Guidelines to achieve social justice through cooperatively governed education

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CHAPTER 1: INTRODUCTION

1.1 RATIONALE AND BACKGROUND

One of the main objectives of our constitutional state is to establish a society based on social justice as contemplated in the *Constitution of the Republic of South Africa*, 1996.[1] Indeed, social justice is also one of the central visions and ideals of the South African education system.[2] However, the public basic education system fails to provide equal access to the opportunities and rights required to achieve social justice. While schools may be accessible, learner attendance does not necessarily equate to quality education.[3]

Historical geographic patterns of (dis)advantage continue to affect institutions' capacity to provide quality education and achieve equality of opportunity and outcomes. The historical influence of race on equitable opportunities and outcomes is compounded by geography and social class.[4] In his discussion of the education markets, Ball states that in an ideal world, every parent would have the freedom to pick any school where they want their children to be educated.[5] In the South African reality, however, this is not the case. In fact, parents from rural areas often have access to only one or two poorly resourced schools with poorly trained teachers, leaving them with not much choice for their children's education.[6] These children might never enjoy the equal and quality education they should be receiving.[7] In essence, therefore, for some, socioeconomic realities limit the constitutionally entrenched right to education.[8]

The implementation of the constitutional rights framework that enshrines equal access to quality basic education has been hindered by a number of deficiencies and failures. These include a a shortage of proficient educators and staff,[9] an undervaluing of the

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1 Hereinafter 'the *Constitution*'.

2 Rossouw 2015:17.

3 See Spaull & Kotze 2015:12-24; Spaull & Taylor 2015a:133-165; Spaull & Taylor 2015b:47-59; Spaull 2013:436-447. Also see UNICEF Poverty traps and social exclusion among children in South Africa Report (2014), to which Spaull contributed.

4 Badat & Sayed 2014:134.

5 Arendse 2019:44-64.

6 Nieuwenhuis 2011:197; Arendse 2019:44-64.

7 Arendse 2019:44-64; Nieuwenhuis 2011:197.

8 Arendse 2019:44-64; Nieuwenhuis 2011:197.

9 Chisholm 2012:93.

pedagogical importance of the language of instruction,[10] inadequate infrastructure (classrooms and physical space),[11] financial constraints and school quintiles,[12] and insufficient early childhood education.[13]

While the Department of Basic Education continues to add to its complex framework of education policies, the risk is that these may function more as a vehicle for politics than being a bona fide attempt to achieve true social justice in education and work together to achieve this goal.[14] Detailed policies are often issued and strong political stances taken on specific social matters, but are not accompanied by the required will or funding to address the concern in practice. One example is the Department's promotion of Grade R education to be made compulsory, though without allocating sufficient funds to incorporate it into the formal schooling system. In this way, policies are merely symbolic and social justice remains a pipe dream.[15]

The failure to provide adequate school infrastructure and facilities[16] also contributes to disparities in access to quality education. This causes regular disputes between the governing bodies of well-functioning schools and provincial education departments over schools' capacity to admit additional learners.[17] Additionally, numerous disputes have resulted from provincial departments' failure to fill educator positions or their abuse of power and overreach.[18]

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10 Taylor & Von Fintel 2016:75-89.

11 Table 7 in NEIMS 2020 Report.

12 Badat & Sayed 2014:137.

13 NPC 2012:299.

14 Serfontein 2018:1-13; Jansen 2001:s.p.

15 Arendse 2019:44-64; Nieuwenhuis 2010:281.

16 Singh 2012:7.

17 *Governing Body, Hoërskool Overvaal v Head of Department of Education Gauteng Province* (86367/2017) [2018] ZAGPPHC 258 (12 February 2018).

18 *Schoonbee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T); *Destinata Skool v Die Departementshoof: Department van Onderwys Gauteng* case no. 23675/03 (2004-03-03); *Governing Body of Mikro Primary School v Western Cape Minister of Education (332/05) [2005] ZAWCHC 14; 2005 JOL 13716 (C); 2005 (3) SA 504 (C); 2005 (2) All SA 37 (C) (18 February 2005)*; *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *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* (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013); *Member of the Executive Council for Education in Gauteng Province v Governing Body of the Rivonia Primary School* [2013] ZACC 34; *MEC: Department of Education Northwest Province v FEDSAS* [2016] ZASCA 192; *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (4) SA 546 (CC).

Where the different spheres of government[19] and organs of state[20] do not cooperate and see eye to eye on the theory and practical realisation of social justice in education, the right to education of an equal standard, and by implication, to social justice is jeopardised.

The *Intergovernmental Relations Framework Act* (IRFA)[21] includes a number of mechanisms and procedures to regulate the relationship and settle intergovernmental disputes between the national Department of Basic Education and provincial education departments.[22] However, IRFA and the education laws are silent on alternative processes to be followed if school governing bodies and education departments, particularly in the provincial context, are locked in dispute, thus preventing the achievement of social justice.

This raises the question of how the relationship between school governing bodies and education departments could be guided and governed to ensure that it is peaceful and productive. The main aim of this dissertation, therefore, is to establish what the relationship between the national Department of Basic Education, provincial education departments and school governing bodies ought to be to comply with the imperative captured in chapter 3 of the *Constitution* and realise social justice in education. Secondly, the dissertation seeks to develop guidelines to assist education departments and school governing bodies to achieve the principles of cooperative governance and settle any potential disputes between them. The ultimate goal is for relationships to remain intact as a prerequisite for safeguarding and promoting a democratic education system that is based on social justice.

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19 National, provincial and local. For purposes of this dissertation, the spheres of government are the national Department of Basic Education and the provincial departments of education.

20 For purposes of this dissertation, the school governing bodies.

21 13/2005.

22 See *Constitution*:sec. 41(2)(*b*). For guidelines on the application of chapter 4 of IRFA, on the settlement of intergovernmental disputes, see Intergovernmental Dispute Prevention and Settlement: Guidelines for Effective Conflict Management Practice Guide, GN 491, Government Gazette 29845, 26 April 2007.

The partnership model for public school governance envisaged by the *South African Schools Act*[23] is underpinned by the principle of cooperative governance[24] set out in the *Constitution*.[25] This compels the partners to cooperate in good faith.

In *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School,*[26] the Constitutional Court held that cooperation between school governing bodies and national or provincial government was "rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to basic education is realised". Moreover, the court in *Head of Department, Department of Education, Free State Province v Welkom High School*[27] stated that the provisions in the *Schools Act* were:

> … carefully crafted to strike a balance between the duties of these various partners [governing bodies, principals, heads of department, Members of Executive Council and the education minister] in ensuring an effective education system. … [T]he interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by the Act.

The Constitutional Court[28] went on to state:

> The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and that has been concretised in the Schools Act as an organising principle for the provision of access to education.

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23 84/1996; hereinafter 'the *Schools Act*'.

24 *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng2016 (4) SA 546 (CC)*:paras. 26-27, 47.

25 Sec. 41(1): "All spheres of government and all organs of state within each sphere must—
(a) preserve the peace, national unity and the indivisibility of the Republic;
(b) secure the well-being of the people of the Republic;
(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(d) be loyal to the Constitution, the Republic and its people;
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution;
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(h) cooperate with one another in mutual trust and good faith by—
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) coordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another."

26 *MEC for Education, Gauteng Province v Governing Body of Rivonia Primary School*:par. 69.

27 *Head of Department, Department of Education, Free State Province v Welkom High School*:paras. 36, 49.

28 *Head of Department, Department of Education, Free State Province v Welkom High School*:par. 123.

Given the nature of the partnership that the *Schools Act* has created, public school governing bodies and the state should be in a close cooperative relationship, recognising the partners' distinct yet interrelated functions. This relationship should be characterised by consultation and cooperation in mutual trust and good faith. The goals of providing quality education to all learners and developing their talents and capabilities depend on it.

In practice, however, this kind of cooperation in the education sector is yet to be established. Among the challenges that currently prevent the realisation of the constitutional imperative of cooperative governance are overreach and abuse of administrative power,[29] tension relating to power and authority,[30] failure to consult and meaningfully engage,[31] ineffective intergovernmental structures and dispute resolution,[32] and unethical leadership.[33]

1.2 PROBLEM STATEMENT

The *Constitution* is devoted to correcting past injustices, strives towards the establishment of a society based on democratic values, social justice and human rights, and can ultimately be described as transformative.[34] The preamble to the *Constitution* expresses this commitment in the following terms:

> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –
>
> > Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> >
> > Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> >
> > Improve the quality of life of all citizens and free the potential of each person; and
> >
> > Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

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29 *Schoonbee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T).

30 Maluleke *et al.* 2017:48.

31 *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC).

32 Du Plessis 2019: 92.

33 Serfontein & De Waal 2015a:3.

34 Kibet & Fombad 2017:350; Klug 2016:s.p.

Both the preamble and section 1 of the *Constitution* aim to establish a democratic society that is based on social justice, human dignity and equality, which will ultimately advance human rights and freedoms. These listed values must inform and guide all education governance endeavours, from policymaking to legislation, and must also flow through to day-to-day practice. All education stakeholders and partners have to protect, fulfil, promote and respect the provisions contained in the *Constitution* as well as the values it enshrines.

In the education context, support for the ideal envisaged in the *Constitution* can be found in a range of policy frameworks, not least the series of education white papers.[35] Of particular importance is Education White Paper 3,[36] which describes the ideal of an improved and sustainable quality of life for all South Africans, where all will share in a culture of democracy and participate in a growing economy. As such, social justice may be seen as one of the central visions and ideals for the South African education system.[37]

Drawing on the different approaches to social justice in both historical and contemporary South African thinking, this dissertation views the concept through the dual lens of distributional and relational social justice.

Distributional social justice pertains to the manner in which goods are distributed in society.[38] Rawls[39] defines it as follows:

> The subject matter of justice is the basic structure of society, or more exactly, the way in which the major institutions … distribute fundamental rights and duties and determine distribution of advantages from social cooperation.

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35 Education White Paper 1 GN 196 Government Gazette 15 March 1995; Education White Paper 2 GN 130 Government Gazette 14 February 1996; Education White Paper 3 GN 1196 Government Gazette 15 August 1997; Education White Paper 4 GN 2188 Government Gazette 25 September 1998; *National Education Policy Act* 27/1996; *Schools Act* 84/1996; *Employment of Educators Act* 76/1998. Education White Paper 5 GN 1043 Government Gazette 17 October 2001. Education White Paper 6 GN 22524 Government Gazette 27 July 2001. Education White Paper 7 GN 26762 Government Gazette 2 September 2004.

36 A programme for the transformation of higher education GN 1196 Government Gazette 15 August 1997.

37 Rossouw 2015:17.

38 Gerwitz *et al.* 1995:49; Moloi 2019:111-127.

39 Rawls 1972:s.p. See also Moloi 2019:111-127; Gewirtz *et al.* 1995:49.

According to Brighouse[40] and Rawls,[41] the two principles of educational equality and personal autonomy are central to the achievement of distributional social justice in education. To achieve educational equality, the state must guarantee the required liberties through which each child's right to education of an equal standard can be realised.[42] Personal autonomy, in turn, requires that each child, being an autonomous person, should be afforded the necessary opportunities relating to their autonomy.[43]

The reality of education provision in South Africa is that the multi-tiered government does not always live up to the ideals of social justice. Although the existing frameworks and principles of social justice offer lofty guidelines in terms of which policies and laws should be drafted, political and socioeconomic contexts eventually shape the way in which social justice plays out in practice.[44]

Scholars concede that it is difficult to capture the exact actions, intent and nature of distributional social justice.[45] Quite often, definitions have a political undertone and vary from one society to the next.[46] What is certain, however, is that social justice discourses are more prevalent in societies marred by injustice and inequality.[47]

For purposes of this dissertation, the distributional dimension of social justice is understood as ensuring equal opportunity and equal outcomes in education and preventing unfair exclusion from life's opportunities and the activities of society. This is the framework within which the dissertation will critically assess progress made towards achieving social justice in and through education.

Relational social justice, in turn, arranges social relationships according to regulations and rules, whether formal or informal, and pertains to procedural rights, governing how members of a society behave towards one another on different levels.[48] For purposes

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40 Brighouse 2002:185.

41 Rawls 1999.

42 Many practitioners and scholars still struggle to capture the meaning and nature of social justice. Worldwide, many governments are satisfied that children's right to education is served by simply making education accessible, available, adaptable and acceptable. Note, however, that even if this benchmark is reached, no progress will follow without providing high-quality education. Rossouw 2015:18. See also Nieuwenhuis 2010:273.

43 Nieuwenhuis 2011:193.

44 Nieuwenhuis 2011:197.

45 Van Deventer 2013: 5.

46 Rossouw 2015:17.

47 Rossouw 2015:17.

48 Moloi 2019:111-127; Mncube 2008:79.

of this dissertation, relational social justice refers to participation by the stakeholders in South African education and its governance, including the national and provincial education departments and school governing bodies.[49]

The preamble to the *Schools Act* suggests a "partnership" as the mechanism through which education is to be provided and achieved. The relevant part states:

> WHEREAS this country requires a new national system for schools which will … uphold the rights of all learners, parents and educators, and promote their [all learners', parents' and educators'] acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State …

Clearly, therefore, the *Schools Act* contemplates a "partnership" between the state, learners, the parents of learners as well as educators, being the major stakeholders.[50] In both *Head of Mpumalanga Department of Education v Hoërskool Ermelo*[51] and *MEC for Education, Gauteng Province v Governing Body of Rivonia Primary School*,[52] the court recognised that the overall design of the *Schools Act* intended for public schools to be run by three crucial partners. The partnership principle of public school governance was also emphasised by the Constitutional Court in *Head of Department, Department of Education, Free State Province v Welkom High School*,[53] stating that the *Schools Act "*makes it clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant HOD and MEC, and the Minister".[54] In a concurring minority judgment in that same matter, Froneman and Skweyiya JJ emphasised the importance of cooperation and engagement as underlying principles for the partnership, referring to the "constitutional obligation on the partners in education to engage in good faith with each other on matters of education before turning to courts".[55]

This emphasis on participation and engagement is well supported by the provisions on cooperative governance in the *Constitution*. According to section 40(1), the South African government comprises a national, provincial and local sphere, which are "distinctive, interdependent and interrelated"*.* Of particular relevance to this

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49 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*:56.
50 *Schoonbee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T):883E-G.
51 2010 (3) BCLR 177 (CC).
52 2013 (6) SA 582 (CC).
53 2014 (2) SA 228 (CC).
54 Par. 36.
55 Par. 135.

dissertation, however, is section 41, which extends the principles of cooperative governance and intergovernmental relations to all organs of state in each sphere of government. A public school is such an organ of state.

In terms of section 41(1)(h), the spheres of government and organs of state have an unequivocal obligation to cooperate with one another in mutual trust and good faith by assisting and supporting one another, informing one another of and consulting one another on matters of common interest, coordinating their actions, and avoiding legal proceedings against one another.[56] This is reinforced by the *Schools Act*,[57] which requires engagement, participation and cooperation as a general norm, and acknowledges that cooperative governance requires an understanding of the distinctiveness, interdependence and interrelatedness of the different stakeholders.[58]

The explicit provisions of section 41(1)(h)(vi) of the *Constitution* also appear to require all internal remedies to be exhausted before organs of state should consider approaching a court of law.[59] Cooperative governance, therefore, requires proper engagement. This, the court in *MEC for Education, Gauteng Province v Governing Body of Rivonia Primary School*[60] emphasised, referring to proper planning and coordination between the provincial government and school governing bodies as "crucial".[61] The court stressed the stakeholders' constitutional and statutory obligation

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56 Cf. *Head of Department, Department of Education, Free State Province v Welkom High School*:par. 141. "The school governing bodies and HOD are organs of state. In terms of s 41(1)(h) they have an unequivocal obligation to co-operate with each other in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one F another on, matters of common interest, co-ordinating their actions, and avoiding legal proceedings against one another."

57 Preamble.

58 *Head of Department, Department of Education, Free State Province v Welkom High School*:par. 147. "These provisions reinforce the provisions of the Constitution, that engagement, participation and co-operation are the required general norm, and that co-operative governance requires recognition of the distinctiveness, interdependence and interrelation of the different functionaries B involved in the co-operative."

59 Cf. *Head of Department, Department of Education, Free State Province v Welkom High School*: par. 162. "The explicit provisions of s 41(h)(vi) of the Constitution appear to H require a form of exhaustion of internal remedies before organs of state within a sphere of government should turn to the courts. In appropriate cases the courts may well be entitled to ensure compliance with the section's provisions in constitutional disputes in the exercise of their just and equitable remedial power in terms of s 172(1)(b) of the Constitution."

60 2013 (6) SA 582 (CC).

61 Par. 71, 72.

to engage in good faith before turning to the courts[62] and held that "one organ of state cannot use its entrusted powers to strong-arm others".[63]

However, to date, and despite the clear direction given in case law,[64] the legislation that governs South African education fails to provide guidance on how education stakeholders should apply the principles of cooperative governance and what alternative processes should be followed in the event of conflict. A literature search on alternatives to be used in the South African education sector to avoid litigation yields nothing.

1.3 OUTLINE OF RESEARCH TOPIC AND KEY QUESTIONS TO BE ANSWERED

Consequently, to fulfil the imperative captured in chapter 3 of the *Constitution* and advance social justice in education, this dissertation aims to determine the relationship between the national Department of Basic Education, provincial education departments, and school governing bodies. This will be used as a basis to suggest guidelines and explore alternative processes for dispute resolution. To this end, the following primary and secondary research questions will be answered:

Primary question

What are the cooperative governance requirements to realise social justice in public education in South Africa?

