover, the same person may only serve a maximum of two subsequent terms.[42]

This makes sense and further ensures that the current incumbent is able to execute his or her duties and responsibilities more effectively and therefore ensure that by the time the term expires, the work that he or she has done in the sector has had a significant impact.[43] Ombudsmen should also have immunity from criminal and civil

37 Gottenhrer and Hostina 2000: 410.
38 See Appendix A: Draft model for the Ombudsman for Education: sec. 15.
39 Reif 2004: 400.
40 Gottenhrer and Hostina 2000: 404; Giddings 2000: 461.
41 *Ombudsman for Children Amendment Act 24*/2008: Art. 6(1).
42 *Ombudsman for Children Amendment Act 24*/2008: Art. 6(3).
43 See Appendix A: draft model for the Ombudsman for Education: sec. 3(2) and (6).

actions for conduct undertaken in the proper exercise of official functions.[44]

2.1.3 Functional independence

Functional independence is achieved by ensuring that the ombudsman is not subjected to any external pressures. Therefore the ombudsman must not be subject to instruction from just anybody; he or she must be empowered to interpret his or her own competence, free to conduct investigations and to reach his or her own conclusions and recommendations.[45] It is a further requirement that during the term of office an ombudsman must be required to abstain from any political affiliation or professional or other activity that is incompatible with the office.[46]

2.3 Jurisdiction of the Ombudsman Institution

Both classical and hybrid ombudsmen should be given a broad jurisdiction to enable them to fulfil their mandate effectively. It is of critical importance that the jurisdiction of the ombudsman be defined precisely in order to avoid jurisdictional conflict with other state institutions. In education, the jurisdiction will be limited to the sector and the educational school environment for public ordinary schools.[47]

Reif[48] further argues that some consideration should also be given to the feasibility of including the judiciary within an ombudsman's jurisdiction, which will be realistic in limited terms, such as where there has been unreasonable delay in rendering decisions or with respect of the administration of the court system. In this regard, consideration should be given to grant the Ombudsman for Education immediate access to the Constitutional Court in South Africa, which is the highest court in the country, as opposed to first approaching the High Court and then the Supreme Court of Appeal.[49]

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44 Reif 2004: 400. See also Appendix A: Draft model for the Ombudsman for Education: 5(3).
45 Oosting 1998: 19–20.
46 Reif 2004: 400.
47 See Appendix A: Draft model for the Ombudsman for Education: preamble.
48 Reif 2004: 401.
49 Reif 2004: 403. A growing number of ombudsmen have been given powers to apply directly to the Constitutional Court and other courts to bring protective action or ask for clarification of constitutional and human rights issues. This phenomenon is most pronounced in Europe and Latin America, for example. See Appendix A: Draft model for the Ombudsman for Education: 12(4)(a)–(c).

The institution should further be given powers in its legal framework to cover aspects related to the investigatory process, the implementation stage and other roles that a hybrid institution undertakes, for example, advice, training and education.[50] The power to launch own-motion investigations also facilitates the investigation of economic, social and cultural rights violations like education, including the lack of access to justice, which are often systemic problems and the investigation of matters affecting vulnerable groups.[51]

2.4 Accessibility of the office to members of the public

The education ombudsman office, like all others, must be accessible to the population that the office will be designed to protect. Accessibility is directly linked to access to justice.[52] Ensuring that the Ombudsman for Education is accessible is one of the most important parts to govern the institution properly.[53] A lack of accessibility can result in a denial of justice to the parties.[54]

In this regard it will be important for the public to know about the education ombudsman, its mandate(s), physical location and the diversity of the personnel.[55] Ombudsmen institutions can improve access through devices such as advertising the office by way of television, radio and brochures, providing toll-free telephone access. It was already discussed that it would be practical for each PDE in the respective provinces to each have their own Ombudsman for Education. Further consideration is to maintain regional offices, for instance. Ombudsmen can further visit rural areas or make use of local media to inform the public of their presence and their powers.

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[50] United Nations, *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, 1995, HR/P/PT4, available at: https://www.refworld.org/docid/4ae9acb7289.html (accessed 17 October 2022): 142–143. See Appendix A: draft model for the Ombudsman for Education: sec.5, 6, 8, 9, 10, 11, 12 and 13 and sec. 7, respectively.

[51] See discussion in ch. 1, 2, 3, 4 and 5 on the issue of vulnerable groups and lack of access to justice for the education atrocities that some of the children are faced with. See Appendix A: draft model for the Ombudsman for Education: sec. 6(3), sec. 8 and 9.

[52] Reif 2020: 41.

[53] Appendix A: Draft model for the Ombudsman for Education: sec. 6(1)(a) and (b).

[54] Fenwick 2009: 20-23.

[55] United Nations, *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, 1995, HR/P/PT4, available at: https://www.refworld.org/docid/4ae9acb7289.html (accessed 17 October 2022): 13-14.

Affordability and the time taken to resolve a matter are further important aspects. These aspects are further linked to the informality of the processes an ombudsman can apply to resolve cases. Ombudsman institutions are free to the target group it is intended to serve; in this instance, it will be education role-players.[56] Compared to courts and tribunals such as arbitration, the ombudsman's cost to the state is relatively inexpensive.[57] In this regard, education role-players will save on legal expenses and funds utilised for litigation can be used better to improve education outcomes for the learners. A further strength of the institution is the ability to achieve a quick remedy as opposed to the courts which are usually slow due to the volumes of cases.[58] If one has due regard to the admission cases that have served before court by the time the matter is heard, most learners have either already been accommodated by a school or have been relocated elsewhere. If a matter must be referred to court, where the office has such powers, it will be for the account of the Ombudsman office and not for the schools or SGBs it is seeks to assist.

2.5 Cooperation

Ombudsman institutions that are established on the hybrid model are required to develop relationships and cooperate with other non-governmental organisations or civil society institutions.[59] Given the context of this dissertation, it will also be important for the Ombudsman for Education to develop relationships and cooperate with the institution it oversees and the education role-players if the governance relationship as discussed in Chapter 3 is to survive.

Having these relationships will provide the institution with information and any feedback on their own work. It further provides a forum for mutual training, education and support, all requirements for the cooperative governance model.[60]

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56 Appendix A: Draft model for the Ombudsman for Education: sec. 6(2).

57 Giddings 2000: 462; Fenwick 2009: 23-24; Reif 2020: 44-54 and see also discussion at ch.5: par. 6.2.4.

58 See discussion at ch.5: para. 6.2.1-6.2.4.

59 United Nations, *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, 1995, HR/P/PT4, available at: https://www.refworld.org/docid/4ae9acb7289.html (accessed 17 October 2022): 14–15. See discussion at ch.2: par. 2.4.6.

60 Appendix A: draft model for the Ombudsman for Education:sec.14.

2.6 Operational efficiency

Operational efficiency requires that the Ombudsman office for Education's operations be given adequate financial and human resources. An inadequately funded office will not be able to perform the functions required by law and will lack true independence.[61] An ombudsman spends budgeted funds independent of any approving authority and accounts for its expenses to the legislative body who established the office. It is ultimately a government's responsibility to ensure that the office is adequately funded. The Ombudsman for Children's office in Poland is also funded and financed by the relevant state budget, which has its basis in the budgetary statute.

An ombudsman is an office or institution most often headed by one person or a board confirmed by the legislative body. An ombudsman has the power to delegate powers and responsibilities to the staff appointed by him or her and in this regard should be given the freedom to select and employ his/her own staff and not be forced to employ from the existing civil service or government complement.[62] In addition, the staff will be required to work with information that is delicate and sensitive; therefore the ombudsman must have confidence in them. In addition hereto, an ombudsman has the powers to appoint deputies or acting ombudsmen who can always exercise their powers in the event of his/her absence. Maintaining an office function when the office is vacant is imperative and encourages legislative bodies to appoint a successor speedily. It is noteworthy to concede that if there is no-one to exercise the powers of an ombudsman in his or her stead, it will leave the office paralyzed.[63]

2.7 Accountability and transparency of the institution

The effectiveness of the ombudsman should be enhanced if it has an accountability system and an optimum level of transparency, usually implemented through the reporting requirements imposed on ombudsmen in the form of annual and special public reports to the legislature and/or the executive.[64] Just as the ombudsman's independence is heightened through appointment by legislature, accountability and

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61 Gottehrer and Hostina 2000: 405.
62 Reif 2004: 406.
63 Appendix A: Draft model for the Ombudsman for Education: sec. 4(1) and (2), 17(1)-(5).
64 Reif 2004: 407 and Fenwick 2009: 23-24.

transparency are optimized if the ombudsman also reports to the legislature.[65] The institution should also be accountable to the members of the public it is mandated to protect, in this instance, the education role-players. Accountability to the public and transparency can be enhanced through actions such as ensuring that annual and special reports are distributed widely in the public sphere and that there is a regular flow of communication between the institution and the complainant during an investigation.[66]

2.8 Personal character and expertise of the person appointed to head the institution

It is extremely important to appoint an individual who has expertise and competence in the subject matter of the institution and in office administration as an ombudsman.[67] In addition hereto, the office bearer must have credibility, both in the eyes of government and the general public it serves. Ombudsmen investigate and make recommendations to the highest officials of a government. As a result hereof they are paid at a level commensurate with that responsibility. For example, remuneration could be equated to that of judges, justices of supreme courts or heads of ministry. The salary is fixed so that the renumeration may not be reduced while the person is in office, preventing punishment of an ombudsman whose reports may have been politically difficult or unpopular.[68]

2.9 The extent and adequacy of the powers given to the institution

As discussed in Chapter 6, ombudsman models dealing with children should have an administrative and human rights function. In this regard, investigative powers is an important function in order to promote children's' rights as these relate to education.

65 Reif 2004: 407 and Fenwick 2009: 23-24.

66 Reif 2004: 407 and Fenwick 2009: 23-24. Appendix A: Draft model for the Ombudsman for Education: sec. 16(1) and (2).

67 Reif 2004: 407.

68 Gottehrer and Hostina 2000: 405. For example the decisions taken by the Public Protector in South Africa with Zuma and Nkandla.

2.9.1 Powers of investigation, recommendation and reporting for the Ombudsman for Education

For the office to be fully effective, it needs to be able to investigate cases of alleged maladministration or malfunctioning within a PDE fully and comprehensively, with access to all persons, papers and records involved.[69] The investigatory powers must be provided for in the legal framework for the ombudsman and it must include the fact that the ombud can obtain documents, compel the attendance and testimony of witnesses, and inspect premises.[70]

To extract these from public officials who may not always be instantly willing to release them, particularly if they may show them in a bad light, the office needs the authority and power that come from its statutory base. The ability of an ombudsman to gain access to all the relevant files and witnesses, without having to bring to bear the ponderous discovery mechanisms of the courts, is a key feature of the institution and a major resource in dealing with recalcitrant officials of the state.[71] In order to enforce these powers, Reif[72] suggests that an ombudsman should have powers of search and seizure and subpoena.