Secondary questions

a) What does the concept of social justice entail?

b) How should social justice be defined in the context of education in South Africa today?

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62 Par. 73.

63 Par. 78.

64 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo Head of Department*; *Department of Education, Free State Province v Welkom High School*; *Fedsas v Head of Department: Department of Education, Northern Cape Province* (887/2016) [2016] ZANCHC 28 (8 July 2016).

c) What does the cooperative governance imperative entail in the South African public school education sector?

d) What inhibits and enhances the realisation of the constitutional imperative of cooperative governance in education?

e) How does cooperative governance affect social justice in education?

f) What guidelines can be adopted to enhance cooperative governance and social justice in education?

1.4 RESEARCH METHODOLOGY

The research mainly comprises a doctrinal studyof the relevant South African laws and regulations, case law, academic textbooks, journal articles and electronic resources to critically assess, clarify and analyse the role and status of cooperation and cooperative governance between the national and provincial education departments and school governing bodies in pursuit of social justice in education as envisaged in the *Constitution*. In the context of this study, the term "doctrinal" refers to a research approach that focuses on the theoretical aspects, principles, and doctrines within the field of law. A doctrinal study involves the examination and analysis of existing legal or theoretical frameworks, principles, and rules without necessarily conducting empirical research or practical investigations. For example, in legal research, a doctrinal study might involve a thorough analysis of legal statutes, case law, and legal theories to understand and interpret the existing legal framework surrounding a specific issue. This type of research often relies on library-based methods, such as reviewing legal literature, statutes, and judicial decisions, to develop a comprehensive understanding of the doctrinal aspects of the subject under investigation. [65]

Drawing on philosophical and historical research, the study introduces some of the views on social justice expressed over time and considers how these inform our understanding of what a fair and equitable school system might or should look like.

[65] Hutchinson & Duncan, 2012: 85.

Rawls's[66] writings in particular dominate the discourse on social justice and warrant critical and interpretative discussion. The work of theorists such as Rousseau,[67] Locke,[68] Kant,[69] Nozick[70] and Brighouse[71] is also discussed.

In addition, the meaning of social justice in education is examined, and social justice principles, ideals and values are identified. This occurs through applied research,[72] analysing and considering the social, economic and practical impact of the law.

Finally, and most importantly, in light of all education partners' responsibility to advance, promote and protect the ideals, values and principles of social justice, the research determines and discusses the fundamental changes introduced by South Africa's democratic constitutional dispensation, the system of multi-tiered government, and the role of the various spheres of government to pursue a shared vision for a fair and just society. Key court judgments that have helped shape the social justice discourse in the South African education landscape are consulted throughout the study. This will reveal previous challenges in the relationship between the spheres of government in realising a shared vision of social justice, and the direction issued by the courts to preserve cooperation and cooperative governance and the commitment to social justice in education. Ultimately, the guidelines and legal doctrines gleaned from the study will help answer the primary question: What are the cooperative governance requirements to realise social justice in public education in South Africa?

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[66] Rawls J 1958. Justice as fairness. Philosophical Review 67(2):163-193. 1971. A Theory of Justice. Cambridge, Massachusetts: Belknap Press. 1972. A Theory of Justice. Oxford: Clarendon Press. 1996. Political Liberalism. Revised edition. Cambridge: Harvard University Press. 1999. A Theory of Justice. Revised edition. Cambridge: Harvard University Press. 2001. Collected Papers. Edited by Samuel Freeman. Cambridge, Massachusetts: Harvard University Press. 2005a. A Theory of Justice. Revised edition. Cambridge, Massachusetts: Belknap Press. 2005b. Political Liberalism. New York: Columbia University Press.

[67] Rousseau 1975. Du Contrat Social et Autres Oeuvres Politiques. Paris: Editions Garnier Fréres. 1994. Discourse on the origins of inequality. Edited by P Coleman, translated by F. Philip. New York: Oxford University Press. (Original work published in 1754).

[68] Locke, 1690. An Essay Concerning Human Understanding (1690; repr., Mineola, NY: Dover Publications, 1959), 72-73. Two Treatises of Government (1690; repr., Cambridge: Cambridge University Press, 1988), 112. A Letter Concerning Toleration (1689; repr., Indianapolis: Hackett Publishing Company, 1983), 45-46.

[69] Kant,1998. Critique of Pure Reason, 2nd ed. (Cambridge: Cambridge University Press, 1998), 45. Groundwork of the Metaphysics of Morals, Revised ed. (New Haven: Yale University Press, 2002), 112. Critique of Practical Reason, 3rd ed. (Indianapolis: Hackett Publishing Company, 2015), 75.

[70] Nozick, 1974. Anarchy, state and utopia. New York: Basic Books.

[71] Brighouse, 2002. Egalitarian liberalism and justice in education. Political Quarterly 73(2):181-190.

[72] Applied research is a systematic investigation that seeks to address specific practical problems or issues, with the goal of producing tangible solutions, innovations, or improvements in real-world contexts.

1.5 OUTLINE OF CHAPTERS

Chapter 1: Introduction

This introduction has provided the background to the research, explained its relevance, presented the study rationale, as well as the research goal and how it will be achieved.

Chapter 2: Social justice in the South African education context

Chapter 2 presents a broad understanding of social justice based on an exploratory and critical examination of the concept. The examination is conducted in the context of the *Constitution*, the philosophical roots of social justice, and its conceptualisation over time, also identifying the themes emphasised by the different perspectives. These themes are then used to assess progress made towards the achievement of social justice in and through education.

Chapter 3: The position of the South African education system in relation to the constitutional demands of social justice

To establish how the South African education system relates to the constitutional demands of social justice, chapter 3 examines the significance of political developments throughout the country's modern history. The chapter also discusses the importance attached to education in South Africa's pre-democratic history. To determine whether the education system provides equal access to opportunities and rights, the right to equal access to quality basic education as well as its implementation is examined within the framework outlined in chapter 2.

Chapter 4: The constitutional imperatives of cooperation and cooperative governance

Chapter 4 contains an analysis of the cooperative framework within which the spheres of government should operate in order to meet the constitutional demands of social justice discussed in chapter 3. Following a discussion of cooperative governance in broad terms, the chapter delves deeper into the constitutional and institutional framework in this regard, and particularly also the principles of cooperative governance in section 41(1) of the *Constitution*. Additionally, the chapter broadens its

scope to include a brief reference to how the concept of cooperative government manifests in the realm of education, offering insights into the dynamic interactions among stakeholders in the educational sphere. This exploration provides a nuanced perspective, distinct from the conventional examination of cooperative governance within various state departments, shedding light on its unique dynamics within the context of education.

Chapter 5: Failures and challenges that inhibit the realisation of the constitutional imperative of cooperative governance in education

Chapter 5 reviews case law to identify the failures and challenges that have hindered cooperative governance in education. In addition, it assesses how these failures and challenges have affected the pursuit of social justice.

Chapter 6: Conclusion and recommendations for enhancing cooperative governance and social justice in education

In this chapter, the answers to the research questions are summarised and conclusions drawn. Chapter 6 also crystallises key legal doctrines to help determine the cooperative governance requirements to realise social justice in public education in South Africa.

Chapter 7: Guidelines for the national and provincial departments of education and school governing bodies to give effect to the principles of cooperative governance

Finally, as a concrete research output to help achieve social justice in education, chapter 7 provides guidelines to assist the education departments and state organs in implementing the principles of cooperative governance.

1.6 DEFINITIONS OF KEY TERMS

In this dissertation, unless stated otherwise:

'collaboration' means a process in which spheres of government and state organs work together towards a common goal or objective;

'*Constitution*' refers to the *Constitution of the Republic of South Africa*, 1996;

‘Department’ means either the Department of Basic Education, or a provincial department of education, or both;

‘Department of Basic Education’ refers to the department that was established pursuant to section 7(2) of the 1994 *Public Service Act* and is tasked with basic education nationally;

‘Head of Department’ refers to the head of a provincial department of education;

‘intergovernmental forums’ are platforms or structures where the spheres of government and state organs convene to discuss matters of common interest, coordinate their policies and actions, and work collaboratively to achieve shared goals;

‘intergovernmental relations’ refer to the relationships and interactions between the spheres of government and state organs;

‘Member of the Executive Council’ refers to the Member of an Executive Council responsible for a province’s education portfolio;

‘organ of state’ means a functionary or an institution that exercises a public power or performs a public function in accordance with legislation, and includes a public school, which performs a public function in providing education, being a fundamental right that is enforceable against the state under section 29;

‘overreach’ is where the spheres of government or organs of state exceed their limits, authority or capabilities, with negative consequences;

‘partners’ are the national Department of Basic Education and the provincial departments of education (as the spheres of government) and public schools (as the organs of state),[73] who are jointly responsible for education and its administration and are bound by the principles of chapter 3 of the *Constitution*;

‘provincial departments of education’ refer to provincial departments responsible for overseeing and managing the provision of basic education in a specific province of South Africa;

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[73] To the extent that they exercise a public power or perform a public function in accordance with legislation.

'school' refers only to a public school as defined in the *Schools Act*,[74] thus enrolling learners in one or more grades from grades R to 12, and excludes independent schools for purposes of this dissertation;

'*Schools Act*' means the *South African Schools Act* 84 of 1996;

'school governing body' means a governing body contemplated in section 16(1) of the *Schools Act* that governs a public school and comprises the school principal and elected members, including parents, educators, non-educators, and learners in the eighth grade and higher, as well as co-opted members; and

'spheres of government' refer to the levels of government responsible for education nationally and provincially.

1.7 CONCLUSION

This chapter has presented an overview of the constitutional commitment to cooperation between the spheres of government, particularly also as it pertains to their respective roles in achieving social justice in education. In collaborating, each sphere should understand their purpose, know their boundaries and operate within the framework adopted by government.

However, despite being endorsed in the *Constitution*, the concept and principles of cooperative governance in pursuit of a society based on human rights, democratic values and social justice do not seem to be well understood by all stakeholders. This is evident from the significant amount of litigation and large number of court rulings that have emanated from abuse of power and overreach, incompetent officials, cadre deployment, lack of training to mention a few.

While the *Constitution* mandates the different spheres to work together to achieve social justice in the education system, this mandate is not always fulfilled as expected. In this regard, the guidelines proposed in this dissertation (chapter 7) define the standards expected of the various education stakeholders and should contribute to the realisation of social justice in South African education and the general wellbeing of learners. The findings of this research and the suggested guidelines also stand to

[74] Sec. 1.

benefit policymakers in drafting policies that will support cooperative governance in the education context, strengthen partnerships, improve education standards, and ultimately, achieve social justice.

CHAPTER 2: SOCIAL JUSTICE IN THE SOUTH AFRICAN EDUCATION CONTEXT

2.1 INTRODUCTION

The *Constitution*, including its Bill of Rights, which establishes the right to basic education, is committed to correcting the injustices of the past and establishing a society based on social justice. Nevertheless, the *Constitution* does not expressly articulate what social justice entails. Although the concept of social justice and the means of realising it remain contentious in modern jurisprudence, scholars and jurists agree that, in essence, social justice is about the equal enjoyment of all rights and freedoms, as reflected in the fair, just and equitable distribution of opportunities, benefits, privileges and burdens in a society or group.[75]

In this regard, Chaskalson[76] explains that a socially just society is one in which "the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another".

It is against this backdrop that this chapter explores and critically examines the concept of social justice with the aim to arrive at a working definition and framework of social justice in the South African education context. This necessitates a consideration of the concept in our constitutional framework as well as its historical development. The philosophical roots of social justice are briefly discussed to chart its development and conceptualisation over the years and highlight the social justice themes emphasised by different schools of thought. These themes are then used to assess progress made towards achieving social justice in and through education.

2.2 SOCIAL JUSTICE IN THE SOUTH AFRICAN CONSTITUTIONAL FRAMEWORK

[75] Van Blerk 1996:127; Sooka 2010:193; Madonsela 2021:s.p.; Fraser 2003:36.
[76] 2000:205.

2.2.1 Founding provisions – the preamble

To date, the courts have understood the preamble to the *Constitution* as an interpretative aid rather than a source of rights and duties in and of itself.[77] This is in line with the traditional approach to preambles in interpretation[78] and is structurally sound, as rights are dealt with elsewhere in the *Constitution*.[79] However, in *S v Mhlungu*,[80] Sachs J set the record straight by making the following classic statement about the significance of the preamble:

> The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the rest that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purpose.[81]

Ngcobo J conveyed a similar idea, albeit in a more specific context, in his separate judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,[82] in which the entire Constitutional Court concurred.[83] He held that the court needed to interpret legislation in a way that promotes "the values of our constitutional democracy", and treat the preamble as an important datum in identifying what these values are.[84] This approach was reaffirmed in *Van Vuuren v Minister of Correctional Services.*[85] The preamble, therefore, is understood both to imply a purposive approach to interpretation and to serve as an important source for determining what those purposes are.[86]

One of the underlying aims of the *Constitution*, the preamble says, is to establish a society based on democratic values, social justice and fundamental human rights. Yet

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77 Woolman, Roux, Klaaren, Stein, Chaskalson & Bishop 2014:13-3.
78 Devenish 2005:27-29.
79 Currie & De Waal 2016:1-22; Woolman *et al.* 2014:13-3.
80 *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).
81 *S v Mhlungu*:112.
82 [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).
83 Woolman *et al.* 2014:13-3.
84 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism:*72-73.
85 *Van Vuuren v Minister of Correctional Services* [2010] ZACC 17; 2012 (1) SACR 103 (CC); 2010 (12) BCLR 1233 (CC):47.
86 Woolman *et al.* 2014:13-4.

the precise normative weight to be attached to this provision is unclear.[87] Other references to the preamble have also not been definitive,[88] and no judgment to date has attempted any comprehensive analysis of this part of the *Constitution*.[89] In the absence of relevant case law, therefore, the preamble should be taken at face value, and its direct reference to social justice should be understood to mean the following:[90]

First, in providing that one of the purposes of the *Constitution* is to "establish a society based on democratic values", the preamble suggests that democracy is more than a system of government or a value-neutral set of procedures for achieving other, valued ends. Democracy itself, the preamble implies, is a value system that demands our societies allegiance. Moreover, this value system is not limited in its application to the structure of state institutions or the way government conducts itself.[91] Rather, the purpose behind the adoption of the *Constitution* is "to establish a *society* based on democratic values".[92] The expectation, in other words, is for the *Constitution*'s commitment to democracy to permeate all social relations and inform all South Africans' interaction with one another,[93] whether as private citizens *inter se* or as civil servants appointed to serve the public interest.[94] The fact that the reference to democracy in this part of the preamble is tied to social justice suggests that these concepts are to be the fundamental building blocks of South African society, implying no necessary contradiction between them.

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87 In essence, though not part of the operative provisions, the preamble may be taken into account in interpreting the rest of the *Constitution.* In *Soobramoney v Minister of Health, Kwazulu-Natal 1997 (12) BCLR 1691 (CC),* for example, the court quoted the first part of the preamble in explaining the role of socioeconomic rights in combating poverty and inequality.

88 *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C); 2000 (2) BCLR 151 (C):58; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC):43. The preamble was quoted in holding that "[f]airness requires a consideration of the interests of all of those who might be affected by the [court's] order". *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC):1. The preamble was referred to as recording South Africa's commitment to "the attainment of social justice and the improvement of the quality of life of everyone". *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC):par. 45. The preamble was cited in considering the fourth respondent's submission that the right to freedom of expression may be limited in the interests of "building a united society".

89 Currie & De Waal 2016:1-22; Woolman *et al.* 2014:10-23.

90 Currie & De Waal 2016:1-22; Woolman *et al.* 2014:10-23.

91 Currie & De Waal 2016:1-22; Woolman *et al.* 2014:10-23.

92 Own emphasis added.

93 Currie & De Waal 2016:14.

94 *Constitution*:sec. 195(1): "Public administration must be governed by the democratic values and principles enshrined in the Constitution ..."

Secondly, and most notably, the text of the preamble states that the *Constitution* aims to "[h]eal the divisions of the past", "establish a society based … on social justice" and "[l]ay the foundations for a … society … in which … every citizen is equally protected by law". Judicial reliance on the preamble has focused on the notion that the *Constitution* represents a break with South Africa's apartheid past.[95] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,[96] which pertained to fishing quotas allocated in part to address historical imbalances, Ngcobo J described South Africa as a country in transition from a society based on inequality to one based on equality, and interpreted the preamble as expressing a commitment to the transformation of society.[97] The court in *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*,[98] in turn, invoked the preamble's references to not only "democratic values" and "fundamental rights", but also "social justice" to underline the tension between individual rights and social transformation that lies at the heart of private property rights.[99]

2.2.2 Right to equality and social justice

The Constitutional Court has consistently referred to the achievement of equality in the context of South Africa's apartheid past.[100] It has always recognised that the achievement of equality in South Africa entails the need to overcome a past characterised by deep social and economic inequalities, in which race, gender and other patterns of exclusion and disadvantage determined access to, and enjoyment of, opportunities and benefits.[101]

In *Minister of Finance v Van Heerden*[102] (hereinafter *Van Heerden*), Moseneke DCJ spoke of the need for "a credible and abiding process of reparation for past exclusion,

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95 Woolman *et al.* 2014:13-5.

96 [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

97 73.

98 [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

99 49-50.

100 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC): 60-62; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*:72-77. That the value of equality embraces an idea of material equality and economic redistribution has been endorsed by former Chief Justices Arthur Chaskalson and Pius Langa. See Chaskalson 2000:193; Langa 2006:351.

101 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC):42; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

102 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

dispossession and indignity within the discipline of our constitutional framework".[103] This statement was perhaps the first detailed and explicit recognition of the relationship between the value of equality and the right to equality.[104] *Van Heerden* was also the first case to engage with section 9(2), which "provides constitutional protection for positive measures designed to remedy unfair discrimination".[105]

In *Van Heerden*,[106] the court made a connection between the achievement of equality and the achievement of a society based on social justice,[107] although adding that this would only be possible if there is a "positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalized under-privilege".[108] This commitment necessitates the positive, remedial and restitutionary measures referred to in section 9(2) as fundamental to the achievement of equality and the creation of conditions for full and equal participation in society.[109] Although the court in *Van Heerden* did not use the term 'redistribution', its interpretation of the value of equality clearly envisages a degree of economic redistribution and the removal of material disparities.[110]

In *Government of the Republic of South Africa v Grootboom*,[111] in turn, the court emphasised the attainment of social justice and an improved quality of life for everyone as a key constitutional requirement. The court highlighted that the extent of the state's obligation to attain social justice for all is directly linked to the state's duty to take reasonable legislative and other measures to progressively realise social justice within its available means.

Section 9(2) also states that equality includes the equal enjoyment of the rights and freedoms set out in the Bill of Rights.[112] This, Chaskalson suggests, envisages a society in which all people enjoy a level of psychological, physical and material

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103 *Van Heerden*:25. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice*:60-62.
104 Currie & De Waal 2016:210-213; Woolman *et al.* 2014:35-13.
105 Currie & De Waal 2016:210-213; Woolman *et al.* 2014:35-13.
106 30.
107 Woolman *et al.* 2014:35-13.
108 *Van Heerden*:31.
109 *Van Heerden*:22-32.
110 Moloi 2019:111-127; Currie & De Waal 2016:210-213; Woolman *et al.* 2014:35-14.
111 2001 (1) SA 46 (CC).
112 Currie & De Waal 2016:210-213; Woolman *et al.* 2014:35-31; Moloi 2019:111-127.

wellbeing, enabling them to enjoy all rights and participate fully in that society.[113] In this sense, the assertion of equal rights in the equality clause is an important statement of principle, prefiguring the fundamental transformation of our society.[114] Read in its entirety, the assertion of equality in section 9 does not merely offer protection against past discrimination, but also mandates the redress of existing inequality in line with a distinctly South African constitutional vision of social justice.[115]

2.2.3 Distributive justice in the South African context

Although the *Constitution* does not expressly prescribe distributive justice, it is implied in its provisions. In terms of social justice, the *Constitution* is premised on the need to realise an orderly and fair redistribution of resources.[116] The *Constitution* is perceived as, among others, an instrument to transform South Africa from a society based on socioeconomic deprivation to one based on an equal distribution of resources.[117] For this reason, service provision (including the provision of education), which was racially skewed under apartheid, is considered to be central to the transformative project of the *Constitution.*[118]

Just distribution is necessarily tied to some notion of equality, which, in the South Arican context, tends to be more substantive than formal. [119]

Formal equality is based on the idea that inequality is irrational and arbitrary. It presumes that all persons are equal and that any differential treatment on the basis of arbitrary grounds, such as race or gender, is almost inevitably suspect.[120] Formal equality also entails a formal approach to law,[121] which narrowly defines and abstracts issues from social life. Actual social and economic differences between individuals and groups are not seen as essential to the legal inquiry.[122] Formal equality is perhaps best described as the abstract prescription of equal treatment for all persons,

113 Chaskalson 2000:193, 203.
114 Moloi 2019:111-127; Currie & De Waal 2016:210-213; Woolman *et al.* 2014:35-31.
115 *Van Heerden*:22-32.
116 Mbazira 2008:6.
117 Klare 1998:147.
118 Langa 2006:351.
119 Langa 2006:351.
120 Currie & De Waal 2016:210-213; Woolman *et al.* 2014:35-6.
121 Legal formalism.
122 Currie & De Waal 2016:210-213; Woolman *et al.* 2014:35-6.

regardless of their actual circumstances. It perceives inequalities as illogical aberrations in an otherwise just social order.[123] These aberrations can be overcome by extending the same rights and entitlements to all in accordance with a single, neutral standard of measurement.[124] In a sense, formal equality requires not only equal access, but also equal processes and even equal outcomes.

As a result, formal equality does not tolerate any differentiation: Affirmative action measures are seen as a form of discrimination rather than an effort to deepen the commitment to equality.[125] Its reliance on neutrality tends to mask forms of judicial bias and ignores real social and economic differences between individuals and groups.[126] The application of standards that appear to be neutral, but often embody the interests and experiences of socially privileged groups, means that a legal commitment to formal equality may render socially or economically disadvantaged groups even worse off.[127]

For example, based on the principle of formal equality, a school that decides to offer a class electronically would be obligated to ensure the same access for all learners, which may involve supplying computers to learners who do not have them. If the school cannot ensure such access, the principle of formal equality requires that classes not be offered through that medium.

By contrast, the legal understanding of substantive equality is based on the recognition that inequality not only emerges from irrational legal differentiation, but is often also deeply rooted in social and economic divides between groups in society.[128] Such inequalities are systemic, being rooted in the structures and institutions of society. Therefore, legal claims[129] that target this kind of inequality require an understanding

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123 Woolman *et al.* 2014:35-6; Currie & De Waal 2016:210-213.

124 The jurisprudence of section 9(1) is, arguably, underpinned by formal equality.

125 In both the United States and Canada, the reliance on formal equality led to difficulties in arguing that the failure to afford women maternity benefits was a form of discrimination based on sex or gender. Courts tended to find that pregnancy was the result of a real (biological) difference, and thus, differentiation on this basis could not amount to discrimination. Because pregnancy is unique to females, employers could exclude pregnancy from insurance coverage (and so deny maternity pay). See *Geduldig v Aiello* 417 US 484, n 21 (1974); *General Electric Co. v Gilbert* 429 US 125 (1976); *Bliss v A-G Canada* [1979] 1 SCR 183, (1979) 92 DLR (3rd) 417.

126 *Woolman et al. 2014:35-6*; Currie & De Waal 2016:247; Moloi 2019:111-127.

127 Minow 1987:10.

128 Currie & De Waal 2016:247; Woolman *et al.* 2014:35-6.

129 Usually of discrimination.

of the underlying social and economic conditions that have created and reinforced the inequality to be able to remedy it.[130]

A legal commitment to substantive equality entails attention to context,[131] including how the private sphere influences disadvantage and subordination. Therefore, equality claims are assessed in relation to lived inequalities. According to substantive equality, differentiation is not the problem, but rather the harm that may flow from it.[132] This is why the legal inquiry focuses on the impact of the act[133] and the nature of the harm that the act creates. In effect, therefore, equality can be advanced through either similar or differential treatment, depending on the context.[134] Difference is regarded as a positive value if it is not linked to harm and disadvantage.[135] Difference is also seen as relational rather than hierarchical, with no necessary valuing of one group over another. Instead, it is the relationship between groups[136] that is examined.[137]

In *Soobramoney v Minister of Health, KwaZulu-Natal*,[138] the Constitutional Court deferred to the hospital to decide how best to utilise scarce medical resources in a distributive manner without prioritising the needs of an individual at the expense of others. This approach led the court in *Government of Republic of South Africa v Grootboom*[139] to reject the submission that the socioeconomic rights provisions in the *Constitution* conferred individual entitlements on demand. The court did not accept the argument that the *Constitution* had to be interpreted as establishing a core basket of goods and services claimable individually on demand.[140]

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130 Woolman *et al.* 2014:35-6; Currie & De Waal 2016:247.

131 Such a contextual approach was adopted by the Canadian Supreme Court in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143. The court found that "to approach the ideal of full equality before and under the law, the main consideration must be the impact on the individual or group concerned". This approach has also been endorsed by the South African Constitutional Court.

132 Woolman *et al.* 2014:35-7.

133 Rather than on the differentiation as such.

134 Currie & De Waal 2016:247; Woolman *et al.* 2014:35-7.

135 Woolman *et al.* 2014:35-7; Moloi 2019:111-127.

136 Including the substantive arrangements that produce or prevent a group's social prosperity or political self-determination.

137 Minow 1990:10-96. She argues that difference does not inhere in the individual or group, but in the relation between individuals and/or groups. It is not the characteristics of the individual or the group that are the concern, but the social arrangements that make these differences matter.

138 1998 (1) SA 765 (CC).

139 2000 (11) BCLR 1169 (CC).

140 71.

Instead, the Constitutional Court chose to locate the claims of all individuals, adults and children in the broader context of society's needs. It held that all that the state was obligated to do was to put in place a reasonable programme to progressively realise socioeconomic rights.[141] This program, crucially, needed to encompass the diverse needs of the entire population, addressing short-term, medium-term, and long-term requirements. The court's decision thus emphasized a collective and progressive approach to socioeconomic rights rather than endorsing individual entitlements on demand.

Thus, a legal commitment to substantive equality requires a retreat from legal formalism. Importantly, the assessment of context and impact should be guided by the purpose of the right and its underlying values.[142] While an analysis of the context of the alleged violation enhances a court's understanding of the legal claim, a clear exposition of the purpose of the right to equality, and of the constitutional values that underpin it, provides the court with crucial signposts to a decision most faithful to the *Constitution*.[143] These signposts help the courts determine when an impugned differentiation[144] amounts to a violation of the equality right. They also offer the necessary flexibility to address the varied legal claims for equality, ranging from claims for consistency (similar treatment),[145] recognition, inclusion, and acceptance of the

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141 *Government of Republic of South Africa v Grootboom*:75.

142 In *President of the RSA v Hugo* 1997 (6) BCLR 708 (CC):41, the court identified dignity as a core value and purpose of the right to equality, while retaining the idea of remedying disadvantage in the overall assessment of unfair discrimination: "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked." In *Egan v Canada*, Heureux-Dube J analysed the purpose of the Canadian right to equality as follows: "Equality, as that concept is enshrined as a fundamental right … means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."

143 Woolman *et al.* 2014:35-7.

144 Or failure to differentiate.

145 Similar treatment" in this context refers to the principle of consistency in applying the right to equality, emphasizing fairness and non-discrimination. Achieving substantive equality involves moving beyond formalistic legal interpretations. The court evaluates distinctions in treatment by considering the context, guided by the purpose of the right and constitutional values. The term is part of a broader spectrum of equality claims, ranging from recognition and inclusion to redistributive claims for economic benefits. The ultimate goal is to dismantle systemic inequality, recognizing that many claims involve a mix of recognition and redistribution aspects. Ek het net die margin ook reggemaak hier.

status of individuals and groups as full and equal members of society,[146] to more redistributive claims, seeking access to economic benefits and resources. In practice, many claims involve aspects of both recognition and redistribution, suggesting that the dismantling of systemic inequality is always the end goal of equality claims.[147]

Moreover, a solid grasp of the purpose of the right and its underlying constitutional values provides courts with the flexibility to negotiate the boundaries of their institutional competence.[148] Indeed, a redistributive function does not always fit in comfortably with the institutional role of courts and with the distinction they seek to draw between issues of social policy and issues of law.[149] The meaning attached to the value of dignity has become fairly crucial in defining the boundaries of the right to equality,[150] and its flexibility and degree of abstraction has been useful for courts as they negotiate the redistributive and institutional difficulties posed by the equality right.[151] The value of equality is explicit in its commitment to redistribution, yet the Constitutional Court's embrace of the redistributive aspects of equality has been constitutionally and legally constrained by the presence of other rights in the *Constitution*[152] and other legislation.[153] Fredman[154] suggests that the presence of such express rights is an important indicator of a court's tendency to act in a redistributive manner.

Because of its place in our equality jurisprudence, dignity needs to be harnessed in a manner that enables jurists to use the right to equality to achieve transformative ends. However, it is important to keep in mind that the rights and values of dignity and

146 Woolman *et al.* 2014:35-7; Currie & De Waal 2016:247.

147 The distinction between recognition of status and redistribution was first used in 1997 by Nancy Fraser in *Justice interruptus: Critical reflection on the "postsocialist" condition*. South African writers have since used this distinction in relation to socioeconomic rights. See Liebenberg 2006:17.

148 Currie & De Waal 2016:247; Woolman *et al.* 2014:35-7.

149 In *National Coalition for Gay and Lesbian Equality v Minister of Justice*:paras. 60-62, Sachs J expresses concern regarding "over-intrusive judicial intervention in matters of broad social policy".

150 Currie & De Waal 2016:247; Woolman *et al.* 2014:36-4.

151 Woolman *et al.* 2014:35-14.

152 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC). The right to social assistance.

153 The *Maintenance Act* 99/1998 in *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC), and the Political Office-Bearers Pension Fund in *Van Heerden.*

154 Fredman 2005:163.

equality respond to different kinds of claims and that each has its place in addressing systemic social and economic inequalities in South Africa.[155]

2.2.4 Transformative constitutionalism

Importantly, traditional conceptions of constitutionalism do not adequately address the needs of transitional societies that are emerging from traumatic pasts characterised by deep divisions and political repression. In these societies, institutions and laws have a greater responsibility[156] to address previous injustices and crises and to inspire hope for the future.[157]

In this regard, South Africa's *Constitution* (both the 1993 interim and the 1996 final version) is an excellent example. By devising delicately balanced mechanisms, the *Constitution* managed to end an immoral and oppressive legal and political regime and usher in a new era of hope and inspiration;[158] a democratic regime based on freedom, multiculturalism, equality, equity, respect for human dignity and rights,[159] the protection of socioeconomic rights, the imposition of positive duties on the state, and the horizontal application of the *Constitution*.[160] Clearly, therefore, the purpose of the *Constitution* was not only to limit government's power in the traditional sense, but also to secure social and political transformation as a means of legitimising the new constitutional and political order.[161] Any constitutional and political change that does not advance the emancipation of the previously oppressed and the creation of an egalitarian society where all interests are protected would face legitimacy challenges. Therefore, transformative constitutionalism is essential.[162]

In the context of the 1996 *Constitution*, Klare[163] defines transformative constitutionalism as

> a long-term project of constitutional enactment, interpretation, and enforcement committed (… in a historical context of conducive political developments) to

155 Woolman *et al.* 2014:35-14; Moloi 2019:111-127.
156 Kibet & Fombad 2017:350; Teitel 2022: 2009 – 2052.
157 Kibet & Fombad 2017:350; Klug 2016: 1373.
158 Kibet & Fombad 2017:350; Klug 2016:1373.
159 Moseneke 2012:749; Kibet & Fombad 2017:350.
160 Klare 1998:150; Kibet & Fombad 2017:350.
161 Klare 1998:150; Kibet & Fombad 2017:350.
162 Klare 1998:150; Kibet & Fombad 2017:350.
163 Klare 1998:150.

> transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.

Langa[164] acknowledges the difficulty of defining the concept in juridical terms, noting that the goal is primarily to bring about social and political change.[165]

Yet, while its exact meaning and scope may be disputed, it is possible to deduce a number of elements of transformative constitutionalism: For instance, it emphasises substantive equality and substantive justice, as opposed to classical liberalism, which assumes formal equality. (It involves an intentional effort to empower previously excluded segments of society through policies and programmes aimed at achieving social justice, such as protecting socioeconomic rights. This requires a broader perspective of justice than a mere narrow understanding of negative rights, since the state needs to be proactive in order to achieve substantive equality.[166]

2.3 THE HISTORICAL DEVELOPMENT OF THE CONCEPT OF SOCIAL JUSTICE

This section introduces some of the views of social justice held, and the dimensions of social justice emphasised, over time. These are important, as they inform our understanding of what a fair and equitable school system might or should look like.

2.3.1 Earliest ideas of social justice

The first recorded notions of social justice applied to specific nations or groups of people and were aimed at redressing inherited and hierarchical inequalities.[167] The Bible refers to the jubilee year, when original landowners were reinstated, slaves were freed, and debts and obligations were liquidated. This redistribution did not apply universally, but occurred between individuals first and foremost.[168]

In 380 BC, Plato stated that, considering a person's particular position in society, justice could only be achieved if goods were distributed to each according to what they deserved.[169] Aristotle (384-322 BC), in turn, believed that the regulation of the

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164 2006:17.
165 Kibet & Fombad 2017:353.
166 Kibet & Fombad 2017:353.
167 Reisch 2002:343.
168 Reisch 2002:343. Involves individuals within a defined geographic jurisdiction (legal system).
169 Reisch 2002:343; Grube 1974:s.p.

distribution of welfare was necessary to ensure the social order.[170] Note, however, that according to Aristotle's perspective, justice and equality could only be applied to individuals within a matching stratification of the social hierarchy. In other words, all who were unequal in the same social hierarchy were to be treated unequal. The notion did not challenge the social structures of the time, but merely operated within them,[171] rationalising the coexistence of slavery or oppression for the many and a democratic polis[172] for the few. Social justice, therefore, did not involve efforts to transform or transcend existing societal structures; instead, it guaranteed that existing institutions would continue to function as intended.

This view differs from the general conception of social justice, which often implies a broader and more transformative perspective. Unlike historical perspectives that operated within existing social structures, contemporary notions of social justice typically advocate for changes that transcend or transform those structures. The question of whether the concept implies movement towards a more just dispensation for people hinges on its alignment with transformative ideals. While historical views like Aristotle's merely justified existing social structures, modern perspectives on social justice often involve efforts to challenge and reform societal norms to achieve a more equitable and just society. In conducting this study, I employed a modern perspective to comprehend social justice.