To be able to achieve effective redress for education role-players who have been wronged by governmental authorities, an ombudsman requires authority and power firmly entrenched in the law of the land. This is of particular importance when the redress involves asking officials publicly to admit their errors and omission and/or reverse decisions previously taken; more especially where officials – contrary to the ombudsman's opinion – believe that the decisions taken were correct.[73]

The powers attributed to ombudsmen in general are often defined in the legislation that creates the office and will therefore indicate the types of acts that can be a subject of complaint to the office. So, for example, education role-players will fall under the jurisdiction for the Ombudsman for Education. As a result hereof, few limits would be placed on the kinds of acts that may be subject to an investigation. The acts that could be the subject of investigation will emanate from the requirements of the International

69 Giddings 2000: 463.
70 Reif 2004: 403. Appendix A: Draft model for the Ombudsman for Education: sec. 12(4) and (5).
71 Giddings 2000: 463.
72 Reif 2004: 403.
73 See case law discussed in ch.2: para. 3.1.1–3.1.5 and ch.3: para. 6.1–6.3.

Law instruments insofar as it relates to education and those provided for in education law.[74] The requisite ombudsman legislation will set out the grounds or standards under which complaints are investigated. These grounds and standards are important and provide a test against which acts complained about can be judged once the facts and the law are established.[75]

Fairness, as indicated above, is one of the standards and ombudsmen are often the only place in government where the fairness of an act can be assessed and recommendations be made to remedy decisions or actions. Most investigations will likely arise from a complaint to the ombudsman, and some matters will only be considered if the ombudsman initiates an investigation.[76] Ombudsmen also have the authority to self-initiate an investigation, which allows the ombudsman to act when information warranting an investigation comes to his or her attention in the absence of a willing complainant.[77] The cooperation of government officials and access to records and premises are also critical for effective and credible investigative action. Thorough investigations would further also require this type of access. In addition hereto, ombudsmen have the power to compel testimony and evidence through a subpoena.

An ombudsman creates a report containing findings on the complaint, together with any recommendations to solve problems or prevent them from happening again, to the institution that is the subject of complaint.[78] An ombudsman may also publish and publicize these findings, recommendations and reports so that the office will be accountable to the people and the results of investigations may be widely known.[79]

These findings and reports are final. Ombudsmen may not issue a binding order and no-one may take an ombudsman to court to appeal against the findings or seek a review or modification of the findings and reports.[80] This ensures that office resources are not diverted to litigation. Courts may only review whether or not the ombudsman has jurisdiction over an institution.

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[74] See discussions at ch.2: para. 2.1, 2.2, 2.3, 2.4 and 3.
[75] Gottehrer and Hostina 2000: 409.
[76] Gottehrer and Hostina 2000: 409.
[77] This aspect would be important for education considering the human rights violations that have been alluded to in ch.2: par. 3 (factors that lead to conflict); ch.5: par. 6.2 and ch.6: par .4.1.3.2.
[78] Gottehrer and Hostina 2000: 409. Appendix A: Draft model for the Ombudsman for Education: sec. 7(2).
[79] Gottehrer and Hostina 2000: 409.
[80] Gottehrer and Hostina 2000: 409.

The position is somewhat different in in the South African context, as it relates to the Public Protector's reports and findings where the courts have pronounced that the recommendations contained therein are final and binding on an institution until such time that it is set aside by a court of law.[81] In this regard, the approach where courts can only consider an application pertaining to the review of jurisdictional aspects will not withstand constitutional muster in South Africa. Researchers[82] are not in favour of giving ombudsmen the power to make binding orders, as this would create a "super agency".

However, the fact that ombudsmen cannot issue a binding order is construed as a weakness by some, but for many it is an act of strength for two reasons. Firstly, government institutions that are persuaded to act are more likely to act effectively and efficiently and do a better job than those who are forced to act. Secondly, binding orders would establish appeal rights, which would subject the office to litigation and the need to spend financial resources. In education, the *Schools Act* already makes provision for appeals to the Member of the Executive Council (MEC).[83] Examples of appeals mechanisms in the Act is found in the section on admissions,[84] learner expulsion,[85] the governing body code of conduct,[86] allocated functions to governing bodies,[87] and the withdrawal of functions from the governing body.[88] Another important point to consider for an education ombudsman would be the power to investigate human right's issues.

The objective of the office is to promote good governance in order to encourage accountability, efficiency and transparency in administration. Any person who believes that his rights have been violated by an act, action or an omission thereof of local or central administration, or any other body vested with public functions, can file a complaint.[89] Ireland's Ombudsman for Children as well as the National Council for Children in Denmark have specific functions and powers in relation to education and

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81 See discussion on this aspect at ch.6: par.6.5. Appendix A: Draft model for the Ombudsman for Education:sec. 12(6).
82 Gottehrer and Hostina 200: 410.
83 84/1996 and ch.5: par .7.1.
84 84/1996:sec. 5(9).
85 84/1996:sec. 9(11) (a)-(b).
86 84/1996:sec. 18A(6)
87 84/1996:sec. 21(4).
88 84/1996:sec. 22(5).
89 Batalli 2015: 236.

schools.[90] These powers and functions will be discussed below to determine the feasibility of having similar functions for a prospective South African Ombudsman for Education.

2.9.2 Administrative and Human Rights powers for the Ombudsman for Education

In Ireland, the Ombudsman may investigate any administratively deficient action taken by a school in connection with that school's performance of its functions if the action affected the child in question adversely and provided the internal grievance procedures have all been exhausted.[91] This power will indeed be useful to an Ombudsman for Education in the South African context for matters relating to learner discipline, school codes of conduct, admissions, language issues, or learner pregnancy, to name a few.[92] This will in turn assist in ensuring that dignity, equality and the best-interest principle are not compromised.[93]

Ombudsmen may investigate administrative action taken by or on behalf of a school where the action may affect a child adversely, actions were taken without authority, or taken on irrelevant grounds.[94] This power is important, as the Ombudsman will be able to investigate where a SGB, principal and the PDE took an arbitrary decision that might affect the rights of the learner.[95] Following the investigation, the Ombudsman can make recommendations to the school and the PDE on his or her findings and the recommendations to improve the situation at the level of the school. In the South African context, learner discipline and school safety (issues such as abuse of illegal substances, smoking in schools, sexual abuse, physical punishment, bullying and more recently, the debates around gender orientation in schools) are major challenges. Therefore this would be a most useful power to empower and assist schools in aspects such as these.

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[90] Ch.6: para 4.1.1 and 4.1.2.

[91] Ch.6:par. 4.1.1.3.

[92] See discussion at Ch.2: para. 3.2–3.5; ch.6: par .4.1.3.2. Appendix A: Draft model for the Ombudsman for Education: sec. 7(2) and 11(1)(a)(ii).

[93] See discussion at Ch.2: para. 2.2.1–2.2.8; ch.6: para 4.1.1.3 and 4.1.3.2.

[94] See discussion at Ch.6: par. 4.1.1.3.

[95] Appendix A: Draft model for the Ombudsman for Education:sec.8 and 9.

In further promoting children's and SGBs' rights, the Ombudsman should have the power to advise and encourage PDEs and the DBE on policy development, practices and procedures designed to promote the rights and welfare of those in the education environment. It is further important for the Ombudsman to be able to promote awareness among members of the public relating to education rights and how the rights can be enforced.[96] In addition hereto, the Ombudsman should also cooperate with the other established Ombudsmen Offices in the provinces, as well as civil society partners to monitor and review legislation affecting children.[97]

Another important power to have is to be able to establish structures to consult regularly with vulnerable groups in the education environment, especially children.[98] This is important to realise the South African ideals of a transformative and participatory democracy.

It is recommended that the Ombudsman also have the powers to initiate administrative proceedings, or to make complaints to the administrative court and to participate in pending proceedings.[99] South Africa does not have specialist administrative courts. Litigants in South Africa have the following courts at their disposal for review applications in the education context: the High Court, Supreme Court of Appeal and the Constitutional Court. The High Court is the court of first instance. It was discussed in this dissertation and shown that education disputes have often been pronounced upon by the highest court.[100] This power will be useful where the DBE or PDE fails to implement recommendations; the Ombudsman will have the power to enforce the recommendations in a court of law.

To further ensure accountability of the office, the Ombudsman must be required to report to the legislature annually with information concerning the activities undertaken,

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[96] See discussion at ch.6: par. 4.1.1.2.

[97] See discussion at ch.6: para 4.1.1.2 and 4.1.3.2. Appendix A: Draft model for the Ombudsman for Education: sec. 7(2)(f), 14 and 17.

[98] See discussion at ch.6: para 4.1.1.2, 4.1.2.1 and 4.1.3.2. Appendix A: Draft model for the Ombudsman for Education: sec. 7(3)(a)-(c).

[99] Ch.6: par .4.1.3.2. Appendix A: Draft model for the Ombudsman for Education:sec. 12(4)(a)-(c).

[100] *Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) and *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC).

as well as any remarks regarding the observances of children in the education environment.[101]

Next follows a discussion on the broader functions the Ombudsman for Education should have with reference to the focus of this dissertation.

3. BROADER FUNCTIONS FOR CONSIDERATION FOR THE OMBUDSMAN FOR EDUCATION

As an ombudsman office continues to grow, more and more ombudsmen have powers and functions to engage and mediate. These are important aspects to recommend as part of the powers for an Ombudsman for Education, as it is a direct result from the discussions emanating from Chapter 3 of this dissertation. The central focus of this dissertation is to examine an alternative mechanism to the courts to improve access to justice and cooperation amongst education role-players within a democratic society. The powers and functions ideal for consideration of an Ombudsman office are drawn from those identified in Chapter 6 and relevant to achieve the improvement of access to justice and cooperation amongst education role-players.

3.1 Power to engage meaningfully in the education sector

The concept of meaningful engagement is not a new concept. It is, however, a fairly new concept to education. Meaningful engagement is a useful tool and or power for an ombudsman to have. Liebenberg[102] notes the need for remedial innovation in the context of school governance conflict. In addition, the three significant Constitutional Court judgments in *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others*[103] *(Ermelo)*, *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another*[104] *(Welkom)* and *MEC for Education in Gauteng Province and Others v*

[101] Ch.6: par. 4.1.3.2. Appendix A: Draft model for the Ombudsman for Education:sec. 16(1)-(2).
[102] 2016: 2.
[103] 2010 (3) BCLR 177 (CC).
[104] 2013 (9) BCLR 989 (CC).

Governing Body of Rivonia Primary School and Others (*Rivonia*)[105] emphasise the need for cooperative governance measures and engagement.

Liebenberg[106] further argues that the traditional, binary adversarial litigation process is not well suited to remedying constitutional rights violations in respect of education. In this regard, meaningful engagement is a promising means of resolving constitutional infringements, such as where PDEs undertake to provide additional resources (classrooms, educators and staff) to schools in exchange for admitting more learners in order to assist other schools that are overcrowded.[107] It is also a mechanism that can be used where PDEs have made these undertakings but failed to deliver.

It should be noted that the Constitution does not expressly use the term “meaningful engagement”. However, such engagement can be inferred from the sections that are purported to protect the right to participate in service delivery processes and decisions. The notion of meaningful engagement was developed for the first time by the Constitutional Court in the matter of *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others*[108] (*Occupiers*). In this case, the basis for meaningful engagement was found in the Preamble, section 7(2), section 26 and section 152 of the Constitution.[109] Similarly, in the education context, it can be argued that its basis will be found in the Preamble, section 7(2) and section 29 of the Constitution.

De Vos[110] argues that meaningful engagement is a progressive and effective remedy capable of promoting social transformation and enhancing participatory democracy, transparency and accountability. Engagement has the potential to contribute to the resolution of conflict and to increase both understanding and sympathy if both sides are willing to participate in the process.[111] The engagement must be meaningful and

105 2013 (12) BCLR 1365 (CC).
106 2016: 3.
107 See discussion at ch.2: 4.1.
108 2008 (5) BCLR 475 (CC).
109 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC): par. 16-18.
110 2014: 414.
111 *Residents of Joe Slovo Community, Western Cape v Thubelisho Homes and Others* 2010 (3) SA 454 (CC): par. 239 and 297.

SGBs and PDEs should act fairly throughout the process. Case law provides clear guidelines on the objectives of, and requirements for, meaningful engagement.

3.1.1 Requirements for meaningful engagement

The goal of meaningful engagement is to find a mutually acceptable solution to difficult issues confronting the parties in conflict.[112] SGBs and PDEs should direct their focus at finding a mutually acceptable solution to issues rather than staking out who has the final say.[113] This can be done with the assistance of an ombudsman. Finding solutions and avoiding litigation as far as possible should be the aim of an ombud office. It is important to maintain and restore relationships in the education context, as the education role-players have a legal obligation to adhere to the constitutional prescripts on cooperation.

Lundy[114] developed a voice model that can assist education role-players. Although intended as a means to engage meaningfully with children, the features of the voice model will also assist education players in their approach to engaging meaningfully with one another concerning matters that, in effect, deal with children. The model comprises four factors: space, voice, audience and influence. Alexander[115] elaborates on this model, with specific reference to how it should be applied in the education sector.

3.1.1.1 Space

A prerequisite for meaningful engagement is creating an opportunity for involvement – a safe space in which stakeholders are encouraged to participate actively and to express their views.[116] It is submitted that meaningful engagement is an expression of a “bottom-up” approach to participatory democracy.[117] What this means, in essence, is that the state (the DBE and PDEs) creates the opportunity for SGBs and other

112 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC): par. 244.

113 *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC):par. 78.

114 2007:927-942.

115 Alexander 2018: ch. 4: par. 4.2.1.

116 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC): par. 297. See, also, *Constitution* 1996:Preamble and sec. 7(2), 29(1) and 33.

117 Chenwi and Tissington 2010: 17.

stakeholders to participate in policy issues that may affect the process of admissions. In the context of admissions, meaningful engagement should take place before admission policies and admission strategies are planned, while they are being implemented, and when they are evaluated.[118] The Constitutional Court has emphasised that engagement must happen before issues go to court and not after.[119]

3.1.1.2 Voice

In order to voice an opinion, stakeholders must be in possession of appropriate and relevant information in order to formulate a viewpoint.[120] Dependable and meaningful lines of communication must be maintained. The engagement must be a two-way communication process where parties (SGBs and PDEs) listen and try to understand the other's point of view.[121] Wherever possible, the engagement should be respectful, with face-to-face conversations.[122] A reasonable effort must be made by the parties (SGBs and PDEs) to engage meaningfully with each other and with others;[123] that is, consider the issue at stake and the participants involved. Moreover, an adequate record should be kept of the efforts to engage. Chenwi and Tissington[124] further state that the relevant information provided for the purpose of engaging meaningfully must take the language and special needs of the people involved into account. Moreover, the information must be accessible and transparent and the participants must be able to speak freely.

Good faith and reasonableness are required on the part of the parties engaging.[125] Thus, SGBs and PDEs will be required really to listen to each other and try to understand the concerns, fears and needs they both have in order to find common ground. Participation and engagement find particular recognition in the Constitution's

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118 Chenwi and Tissington 2010: 2.

119 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC): par. 30.

120 Welty and Lundy 2013:2. See, also, *Governing Body Hoërskool Overvaal v Head of Department Education* [2018] 2 ALL SA 157 (GP), where the importance of reliable admission statistics was highlighted.

121 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC): par. 238–39.

122 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC): par. 12.

123 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC): par. 239.

124 2010: 23.

125 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC): par. 244.

provisions on cooperative government.[126] An opportunity for such participation and engagement arose when the plight of two learners became known in 2010.[127] In the *Welkom* case, the court pointed out that the nature of the conflict was such that it cried out for good faith engagement based on mutual trust in order to find common ground and seek a resolution to the problem. Instead, both the PDE and SGBs firmly dug in their heels, in the process ignoring their constitutional duties and failing to take the interests of the pregnant learners into account. The court clearly indicated that the instructing letters issued by the HOD were insufficient in the light of cooperative governance principles and the consultations that took place after the letters had been drafted in bad faith.[128]

3.1.1.3 Audience

Determining who should be part of the engagement is important, and all relevant stakeholders should be included.[129] In the context of formulating any school policies, especially those on admissions, language and pregnancy, the audience is most likely to include PDEs, SGBs, the broader parent community of the school, the broader community (in the case of admissions), and learners. The manner in which dependable and meaningful lines of engagement are facilitated is thus important.

3.1.1.4 Influence

The power imbalance between SGBs and PDEs can affect the engagement process detrimentally. PDEs must therefore treat SGBs and other stakeholders as partners in the decision-making process, instead of simply passing down information about decisions to them.[130] Honesty and mutual trust between the parties are imperatives

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126 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 140.

127 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 159 and 160.

128 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 164 and 165.

129 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC): par. 19.

130 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC): par. 13.

when engaging. Secrecy and hidden agendas are counterproductive to the process and not in keeping with the constitutional value of transparency.[131]

SGBs and PDEs should preferably deploy compassionate and sensitive delegates to consult on their behalf in order to ensure that meaningful engagement is possible between the parties.[132] The process of engagement does not, however, require of the parties to agree on every issue.[133] The focus is on finding common ground. It is trite that, although the final decision rests with the PDE, such decision must also be informed by the concerns raised by other stakeholders.[134] Where meaningful engagement fails, another powerful tool for the Ombudsman to consider is mediation.

Next follows a brief discussion on the power to mediate.

3.2 Power to mediate

Mediation is considered a very effective way to address conflict that culminates in disputes.[135] Conflict mediation is basically a process that facilitates dialogue because it is coordinated by an impartial third party who helps to identify common interests with a view to reaching some kind of agreement.[136] Mediation entails the development of negotiation strategies that focus on communication between parties that are in conflict with one another. The process enhances understanding of the other's needs and interests in order to facilitate a mutually acceptable agreement.[137] According to Elnegahy,[138] outcomes of mediation that is tailored according to needs is a form of distributive justice, as it best addresses both parties' respective needs.

In general, mediation, as opposed to adversarial litigation processes, can address the needs of both PDEs and SGBs. The reason for this is that the process is flexible, it is

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[131] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC): par. 21.

[132] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC): par. 239.

[133] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC): par. 244.

[134] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC): par. 244.

[135] Wiese 2016: 47; Rycroft 2013: 187; Patelia and Chiktay 2015: 3; and Lyster 1996: 231.

[136] Gaspodini, Alves and De Oliveira 2016: 194.

[137] Elnegahy 2017: 783.

[138] 2017: 783.

confidential, and it is a means of enhancing communication and empowerment, all of which are critical for fostering, maintaining and preserving good relations between these two stakeholders.[139] In preserving good relations, it might further encourage the SGBs and PDEs to engage with each other regularly and in a more meaningful manner. The ultimate outcome hereof is that SGBs and PDEs will adhere to the principles of cooperative governance. Mediation is thus a means to facilitate the achievement of cooperative governance principles. According to Gaspodini, Alves and De Oliveira,[140] mediation is suitable for resolving conflict in the education context.

It must be noted that most of the characteristics mentioned are not common in litigation or arbitration processes. These processes are both lengthy and costly. In addition, it is the judge or arbitrator who makes the finding in the form of a final and binding decision. These systems are thus unfortunately characterised by a 'win-lose' outcome, which is not ideal for the preservation of relationships.[141] For example, the admissions process deals with the *placement* of learners at various schools. However, when PDEs and SGBs litigate on this issue, the cases are never resolved before the commencement of the school year, and alternative arrangements must be made to accommodate the affected learners until such time as the court case has been finalised. This occurred in the *Ermelo*[142] case and in the matter of *School Governing Body, Northern Cape High School and Others v The Member of the Executive Council for Education in the Northern Cape and Others* (*Northern Cape High*).[143]

The tone regarding alternative dispute resolution methods was established in the dissenting judgment of Froneman J and Skweyiya J (with Moseneke DCJ and Van der Westhuizen J concurring) in the *Welkom* Constitutional Court judgment.[144] In this regard, the justices correctly pointed out that SGBs and HODs of PDEs must remember at all times that their respective objective functions are to serve the needs

139 Elnegahy 2017: 783.
140 2016: 195.
141 Gaspodini, Alves and De Oliveira 2016: 195.
142 2010 (3) BCLR 177 (CC).
143 Case number 1981/2015 (reportable).
144 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 129–136.

of children in education, as section 28(2) of the Constitution mandates.[145] It is thus incumbent upon these two parties to identify the actual underlying dispute and to take steps to resolve it in a manner that is consistent with constitutional requirements.[146] The court held that disputes involving children are definitely of the kind where one must penetrate the surface to get to the real issue below.[147] The mediation process through an ombudsman can provide these mechanisms at a relatively lower cost than having to adjudicate a court case.[148] In fact, the justices went on to identify that the underlying dispute between the SGBs and PDEs had nothing to do with issues pertaining to the rule of law and procedural fairness, but everything to do with the rights of pregnant learners.[149]

The court stated that the dispute was about how the special needs of pregnant learners should be accommodated at public schools.[150] That the two learners were allowed to continue with their schooling as a result of the intervention by the HOD was, said the court, correct and should have been a pointer to how the dispute should have been resolved and how future difficulties should be avoided or resolved.[151] It can be assumed that what is meant here is a process of consultation and meaningful engagement using various mediation options. Instead of doing this, the parties hastened to court and the focus shifted to a power play resulting in the best interests

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145 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 129.