2.3.2 Universal concepts of justice (first to sixth century)

With the teachings of the world's great religions, such as Islam, Christianity, Judaism and Buddhism some 1 500 to 2 000 years ago, the universal concept of justice developed. Religious teachings advocated for the equal treatment of people, sharing, and rulers acting in a fair, just and righteous manner towards their people. At the same time, the religions cautioned against making a profit at the expense of the poor and disadvantaged, and against greed and its evils. Emerging alongside the idea of an all-powerful divinity was a divine form of humankind and a universal understanding of

170 Aristotle 1980:s.p.

171 Reisch 2002:343.

172 The community structure of ancient Greece, where Athenian democracy developed around the 6th century BC in the city-state (or polis) of Athens.

justice, whether in this life or the next. This perspective recognised universal human value and went beyond the administering of justice by social status.[173]

However, as the religions evolved, religiously permitted hierarchies and establishments appeared, which undermined this initial universal concept of justice. The exclusivity of the different religious[174] proponents as well as competition for resources and recognition among them weakened the ideal of justice for all.[175] With the patriarchy dominating, the lower classes and women were not regarded as equal, and slavery often formed a fundamental part of society.[176]

As a result, within the hierarchy of the religious establishments, a social structure resumed where distribution was unequal and proportional to an individual's position or status in society.[177]

2.3.3 Secular humanism and rationalism in the seventeenth and eighteenth centuries

In the seventeenth and eighteenth centuries, or the Early Modern period, the consolidation of state power was rationalised through social justice under the sovereignty of absolute monarchs.[178] Like Aristotle, philosopher Thomas Hobbes argued that the construction of an external authority[179] was essential to maintain a just society.[180] The belief was that the state, through the creation and enforcement of social norms and laws, could prevent humans from harming one another in the aspiration of self-interest, and so preserve peace.[181] This view of justice complemented the emergence of commercial and industrial capitalism.[182]

In the period 1712 to 1778, Rousseau and his followers (in the age of revolution) believed that the realisation and pursuit of social justice was linked to the achievement of equality (of opportunities, rights and outcomes), the preservation of freedom or

173 National Pro Bono Resource Centre 2011:4.
174 Which were increasingly linked to states or empires.
175 Reisch 2002:344.
176 National Pro Bono Resource Centre 2011:5.
177 National Pro Bono Resource Centre 2011:5.
178 Reisch 2002:344.
179 The state.
180 Hobbes 2019:s.p.
181 Reisch 2002:344.
182 Van Mill 2001:s.p.; Isbister 2001:s.p.

individual liberty, and the establishment of common bonds of all humanity. This shaped the formation of modern institutions in the West.[183]

The French and American revolutions connected the pursuit or perfection of happiness and equality with their social justice goals. This conception of social justice gave prominence to the value of human welfare, as it required the establishment of a society that would maximise collective and individual wellbeing.[184]

2.3.4 Inequality and injustice in the nineteenth and twentieth centuries

During the nineteenth and twentieth centuries, the division between the ideal of social justice and the reality of persistent injustice and inequality became progressively sharper. Similarly, reconciling the preservation of individual liberties with the goal of social equality proved increasingly difficult.[185]

The privileged, who dominated the emerging nation-states, ignored economic and social rights and withheld political rights from a large proportion of the population. The humanity of vast numbers of people, specifically persons of colour and women, was suppressed in the process.[186] The growing recognition of the gap between social justice as an abstraction and injustice as a fact of life gave rise to a torrent of criticism, which inspired most of the revolutions and reform movements of the period between 1815 and the outbreak of World War I.[187]

In the period 1818 to 1883, Karl Marx conveyed a holistic view of the social reality, and of the human condition from which it had emerged.[188] He argued that humans, not having a fixed innate nature, were defined by their social relationships and reliant on the economic structure of society and the classes it produced.[189] He dismissed Hobbes's idea that injustice was caused by selfishness, human competition and

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183 This concept of social justice emphasises individual liberties and equality of opportunity, rights and outcomes. Rousseau 1994:s.p.

184 Reisch 2002:344. Through documents such as the American Declaration of Independence and the French Universal Declaration of the Rights of Man and Citizen, social justice became the unwritten linchpin of so-called natural rights that, in rhetoric, if not reality, would now be applied to all people.

185 Berlin 1958:s.p.

186 Miller 1999:s.p.; Nussbaum 1999:s.p.

187 Reisch 2002:345.

188 Reisch 2002:345.

189 National Pro Bono Resource Centre 2011:5.

hostility.[190] Instead, Marx argued that the origin of injustice lay in political-economic structures based on discrimination, privilege, subjugation and exploitation.[191] Justice, he said, would not be achieved by allocating to individuals what they deserved because of their social standing, origin or productivity, but only by giving individuals what they needed because of their humanity.[192]

The idea of a social contract between a government and its subjects emerged as a way of balancing obligations and mutual rights, with each agreeing to comply with common rules and accept corresponding duties.[193]

2.3.5 Western concept of social justice in the twentieth century: Fair distribution

There is broad consensus that social justice must include various means of distributing societal goods in a fair manner. Nevertheless, ideas as to what constitutes fair distribution vary. The following paragraphs introduce the different aspects of distributive justice, also covering its preconditions, primary subject and object, and normative significance. This will help identify the themes for social justice in the South African education context.

2.3.5.1 *Utilitarianism*

Mill,[194] in 1861, was the first to put forward that distribution of societal goods was society's responsibility, stating: "Society should treat all equally well who have deserved equally well of it, that is, who have deserved equally well absolutely."[195] He submitted that the distribution of societal goods should aim for the "greatest net balance of satisfaction" for society and that utilitarianism was in fact a "standard of morality" that considered the majority of people and their happiness as its highest objective.[196]

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190 Reisch 2002:345.

191 Berlin 1958:s.p.

192 Marx is famous for the communist slogan "From each according to his ability, to each according to his need," which appeared in his *Critique of the Gotha Program* published in 1875. National Pro Bono Resource Centre 2011:6.

193 Reisch 2002:345.

194 Mill 1971:s.p.

195 Thompson 2014:s.p.

196 Mill 1971:s.p.; Funge 2011:73-90.

Funge,[197] on the other hand, warns that "processes and decision making grounded on the logic of utilitarianism may result in the unfair treatment of vulnerable populations".

Picture a society where 51% of the population comprise slave owners, whose interest, therefore, predominates. Following the logic of utilitarianism, which prioritises the greatest good for the majority, this would mean that the 49% who are enslaved may not have their interests served, as they are not part of the majority.[198] This scenario illustrates an uneven distribution based on status, sacrificing the rights of the disadvantaged for the good of the wealthy and elite of society who happen to belong to the majority.[199]

2.3.5.2 *Rawls*

The writings of John Rawls (1921-2002) dominate the discourse on social justice and warrant critical and interpretative discussion. This American moral and political philosopher in the liberal tradition[200] has been described as one of the most influential political philosophers of the twentieth century.[201] Uncommon for a contemporary political philosopher, he is frequently cited by the courts in the United States and Canada and referred to by practising politicians in the United States and United Kingdom.[202]

Rawls's theory of justice as fairness recommends equal basic rights, equality of opportunity, and promoting the interests of the least advantaged members of society. His argument for these principles of social justice is based on a thought experiment called the original position, or the veil of ignorance, which asks people to name the kind of society they would choose to live in without any knowledge of the social position they would personally occupy.[203]

The background to Rawls's theory of justice

197 Funge 2011:73-90.
198 Van Blerk 1996:132.
199 National Pro Bono Resource Centre 2011:6.
200 Wenar 2017:1.
201 Zuckert 2012:s.p.
202 Makarenko 2009:s.p.
203 Zuckert 2012:s.p.

Rawls's theory seems to have drawn a few elements from other sources in (political) philosophy.[204] From the political thinking of the Greeks, Rawls adopted his view of justice as a moral virtue.[205] Based on humans' consciousness of principles and norms, he characterised the human being as a moral person, which is closely related to the Kantian view of moral autonomy.[206]

From the social contract theories of Early Modern times, Rawls takes the idea that the initial agreement is not historical, but rather hypothetical,[207] in his supposition that the contracting parties are heads of families: "For example, we can assume that they are heads of families and therefore have a desire to further the well-being of at least their more immediate descendants."[208] In doing so, he contradicts the radical individualistic (atomistic) orientation of the modern contract theories of Pufendorf, Hobbes, Locke, Kant and Rousseau.[209]

Rawls almost always[210] asserts that the basic structure of society is the primary subject of justice;[211] his theory of justice, therefore, does not centre on individuals. The fact that his 'original position' experiment deprives those participating in the contract of any information regarding their position in society highlights the importance of the basic structure of society.[212] It also presupposes that there is room for diverse positions in the basic structure of society.[213]

There are no "principles of justice" in force prior to the contract.[214] Justice can only emerge from a joint decision by rational individuals, which means that justice is not simply extended from an individual to society as a whole:[215]

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204 Strauss 2009:508.
205 Strauss 2009:508.
206 Strauss 2009:508. The Kantian idea of moral autonomy holds that being a moral person entails "having a conception of their good and [being] capable of a sense of justice". See Rawls 1999:17.
207 Rawls 1996:271.
208 Rawls 1999:111. The 1972 edition of *A theory of justice* states: "We may think of the parties as heads of families." Rawls 1978:128, 146. This reminds of Aristotle's view of the family as the "germ cell" of society.
209 Rawls 1999:111.
210 Occasionally, he does invert this relation of priority, for example when he states that a "theory of justice depends upon a theory of society".
211 Rawls 1978:84.
212 Strauss 2009:509.
213 Strauss 2009:509.
214 Strauss 2009:509.
215 Strauss 2009:509.

> Instead of supposing that a conception of right, and so a conception of justice, is simply an extension of the principle of choice for one man to society as a whole, the contract doctrine assumes that the rational individuals who belong to society must choose together, in one joint act, what is to count among them as just and unjust.[216]

For present purposes, we disregard Rousseau's position, which is a problematic consequence of this approach. Rousseau sees the social contract as a basis for rights obtained in the post-contractual condition.[217] He also asserts that the social contract confers on the body politic an absolute power (the general will) over all its members.[218] When considered along with his definition of freedom as "obedience to a law which we prescribe to ourselves",[219] this "absolute power" results in a dead-end argument, as a person would be disobedient to his own will if he deviates from the general will, and as a result, the person must be forced to comply in order to be free.[220]

Not having any knowledge of one's position in the social system does not mean disposing of the various possible positions in the system:[221]

> No one deserves greater natural capacity nor merits a more favourable starting place in society. Of course, this is no reason to ignore, much less eliminate, these distinctions. Instead, the basic structure can be arranged so that these contingencies work for the benefit of the least fortunate. Thus, we are led to the difference principle if we wish to set up the social system so that no one gains or loses as a result of his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return.[222]

This assumption of a differentiated society in the background manifests in two principles of justice emerging from the contract.[223] The first, as articulated in Rawls's *A theory of justice*, is the idea of basic (equal and free) liberties, namely that "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others".[224] The second is that "social and economic inequalities are to be arranged so that they are both (a) reasonably

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216 Rawls 2001:132.
217 Strauss 2009:510.
218 Strauss 2009:510.
219 Rousseau 1975:247.
220 Rousseau 1975:246. "... ce qui ne signifie autre chose sinon qu'on le forcera à être libre" ["This means no less than that such a person would be forced to be free."]
221 Strauss 2009:510.
222 Rawls 1999:87.
223 Rawls 1999:52.
224 Rawls 1999:53.

expected to be to everyone's advantage, and (b) attached to positions and offices open to all".[225]

In his work *Political liberalism*, Rawls provides a slightly different statement of these principles, namely:[226]

> a. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value;[227] and:
>
> b. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.[228]

The entire contract theory and its accompanying principles of justice presuppose the idea of the basic structure of society, which is a differentiated society with inherent economic and social stratification.[229] Note, however, that Rawls himself never uses the phrases "social stratification" or "differentiated society".[230]

These principles of justice and their implication for the basic structure of society is also closely connected to Rawls's idea of the primary goods of society.[231] In this regard, he states that "the two principles of justice assess the basic structure of society according to how its institutions protect and assign some of these primary goods, for example, the basic liberties, and regulate the production and distribution of other primary goods, for example, income and wealth".[232]

Ultimately, Rawls seeks to account for the way in which a well-ordered society is "effectively regulated by a shared conception of justice":[233]

> The publicity of the rules of an institution ensures that those engaged in it know what limitations on conduct to expect of one another and what kinds of actions are permissible. There is a common basis for determining mutual expectations. Moreover, in a well-ordered society, one effectively regulated by a shared conception of justice, there is also a public understanding as to what is just and unjust. Later I assume that

225 Rawls 1999:53.
226 Strauss 2009:510.
227 Rawls 1996:5.
228 Rawls 1996:6.
229 Strauss 2009:511.
230 Strauss 2009:511.
231 Strauss 2009:511.
232 Rawls 1996:309.
233 Strauss 2009:511.

> the principles of justice are chosen subject to the knowledge that they are to be public. This condition is a natural one in a contractarian theory.[234]

To Rawls, a firm grasp on the conception (or principles) of justice, and that which is primarily connected to it, namely the basic structure of society, is pivotal; in fact, his entire philosophy is built on it. Therefore, it is important to delve deeper into what he understands by justice.

Justice as fairness: Justice in a liberal society

Justice as fairness is Rawls's theory of justice for a liberal society. Belonging to the family of liberal political conceptions of justice, it provides a framework for the legitimate use of political power.[235] Yet legitimacy is only the minimum standard for moral acceptability. After all, a political order can be legitimate without being just. Justice, on the other hand, serves as the maximum standard for the arrangement of social institutions that are morally sound.[236]

Rawls constructs his justice-as-fairness theory around specific interpretations of the notion that citizens are free and equal and that society should be fair.[237] This, he believes, resolves the tension between the ideas of freedom and equality. According to Rawls, justice as fairness is the most egalitarian, and most plausible, interpretation of these fundamental concepts of liberalism. He also argues that justice as fairness provides an understanding of justice that is superior to that of the dominant tradition in modern political thought, namely utilitarianism.[238]

Two guiding ideas of justice as fairness

Some form of social cooperation is necessary for citizens to lead decent lives. Nevertheless, citizens are not indifferent to how the benefits and burdens of cooperation will be divided among them.[239] Rawls's principles of justice as fairness articulate the central liberal ideas that cooperation should be fair to all citizens who are

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234 Rawls 1999:49. Rawls mentions the fact that Locke restricts the right to vote to those who own property and does not accept equal political rights among citizens, for he "assumes that not all members of society following the social compact have equal political rights". Rawls 1996:287.

235 Wenar 2017:11.

236 Wenar 2017:11.

237 White 2020:2.

238 Wenar 2017:11.

239 Wenar 2017:12.

regarded as free and as equals.[240] The distinctive interpretation that Rawls gives to these concepts can be seen as combining a negative and a positive thesis.[241]

His negative thesis starts with the idea that citizens do not deserve to be born into a rich or a poor family, to be born naturally more or less gifted than others, to be born female or male, to be born a member of a particular racial group, and so on.[242] Since these features are morally arbitrary, citizens are not entitled to more of the benefits of social cooperation simply because of who they were born. For example, the fact that a citizen was born rich, white and male provides no reason in itself for this citizen to be favoured by social institutions.[243] This negative thesis does not say how social goods should be distributed; it merely clears the decks.

Rawls's positive distributive thesis is equality-based reciprocity.[244] All social goods are to be distributed equally, unless an unequal distribution would be to everyone's advantage.[245] The guiding idea is that since citizens are fundamentally equal, reasoning about justice should depart from the premise that cooperatively produced goods are to be equally divided.[246] Justice then requires that any inequalities must benefit all citizens, and particularly those who will have the least. Equality sets the baseline. From there, any inequalities must improve everyone's situation, and especially the situation of the worst off. These strong requirements of equality and reciprocal advantage are hallmarks of Rawls's theory of justice.[247]

The two principles of justice as fairness

The guiding ideas of justice as fairness outlined above are given institutional form by the following two principles of justice:

240 Rawls 1996:5.
241 Wenar 2017:12.
242 Strauss 2009:509.
243 Wenar 2017:12.
244 Rawls 1996:6.
245 Rawls 1996:6.
246 Wenar 2017:12.
247 Wenar 2017:12.

(a) Each person has the same indefeasible[248] claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.[249]

(b) Social and economic inequalities are to satisfy two conditions, namely that:

- they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and
- they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).[250]

The first principle is to be embodied in the political constitution, while the second applies primarily to economic institutions. Fulfilment of the first principle takes priority over fulfilment of the second, and within the second principle, fair equality of opportunity takes priority over the difference principle.[251]

The first principle affirms that all citizens should have the familiar basic rights and liberties: liberty of conscience, freedom of association, freedom of speech, liberty of the person, and the rights to vote, to hold public office, and to be treated in accordance with the rule of law.[252] These rights and liberties are afforded to all citizens equally. Unequal rights would not benefit those who would get a lesser share of the rights, so justice requires equal rights for all, in all normal circumstances.[253] Rawls's first principle supports widespread convictions about the importance of equal basic rights and liberties.[254]

His second principle of justice has two parts. The first part, fair equality of opportunity, requires that citizens with the same talents and willingness to use them be afforded the same educational and economic opportunities, regardless of whether they were born rich or poor.[255] Put differently, "[i]n all parts of society there are to be roughly the

248 Unassailable or incontestable.
249 Rawls 1996:5; Kelly 2001:42-43.
250 Rawls 1996:6; Kelly 2001:42-43.
251 Kelly 2001:42-43.
252 Wenar 2017:12.
253 Wenar 2017:12.
254 Wenar 2017:12.
255 Wenar 2017:13.

same prospects of culture and achievement for those similarly motivated and endowed".[256]

The second part of the second principle is the difference principle, which regulates the distribution of wealth and income.[257] Allowing inequalities of wealth and income can lead to a larger social product: Higher wages, for instance, can cover the costs of training and education and provide incentives to fill jobs that are more in demand.[258] The difference principle allows inequalities of wealth and income, as long as these are to everyone's advantage, and specifically to the advantage of those who will be worst off. In other words, it requires that any economic inequalities be to the greatest advantage of those who are advantaged least.[259]

Rawls's difference principle is partly based on his negative thesis that the distribution of natural assets is undeserved. A citizen does not deserve more of the social product simply because (s)he was lucky enough to be born with the potential to develop skills that are currently in high demand. This does not mean that everyone must get the same shares, though.[260] The fact that citizens have different talents and abilities can be used to make everyone better off. In a society governed by the difference principle, citizens regard the distribution of natural endowments as a common asset that can benefit all.[261] Those better endowed are welcome to use their gifts to make themselves better off, as long as their doing so also contributes to the good of those less well endowed.[262]

Therefore, the difference principle expresses a positive ideal; an ideal of deep social unity. In a society that satisfies the difference principle, citizens know that their economy works to everyone's advantage and that those who were lucky enough to be born with greater natural potential are not getting richer at the expense of those who are less fortunate.[263] Rawls's positive ideal may be contrasted with Nozick's ideal of libertarian freedom, or with ideas about economic justice that are dominant in

256 Kelly 2001:44.
257 Rawls 1996:309.
258 Wenar 2017:13.
259 Rawls 1996:6.
260 Wenar 2017:13.
261 Wenar 2017:13.
262 Wenar 2017:13.
263 Wenar 2017:13.

contemporary society. “In justice as fairness,” Rawls says, “men agree to share one another’s fate.”[264]

The basic structure of society

Rawls believes that the best way to develop “a well-ordered society”[265] is by focusing on the basic structure of society. To him, the basic structure of society is not limited to a collaboration of individuals living together in a structured social environment; instead, it is formed through conscious consideration, which produces a linked system of practices and rules.[266] It comprises political institutions, a systematic organisation of laws, the family, and public associations.[267]

Justice as fairness aims to describe a just arrangement of the basic structure of society.[268] The basic structure is the location of justice, as its institutions distribute the main benefits and burdens of social life – who will receive social recognition, who will have which basic rights, who will have access to which job opportunities, and what the distribution of income and wealth will be.[269] Where a society’s institutions promote, or fail to intervene in, the exploitative or inequitable distribution of primary goods, individuals cannot be fully equal citizens and cooperate freely.[270] Social justice is hindered where primary goods, specifically economic resources, are not distributed equitably. A well-ordered society will not be achieved where the institutions that make up the basic structure of society apply unjust practices and rules.[271]

However, while the functioning and structure of social institutions profoundly affects the distribution of the primary goods under their control,[272] these institutions do not have overt authority and control over the actions of individuals and associations that

264 Rawls 1971:102.

265 “[A] society is well-ordered when ... [e]veryone accepts and knows that the others accept the same principles of justice, and the basic social institutions generally satisfy and are generally known to satisfy these principles. … Among individuals with disparate aims and purposes a shared conception of justice establishes the bonds of civic friendship, the general desire for social limits, [and] the pursuit of other ends.” Rawls 2005a:4-5.

266 White 2020:2.

267 Freeman 2003:277-315.

268 Freeman 2003:277-315.

269 Gutmann 2002:168-199.

270 Freeman 2003:277-315.

271 Rawls 2005a:4-5.

272 Parijs 2002:200-240.

can lead to inequitable distribution and social injustice.[273] The question, therefore, is how a society should go about ensuring that primary goods are distributed in line with the principles of social justice, and so maintain a well-ordered society where all are equal citizens and cooperate freely. Rawls offers the following general advice:

> There are no feasible rules that is practical to impose on economic agents that can prevent these undesirable consequences. These consequences are often so far into the future, or so indirect, that the attempt to forestall them by restrictive rules that apply to individuals would be an excessive if not impossible burden. Thus, we start with the basic structure and try to see how this system itself should make the corrections necessary to preserve background justice.[274]

He refrains from discussing detailed steps that should be taken to rectify rules, conditions, interpersonal exchanges and policies that may result in situations of institutionalised social injustice – quite understandably, as these are innumerable. Instead, he emphasises the importance of the basic structure of society and its core duties to sustain the conditions required to maintain a well-ordered society that is open to being directed by precepts of social justice.[275]

> The role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place. Unless this structure is appropriately regulated and adjusted, an initially just social process will eventually cease to be just, however free and fair particular transactions may look when viewed by themselves ... We require special institutions to preserve background justice, and a special conception of justice to define how these intuitions are to be set up.[276]

Rawls does not advocate for a specific type of society over another to implement a social contract that ensures a well-ordered society and social justice, nor does he develop a rubric for the basic structure of society.[277] He rather assigns to the institutions that make up the basic structure of society the responsibility to maintain conditions that will result in individual members of society being regarded as equal and free citizens by their peers.[278]

Creating and maintaining a well-ordered society

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273 White 2020:3.
274 Rawls 1997:160. In short, background justice calls for limits on inequality of property and opportunities.
275 White 2020:3-4.
276 Rawls 2005b:266-267.
277 White 2020:4.
278 White 2020:4.

To Rawls, the end result of having a socially just basic structure of society is the achievement of a well-ordered society.[279] His principles of justice are intended to guide the basic structure of society to produce such well-ordered society, founded on the liberal social contract theory.[280] In this society, everyone has the same conception of justice, namely that all individuals have access to the society's primary goods and are equal and free citizens.[281] This enables people to achieve their best when placed in a normal state of life and social cooperation.[282]

> [A] society is well-ordered when ... everyone accepts and knows that the others accept the same principles of justice, and the basic social institutions generally satisfy and are generally known to satisfy these principles ….[283]

A well-ordered society, therefore, has the following three basic provisions:

- All members of society accept the same conception of justice, which acceptance is known publicly.
- There is a consistent realisation in society of the generally accepted conception of justice in its institutions.
- All members of society have a reasonable sense of justice and want to do what is required by justice.[284]

The first provision requires all members of society to establish a reliable shared value base of what they can expect from the other members of society and what is expected from them in return.[285] This mutual understanding of social justice expectations ultimately fosters bonds of civic friendship,[286] from which members of society establish institutions that adhere to their conception of social justice and that, through the just distribution of primary goods, work to maintain the bonds of civic friendship.[287] In this way, members are fully included in a society where it is each individual's true desire to act in the interest of social justice.[288]

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279 White 2020:6.
280 Cohen 2002:86-138.
281 White 2020:7.
282 Freeman 2002:277-315.
283 Rawls 2005a:4-5.
284 Freeman 2002:277-315.
285 White 2020:7.
286 White 2020:7.
287 White 2020:8.
288 White 2020:9.

To serve a society's conception of social justice, the manner in which that society's institutions distribute primary goods has to be generally accepted, especially if the distribution results in an individual receiving less primary goods for the benefit of another who is less well off.[289] It is only through a shared sense of justice that a means is created to debate the distribution and redistribution of primary goods without upsetting the stability of the established political order of a well-ordered society.[290]

2.3.5.3 *Nozick*

Robert Nozick (1929-2002) may be regarded as an embodiment of the conservative tradition in the field of political and moral philosophy in the latter half of the twentieth century.[291] Nozick's theory on political and economic ethics is based on libertarian ideals. He is renowned for his "entitlement theory of justice", through which he vindicates right-wing libertarianism and the advancement of individual rights of control over one's own mind, body and life – in essence, the right to self-ownership.[292]

His theory is founded on the notion of a minimalist state that is concerned only with things such as safeguarding its citizens from theft, force and fraud, but has no role in compelling citizens to come to the aid of others.[293] Clearly, therefore, the theory leaves no room for compelling redistribution.[294]

In Nozick's view, the distribution of resources would be regarded just if it complies with the following three principles:

1. Justice in acquisition – the appropriation of unowned[295] things, as long as enough is left over for others;

2. Justice in transfer – the voluntary transfer of ownership of holdings to someone else; and

3. Rectification – any unjust transfers are to be rectified by compensation.[296]

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289 Cohen 2002:86-138.
290 Freeman 2002:277-315.
291 Feser 2005:20.
292 Otsuka 2005:15.
293 Phillips 1979:92.
294 Nozick 1974:s.p.
295 Property not owned by anyone.
296 Nozick 1974:150.

According to him,[297] individuals have the freedom to determine what to do with what is theirs on account of their right to self-ownership and to own property. The state's role is to protect these rights and serve as a night watchman of sorts. Nozick[298] considers any attempt by the state to distribute or redistribute resources, such as through taxation, as unjust.

While the notion of rectification of past injustices is inherent in his theory, there is no reason to anticipate that this principle should lead to a more equal distribution.[299] Nozick[300] argues that the state has no obligation to assist unlucky individuals born with few resources (the weak, poor, sick, etc.) and that it is up to the individual to decide whether to assist such persons by gifting them with resources.[301]

To Nozick,[302] resources and goods are not proverbial manna from heaven that the state is free to take and redistribute; instead, they are either created by individuals or preowned. He does not accept Rawls's assumption that greater benefits can be obtained through social cooperation;[303] he rather advocates for limited cooperation, if any.[304]

The conservative tradition and its ideals championed by Nozick, particularly libertarianism, would not be palatable to socialist-minded thinkers. The conservative position on social justice is directly opposed to the collective effort advocated by Rawls. Nevertheless, this tradition continues to exist alongside the liberal and radical traditions of social justice, contributing to the tension between individual competition and communal cooperation.[305]

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297 Nozick also had his critics. He was criticised for not giving any clear justification for individual rights, where they came from or why they should be upheld; there was simply an assumption of the link between personal freedom and property rights. Phillips 1986.

298 National Pro Bono Resource Centre 2011:7.

299 Phillips 1979:s.p.

300 Nozick 1974:225.

301 Nozick 1974:149.

302 Nozick 1974:198-204.

303 For instance, Nozick did not view natural gifts and talents as common property, as Rawls did. He saw the notion of rectification and how it is to operate as impractical and having the potential to create more problems than it solves. Phillips 1979.

304 Nozick 1974:190-193.

305 National Pro Bono Resource Centre 2011:7.

2.3.5.4 *Sen*

In his comparative approach to social justice, Indian economist and philosopher Amartya Sen (1933-) aims to make society less unjust instead of seeking to make society perfectly just, which is how Sen views Rawls's theory.[306] Sen's approach explores social alternatives, ranking them based on the values and priorities of the community.[307] The focus is more on "what actually happens in the world" and less on the justness of underlying institutions.[308] To Sen the effectiveness of actions and institutions is determined by their effectiveness in reducing injustice.[309]

According to him, the effectiveness of government action to bring about social justice is judged by individuals' ability to do things they value and the freedom to choose between different ways of living.[310] Sen's approach to social justice focuses on ensuring individuals' ability to achieve optimal wellbeing in their circumstances. Therefore, he defines poverty as being deprived of these basic abilities, including literacy and being active in the community.[311]

Sen acknowledges that social arrangements have to enable individuals to build their capabilities. The right to education, for instance, is not only about an individual's access to appropriate educational material, but also involves government's responsibility to ensure the stable presence of certain institutions and institutional frameworks.[312]

2.4 SOCIAL JUSTICE IN EDUCATION – A TWO-DIMENSIONAL PERSPECTIVE

Most definitions characterise social justice as distributive justice – the morally just and proper distribution of social benefits[313] and burdens among members of society.[314] Notions of distributive justice mainly fall into one of two categories, one of which

306 Sen 2008:7.
307 Sen 2008:17.
308 National Pro Bono Resource Centre 2011:8.
309 National Pro Bono Resource Centre 2011:8.
310 National Pro Bono Resource Centre 2011:8.
311 National Pro Bono Resource Centre 2011:8.
312 Baldry & McCausland 2008:7.
313 Such as income, rights and respect.
314 Young 1990. See also Rawls 1971, 2001.

conceptualises distributive justice as equality of opportunity, while the other sees it as equality of outcome:

> [E]quality of opportunity is viewed as being dependent upon the existence of equal formal rights, equality of access and equality of participation. Equality of outcome differs from equality of opportunity in that it seeks to ensure equal rates of success for different groups in society through direct intervention to prevent disadvantage.[315]

This perspective on social justice has been criticised for its failure to critically examine the domination and oppression that exists in relationships that operate within social structures and institutional contexts.[316] Theories that have developed in response to this criticism propose an understanding of social justice that goes beyond the traditional focus on the distribution of societal goods, also taking into account relational justice. Drawing on this, and based on a thorough examination of the different views on social justice in both historical and contemporary South African thinking, this dissertation proposes and employs a two-dimensional model of social justice that incorporates both relational and distributional justice.

2.4.1 Relational dimension – shared responsibility to address inequality and unfairness

A social justice concept that focuses on shared responsibility necessitates the establishment of fair institutions and institutional frameworks. It is more about making the systems and structure of society more just than about seeking justice in individual cases, and it assumes that government would intervene positively to tackle structural inequalities.[317]

In practice, social justice and education governance in South Africa involves multiple interrelated, distinctive and interdependent government spheres.[318] Social justice praxis, therefore, depends on a shared understanding of who is responsible for determining the distribution or allocation of burdens and advantages as well as rights and duties.[319]

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315 **Ger**witz, Ball & Row 1995:472.
316 Fraser 2003; Young 1990.
317 National Pro Bono Resource Centre 2011:10.
318 Local, provincial and national.
319 Miller 1999:s.p.

Human rights and constitutional values are the driving force behind the pursuit of social justice, which is to be achieved through collaborative engagement between the education partners.[320] Against the backdrop of South Africa's divided apartheid past, the preamble to the *Constitution* as well as section 1 both aim to "heal the divisions of the past, and to establish a society based on democratic values, social justice and fundamental human rights,"[321] which includes the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms".[322] All education governance endeavours, from the making of policies and laws to practical implementation, must be informed by these values. This is why the Bill of Rights requires education partners to "respect, protect, promote and fulfil"[323] the provisions of the *Constitution* as well as the values it embodies to ultimately establish a society that is the polar opposite of the old apartheid order.[324]

Scholars differ on the institutional and systemic make-up of social justice governance. Rawls,[325] however, suggests that to ultimately achieve distributive justice, one needs a cooperative (i.e. relational) venture that serves everyone's interests. In his *Theory of justice*, Rawls specifically states that equal and fair governance is found in just institutions of education and government.[326] A well-ordered educational society is governed through the relational behaviour of those with the discernment to prioritise what is right over what is good, "bas[ing] their decisions on consistent value-based conduct, which is beneficial and desirable for the individual, as well as for the community more broadly".[327]

Shifting the focus from individuals to the interconnections between them as a society,[328] this relational dimension of justice holistically governs the way in which a society should act towards one another on all levels.[329] It arranges social relationships according to regulations and rules, whether formal or informal, and involves procedural

320 Van Deventer *et al.* 2015:3.
321 *Constitution*:preamble.
322 *Constitution*:sec. 1(a).
323 Sec. 7(2).
324 Van Deventer *et al.* 2015:3.
325 Rawls 1999:s.p.
326 Van Deventer *et al.* 2015:3.
327 Van Deventer *et al.* 2015:3.
328 Martin 1999:48-61.
329 Mncube 2008:79.

rights,[330] such as those on inclusion, democracy and participation. In this regard, Young[331] asserts that "democratic norms mandate inclusion as a criterion of political legitimacy". In addition, Mncube[332] argues that "democracy implies that all members of the polity are included equally in the decision-making process and, as such, these decisions would be considered by all as legitimate".[333]

2.4.2 Distributional dimension

2.4.2.1 *A fair distribution of resources across society*

Notions of fair distribution vary depending on one's perspective on social justice. However, in the education setting and for purposes of this dissertation, a fair distribution of resources is understood as a distribution that shrinks the gap between learners from different backgrounds and with different needs, abilities and preferences. Inevitably, this involves equal opportunities and equal outcomes in education as well as unequal distribution based on the individual's needs or requirements.

Departing from Rawls's idea of distributive justice, it is argued that the conception of social justice should firstly provide "a standard whereby the distributive aspects of the basic structure of society are to be assessed".[334] This, then, should be the standard that underpins the "assigning of rights and duties and defining the appropriate division of social advantages".[335]

To Rawls, therefore, social justice presents a moral frame on which to build a full-fledged modern democracy,[336] applying the two principles of:

- equal liberty, which claims that every person is to receive the largest degree of liberty that is consistent with similar liberty for everyone; and

330 Rawls 1999:49.
331 Young 2000:48-65.
332 Mncube 2008:80.
333 Mncube 2008:80.
334 Rawls 1958:163.
335 Rawls 1958:173.
336 Nieuwenhuis 2011:192.

- difference, which states that unequal treatment of individuals is only permitted if the positions that come with greater reward are open to all and work to everyone's advantage.[337]

In essence, Rawls makes out a case for distributive justice that may be interpreted as either a democratic form of distribution premised on formal equality[338] or a social-democratic form of distribution premised on substantive equality.[339] The former means that all citizens have the same basic needs, and that normalisation or compensation must be applied to those for whom these needs are not being met.[340] The latter means that different social goods must be distributed to different citizens, as individuals have different resources and different needs.[341]

This second form of distributive justice gave rise to the notion of equity and promotes the redistribution of not only material goods, but also social goods such as opportunities, better known as "affirmative action".[342]

2.4.2.2 *Equal access to opportunities and rights*

An emphasis on equal access to opportunities and rights reflects a social justice approach that seeks to ensure that people are not excluded from life's opportunities and the activities of society (such as education) on an unfair basis (such as race, gender, sexual orientation or age).[343] South African human rights and anti-discrimination laws recognise the importance of equal access to opportunities and rights by prohibiting discrimination on the basis of particular immutable traits.[344] However, as those with the greatest need to access or enforce their rights often lack the resources (such as knowledge, confidence or money) to obtain the remedies provided for by human rights and anti-discrimination laws, systemic or structural justice is required to enable individuals to exercise their rights.[345]

337 Rawls 1999:53.
338 Hay & Beyers 2011:238.
339 Hay & Beyers 2011:238.
340 Hay & Beyers 2011:238.
341 Hay & Beyers 2011:238.
342 Hay & Beyers 2011:238.
343 National Pro Bono Resource Centre 2011:11.
344 National Pro Bono Resource Centre 2011:11.
345 National Pro Bono Resource Centre 2011:11.