146 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 130.

147 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 130.

148 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 135.

149 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 131.

150 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 131.

151 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 132.

of the pregnant learners being “lost in translation”.[152] The court asserted that, in order for SGBs and PDEs to resolve their disputes, an approach which sees the best interests of the learners as the starting point had to be preferred. This process must contextualise the dispute within the parties’ duties to engage and cooperate with each other and must look at the bigger picture in order to understand how their interactions may best serve the learners’ interests in future.[153] The right to education and the rights of children, it was said, are basic human rights protected in the Constitution.

With regard to the two most recent admission cases in the Kimberley High Court, it is submitted that, had the PDE and SGBs been willing to consult with each other in good faith, the dispute could have been resolved through meaningful engagement or mediation as opposed to it being resolved in court.[154] This would have saved costs. In the *School Governing Body, Northern Cape High School and Others v The Member of the Executive Council for Education in the Northern Cape and Others*[155] *(Northern Cape High)* case, the admission applications of 23 prospective Grade 8 learners were involved. Of these 23 learners, 18 had also applied to other schools.[156] On the merits of the case, the judge dealt only with the applications of the 18 learners who were declined admission to the school, as it was found that the other 5 learners had indeed been admitted.[157] It turned out that these learners were provisionally admitted to the school in line with its admission policy.[158] The PDE, however, declined the 18 learners’ admission applications and argued that the learners had been admitted to other schools to which they had in fact applied.[159] The PDE accordingly instructed the school not to fill the vacancies left by the non-admission of the declined learners.[160] The PDE further dismissed the appeals lodged on the basis of the department’s criteria set out

152 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 132.

153 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC): par. 134.

154 *Federation of Governing Bodies of South African Schools v The Head of Department, Department of Education, Northern Cape Province and the Member of the Executive Council for Education, Northern Cape Province* [2016] ZANCHC 28; *School Governing Body, Northern Cape High School and Others v The Member of the Executive Council for Education in the Northern Cape and Others* [2016] ZANCHC 14.

155 [2016] ZANCHC 14.

156 [2016] ZANCHC 14: par. 33.

157 [2016] ZANCHC 14: par. 33.

158 [2016] ZANCHC 14: par. 34.

159 [2016] ZANCHC 14: par. 35.

160 [2016] ZANCHC 14: par. 31.

in its admission circular.[161] The crux of the matter was that parents and learners who had applied to various schools and whose applications were successful were not granted an opportunity to select the school of their choice.[162] In this regard, the court found that the PDE had acted arbitrarily by not allowing parents the opportunity to select their school of preference.[163]

In the matter of *Federation of Governing Bodies of South African Schools v The Head of Department, Department of Education, Northern Cape Province and the Member of the Executive Council for Education, Northern Cape Province*[164] (*FEDSAS NC*), FEDSAS brought an application seeking to review the decision of the HOD of the PDE regarding the contents of the admission circular intended for 2016 on the basis that the *audi alteram partem* principle was not observed by the PDE when issuing the circular.[165] In addition, FEDSAS sought to review certain of the provisions in the circular, in that the circular purported to strip SGBs and schools of certain of their powers allocated by legislation and to vest those powers in the PDE.[166] FEDSAS's argument was based on the fact that the PDE had given the undertaking at the Provincial Consultative Forum concerned (PCF) that it would afford FEDSAS an opportunity to comment on the proposed circular.[167] FEDSAS requested the PDE to withdraw the contents of the circular, to which the department did not even respond.[168] The court found in favour of FEDSAS and set aside the PDE's circular on the basis that the PDE had created a legitimate expectation (at the PCF) by giving an undertaking to FEDSAS that it would have the opportunity to comment and provide input regarding the circular.[169] The judge briefly alluded to the fact that no consultation or prior draft of the circular preceded the issuing of the final circular, as well as to the partnership model envisaged in the *Schools Act*.[170] The judge, however, stated that it

161 [2016] ZANCHC 14: par. 38 and 39.
162 [2016] ZANCHC 14: par. 40 to 42.
163 [2016] ZANCHC 14: par. 49 and 50.
164 [2016] ZANCHC 28.
165 [2016] ZANCHC 28: par. 13.
166 [2016] ZANCHC 28: par. 13.
167 [2016] ZANCHC 28: par. 28.
168 [2016] ZANCHC 28: par. 13.
169 [2016] ZANCHC 28: par. 56.
170 [2016] ZANCHC 28: par. 47 and 49.

was not necessary to decide on these issues and that only the aspect of legitimate expectation needed to be considered.[171]

Various research articles have explored the safeguarding and promotion of human rights through ADR mechanisms.[172] The results and recommendations emanating from the articles point to the value thereof; hence mediation as an ADR method can assist in safeguarding and promoting education rights. It would be a worthy tool at the Ombudsman's disposal to resolve disputes amongst education role-players.[173]

4. CONCLUSION

The role of and establishment of an ombudsman institution over the past years have influenced the institutions in older democracies.[174] All international instruments have played a significant contribution in this regard.[175] Batalli[176] states that an ombudsman's role of defender and supervisor are integrated in a democratic country governed by the rule of law. Generally the administrative branch is ombudsmen's main object of control, therefore making it the ideal solution to consider for the education sector. Furthermore, the constitutional concept of independent, easily accessible and soft control of public administration through highly reputable persons is indistinguishably connected to the principle of democracy and the rule of law as it is essential to the contribution of those principles.[177] Its increasing significance for the protection of human rights and liability of administration is accepted worldwide.

Chapter 8 will present a conclusion and recommendations resulting from this study.

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171 [2016] ZANCHC 28: par. 50.
172 Boulle 2012: 1–17; Lyster 1996: 230–246.
173 Appendix A: draft model for the Ombudsman for Education:sec.7(3)(c).
174 See discussion at ch.6: par. 2.2, 2.3, 2.4, 3 and 4.
175 Ch.6: par. 2.2.4. See also Batalli 2015: 235.
176 Batalli 2015: 235. There are however differences from country to country as is evident in the discussions at ch.6.
177 Batalli 2015: 235. See also Hoexter and Penfold 2021: 111–135.

CHAPTER 8
RECOMMENDATIONS AND CONCLUSION

> "There are many problems but I think there is a solution to all these problems; it is just one, and it is education." Malala Yousafzai

1. INTRODUCTION

The primary aim of this dissertation was to investigate the appropriateness of the creation of an Ombudsman office as a suitable dispute resolution mechanism to improve access to administrative justice, and cooperation among education role-players. To give effect to this investigation, the features of the ombudsman institution were investigated and explored, taking into account the justice and cooperative governance requirements with reference to the broad remit of conflict that arises amongst education role-players.

The conceptual framework of this dissertation was premised on the notion of the separation of powers doctrine, the rule of law, transformative constitutionalism and participatory democracy.[1] The aim was to explore the aptness of an ombud office to improve access to administrative justice and enhance cooperation amongst school governing bodies (SGBs), provincial departments of education (PDEs) and other education role-players in conflict with one another as an appropriate alternative to litigation, thereby transforming society and ultimately giving effect to the principles of justice and cooperative governance. The focus was on the broad roles and responsibilities that the National Department of Basic Education (DBE), PDEs and SGBs have in education. These role-players are empowered to perform their functions in terms of International law prescripts,[2] the *Constitution of the Republic of South Africa*[3] *(Constitution)*, the *National Education Policy Act*[4] *(NEPA),* the *South African Schools Act*[5] *(Schools Act),* and other applicable policies.

The introductory chapter sets the scene for the challenges experienced in the education sector by discussing the historical development of the South African

[1] See the discussion in ch. 1: 3.1 to 3.4.
[2] See the discussion in ch. 2: 2.1 and ch.4.
[3] 1996.
[4] 27/1996.
[5] 84/1996.

education system pre-1994 and the main features of the current system.[6] The primary research question that guided this dissertation was whether or not the creation of an ombudsman office would serve as an appropriate dispute resolution mechanism to promote access to justice, just administrative action and improve cooperation among education role-players. In order to answer the primary question, the current legal position with regard to administrative action in the basic education environment among education role-players was explored. The answers to the secondary research questions and recommendations, where appropriate, will be provided in what follows.

2. CONCLUSIONS AND RECOMMENDATIONS WITH REGARD TO THE CURRENT LEGAL POSITION WITH REGARD TO ADMINISTRATIVE ACTION PERTAINING TO EDUCATION ROLE-PLAYERS IN THE BASIC EDUCATION ENVIRONMENT

The first question that needs to be answered is the determination of the current legal position with regard to administrative action pertaining to education role-players in the education context. It was necessary to answer this question to demonstrate how exercising functions in the basic education sector can lead to conflict amongst role-players. In so doing it assists in answering the main research question by firstly identifying the legal framework within which education in the South African context operates, who the main education role-players are in terms of legislation and how exercising these functions lead to conflict and disputes.[7]

In order to set the scene for education it was important to discuss the various key international instruments which provide for the right to education.[8] These instruments included the *International Covenant on Economic, Social and Cultural Rights*[9] (*ICESCR*) and the *Convention on the Rights of the Child*[10] (*CRC*) are the most significant. The Committee on Economic, Social and Cultural Rights (CESCR) provides for four key elements that the State must take into account in realising the right to a basic education, namely availability, accessibility, acceptability and

[6] See discussion in ch. 1: 1.1 to 1.2.
[7] See discussion in ch. 1: 1, 2.1, ch.2: 2.4.2–2.4.6, 3.1.1–3.1.7.
[8] See the discussion in ch. 2: 2.1.1.
[9] ICESCR 1966.
[10] CRC 1989.

adaptability of education.[11] The *CRC* is the lead international instrument advocating the rights of children, and the Committee on the Rights of the Child gave guidance in a 2013 General Comment that stressed that the best interests of the child must be a primary consideration in all actions or decisions that concern him or her.[12] Legislation related to education post 1994 was promulgated in quick succession, all of which contained standards linked to the key international instruments.[13]

Section 28 of the *Constitution* is dedicated to the rights of children.[14] Linked to this is the right to a basic education, which is an immediately enforceable right.[15] Other important rights in the context of education are dignity, equality, freedom and security of the person, privacy and freedom of expression, participation, access to courts (justice) and just administrative action.[16] In order to realise the constitutional right to a basic education, education must be available as well as accessible.[17]