Brighouse[346] calls for a theory on social justice in education that offers guidance on what merits strong state protection, citizens' rights and how these rights should be distributed, and principles to manage trade-offs. He proposes that social justice in education must be guided by the principles of equality of condition and fair equality of opportunity.[347] Equality of condition, he argues, can be achieved through the recognition of disadvantages caused in the past, as well as the recognition of structural barriers that are embedded in the economic, social and political system and perpetuate systemic discrimination. Providing for equitable outcomes, equality of condition acknowledges that there are circumstances when the implementation of the same rules to unequal groups will produce unequal results.[348] Fair equality of opportunity, on the other hand, focuses on providing all people with equal rights, resulting in the equal treatment of all.[349] Importantly, however, fairness of treatment is not necessarily achieved by treating everyone the same.[350] Inevitably, family background and events that disadvantage learners will restrict equality of opportunity.[351] Therefore, social justice principles must be merged with fair equality of opportunity to ensure substantive equality to marginalised groups.[352] Ultimately, these two principles of social justice must provide a framework for assessing the impact of practices and policies on education.[353]

Brighouse[354] argues that personal autonomy and educational equality are essential elements of social justice in education.[355] Personal autonomy entails that every child has the opportunity to become an autonomous person,[356] which schools play a crucial role in facilitating. Education equality, in turn, is rooted in the conviction that the state must guarantee a set of liberties, implying that all children in South Africa have a right to education of an equal standard.[357] It follows, then, that in order to ensure the same

346 Brighouse 2002:185.
347 Brighouse 2002:183.
348 Nieuwenhuis 2011:193.
349 Nieuwenhuis 2011:192.
350 Nieuwenhuis 2005:182-197.
351 Nieuwenhuis 2011:192.
352 Nieuwenhuis 2011:193.
353 Nieuwenhuis 2011:193.
354 Following Rawls's line of reasoning.
355 Brighouse 2002:185.
356 Nieuwenhuis 2011:193.
357 Nieuwenhuis 2011:193.

quality, more resources must be made available to those with less.[358] First, therefore, the quality principle proposes that those willing to apply a similar level of effort and have similar ability levels should face similar prospects, irrespective of their circumstances and background. Secondly, additional resources must be awarded to those with lower ability levels.[359]

2.4.3 Implications for a social justice theory fit for the South African education setting

A theory of social justice in education is essential and was glaringly absent until recently.[360] Also, such a theory cannot be a mere replica of the proposals of Rawls, Young, Giddens or any other author,[361] but must be fit for the education setting. Therefore, this chapter critically reviewed a number of theories, elements of which could inform such a theory of social justice in education in the South African context. As one of the underlying aims of the *Constitution*, social justice recognises the importance of the equal enjoyment of all rights and freedoms, as reflected in the fair, just and equitable distribution of all opportunities, benefits, privileges and burdens in a society or group. Achieving this will involve both distributional and relational justice.

In terms of the distributional dimension (equal access to opportunities and rights), merely eliminating the educational inequalities[362] that have resulted from underdeveloped and unequal apartheid-era institutions[363] will not suffice. This would fly in the face of sections 9(1) and (2) of the *Constitution.* As long as these structurally embedded and inherited inequalities are ignored, formal equality alone (ensuring standardisation and sameness) will fail in remedying inequities. What is also needed is substantive equality, which is concerned with just and fair treatment.[364]

To realise social justice in and through education, quality public education for all is essential. It is a precondition for cultivating lifelong learners,[365] shaping their

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358 In other words, the disadvantaged. Nieuwenhuis 2011:193.
359 Nieuwenhuis 2011:193.
360 Brighouse 2002:181.
361 Brighouse 2002:181.
362 Systemic, historical and structural.
363 Badat & Sayed 2014:128.
364 Woolman *et al.* 2014:35-6; Currie & De Waal 2016:1-23.
365 In South Africa, students are called "learners". However, this dissertation uses the two terms interchangeably.

intellectual and other capabilities, equipping them to be socially adept and productive, and enabling their participation as democratic citizens and autonomous people.[366] Chapter 3 examines the current legal framework pertaining to the right to equal access to quality basic education, along with the implementation of this framework, to establish whether the South African education system indeed provides such access.

With regard to the relational dimension (shared responsibility to address inequality), socially just education in the South African setting requires participation by all stakeholders responsible for education and its governance[367] in setting up fair institutions and fair institutional frameworks. To delve deeper into this aspect, chapter 4 analyses the relationship between the national Department of Basic Education, the provincial education departments and school governing bodies and proposes what the relationship ought to be to comply with the constitutional imperative of cooperative governance captured in chapter 3 of the *Constitution* and ultimately achieve social justice in education.

366 Badat & Sayed 2014:128.

367 National and provincial education departments as well as school governing bodies. *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*:56.

CHAPTER 3: THE POSITION OF THE SOUTH AFRICAN EDUCATION SYSTEM IN RELATION TO THE CONSTITUTIONAL DEMANDS OF SOCIAL JUSTICE

3.1 INTRODUCTION

When South Africa transitioned to democracy, the right to education was guaranteed to all, irrespective of gender, race, social standing, poverty, family background, or religion. This right is clearly enshrined in the *Constitution* as well as complementary legislation, including Education White Paper 3,[368] the *Schools Act*[369] and the *National Education Policy Act.*[370] Through the implementation of policies that have resulted from these laws and regulations, South Africa strives to establish an education system that is based on democratic values and principles of social justice, addresses past injustices, improves quality of life, and reduces inequality.

Based on the principles and values outlined in Education White Paper 1,[371] the state has an obligation to promote and protect education as a human right, and to ensure that all citizens have opportunities to "develop their capacities and potential, and to contribute fully to society". [372] In addition, the state must guarantee access to basic education in an acceptable manner, which "must encompass not just the proportion of eligible children attending school, but also the nature and quality of the education offered".[373]

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368 A programme for the transformation of higher education GN 1196 Government Gazette 1997. In the legislative process, a White Paper serves as a refined and comprehensive government document that outlines a broad statement of policy on a particular issue. Unlike the initial Green Paper, which presents the government's preliminary thinking on a policy, the White Paper represents a more polished version of government intentions. It is typically drafted by the relevant department or a designated task team under the Minister's authority. The purpose of the White Paper is to offer a clear and detailed presentation of the government's policy stance, providing a foundation for further discussion and decision-making. It serves as a crucial communication tool, inviting comments and input from interested parties, including relevant parliamentary committees. The feedback received during this phase contributes to the refinement and finalization of the government's policy before it progresses to the legislative stage. Parliamentary Monitoring Group [https://pmg.org.za/page/legislative-process].

369 84/1996.

370 27/1996.

371 White Paper on Education and Training: Education and training in a democratic South Africa GN 196 Government Gazette 15 March 1995.

372 4.2.

373 13.13.

For the past nearly three decades, the obligations outlined in the *Constitution*, Education White Paper 1 and other legislation have been governing the way in which the different government spheres[374] approach our education system. While commendable progress has been made in removing barriers that restrict access to education, and much has been achieved since the advent of democracy, many young people continue to face social inequalities and aggravating socioeconomic conditions.

This chapter explores the significance of political developments throughout modern South African history to establish how the country's education system relates to the demands of social justice and responds to the imperatives of the *Constitution*. The discussion includes a comprehensive description of the legacy conditions facing the post-apartheid government. The chapter also examines the importance attached to education in South Africa's pre-democratic past.

As stated in the conclusion to chapter 2, to achieve social justice, quality public education must be made available to everyone. This requires equal access to opportunities and rights, ensuring that no one is unfairly excluded from life's opportunities and society's activities. For this reason, the right to equal access to quality basic education is examined within the context of the current legal framework and its implementation to determine whether the South African education system indeed provides such equal access to opportunities and rights. This is done within the distributional framework outlined in chapter 2. The end goal is to provide a narrative for how South Africa has arrived at the present situation where social justice is a critical area of contention.

Chapter 3 does not intend to delve into every intricacy of social justice. This chapter also does not aim to determine who (School Governing Bodies (SGBs) or the Provincial Departments of Education(PDEs) is ultimately responsible for the lack of social justice in education. Both parties at some point contributed to social injustice. Instead, its goal is to identify the origins of the social justice concept, establish a reasonable benchmark for its manifestation, and analyse how the actions and power dynamics of SGBs and PDEs influence the realization of social justice.

374 National, provincial and local.

3.2 HISTORICAL OVERVIEW OF SOUTH AFRICAN EDUCATION

The following paragraphs describe the development of education in South Africa since the Union to the present day. The narrative starts with the period 1910-1948, being the time from the formation of the Union up until the start of apartheid. This is followed by a discussion of South African education in the apartheid years and concludes with the democratic era from 1994 to the present.

The discussion includes the key education legislation that currently applies to the governance of public schools.

3.2.1 Union education: 1910-1948

Preceding the formation of the Union on 31 May 1910, the country's four colonies each arranged and controlled their own education. The Union, however, marked a complete break with the past,[375] and following the adoption of the *South Africa Act* of 1909,[376] the education system underwent significant changes.

Clause 85(iii) of the *South Africa Act* provided that all education other than higher education would be entrusted to the provincial councils for a period of five years, after which Parliament could decide otherwise.[377] Black, coloured, Indian and white learners attended different schools, but the same rules and regulations of the provincial authorities applied. All schools also fell under the supervision of the same inspectors.[378] Upon the expiry of the five years provided for by the *South Africa Act,* the Provincial Administration Commission was appointed to report on the provincial councils and the control of education. The majority in the commission proposed that the provincial councils be abolished and replaced by local governing bodies and that all education should fall under the Union government after ten years. Yet the minority report, which was eventually adopted, recommended that the education system

375 Cilliers 1960:6.

376 Passed by the British Parliament to create the Union of South Africa from the British colonies of the Cape of Good Hope, Natal, the Orange River Colony, and Transvaal.

377 Behr 1988:59.

378 Behr 1988:60.

remain unchanged, and so, the education system remained under provincial control. By that time, the provinces had each developed in their own direction, and provincial conferences that were intended to unite them failed.[379]

Most schools for black learners were state-supported mission schools that provided elementary and secondary school education. The quality of the education was considerably lower than that offered to white learners. About 70% of black learners of school-going age did not attend school, and many who wanted to attend were not given the opportunity to do so.[380] The state's per-capita financial contribution for the education of white learners was ten times the contribution put towards the education of black learners.[381] Despite several proposals for improving education for black learners, a lack of funds and successor governments' attitude hampered progress in this regard.[382] An education system that delivered a cheap workforce without developing the black population politically, economically or educationally served the Union government's political and economic interests.[383] This tendency to provide non-white learners with just enough of an education to provide manual labour to whites has repeated itself over the years.[384]

The Interdepartmental Committee on Native Education, which was commissioned around 1935 to evaluate non-white education in the Union, suggested a drastic increase in funding for non-white education. They cautioned that cutting corners on non-white education would cost future generations dearly.[385]

In the first half of the twentieth century, Afrikaner nationalism became a powerful political force. While initially intended to defend Afrikaner culture and language against British imperialism,[386] it later became geared towards dominating all aspects of South African society. At the Durban conference of 1924, recommendations to establish a Union Education Council that would coordinate all primary and secondary education[387]

379 Cilliers 1960:9.
380 Behr 1988:29-31.
381 Behr 1988:29-31.
382 Cilliers 1960:11.
383 Burger 2001:s.p.
384 Burger 2001:s.p.
385 Burger 2001:s.p.
386 Behr 1988:52.
387 These recommendations were made by the Education Administration Commission of 1924 led by JH Hofmeyer. Cilliers 1960:11.

were rejected.[388] This saw the divided education system continue until the 1950s, notwithstanding several more failed attempts by various commissions to establish a uniform Union Education Council.[389]

Meanwhile, rapid growth in the black population between the two World Wars drastically increased the demand for education. From 1921 to 1946, the black population in urban areas doubled in size, creating an urgent need for schools.[390]

3.2.2 Education in the apartheid era: 1948-1994

The National Party's ascent to power had far-reaching consequences for non-white education.[391] Churches and missionaries were taking charge of 90% of black education, and illiteracy among black people was common. Although some mission schools provided good education, black education was generally very poor. By 1952, only 3% of all black people had received any schooling after the primary school phase, and only approximately 8 500 black people were obtaining matric each year compared to 40 000 of their white peers.[392]

Under the pre-1994 constitutional framework marked by parliamentary sovereignty and autocracy, South Africa witnessed a disturbing descent into chaos. The state, exceeding its legitimate authority, utilized legislation to control various aspects of citizens' lives. The *Suppression of Communism Act* [393] sought to regulate thoughts, the *Influx Control and Group Areas Act*[394] targeted movements, the *Immorality Act*[395] intervened in morals and sexual preferences, and the *Population Registration Act*[396] addressed descent. In an autocratic manner, the state extended its control beyond the realm of conflicting legal interests to encompass citizens' entire lives. This systematic approach not only disempowered the black majority but also conditioned white South Africans, despite their material privileges, to accept the state's assumption of control

388 Cilliers 1960:11.
389 Cilliers 1960:11-20; Behr 1988:22-29.
390 Burger 2001:s.p.
391 Giliomee & Mbenga 2007:319.
392 Giliomee & Mbenga 2007:319.
393 44/1950.
394 41/1950.
395 23/1957.
396 30/1950.

over all facets of their lives, relegating conflicting legal interests to the realm of political channels.

Upon becoming a republic, the country had four separate education ministries for the four different racial groups in South Africa. While there was centralisation within each racial group, there was decentralisation between groups.[397] The first step was the removal of black education from the jurisdiction of provincial education departments and the establishment of a separate Department of Bantu Education in terms of the *Bantu Education Act,*[398] *National Education Policy Act 39 of 1969*[399] *regulated the education system for white learners*.[400] In 1961, the Department of Indian Education was established, which took over Indian education in 1966 under the *Indian Education Act*.[401] The adoption of the *Education for Coloureds Act*,[402] in turn, transferred responsibility for the education of coloured people to the Department of Coloured Affairs.[403]

Although the creators of apartheid were not the first in the world to implement the concept of separate education,[404] education provision to non-whites did become part of a broader Nationalist ideology intended to segregate the different races of South Africa in all respects.[405] The *Bantu Education Act* compelled all black schools to register with the government, causing almost all mission schools to close immediately. The adoption of this law fulfilled Prime Minister Dr HF Verwoerd's dream of state-controlled black education.[406]

The *Bantu Education Act* stemmed from the recommendations of the Eiselen Commission,[407] who received clear instructions[408] as part of its investigation into black education. The commission was asked to look into the principles and goals of

397 Behr 1988:61.
398 47/1953.
399 39/1969.
400 Nasson & Samuels 1990:17-18.
401 61/1965.
402 47/1963.
403 Behr 1988:61.
404 Burger 2001:s.p.
405 Burger 2001:s.p.
406 Giliomee & Mbenga 2007:320; Nasson & Samuels 1990:18-19.
407 Appointed on 19 January 1949. The commission was led by Dr Werner Eiselen, an academic in Bantology at Stellenbosch University who later became Secretary for Native Affairs. The *Bantu Education Act* 47/1953, which took effect on 1 January 1954, was the result of the commission's recommendations.
408 Beckmann 2011:512; Giliomee & Mbenga 2007:319.

education for black people as an independent race, considering their past and future, as well as their racial characteristics and aptitudes.[409] Although, at first glance, the commission appeared to be an improvement, it was in fact based on racist inferences such as the following articulated by Verwoerd:

> There is no place for him [the black person] in the European community above the level of certain forms of labour … Until now he has been misled by showing him the green pastures of European society in which he was not allowed to graze.[410]

The purpose of the *Bantu Education Act* was twofold: It officially brought an end to all mission schools and introduced a system of mass education. As the Department of Native Affairs was given responsibility for black education, the government ultimately gained control.[411] Although school attendance was not compulsory, it was made available everywhere, primarily because of the demand for cheap labour. Children learned to read and write, but only for purposes of labour. The education offered, therefore, was intentionally inferior.[412] Bantu education meant that more black children could attend school, and black learner enrolment increased dramatically. By 1955, there were about 970 000 black learners in the lower grades.[413] By 1975, the number of black learners in primary schools had grown to approximately 3 378 000.[414]

However, most black education occurred at the lower levels, with large disparities between primary and secondary school enrolments. The dropout rate in high school was also very high, and only a tiny proportion of black learners who passed matric were granted matric exemption. Of the 200 000 black learners in Sub A (today's Grade 1) in 1950, only 894 passed matric in 1962.[415]

For black students, there was no guarantee of quality education. Through the administrative and financial structures of education as well as the curriculum, different racial groups were schooled to perform different forms of labour according to their

409 Behr 1988:32.
410 Christie & Collins 1982:66.
411 Beckmann 2011:512.
412 Mandela 1994: s.p.
413 Steinberg 1967:1405-1424. According to a 1960 census, there were 10 928 264 black persons in South Africa.
414 Nasson & Samuels 1990:18.
415 Nasson & Samuels 1990:18-19; Burger 2001:s.p.

social class.[416] The fact that Bantu education was designed to deprive black people of quality education and to isolate them became a rallying point for student protests.[417]

On 16 June 1976, hundreds of secondary school learners in Soweto protested against the state's decision to introduce Afrikaans alongside English as the language of instruction in black schools. Yet the uprising can, in fact, be attributed to something more fundamental, namely rebellion against subservience.[418] The 1976 uprising marked the beginning of a new era in education. As a policy, Bantu education failed. In the aftermath of the Soweto uprising, Afrikaans was withdrawn as official medium of instruction, the Department of Bantu Education was reorganised into the Department of Education and Training, more funding was provided for black education, and school conditions were reviewed.[419] However, these transformation efforts were too little too late. Protests against racial discrimination continued for another 15 years after the Soweto uprising. In essence, protesters sought to voice their rejection of Christian national education, which held that children should identify with their own ethnic group.[420]

The state's response to the unrest was slow, political in nature, and bent on advancing "separate development".[421] On 1 January 1980, a new law called the *Education and Training Act*[422] was enacted to replace the *Bantu Education Act*. The aim of the *Education and Training Act* was to dispose of the negative elements of its predecessor. Students would receive instruction in their home language up to and including Standard 2 (today's Grade 4), and the term 'Bantu' was replaced with 'black'. The Department of Education and Training assumed responsibility for constructing and maintaining black schools. According to those involved in black education, however, the legal reform was not nearly enough to improve the circumstances.[423]

In the face of a new wave of unrest as a result of the lack of education reform since the Soweto uprising, the government announced that it would launch an inquiry into

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416 Nasson & Samuels 1990:19; Burger 2001:s.p.
417 Mandela 1994: s.p. Nasson & Samuels 1990:18-19; Burger 2001:s.p.
418 Beckmann 2011:514; Giliomee & Mbenga 2007:354.
419 Mandela 1994: s.p.
420 Giliomee & Mbenga 2007:388; Mandela 1994: s.p.
421 Nasson & Samuels 1990:23.
422 90/1979.
423 Nasson & Samuels 1990:23.

all aspects of South Africa's education system. This investigation led to the report by the De Lange Commission.[424] The De Lange report, submitted to the Minister of Education on 31 July 1981, represented the most comprehensive investigation into education in South Africa since the Eiselen report of 1949.[425]

One of the main guidelines in the report was that the state should pursue a policy of equal education provision in terms of opportunities and standards for all South Africans, regardless of race, colour, religion or gender. The De Lange Commission also proposed that the fragmented system of education departments be replaced with a single education department for all groups.[426] In addition, the report provided for a distinction between informal, formal and non-formal education.[427] Other proposals included that education be subdivided into pre-basic[428] and basic education, of which the first six years of schooling should be free and compulsory for all.[429] After the basic phase, learners were to be classified according to their skills and achievements in an academic or technical (post-basic) teaching phase, which extended up to Standard 10 (today's Grade 12). Higher education was to be made available to those learners who obtained matric exemption.[430] Parents were to pay for formal academic training after the post-basic phase, while the business sector, which experienced a shortage of skilled workers, was to fund technical training.[431]

The De Lange report also addressed financial considerations. In the 1979/80 financial year, the state paid R534 per white learner in the primary school system and R960 per white learner in the high school system. The corresponding expenditure on black learners was R92 and R459 respectively. As the ratio of black learners to their white peers was 4:1, which was expected to increase to 8:1 by 2000, the cost of achieving

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424 Burger 2001:s.p.; Nasson & Samuels 1990:25.

425 Beckman 2011:514.

426 Beckman 2011:514; Behr 1988:514.

427 Behr 1988:47-48. Informal education takes place spontaneously in family and community contexts and is influenced by the media, ranging from pictures and books to radio and television. Formal education is provided in a planned manner by recognised institutions such as schools, universities and technikons. Non-formal education is about literacy, orientation, in-service training and support systems.

428 Pre-basic education involves a programme that prepares learners between the ages of five and six for school. It can be equated with the current-day Grade R.

429 This education provides the essential foundation for literacy to understand the needs of the social community and benefit from post-basic education, vocational training or non-formal education.

430 Beckman 2011:514; Burger 2001:s.p.; Behr 1988:49-52.

431 Burger 2001:s.p.

equality at all levels was estimated at some 50% of the country's gross national product in 1982, and even more in the ensuing years.[432]

In 1983, the government accepted the De Lange Commission's proposal of equal opportunities by way of a white paper, although the proposal of a single education department was rejected. The National Policy on General Education Affairs was enacted in 1984, establishing education systems in accordance with the (then new) 1983 *Constitution*. White, Indian and coloured education was now to be handled as "own affairs" by the various ministers in the three houses of the three-chamber parliament, while black education would fall under "general affairs".[433] Education of white learners was to be handled by the Department of Education and Culture (Administration: Volksraad), while the organisation and administration of coloured education fell under the authority of the Board of Representatives, and that of Indians under the jurisdiction of the Board of Deputies.[434] The Department of Education and Training was responsible for the overall administration of education for black students. The homelands[435] each had their own minister and department. Yet the white education minister still divided the available funding, and the homelands ministers could only decide on the distribution of that money within their own departments.[436]

During the 1980s, as the struggle for freedom intensified, a movement called Education for the People (or People's Education) emerged. The government declared a state of emergency: Police patrolled black schools, and learners were detained without trial. Those who resisted were met with police brutality. By the end of 1985, less than half of the learners who registered for matric at the beginning of the year had

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432 Burger 2001:s.p. Today, the state's financial contribution to learner education has changed dramatically. Funding no longer distinguishes between black and white learners or between primary and secondary school education. Now, the distinction is between schools that charge school fees and those that do not. According to the amended National Norms and Standards for School Funding GN 192 Government Gazette 44254 10 March 2021, 60% of all learners are enrolled in no-fee schools. In 2021, these schools received R1 466 per learner from the state, while schools that do charge school fees received either R735 or R254 per learner. The corresponding amounts for 2022 were R1 536 per learner and R770 or R266 per learner respectively.

433 Beckmann 2011:515.

434 Behr 1988:61, 71-72.

435 The apartheid government established the homelands, or Bantustans, to keep the majority of the black population from moving to urban areas. Homelands were a key administrative mechanism to remove blacks from the South African political system. Essentially, blacks were separated from their white compatriots and given the responsibility of running their own governments, denying them any remaining protection or rights they might have had in South Africa.

436 De Villiers 2009:9.

completed the final examination.[437] Students, now convinced that freedom was in sight, responded to calls to return to school with slogans such as “First liberation, then education”. However, realising that liberation would not be immediate, the African National Congress (ANC) adopted the strategy of “Education for liberation”. The idea was to transform education in the inner circles into a new curriculum that would reflect the struggle and prepare learners for the politics of liberation.[438]

The National Education Crisis Committee was established in 1986, and black learners returned to school after a call by the Soweto Parent Crisis Committee. Then President PW Botha once again declared a national state of emergency, which was renewed annually until 8 June 1990.[439]

On 10 September 1990, the government introduced the Model A to C schools. In his statement, then Minister of Education and Culture (Administration: Volksraad) PJ Clase acknowledged that there was a need in certain school communities for a greater say in schools’ admission policies.[440] With the establishment of these schools, certain conditions were laid down for black learners to access white schools, including that the character of the school in question may not be jeopardised and that preference would be given to members of the population group for whom the school was initially established.[441] The schools had different degrees of autonomy through the implementation of management committees.[442]

The state introduced the Education Renewal Strategy in 1991, which made recommendations on a future model for education provision. One of the recommendations was for the then racially based system to be replaced with a system that would lead to national unity.[443]

In the years 1990 to 1994, the period of negotiations between the ANC and the Nationalist government, the economy stagnated and education conditions deteriorated. In 1994, the newly elected Government of National Unity had the

437 Nasson & Samuels 1990:27-28.
438 Nasson & Samuels 1990:27-28.
439 Mandela 1994: s.p.

440 Heiberg 1994:60.
441 Heiberg 1994:60.
442 Möller 2000:s.p. The management committees would later be known as school governing bodies.
443 Beckmann 2011:507; Burger 2001:s.p.

enormous task of restructuring and rebuilding the South African education system, while also redressing past inequalities.[444] The new Minister of Education, Sibusiso Bengu, faced challenges with dysfunctional schools in informal settlements, instances of unruly students, and inadequately trained educators.[445]

3.2.3 Post-apartheid renewal in South African education: 1994-2021

Post-apartheid education in South Africa had to respond to two impulses. First, as one of the most visible and obvious forms of education inequality, racial discrimination was the new government's top priority, and as a result, social justice was understood as racial redress.[446] Secondly, racial redress had to occur in a way that supported the education system and social order. The objective was to change, but without radically disrupting predominant structures, education norms or policies.[447] Indeed, since1994, government has sought to transform all aspects of the education system. After apartheid, a single national system, encompassing nine provincial systems, replaced the fragmented and racially duplicated apartheid-era dispensation.[448]

The most important development in terms of legislation was the enactment of the *Constitution*, which was the product of intense negotiations between representatives of all the main political groupings. On 27 April 1994, the interim *Constitution* took effect, and while this was only the first step in building a post-apartheid state, it had a revolutionary impact on the South African legal system. With the interim *Constitution*, 300 years of colonialism and segregation came to an end, replacing parliamentary sovereignty with constitutional supremacy.[449]

The Constitutional Court ratified the final text of the *Constitution* on 8 May 1996. After a long and bitter struggle for democracy in South Africa, the 1996 *Constitution* took effect on 4 February 1997. The principles entrenched in the document include constitutionalism, legality, democracy, accountability, separation of powers, cooperative governance, and devolution of power.[450]

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444 OECD 2008:37.
445 Johnson 1995:217.
446 Badat & Sayed 2014:129.
447 Badat & Sayed 2014:129.
448 OECD 2008:37-38.
449 Currie & De Waal 2016:2; Giliomee & Mbenga 2007:409.
450 Currie & De Waal 2016:6-7.

The Bill of Rights[451] contained in the *Constitution* compels the state to exercise the powers conferred on it by the *Constitution* in a way that respects and realises people's fundamental rights.[452] Accordingly, the *Constitution* requires that South African education be transformed and democratised in line with the principles of human dignity, equality, freedom, non-racialism and non-sexism, ensuring that everyone's right to a basic education is realised.[453]

Moreover, South Africa's democratic constitutional dispensation introduced a new system of multi-tiered government. Instead of one overpowering central government, the country now has a separation of powers between the legislative and executive branches in the national, provincial and local government spheres.[454] These spheres are interconnected, distinct and interdependent, which means that all parties involved in the governance of schools across all spheres should collaborate and support one another.[455] This is a key component of participatory democracy, which is to ensure social justice in education.[456, 457]

As a result of this democratic transformation, new education legislation has been promulgated. South Africa's first democratically elected government issued Education

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451 *Constitution*:chapter 2.

452 Currie & De Waal 2016:23.

453 OECD 2008:38. Section 29 of the *Constitution* stipulates: "(1) Everyone has the right – (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible. (2) Everyone has the right to receive education in the official language of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account – (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices. (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that – (a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions. (4) Subsection (3) does not preclude state subsidies for independent educational institutions."

454 *Constitution*:sec. 40(1); Currie & De Waal 2016:2; Giliomee & Mbenga 2007:409.

455 *Constitution*:sec. 40(1); *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*; *Head of Department, Department of Education, Free State Province v Welkom High School*; *The Federation of Governing Bodies of South African Schools v Head of Department: Department of Education, Northern Cape Province*.

456 Education White Paper 1 White Paper on Education and Training: Education and training in a democratic South Africa GN 196 Government Gazette 15 March 1995:19.

457 While this chapter focuses on the distributive dimension of social justice, cooperative governance as the relational dimension of social justice is discussed in chapter 4.

White Paper 1 as its first policy document on education and training.[458] It sets out new education and training system priorities, values and principles, and highlights important development initiatives to be undertaken by the Minister of Education.[459] It also discusses how the *Constitution* affects the education system, how provincial and national education departments divide their responsibilities, and how these departments are structured.[460] In addition, it touches on the budget process in education, and the need to implement a strategic plan for education funding to respond to the national priority of human resource development.[461] Finally, it describes two important school system policies, namely school organisation, governance and funding[462] and the provision of free, compulsory general education.[463] The new legislation marked a shift from an education system built on inequality to one that values social justice.

Based on the Hunter Committee (or the Review Committee) report in 1995,[464] Education White Paper 2[465] laid the foundation for the Ministry's policy.[466] It was agreed that the Hunter Committee's recommendations on school organisation and governance would be implemented. In general, Education White Paper 2 set out the following important principles:

- A new financial system based on a partnership between government and communities

458 White Paper on Education and Training: Education and training in a democratic South Africa GN 196 Government Gazette 15 March 1995. Education White Paper 1 envisaged the appointment of a committee that would investigate a uniform system of organisation, governance and funding of schools and advise the Minister accordingly. The report of the Hunter Committee was published on 31 August 1995 and eventually resulted in White Paper 2, which, in turn, formed the basis for the *Schools Act*.

459 Education White Paper 1:part 2.

460 Part 3.

461 Part 4.

462 Part 12, chapter 5.

463 Part 5, chapter 13. Section 29 of the Constitution does not encompass all universally recognized education rights. It does not explicitly guarantee the right to compulsory education, despite the Schools Act mandating that learners must attend school until the age of fifteen or the completion of their ninth grade, whichever occurs first. Furthermore, in deviation from international norms, Section 29 does not ensure the right to free education.

464 Department of Education 1995.

465 The Organisation, Governance and Funding of Schools GN 130 Government Gazette 14 February 1996.

466 And, ultimately, also for the *Schools Act*.

- A school-based formula aimed at raising quality and efficiency in the poorest schools, with an emphasis on equity and redress
- Parents as the majority member component of school governing bodies
- School governance based on participative management, with the minimum level of government involvement required to ensure legal accountability[467]

Another five white papers followed. These focused on the transformation of higher education,[468] the transformation of continuing education and training,[469] early childhood development,[470] inclusive education,[471] and the transformation of education through technology, respectively.[472] To give these white papers legal efficacy, additional education laws were promulgated, which legally bind all education stakeholders. For purposes of this dissertation, only those laws relevant to the research are discussed below.

Among the first pieces of legislation was the *National Education Policy Act*,[473] which provides for the determination of national education policy. In addition to amending the *National General Education Policy Act*,[474] it provides for the determination of a policy on educator salaries and conditions of employment, among others.[475] The *National Education Policy Act* resulted in the issuing of key policies, including the Admission Policy for Ordinary Public Schools and the National Policy on Religion and Education.[476] These particular two policies provide a framework to all provincial departments of education and school governing bodies of public schools to develop

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467 GN 130 Government Gazette 14 February 1996:18;

468 Education White Paper 3 Programme for the transformation of higher education GN 1196 Government Gazette 15 August 1997.

469 Education White Paper 4 Programme for the transformation of further education and training GN 2188 Government Gazette 25 September 1998.

470 Education White Paper 5 White Paper on Early Childhood Education: Meeting the challenge of early childhood development in South Africa GN 1043 Government Gazette 17 October 2001.

471 Education White Paper 6 Building an inclusive education and training system GN 703 Government Gazette 2 July 2001.

472 Education White Paper 7 White Paper on e-Education: Transforming learning and teaching through information and communication technologies GN 1922 Government Gazette 2 September 2004.

473 27/1996.

474 76/1984.

475 See *National Education Policy Act*:preamble. The *National General Education Policy Act* 76/1984 was later repealed by the *Education Laws Amendment Act* 100/1997.

476 Joubert & Bray 2007:13.

admission policies for their schools and ensure that all learners have access to education and schools without being unfairly discriminated against.[477]

The *Schools Act*[478] was the second important law to follow. In its preamble, the reasons for its promulgation are stated as follows:

> WHEREAS the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and
>
> WHEREAS this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State; and
>
> WHEREAS it is necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa;

These aims should guide the actions of the various government systems, from making laws through the formulation of policies to practical implementation, to ultimately achieve social justice in education.[479]

To ensure that every learner has equal access to quality education, the *Schools Act* makes schooling compulsory from the age of seven up to and including the age of fifteen or the completion of the ninth grade, whichever occurs first.[480]

3.2.4 Public schools versus state schools

The status of schools in South Africa has changed quite significantly over the past three decades. While schools used to be fully state-run, it is no longer that simple. Having moved away from state schools, the current order recognises public schools, although many (erroneously) still often call them ‘state schools’. The term ‘state school’ implies that the school is fully state-controlled and functions as a state institution, while

477 OECD 2008:39.
478 84/1996.
479 Van Deventer *et al.* 2015:3.
480 Sec. 3(1).

a closer look at the *Schools Act* clearly shows that the state is no longer the only stakeholder in the governance and management of public schools.[481]

The term 'public school' is now used to refer to schools previously called community schools, industrial schools, farm schools, state schools and state-aided schools. In its report, the Hunter Committee[482] made the following comment on the decision to gather all the different school categories under a single category:

> The characteristics which defined schools as 'farm', 'state', 'state-aided' or 'community' schools will have less and less relevance, and the schools will take their place in the public schooling sector with the combination of powers and functions which best reflects the capacity and will of the community, and the policy priorities and accountability of the provincial authorities.