It is in this context that the *NEPA* and the *Schools Act* were promulgated and various policy documents were published to achieve, *inter alia*, the ideals of participatory democracy and equal access to education.[18] In the post-1994 dispensation, the state no longer has all the power and control over education. Instead, the legislator has delegated powers to key identified role-players (the DBE, PDEs, SGBs, schools, and principals) to ensure that there are adequate school places, infrastructure and other educational resources in place to ensure that each child can receive an education.[19] The decisions taken in relation to the exercise of these powers are administrative by nature.[20] In exercising their powers, SGBs and PDEs have a duty to respect the separation-of-powers doctrine and must ensure that the administrative decisions taken are in terms of education legislation in line with the rule of law, administrative law prescripts, and cooperative governance principles.[21]

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11 See the discussion of the four A's in ch. 2: 2.1.2.
12 CRC/C/GC14/2013:par. 6(c).
13 See the discussion in ch. 1: 1.2 and ch. 2: 2.3.
14 See the discussion in ch. 2: 2.2.5.
15 Discussed in ch. 2: 2.1.
16 See the discussion in ch. 1: 1.2 and ch. 2: 2.3 to 2.4.
17 See the discussion in ch. 2: 6.
18 See the discussion in ch. 2: 3.3 and 3.4.
19 See the discussion in ch. 1: 1.1 to 1.2 and ch. 2: 2.3 to 2.4.
20 See the discussion in ch. 1: 1.2.1.1 – 1.2.1.5; ch.5: 4, 4.1–4.3, 5 and 5.1-5.3.
21 See the discussion in ch. 1: 3.2 and ch. 2: 2.2.

The current legal position regarding the responsibilities and powers of education role-players is the direct result of a deliberate proses of decentralisation of power to the DBE, PDEs and SGBs so as to give effect to the ideals of participatory democracy.[22]

Conflict and disputes in education emanate from the decisions or action take as well as the failure to act by PDEs that overrule, or depart from, school policy or the law. These actions or decisions relate to admissions policies (including aspects of learner migration patterns resulting in overcrowding at school), language policies, pregnancy policies, expulsion in the learner code of conducts, school fees and failure to provide the basic educational resources such as appropriate infrastructure (it was also seen that overcrowding and deplorable education conditions are to be found at the quintile 1 to 3 schools), textbooks and basic nutrition in terms of the National Schools Nutrition Program (NSNP), which have led to conflict and disputes.[23]

It was confirmed that most education cases involving conflict between PDEs and SGBs involve the affluent schools located in quintiles 4 and 5. It was also recognized that SGBs of schools located in quintiles 1 to 3 are, for the most part, dysfunctional. It was ascertained that these schools do not have the necessary financial resources to seek recourse in courts of law, unlike their counterparts in quintiles 4 and 5. The point is, simply, that such schools do not have access to administrative justice.[24] In this regard, education legislation makes no provision for any sort of alternative to litigation, especially for these schools. As a result of the quintile system, some researchers correctly argue that the inequities and disparities of the past are still acutely felt in the education system despite a rather comprehensive legal framework that regulates the sector.[25] This conflict resulting in litigation is contrary to the aims and provisions of national legislation and policies as well as international instruments.[26] It is therefore recommended that it is acknowledged that there is a dire need for the state to consider implementing an appropriate mechanism to avoid litigation and that appropriate steps are taken in this regard. Further details on this recommendation follow below.[27]

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22 See discussion in ch. 1: 3.1; ch. 2: 2.2.
23 See the discussion in ch. 2: 2.1, 3.
24 See ch. 4.
25 See the discussion in ch. 2: 2.2.
26 See the discussion in ch. 1: 1, 1.2.2, 2.1; ch. 3: 4.1.1–4.1.4 and ch. 4: 3.1.1.8.
27 See the discussion in ch. 1: 2.2; ch. 2: 3.1.1–3.1.7; ch. 3: 6.1–6.3, ch. 4 and ch. 5.

3. CONCLUSIONS AND RECOMMENDATIONS REGARDING THE EXISTING LEGAL FRAMEWORK THAT REGULATES ADMINISTRATIVE DECISIONS AMONG EDUCATION ROLE-PLAYERS AND WHETHER OR NOT IT ACCORDS WITH THE CONSTITUTIONAL IMPERATIVES FOR ACCESS TO JUSTICE, JUST ADMINISTRATIVE ACTION AND THE ENHANCEMENT OF COOPERATION

Chapter 3 scrutinised the constitutional cooperative governance imperatives for addressing conflict between PDEs and SGBs. Cooperative governance is one of the most important democratic principles on which the South African constitutional dispensation is premised and is based on the notion of participatory democracy.[28]

These values are embedded in the *Constitution* as well as in education legislation and confirm the link between education role-players.[29] SGBs and PDEs are organs of state and are bound by cooperative governance principles, yet the provisions contained in the *Intergovernmental Relations Framework Act*[30] (*IRFA*) are not applicable to PDEs and SGBs in conflict with each other.[31] Therefore, the provisions outlined in section 41(1)(h)(i) to (vi) of the *Constitution* must be followed by SGBs and PDEs when in conflict.[32]

Smit[33] and Sayed[34] correctly argue that school governance can be enhanced through cooperative governance measures. The need to comply with the constitutional imperatives pertaining to cooperative governance has been highlighted in several court cases.[35]

The assumption of cooperative governance principles are informed by democracy,[36] the devolution of powers,[37] shared decision-making and responsibilities,[38]

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28 See ch. 3: 1.1.
29 See ch. 3: 3 and 4.
30 13/2005.
31 See ch. 3: 4.3.1 to 4.3.2.
32 See ch. 3: 2.3.2, 4.1 to 4.4, and 6.1 to 6.3.
33 Smit 2014: 37–63.
34 Sayed 2002: 35–46.
35 See ch. 3: 6.
36 See ch.3: 3.1.
37 See ch.3: 3.2.
38 See ch. 3: 3.3.

cooperation,[39] the empowerment factor,[40] freedom to accomplish quality education,[41] restructuring of the education administration,[42] accountability,[43] developing constructive partnerships[44] and the coordination of activities.[45] These principles must be executed in a spirit of mutual trust and good faith.[46] However, the challenges for PDEs and SGBs in implementing cooperative governance principles is that, currently, some of their relationships are strained as a result of mutual mistrust and a lack of good faith in their dealings with each other.[47] The conflict is exacerbated by: both PDEs and SGBs lacking knowledge of education legislation; inadequate communication between these institutions; misinterpretation of education legislation and policies; a lack of transparency in their actions; the lack of support structures for SGBs; constant interference by PDEs in the affairs of SGBs; and instances of SGBs refusing to adapt to changes in the education system.[48] Despite these challenges, PDEs and SGBs have a constitutional mandate to execute their education powers and functions in the light of the constitutional imperatives contained in section 41(1)(h)(i) to (vi).[49] Despite these constitutional imperatives there is no appropriate mechanism in place to enhance these measures.

It is daunting that 1.5 billion people cannot obtain justice for civil, administrative or criminal justice.[50]Access to justice has been an imperative in South Africa since 1994, but post-apartheid has not entirely transcended to transitional justice.[51] The residues of apartheid continue to haunt society through the deeply ingrained inequalities in that the disadvantaged (SGBs serving quintile 1 to 3 schools) have limited access to courts to challenge decisions by PDEs.[52] The State is obliged to ensure that there are

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39 See ch. 3: 3.3.2.
40 See ch. 3: 3.5.
41 See ch. 3: 3.4.
42 See ch.3: 3.6.
43 See ch.3: 3.7.
44 See ch.3: 3.8.
45 See ch. 3: 3.3.1.
46 See ch. 3: 4.1 to 4.4 and 6.
47 See ch. 3: 5.
48 See ch. 3: 5.
49 See ch. 3: 4, 5 and 6.
50 See discussion at ch.4: 3.
51 See discussion at ch.4: 1.2.3.
52 See discussion at ch. 1: 1.2.3, ch. 2: 2.2.2.1 (a)–(e), 2.4.6, ch. 4: 5.2, ch. 5: 5.1 and 6.2.

sufficient mechanisms in place to enhance access to justice and to improve cooperation among role-players.

The South African state has ratified key international law instruments dealing with access to justice and the requirements set out therein and is therefore obliged to ensure that there are sufficient mechanisms in place for society to access justice.[53] Access to justice ideals are linked to a human-rights-based approach,[54] the rule of law,[55] accountability and capacity and empowerment.[56] Access to justice is further premised on the constitutional imperatives of human dignity, equality and freedom.[57]

Currently the judicial route in the form of the courts is the only mechanism utilized by SGBs and PDEs to resolve their conflict or disputes. As a result hereof the South African State has insufficient mechanisms to deal with conflict between education role-players.

Furthermore, the courts are not always suitable forums to resolve education rights disputes partly because not all education role-players have access to the courts and this impedes on the right to access justice.[58] In addition is the costs, physical location of courts and the time delay in resolving matters.[59] Lack of adequate access to justice is a breach of freedom, equality and dignity not to mention section 33 and 34 contained in the *Constitution*. Access to justice was investigated from a narrow and broad perspective.[60] The broader perspective was adopted over and above the narrow approach, simply because the narrow approach is limited to court access. The broader perspective entails an exploration of various other non-judicial control mechanisms such as the creation of special legislative oversight bodies like an Ombudsman office.[61]

To improve access to justice, particularly administrative justice and to enhance cooperation the following is recommended:

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53 See discussion at ch. 4: 3.1.1.1–3.1.1.8.
54 See discussion at ch. 4: 3.2.
55 See discussion at ch. 4: 3.3.
56 See discussion at ch. 4: 3.4 and also at 3.4.1 and 3.4.2 dealing with empowerment and capacity and accountability and good governance.
57 See discussion at ch. 2: 2.2.2, 2.2.3, 2.2.6, 2.2.8, ch.4:4.1, 4.2, 4.3 and 4.4.
58 See discussion at ch. 5: 6.2, 6.2.1–6.2.4.
59 See discussion at ch. 5: 6.2.4.
60 See discussion at ch. 4: 5.1 and 5.2.
61 See discussion at ch. 5: 7.1 and 7.2.

- On the one hand education legislation and policy should be amended to provide for a clearer understanding of how PDEs and SGBs must coordinate their actions for better cooperation. Inserting a similar provision to the one contained in the *Constitution* will be a reminder to SGBs and PDEs of their constitutional mandate and obligations. A further provision could be included that allows the Minister to promulgate regulations to give effect to the cooperative governance principles and so ensure that SGBs and PDEs cooperate in good faith and mutual trust by assisting, supporting and consulting each other, by coordinating their activities, by adhering to agreed procedures, and by avoiding litigation.[62]
- On the other hand, SGBs and PDEs require a mechanism to facilitate the conclusion of agreements between the PDEs and SGBs and to create, strengthen and facilitate the partnership relationship. This could be done in the *Schools Act*. The next question is how this can be monitored so that it does not simply become a hoop to jump through to get to court. The answer is by way of a dedicated Ombudsman office for Education.
- In this regard the Ombudsman office can also keep PDEs and SGBS abreast of any changes in the law and the interpretation thereof that could impact the sector. In fact the Ombudsman can make recommendations to the DBE and PDE regarding legislation to improve educational outcomes. The Ombudsman can also assist the PDE with training in this aspect so that PDEs implement good practice to communicate these changes to SGBs and schools. Furthermore, there should be constant and adequate training for PDE officials as well as SGBs in the interpretation of the law. This would improve the relationship of trust and cooperation amongst all.
- SGBs and PDEs must be trained to understand what is meant by the separation-of-powers doctrine as well as the rule of law and, where conflict arises, to follow the prescripts of the law. An Ombudsman can assist in this regard. This, in turn, will ensure that administrative justice principles are complied with. This can be done by a dedicated Ombudsman office and in addition hereto the Ombudsman is able to compile reports and recommendations. So, for example, where

[62] See, for example, *NEPA* 27/1996: sec. 3(4)(i).

departmental officials promise extra classrooms in exchange for schools to admit more learners and fail to deliver – thus causing admissions and trust issues the dispute can be reported to the Ombudsman who in turn will lodge an investigation and issue a report with recommendations.

- Courts should also start issuing punitive cost orders against SGB members and PDE officials in their personal capacity if they fail to cooperate properly and run to court at every skirmish.

5. CONCLUSIONS ON WHETHER OR NOT THE OMBUD OFFICE CAN SERVE AS AN APPROPRIATE ALTERNATIVE FORUM TO DEAL WITH CONFLICT AND DISPUTES ARISING FROM ADMINISTRATIVE DECISIONS AMONG EDUCATION ROLE-PLAYERS

In the education sector it was determined that firstly, education role-players have a duty to avoid litigation and cooperate with one another. Secondly it was determined that where litigation is unavoidable, not all SGBs have access to courts to challenge administrative decisions of the PDEs. Chapter 6 of this dissertation evaluated the various ombudsman models with reference to various jurisdictions around the world.[63]

The core mission of all public ombudsman institutions is supervision of the administrative authorities through impartial investigations, reports and recommendations with the objective of promoting legality, justice and fairness.[64] This therefore confirms that the ombuds institution is a worthwhile consideration to deal with administrative decisions. Ombuds institutions have evolved over the years to include powers to deal with human rights breaches.[65] The essential characteristics for an effective ombuds institution are that a state should be democratically governed, independent, jurisdiction, accessibility to the institution, level of cooperation of the institution with other bodies, operational efficiency, accountability and transparency of the institution and the personal character and expertise of the person.[66]

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63 See discussion at ch. 6: 2.1–2.4, 4.1, 4.1.1–4.1.4.
64 See discussion at ch. 6: 5.1–5.2.
65 See discussion at ch. 6: 2.4, 3, 4 and 5.1.
66 See discussion at ch. 6 evaluation of the various ombudsman models; ch.7:2.1–2.9.

The popularity of the institution has grown over the years and more and more ombudsmen have the power to engage and mediate as a tool to persuade state institutions to implement the recommendations made by an ombudsman and to cooperate with the institution. In education, the South African courts have provided valuable lessons from case law to education role-players regarding engagement.[67] Alexander[68] further argues for mediation as an appropriate means to resolve conflict. This dissertation is an extension of that work and recommends the establishment of an ombuds office with powers to engage and mediate.

Ombudsman institutions were never intended to replace the judiciary, or act alone to protect and promote human rights or fight maladministration. The function or establishment of the institution must rather be seen as a complement or supplement to the courts, designed to operate in a larger network of this institution and to serve as both a vertical and horizontal accountability mechanism.[69]

6. CONCLUSIONS ON WHETHER THE CREATION OF AN OMBUD OFFICE WILL RESPECT, PROTECT AND FULFIL THE CONSTITUTIONAL IMPERATIVES WITH REGARD TO ACCESS TO JUSTICE, JUST ADMINISTRATIVE ACTION AND THE ENHANCEMENT OF COOPERATION

The barriers to courts such as the financial expense, time factor and non-justiciability of certain disputes have been highlighted. Ombuds offices can provide access to justice for persons (including SGBs) who are excluded from the adjudicative mechanisms being the courts.[70] Ombuds institutions can improve access to justice and ultimately just administrative action through laws and operating practices that improve the office's accessibility by undertaking own-motion investigations and by opening provincial offices.[71] Access to justice is further enhanced through the exercise of the human rights responsibilities given to the ombudsman, for example public education, public awareness-raising and legal advice.[72]

67 See discussion at ch. 3: 6, 6.1–6.3.
68 Alexander 2018: 1–177.
69 See discussion at ch. 6: 3.
70 See discussion ch. 1, 2, 3, 4, and 5.
71 See also Reif 2020: 41.
72 See discussion at ch. 6: 2.4, 4.1, 4.1.1–4.1.5.

7. RECOMMENDATION: DRAFT MODEL OF LEGISLATION FOR AN EDUCATION OMBUDSMAN

This dissertation concludes by attaching a draft model of what the office of an Ombud should look like and is provided for in the attached Appendix A.[73] This draft signifies a culmination of what an Ombuds office for Education should look like in the South African context. The draft legislation includes aspects on access to justice and cooperation. The draft Appendix is an important aspect to the conclusion of this dissertation in that it is one of the main contributions of this dissertation to show that indeed the creation of an ombud office can serve as an appropriate dispute resolution mechanism to promote access to justice, just administrative action and to improve cooperation amongst education role-players.

8. CONCLUSION

Given the partnership nature of relationships that the *Schools Act* has created, the relationship between SGBs and PDEs must be informed by close cooperation that recognises each other's distinct but interrelated functions.[74] The relationship should therefore be characterised by engagement, cooperation in mutual trust and good faith, and the use of mediation where conflict arises.[75] The goals of providing high-quality education for all learners are connected to the governance of education. It is, therefore, essential for the effective functioning of the school that SGBs and PDEs respect each other's functions.[76] Education role-players have a constitutional duty to avoid litigation at all costs. The state has a duty to ensure that all citizens. including SGBs. elected to serve in quintile 1 to 3 schools have adequate measures and institutions in place to resolve conflict that affects children's' right to a basic education.

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73 See attached Appendix A.

74 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education v Harmony High School and Another* 2013 (12) BCLR 1365 (CC): par. 124.

75 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education v Harmony High School and Another* 2013 (12) BCLR 1365 (CC): par. 124.

76 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education v Harmony High School and Another* 2013 (12) BCLR 1365 (CC): par. 124.

Justice Musi correctly stated that, when power, competency or authority is not properly delineated, circumscribed or exercised, dysfunctionality will reign supreme.[77] The DBE, PDEs and SGBs (including principals) need to pay careful attention to the issues of democratisation and participatory governance. If the DBE, PDEs and SGBs truly embrace their respective obligations to adhere to the principles of cooperative governance, meaningful engagement and mediation, a dedicated Ombudsman office will embrace the promise for transforming society for the better and thus realising greater opportunities for access to education.[78]

In conclusion, the ombuds institution is indeed a worthy approach of achieving sustainable reconciliation of the different interests involved amongst education role-players. The ombuds institution can encourage and require parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. In this regard respectful face-to-face engagement or mediation through an ombuds institution should replace the litigation combat amongst education role-players. This will not only reduce litigation but will also enhance access to justice and promote cooperation among education stakeholders.

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77 *Deon Scheepers v The School Governing Body, Grey College Bloemfontein and 3 Others,* [2018] ZAFSHC 210: par. 1.

78 See the discussion in ch. 1:3.1 and 3.2.

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APPENDIX A

DRAFT LEGISLATION FOR THE ESTABLISHMENT OF AN OMBUDSMAN FOR EDUCATION IN SOUTH AFRICA

THE OMBUDSMAN FOR EDUCATION ACT

To establish a framework for the National Department of Basic Education, Provincial Education Departments and School Governing Bodies to promote access to justice, just administrative action and improve cooperation and to provide for mechanisms and procedures to facilitate the resolution of conflict and or disputes; and to provide for matters connected therewith.

ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY AND GENERAL

Section

1. Preamble.
2. Interpretation, application of the Act and object of the Act

PART 2

OMBUDSMAN FOR EDUCATION

Chapter 1

Appointment, terms and conditions of office

Section

3. Appointment and term of office.
4. Salary and allowances for expenses.

Chapter 2

Performance of functions and powers

Section

5. Performance of functions and powers of the Education Ombudsman

6. Reporting matters to and additional powers of the Education Ombudsman

Chapter 3

Rights of Education Role-players

Section

7. Function to promote rights of education role-players in the public ordinary schooling environment.

Chapter 4

Complaints against public bodies: Department of Basic Education, Provincial Departments of Education, School Governing Bodies and Public Ordinary Schools

Section

8. Function to examine and investigate complaints against public bodies such as the department of basic education and provincial department of education.

9. Function to examine and investigate complaints against public ordinary schools

10. Preliminary examination and investigation of complaints.

11. Exclusions.

Chapter 5

Reporting, Examination, investigation and reporting of complaints

Section

12. Examination and investigation of complaints

13. Powers in respect of preliminary examinations and investigations.

14. Cooperation

15. Confidentiality of information.

16. Reports

Chapter 6

Section

17. Miscellaneous

PART 1

1. **PREAMBLE**

WHEREAS the education sector in the Republic is constituted of education role-players at a National, Provincial and School Governing Body level, which are distinctive, interdependent and interrelated;

AND WHEREAS the education role-players must provide effective, efficient, transparent, accountable and coherent education for the Republic to secure the well-being of the learners and the realisation of their constitutional rights;

AND WHEREAS one of the most pervasive challenges facing our country as a developmental state is the need for government to redress poverty, underdevelopment, marginalisation of people and communities and other legacies of apartheid and discrimination to ensure that there is equal access to justice and education;

AND WHEREAS this challenge is best addressed through the effort of education role-players to work together and to integrate as far as possible their actions in the provision of education services.

AND WHEREAS cooperation and the integration of actions amongst education role-players depend on a stable and effective system of governance for regulating the conduct of relations and the resolution of conflict and or disputes between the education role-players;

AND WHEREAS section 41(1)(h)(i)-(vi) of the Constitution requires of education role-players to cooperate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, coordinating their actions and legislation with one another, adhering to agreed procedures, and avoiding legal proceedings against one another.

AND WHEREAS the Ombudsman for Education, hereinafter referred to as the Education Ombudsman, is appointed in order to protect and safeguard the rights of education role-players as set forth in the Constitution of the Republic of South Africa, the South African Schools Act and other Acts and Regulations of law in education.

AND WHEREAS the Education Ombudsman is appointed to investigate matters such as maladministration, administrative decisions in connection with the affairs of education role-players in the execution of their duties, human rights violations affecting education role-players in the schooling environment and any improper conduct by a person performing a public function in relation to the execution of education related functions.

AND WHEREAS it is necessary to establish a general legislative framework applicable to education role-players to ensure they conduct their relations in the spirit of the Constitution and to provide a mechanism to promote access to justice and improve cooperation.

2. INTERPRETATION, APPLICATION OF THE ACT AND OBJECT OF THE ACT

Interpretation

(1) In this Act, unless the context otherwise requires –

"Act" means this Ombudsman for Education in South Africa Act.

"Administrative action" means any decision taken, or any failure to take a decision, by – an organ of state, when exercising a power in terms of the Constitution or Provincial Constitution; or exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect.

"Cooperation" refers to the cooperative governance requirements as is envisaged in section 41 of the Constitution.

"Education Ombudsman" means the Ombudsman appointed in terms of this Act.

"Education role-players" means the National Department of Basic Education, the Provincial and District Departments of Education, the Principal and management team of the public ordinary school, School Governing Bodies, educators and learners.

"Learner" means any person receiving education or who is obliged to receive education in terms of the South African Schools Act 84 of 1996

"Meaningful engagement" is a process that can be used by the Education Ombudsman to find mutually acceptable solutions to resolve conflict and or disputes amongst

education role-players by creating the necessary space, voice, audience and influence.

“Mediation” means a process that can be used by the Education Ombudsman to facilitate dialogue between the education role-players to identify common interests with a view to reaching an agreement to resolve conflict and or disputes.

Public Ordinary School is defined in the South African Schools Act 84 of 1996.

[These are just some examples of the definitions that can be captured in ` legislation]

(2) Application of the Act

This Act applies to:

(a) The National Department of Education

(b) The Provincial Departments of Education

(c) The Districts for the Department of Education

(d) The Principal and management team of the school

(e) Elected School Governing Bodies of public ordinary schools

(f) Educators and learners

(g) Any other person as listed in section 38 of the Constitution

(3) Object of the Act

(a) to establish a framework to promote access to justice, access to administrative justice and to improve cooperation amongst education role-players;

(b) to provide for mechanisms and procedures to facilitate the resolution of education related conflict and disputes; and

(c) to provide for matters connected therewith.

PART 2

OMBUDSMAN FOR EDUCATION

Chapter 1

Appointment, terms and conditions of office

3. Appointment and term of office

(1) The Office for the Education Ombudsman is hereby established and the holder of the office shall be known as the Education Ombudsman.

(2) The Education Ombudsman is appointed for a renewable, seven-year term by the President on the recommendation of the National Assembly. The resolution recommending the appointment of the Education Ombudsman must enjoy the support of at least 60% of the Members of the National Assembly. The Office reports to parliament through the Portfolio Committee on Basic Education.

(3) The Education Ombudsman must:

(a) be a South African citizen,

(b) have the capacity to undertake legal transactions and fully enjoys public rights,

(c) have not been lawfully convicted for intentional crime,

(d) have graduated from a University and received the title of Master or an equivalent one; the qualifications obtained must be in the field of a specialist in the education and law sector,

(e) have at least experience in working with or for children, and legal matters in the field of education,

(f) be a person of immaculate character and high prestige.

(g) being an admitted Advocate in the High Court of South Africa, will be an added advantage.

(4) A person appointed to be the Ombudsman for education –

(a) may be removed from office on the grounds of misconduct, incapacity or incompetence. The resolution recommending the removal of the Education Ombudsman must enjoy the support of at least 60% of the members of the National Assembly.

(b) shall not be removed from office except where –

(i) he or she has become incapable through ill health of effectively performing his or her functions of the office,

(ii) he or she is adjudicated bankrupt,

(iii) he or she is convicted on a criminal offence by a court of competent jurisdiction and sentenced to imprisonment,

(iv) he or she has failed without reasonable excuse to discharge the functions of the office for a continuous period of three months beginning not earlier than six months before the day of removal, or

(v) for any other stated reason, he or she should be removed,

(5) The term of office shall expire in case of his or her death or dismissal.

(6) The same person may not be appointed as the Education Ombudsman for more than two consecutive terms of office.

(7) Prior to taking over his or her duties, the Ombudsman shall take the oath stipulated in Schedule 1.

4. Salary and allowances for office expenses

(1) There shall be paid to the holder of the office of the Ombudsman for Education such remuneration and allowances for expenses as determined by Parliament and provided that it shall not be less than that of a Judge of the Supreme Court of South Africa.

(2) The Office receives an annual budget, allocated through the Department of Finance and approved by a vote in parliament.

Chapter 2

Performance of Functions and powers of the Education Ombudsman

5. Performance of Functions and powers

(1) The Ombudsman shall serve impartially and independently in the performance of his or her functions in terms of this Act.

(2) The Ombudsman for Education shall have regard for the best interests of the child concerned and shall give due consideration, having regard for the age and maturity of the child, to his or her wishes when dealing with matters related to the learners in the education environment.

(3) The Ombudsman for Education may not:

(i) take other office nor perform any other professional activities for remuneration,

(ii) belong to a political party,

(iil) run public activity that cannot be reconciled with the duties and dignity of the office.

(4) The Ombudsman for Education shall perform his or her functions in good faith and without fear, favour, bias or prejudice so as to promote access to justice, just administrative action and improve cooperation among the education role-players

(5) The Ombudsman for Education shall establish structures and protocols for the purposes of engaging and mediating disputes or conflict that result from the education role-players exercising their functions as is prescribed in education law.

6. Reporting matters to and additional powers of the Education Ombudsman

(1) Any matter in respect of which the Education Ombudsman has jurisdiction may be reported to the Education Ombudsman by any person –

(a) by means of a written declaration under oath or after having made an affirmation, specifying -

(i) the nature of the education matter in question;

(ii) the grounds on which he or she feels that an investigation is necessary;

(iii) all other relevant information known to him or her, or

(b) by such other means as the Education Ombudsman may allow with a view to making his or her office accessible to all persons.

(2) A member of the office of the Education Ombudsman shall render the necessary assistance, free of charge.

(3) In addition to the powers and functions assigned to the Education Ombudsman in terms of this Act, he or she shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged –

(a) maladministration in connection with education,

(b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by the National or Provincial Department of Education or by the elected school governing body members or other role-players.

(4) The Ombudsman for Education may, by notice in the *Gazette,* issue regulations, protocols or guidelines, not inconsistent with this Act regarding –

(a) any matter that may be prescribed in terms of this Act,

(b) a framework for education role-players to assist in co-ordinating training and other developmental priorities and objectives between the role-players.(c) a framework to assist education role-players to co-ordinate and align education related activities prone to cause conflict and or disputes between the role-players,

(d) a framework to provide for the process of meaningful engagement and mediation between education role-players

(e) implementation protocols for the benefit of education role-players to safeguard and preserve their relationships

(f) indicators for monitoring and evaluating the implementation of this Act, and

(g) any other matter that may facilitate the administration of this Act.

Chapter 3

Rights of Education Role-players

7. The rights of education role-players

(1) The Education Ombudsman promotes and protects the rights of all education role-players.

(2) The Education Ombudsman shall take measures and promote the rights of all education role-players. To provide the education role-players with full harmonious improvement in the education environment, respecting the dignity and subjectivity of all education role-players by –

(a) Advising the Minister for the National Department of Education or Member of the Executive Council for the Provincial Departments of Education or any other Minister of the Government, as may be appropriate, on the development and co-ordination of policy relating to all education role-players executing their functions in the schooling environment

(b) Encouraging the National Department of Basic Education, Provincial Departments of Education and school governing bodies to develop policies, practices and procedures designed to promote the rights of all education role-players

(c) Collecting and disseminating information on matters relating to all role-players in education,

(d) Promoting awareness among members of the public on matters relating to all education role-players in education and how those rights can be enforced.

(e) Highlighting issues relating to education role-players in the schooling environment that are of concern to children,

(f) Exchanging information and cooperating with other Provincial Ombudsmen in the Provinces.

(g) Monitoring and reviewing the operation of legislation concerning matters that relate to all education role-players

(h) To protect and promote all education role-players rights by engaging or mediating with all education role-players to balance the rights of the role-players for the benefit of the learner/s in the schooling environment.

(i) Monitoring and reviewing the operation of this Act and, whenever he or she deems it necessary, to make recommendations to the Minister of Basic Education and or the Member of the Executive Council for Education or in a report under the Act or both for the amendment of the Act.

(3)

(a) The Ombudsman for Education shall establish structures to consult and engage regularly with all education role-players for the purposes of his or her functions under this section.

(b) In consultation or engagement under this subsection and where learners are involved, the views of a learner/s shall be given due weight in accordance with the age and understanding of the learner/s.

(4) The Ombudsman for Education may undertake, promote or publish research into any matter relating to the rights and welfare of learners and other education role-players in the education environment.

(5) The Ombudsman for Education may, on his or her own initiative, and shall, at the request of an education role-player, provide advice to the education role-player concerned. This advice must also be provided to the Minister or Member of the Executive Council for education on any matter. This will include the probable effect of the implementation of any proposals of policy or legislation in education relating to the rights of learners in the education context.

(6) The Minister for Basic Education or Member of the Executive Council for education or any other Minister, or education role-player referred to in this section shall attend to the matters submitted to it by the Ombudsman.

(7) The Minister for Basic Education or Member of the Executive Council for Education or any other Minister, or education role-player who receives recommendations from the Ombudsman with regard to measures to be implemented for the benefit of a learner/s at school or relating to other education role-players shall be obliged to inform the Ombudsman promptly and not later than within 30 days on the measures or position they had taken.

(8) In the case where the Minister for Basic Education or Member of the Executive Council for Education or any other Minister, or education role-player referred to herein do not inform the Ombudsman on the measures or position taken, or in case the Ombudsman does not agree with their position, the Ombudsman may address an instruction and/or request of a competent authority to take relevant action.

(9) In case the Ombudsman finds that the measures taken by the Minister for Basic Education or Member of the Executive Council for Education or any other Minister, or education role-player infringe the rights or violate the wellbeing of the learner/s, he or she may require that disciplinary proceedings be instituted or official sanctions be imposed.

(10) All education role-players must make every reasonable effort –

(a) to avoid conflict or disputes when exercising their statutory powers or performing their statutory functions; and

(b) to resolve such conflict or disputes without resorting to litigation proceedings by first approaching the Education Ombudsman for assistance to resolve such conflict or dispute.

(c) No education role-player may institute litigation proceedings in order to settle such a dispute or conflict unless all efforts have been made to resolve the dispute and conflict by the mechanisms provided for in terms of this Act.

Chapter 4

Complaints against public bodies: Department of Basic Education, Provincial Departments of Education, School Governing Bodies and Public Ordinary Schools

8. Complaints against public bodies: Department of Basic Education, Provincial Departments of Education, school governing bodies and public ordinary schools

(1) Subject to this Act, the Ombudsman for Education may investigate any administrative action without prior notice, which action was taken either by the National Department of Basic Education, the relevant Provincial Department of Education or School Governing Body of a public ordinary school where upon having carried out a preliminary examination of the matter, when it appears to the Ombudsman for Education that –

(a) the action has or may have adversely affected a learner or other education role-player, and

(b) the action was or may have been –

(i) taken without proper authority,

(ii) taken on irrelevant grounds,

(iii) the result of negligence or carelessness,

(iv) based on erroneous or incomplete information,

(v) improperly discriminatory,

(vi) based on undesirable administrative conduct or practice, or

vii) otherwise contrary to fair and sound administration as is required in terms of the Promotion of Administrative Justice Act 3 of 2000.

9. Complaints against Department of Basic Education, Provincial Departments of Education by school governing bodies and public ordinary schools

(1) Subject to this Act, the Ombudsman for Education may investigate any administrative action without prior notice, which action was taken either by the National Department of Basic Education, the relevant Provincial Department of Education where upon having carried out a preliminary examination of the matter, when it appears to the Ombudsman for Education that –

(i) the action has or may have adversely affected a learner/s, and

(ii) the action was or may have been –

(I) taken without proper authority,

(II) taken on irrelevant grounds,

(III) the result of negligence and carelessness,

(IV) based on erroneous or incomplete information,

(V) improperly discriminatory,

(VI) based on undesirable administrative conduct or practice, or

(VII) otherwise contrary to fair and sound administration as is required in terms of the Promotion of Administrative Justice Act 3 of 2000.

(2) The Ombudsman for Education may investigate an action under this subsection only where internal remedies prescribed in the South African Schools Act have been resorted to and exhausted in relation to the action.

10. Investigation Powers

(1)

(a) The Ombudsman shall not investigate an action under section 9 or 10 unless –

(i) a complaint has been made to him or her in relation to the action by or on behalf of a child, or

(ii) a complaint has been made to him or her in relation to the action taken by the Department of Basic Education,

(iii) a complaint has been made to him or her in relation to the action taken by the Provincial Department of Education,

(iv) a complaint has been made to him or her in relation to the action by or on behalf of a school governing body of a public ordinary school

(ii) it appears to him or her, having regard to all the circumstances, that an investigation under this section into the action would be warranted.

(b) A complaint may be made to the Ombudsman for Education on behalf of a child by –

(i) a parent of the child, or

(ii) any other person such as an educator, departmental official or a member of the school governing body or any such other person who is considered by the Ombudsman for Education to be a suitable person to represent the child.

(c) If a complaint is made to the Ombudsman for Education by a learner/s or on behalf of a learner/s by a person other than a parent of the learner/s, the Ombudsman for Education shall, before investigating the complaint, inform a parent and or guardian of the learner/s of the complaint.

(2) The Ombudsman for Education may –

(a) having carried out a preliminary examination of the matter, decide to discontinue the investigation under this Act into such action, -

(b) discontinue an investigation under this Act into such action;

If he or she becomes of the opinion that –

(i) the complaint is trivial or vexatious,

(ii) the education role-player/s making the complaint, or on whose behalf the complaint is made, has not taken sufficient interest in the matter,

(iii) the education role-player/s making the complaint or on whose behalf the complaint is made, has not taken reasonable steps to seek redress in respect of the subject matter of the complaint or refuses to take such redress, or

(iv) the lapse of time since the occurrence of the matter complained of makes effective redress impossible or impracticable. In this regard if the complaint is not made before the expiration of two years from the time of the action, or the time the education role-player/s made the complaint, or on whose behalf the complaint is made, became aware of the action, whichever is later, the Ombudsman may elect not to investigate.

(3) A preliminary examination or investigation by the Ombudsman for Education shall not affect the validity of the action examined or investigated or any power or duty of the person who took the action to take further action.

11. Exclusions

(1) The Ombudsman for Education shall not investigate any action taken by or on behalf of an education role-player–

(a) if the action is one in relation to which –

(i) civil litigation proceedings have been initiated in court,

(ii) the child or school governing body affected by the action has a right of appeal to the Member of the Executive Council in terms of the South African Schools Act 84/1996. In this regard the decision must first have been taken by the Member of the Executive Council before it can be referred to the Education Ombudsman.

(iii) All conflict and disputes related to educator appointments between education role-players as there are specific labour forums to resolve this type of conflict and disputes.

Chapter 5

Examination and investigation of complaints

12. Examination of complaints

(1) In the case where a complaint has been made to the Ombudsman for Education and he or she decides not to investigate the action under this Act or discontinues the investigation, he or she must send the complainant a statement in writing of his or her reasons for the decision.

(2) The Ombudsman may examine each case without prior notice.

(3) In matters where the Ombudsman for Education conducts an investigation under this Act, he or she shall send a statement in writing of the results of the investigation – to the education role-players involved.

(4) The Ombudsman may require of departmental officials at a National and Provincial departments, school governing bodies, or such other relevant institutions to submit explanations or give information as well as to disclose those relevant files and documents in order to,

(a) enter proceedings before the Constitutional Court initiated by or on the basis of constitutional claims concerning the rights of the learner/s and any other role-player and participate in such proceedings,

(b) request the High Courts to adjudicate cases of divergence in law interpretation with regards to regulations of law concerning the rights of the learner/s or other education role-players in education.

(c). may institute administrative proceedings or institute civil litigation cases on behalf of learners and school governing bodies whose rights have been adversely affected.

(5) The Ombudsman for Education may by way of subpoena, subpoena any education role-player to submit explanations or give information as well as to disclose those relevant files and documents to conduct the investigation or for the purposes set out in sub-section (4) above.

(6) Where following the investigation under this Act into an action, it appears to the Ombudsman for Education that the action adversely affects the learner/s or other education role-players he or she may recommend to the department and public ordinary school concerned –

(a) that the matter in relation to which the action was taken be considered further by the department and public ordinary school concerned by way of meaningful engagement or mediation

(b) the measures or specified measures be taken to remedy, mitigate or alter the adverse effect of the action, or

(c) that the reasons for taking the action be given to the Ombudsman for Education,

and, if the Ombudsman for Education deems it fit to do so, he or she may request the department or public ordinary school to notify him or her within a specified time of its, his or her response to the recommendations.

(7) The effect of the recommendations made by the Ombudsman for Education are final and implementable against the education role-player where recommendations have been made, until such time that the affected education role-player review and set aside the recommendations of the Education Ombudsman.

13. Powers in preliminary examinations and investigations

(1) The Ombudsman shall submit evaluations and conclusions to The Minister for Basic Education or Member of the Executive Council for education or any other Minister, or education role-player/s so as to provide effective protection of rights and wellbeing of

all the education role-players including the rights and wellbeing of the learner/s to improve the procedure of solving cases in that matter.

(2) The Ombudsman may also apply to competent authorities for legislative initiative or for issue or amendment of legal Acts.

(3) The Minister for Basic Education or Member of the Executive Council for education or any other Minister, or education role-player approached by the Ombudsman as set forth in this paragraph 1 and 2 shall be obliged to take a position with regard to those applications within 30 days from the day they receive those applications.

14. Cooperation

(1) The Ombudsman for Education shall cooperate with associations, civil society institutions and other voluntary associations and foundations that Act to protect the rights of the learner/s or other education role-players

(2) The Ombudsman for Education will encourage education role-players to cooperate by way of meaningful engagement and or mediation to resolve conflict and or disputes amongst them.

(3) In the case where the Minister for Basic Education or Member of the Executive Council for education or any other Minister, or education role-player referred to herein do not inform the Ombudsman on the measures or position taken or in case the Ombudsman does not agree with their position, the Ombudsman may address an instruction and or request to a competent authority to take relevant action.

15. Confidentiality

The Ombudsman for Education may refuse, also to the public authority, to disclose personal data of a person from whom he or she obtained the information on infringement of rights or violation of wellbeing of the learner/s or any other education role-player, as well as of a person whom the infringement concerns, shall the Ombudsman deem it necessary, to protect liberties, rights and the best interest of a juristic person.

16. Reports

(1) The Ombudsman for Education shall annually and not later than the 31st of March present a report on his or her activity and comments on the observance of the rights

of learners in education and the other education role-players to Parliament and the National Assembly.

(2) The information submitted by the Ombudsman shall be made public.

(3) The Ombudsman shall, at any time, submit a report to Parliament on the findings of a particular investigation if –

(a) he or she deems it necessary;

(b) he or she deems it in the public interest related to education rights;

(c) it requires the urgent attention of, or an intervention by Parliament;

(d) he or she is requested to do so by the Speaker of the National Assembly; or

(e) he or she requested to do so by the President of South Africa.

(4) The findings of an investigation by the Education Ombudsman shall, when he or she deems it fit but as soon as possible, be made available to the complainant and to any education role-player implicated thereby.

Chapter 6

17. Miscellaneous

(1) The Ombudsman for Education shall perform his or her duties of with the assistance of the Provincial offices of the Ombudsman for Education.

(2) The Ombudsman for Education shall determine the organization of his or her office.

(3) The Ombudsman for Education may appoint a deputy/s Ombudsman for Education and has the right to dismiss the deputy where deemed necessary.

(4) The Ombudsman for Education determines the scope of responsibilities of the deputy Ombudsman for Education.

(5) The Office of the Ombudsman for Education shall be a juristic person.

SCHEDULE 1 OATH

"I solemnly swear that in performing the duties of the Ombudsman for Education I shall be entrusted with, I shall keep faith with the Constitution of the Republic of South Africa, safeguard the rights of the education role-players in relation to education, being guided by the provisions of Law, and the wellbeing of the education role-players in the educational environment. I do swear that I shall impartially, with utmost diligence and care perform the duties I shall be entrusted with, that I shall protect the dignity of the office I shall be entrusted with and that I shall keep the legally protected matters strictly confidential."

The oath may be made with a sentence "so help me God" added at the end.