This indicates that the Department of Education sought to eliminate the characteristic features of the different types of schools, including state schools. Education White Paper 2[483] unequivocally states that public schools are governed in accordance with a new democratic order. Local communities and the provincial education department should work together as partners to control public schools, with government's role limited to the minimum that is legally required.[484] A deliberate decision was made to transfer control of public schools from the Department to the community via an elected governing body, of which the majority of members are parents who offer their services voluntarily. Therefore, a public school is primarily run by volunteers, and not by government officials or their representatives. In addition to parents, a school governing body consists of staff members at the school (including educators and non-educators), learners in the eighth grade or higher, the principal, being a representative of the Head of Department and coopted members. Section 16(1) of the *Schools Act* vests the power of governance of public schools in school governing bodies.

The *National Education Policy Act*[485] expects the national Minister of Education to ensure public participation in the development of education policies and to see to it

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481 *Schools Act*:preamble. See also Kruger, Beckmann & Du Plessis 2022:313; Van der Merwe 2012:30.

482 Department of Education 1995:49.

483 The organisation, governance and funding of schools GN 130 Government Gazette 14 February 1996.

484 Education White Paper 2:9.

485 27/1996. According to section 3, the Minister is responsible for establishing national education policy in accordance with the *Constitution* and the *National Education Policy Act*. Section 4(m) states that such policies shall incorporate public participation in the development of education policies, as well as stakeholder representation in the control of the entire educational system.

that stakeholder input is considered in the overall control of education.[486] If public schools were state institutions, there would be no need for the Minister to ensure public participation or stakeholder representation. After all, state institutions belong to the state, which can determine its own policy.[487] Yet the legal framework requires the community to be consulted, as they are in the best position to identify social justice needs and play a significant and direct part in meeting those needs, and therefore, should have a direct influence on policy decisions.

Section 20 of the *Schools Act* goes on to stipulate the functions of governing bodies. According to section 20(1)(*c*), a public school's governing body must formulate its mission statement. A mission statement allows a community to express its unique character, its perspective on life and the world, as well as its sovereignty. Similarly, a school's mission statement represents the views of the school community.[488] If public schools were state institutions, all schools would have had the same mission statement, as determined and prescribed by the state. The provisions on the financial management of schools,[489] the ownership of assets and money[490] and the employment of educators and non-educators[491] all serve as examples of powers conferred on governing bodies, with no other organ of state outside the state having similar powers.[492]

3.2.5 Public schools as organs of state

The definition of organ of state in section 239(b)(*ii*) of the *Constitution* includes public schools. According to this section, an organ of state is an institution or functionary that exercises public powers or performs public functions in accordance with the law. To Woolman,[493] the performance of a task that promotes some state function is a public power. By definition, a public power or function must also affect the public or part of it. A public school, being an educational institution, performs a public function because it provides education, which is a fundamental right that is enforceable against the state

486 Makhuvele, Litshani & Mashau 2019:190; Oosthuizen & Rossouw 2003:195
487 Van der Merwe 2012:31.
488 Colditz 2003:s.p.; Van der Merwe 2012:34.
489 *Schools Act*:sec. 37(1)-(4).
490 *Schools Act*:sec. 37(5).
491 *Schools Act*:sec. 20(4)-(5).
492 Colditz 2003:s.p.; Van der Merwe 2012:34.
493 Woolman *et al.* 2014:10-63; Mdumbe 2009:75; Hoexter & Penfold 2021:s.p.

under section 29 of the *Constitution*. The *Schools Act* transfers this obligation to public schools.[494] It follows, therefore, that to the extent that a public school performs a public function, it must be considered an organ of state.[495] In *Moko v Acting Principal of Malusi Secondary School*,[496] the Constitutional Court noted that the first respondent, being the acting principal of the school, was an organ of the state, which imposed on him not only a negative obligation not to infringe a person's right to basic education, but also a positive obligation to promote social justice. The court in *Western Cape Minister of Education v Governing Body of Mikro Primary School*,[497] in turn, confirmed that a school governing body, as the school's representative, performs a public function when it fulfils its duties, making it a state organ.[498] However, this reasoning, namely that school governing bodies are independent of executive control when determining policy, was rejected in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*.[499] Similarly, the dispute in *Head of Department, Department of Education, Free State Province v Welkom High School*[500] was not so much about the existence of executive control over the school's pregnancy policy, but about who may exercise control and in what manner. It was confirmed that education governance and management was pre-eminently an area where the constitutional principles of cooperative governance should apply.

As indicated in chapter 2, one of the dimensions of social justice is the creation of fair institutions and institutional frameworks as a shared responsibility. This implies participation by the national and provincial education departments as well as the school governing bodies within a cooperative governance regime. The constitutional

494 Malherbe 2001:8.

495 Independent (or private) schools are not organs of state because they do not function in accordance with legislation. The *Schools Act* merely governs the registration of these institutions in sections 45-51; the institutions themselves do not operate under the *Schools Act*. Malherbe 2001:8; Davies 2001:60.

496 [2020] ZACC 30: para 32 – 35. In the context provided, the *Moko* case holds significance concerning the classification of public schools as organs of the state. According to section 239(b)(ii) of the Constitution, public schools fall within the definition of an organ of state. An organ of state is characterized as an institution or functionary exercising public powers or performing public functions in accordance with the law. In the *Moko* case, the Constitutional Court explicitly acknowledged that the acting principal, as the first respondent, qualified as an organ of the state. This acknowledgment imposed both negative obligations, preventing the infringement of an individual's right to basic education, and positive obligations to promote social justice.

497 2005 JOL 14774 (SCA):paras. 17-22.

498 Visser 2007:385.

499 [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC):paras. 77 – 81.

500 [2013] ZACC 25.

and institutional framework for such cooperative governance is examined in detail in chapter 4.

3.3 THE CONSTITUTIONAL FRAMEWORK FOR PURSUING EQUAL OPPORTUNITIES IN EDUCATION

As in other spheres, equality in education is naturally intertwined with redressing the racial discrimination and inequalities of apartheid in South Africa. However, equal opportunities are not about redress alone, but also about empowering people to realise their potential, regardless of their race, gender, age or disability. It is about treating people with dignity, respecting their freedoms, and recognising their uniqueness. In education, equality is about human relations as well as the duty of the various education partners[501] to promote what is just and fair to all.

To form a proper understanding of the phrase "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" in the preamble to the *Constitution*, one of the best places to start is by familiarising oneself with the constitutional framework within which equal education opportunities in South Africa should be pursued. Below, the *Constitution* is discussed as a transformative instrument[502] that connects the past and the future, reality and imagination, while creating new ideas for the way forward.[503] This is followed by a discussion of the education rights entrenched in section 29 and the principle of equality in section 9 against the backdrop of the *Constitution* as a whole.

3.3.1 Transformative *Constitution*

The *Constitution*, being the "supreme law of the Republic",[504] was conceived "explicitly as a legal framework for overcoming the injustices of the past".[505] It seeks to transform a disparate society into one that values democratic values, social justice and fundamental human rights.[506]

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501 National and provincial departments of education and school governing bodies.

502 Kibet & Fombad 2017:340-366; Klare 1998:150; Langa 2006:351-360.

503 Le Roux 2004:629, 634; Khampepe 2016:441-453; Arendse 2014:162.

504 *Constitution*:sec. 2. "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

505 Brand & Heyns 2013:414.

506 Preamble.

According to Brand,[507] "the South African Constitution differs from a traditional liberal model in that it is transformative, as it does not simply place limits on the exercise of collective power (it does that also), but requires collective power to be used to advance ideals of freedom, equality, dignity and social justice". The transformative mandate of the *Constitution* has also been confirmed by the Constitutional Court, stating in *Soobramoney v Minister of Health, Kwazulu-Natal*[508] that "a commitment … to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new Constitutional order".[509]

Instead of prescribing a "comprehensive model for a transformed society" or "the detailed processes for achieving this",[510] the *Constitution* presents "a set of institutions, rights and values for guiding and constraining processes of social change".[511] As a result, the courts are uniquely placed to honour the transformative aspirations of the country's supreme law.[512] The judiciary, therefore, is responsible for interpreting and enforcing both the Bill of Rights in general and socioeconomic rights in particular to facilitate social change in South Africa.[513]

Moreover, the *Constitution* invites (or perhaps even provides for) the maximisation of the rights enshrined in the Bill of Rights. Roux[514] suggests that there are two ways to do so:

> First, by prohibiting past practices that are deemed to conflict with society's new conception of justice, and, second, by specifying new governing norms as a guide to future conduct.

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507 Brand & Heyns 2013:1.

508 1998 (1) SA 765 (CC).

509 Par. 8. The notion of the *Constitution* as a transformative document has been confirmed in various other Constitutional Court judgements. See for example *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC):paras. 73-74; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC):par. 142; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC):par. 77; *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC):par. 38.

510 Khampepe 2016:441-453; Liebenberg 2010:78-79; Arendse 2014:162; Kibet & Fombad 2017:340-366.

511 Liebenberg 2010:78-79; Arendse 2014:162; Kibet & Fombad 2017:340-366.

512 See Liebenberg 2010, who writes that the judiciary is "not the institution directly responsible for making policy or advocating for social change. Nevertheless, they have a significant role to play in inducing and supporting the kind of fundamental transformative changes envisaged by the Constitution. They are constitutionally mandated to determine whether social policies and programmes are consistent with the Bill of Rights, and to provide 'appropriate relief' when infringements are found [in terms of section 38 read with section 172 of the Constitution]."

513 Moyo 2018:81.

514 Roux 2004:466, 467; Kibet & Fombad 2017:356.

One of the unique characteristics of the *Constitution* is that it strives towards substantive equality, realises social justice, incorporates human rights standards into the private sphere, and cultivates a culture of justification in public law interactions. [515]

3.3.2 The underlying values of the *Constitution*

The equality provisions in section 9 and the education rights in section 29 of the *Constitution* are particularly relevant to a debate on equal education.

Of course, these provisions must be read in the context of the *Constitution* as a whole, and in light of all its underlying values.[516] Specifically, section 39(1) outlines the importance of promoting the values underpinning an open and democratic society based on human dignity, equality and freedom when interpreting the Bill of Rights. Section 1 reiterates the country's values, including human dignity, equality, and the advancement of human rights and freedoms, while the preamble stresses citizens' enjoyment of equal protection by the law.

In addition, sections 9 and 29 must be seen against the backdrop of the achievement of equality in democratic South African society.[517] In *S v Makwanyane*,[518] the Constitutional Court equated equality with equality of worth and elevated human dignity above all other rights and values. In *President of the RSA v Hugo*,[519] the court went so far as to say:

> Equality … means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.[520]

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515 Woolman *et al.* 2014:32-81.

516 Malherbe 2004:11; Woolman *et al.* 2014:13-8.

517 Malherbe 2004:11; Woolman *et al.* 2014:13-8.

518 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC):par. 144: "The rights to life and dignity are the most important of all human rights and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."

519 1997 (6) BCLR 708 (CC).

520 *President of the RSA v Hugo*:41, citing Canadian case law. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC):par. 42; *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC); 2001 1 SA 46 (CC):par. 83.

In *Prinsloo v Van der Linde*,[521] the court determined that "unfair discrimination", as prohibited by section 9(3), should be evaluated against the backdrop of past inequalities of treatment in which people's inherent dignity was violated. According to the court:

> In our view unfair discrimination … principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.[522]

Clearly, the pursuit of equality cannot be separated from the pursuit of human dignity and freedom.[523] Particularly considering the significant cultural, linguistic and religious diversity of South African society, therefore, equality cannot mean uniformity, but should be understood as "of equal value",[524] allowing people to live their lives freely in order to preserve everyone's dignity and uphold their equal worth.[525] The quest for equality in education requires balancing and harmonising the values of dignity, equality and freedom, accommodating people's "otherness", and building the South African nation from and through their diversity.[526]

3.3.3 Section 29 of the *Constitution*

The right to education is one of the so-called economic and social rights guaranteed in section 29 of the *Constitution*. The same section also articulates the desire to achieve equality in a diverse society.[527] The provision provides a right to receive education in the language of one's choice in public educational institutions where that education is reasonably practicable, as part of a broader goal of ensuring equal educational opportunities for all according to their needs and capabilities.[528]

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521 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC).

522 *Prinsloo v Van der Linde*:31-32. This view was confirmed in *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC):50-53.

523 Malherbe 2004:12; Woolman *et al.* 2014:13-8; Adams & Slade 2022:582-591.

524 Tribe 2021:1515-1516 states: "The core value of this principle is that all people have equal worth. When the legal order that shapes and mirrors our society treats some people as outsiders, or as though they were worth less than others, those people have been denied the equal protection of the laws … The goal of the equal protection clause is … to guarantee a full measure of dignity for all."

525 Malherbe 2004:12; Woolman *et al.* 2014:13-8; Equal Education 2015:s.p.; Veriava 2017:90-103.

526 Adams & Slade 2022:582-591; Malherbe 2004:12; Woolman *et al.* 2014:13-8.

527 Woolman *et al.* 2014:57-6; Malherbe 2004:12.

528 Malherbe 2004:12; Woolman *et al*. 2014:57-6.

Section 29 does not include all universally acknowledged education rights.[529] There is no right to compulsory education, for instance, although the *Schools Act* stipulates that learners must attend school up until the age of fifteen or the end of their ninth grade, whichever comes first.[530] In contrast to international norms,[531] section 29 does not guarantee the right to free education either.[532]

Due to feeder zone restrictions in school and provincial policy,[533] there generally is no freedom of choice of schools, but there is the right to choose between public and private (independent) education, and to learn in one's language of choice, where practicable. There is no explicit provision for the right to freedom of choice regarding homeschooling, nor for parents to decide how their children ought to be educated in public schools based on their religious and philosophical beliefs.[534]

According to the *Schools Act*, homeschooling is permissible if learners are registered to receive education at home,[535] although this possibility has no constitutional

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529 A number of international law instruments recognise the right to education. Examples include the International Covenant on Economic, Social and Cultural Rights (article 13(1)), the African Charter on Human and People's Rights (article 17), the European Convention on the Protection of Human Rights and Fundamental Freedoms (protocol 1, article 2) and the Convention against Discrimination in Education.

530 *Schools Act*:sec. 3(1).

531 Article 26(1) of the Universal Declaration of Human Rights determines that everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Article 13(2)(*a*) of the International Covenant on Economic, Social and Cultural Rights provides that primary education shall be compulsory and available free to all. Article 28(1)(a) of the Convention on the Rights of the Child: "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all." Article 3(a) of the African Charter on the Rights and Welfare of the Child: "Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."

532 Malherbe 2004:13; Woolman *et al.* 2014:57-24; Adams & Slade 2022:582-591.

533 Gauteng regulations relating to the admission of learners to public schools GN 4138 Provincial Gazette 13 July 2001.

534 Malherbe 2004:13; Woolman *et al.* 2014:57-21. This suggests that there is an absence of clearly defined legal provisions or explicit recognition of the right to freedom of choice in matters related to homeschooling and parental control over the education of their children within public schools. In other words, there is no specific legal framework that guarantees parents the right to choose homeschooling as an alternative to traditional schooling, and there is also a lack of provisions allowing parents to influence the educational content in public schools based on their religious or philosophical beliefs. This absence may imply that the legal system does not expressly address or protect these aspects of educational choice and parental influence in the current context.

535 Sec. 51.

protection.[536] Providing for voluntary religious observances in public institutions has offered partial protection for parents' freedom of choice regarding religious matters.[537]

While section 29 contains no express right to equal access to educational institutions, this right implicitly flows from the guarantee of equality of access and opportunity in section 9.[538] Although this does not mean complete equality – for instance, reasonable and justifiable requirements for admission may be based on a student's age and language proficiency[539] – it does imply equal opportunity for each person to be educated based on their skills and potential.[540] In short, the principle of equality is closely linked to education rights: Some education rights may be considered manifestations of the equality principle, while the equality principle, in turn, affects nearly all aspects of the education rights discussed in this chapter.[541]

3.3.3.1 *Section 29(1) – the right to a basic education*

In *Governing Body of the Juma Musjid Primary School v Essay NO*,[542] Nkabinde J confirmed that the right to basic education was distinct from the other socioeconomic rights entrenched in the *Constitution*.[543] In contrast to the other socioeconomic rights, which are subject to the internal limitations of "progressive realisation", "availability of state resources" and "reasonable legislative measures", the court affirmed that the right to a basic education was immediately enforceable, as it was not qualified by any

536 Cheadle *et al.* 2002:543, who assert that section 29(3) obligates the state to allow parents to educate their children at home because it refers to "independent educational institutions". Adams & Slade 2022:582-591.

537 *Constitution*:sec. 15(2); *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* (29847/2014) [2017] ZAGPJHC 160; [2017] 3 All SA 943 (GJ); 2017 (6) SA 129 (GJ) (27 June 2017).

538 Cheadle *et al.* 2002:537.

539 For instance, see National Admission Policy for Ordinary Public Schools GN 2432 Government Gazette 19 October 1998:2. "The admission policy of a public school and the administration of admissions by an education department must not unfairly discriminate in any way against an applicant for admission." This should not be interpreted to mean that single-sex schools are inadmissible. See also item 2 of the schedule to the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

540 Osei-Fofie & Herd 2021:394; Malherbe 2004:14; Woolman & Fleisch 2009:13; Veriava 2019:s.p.

541 See the cases discussed in par 3.3.3.1 – 3.3.3.5 below.

542 2011 (8) BCLR 761 (CC).

543 Par. 37.

of these restrictions.[544] However, the right can be limited in terms of section 36 of the *Constitution*.

Grasping the significance of this distinction requires a closer look at the court's reasonableness approach to qualified socioeconomic rights.[545] A reasonableness test considers the fairness or appropriateness of government action to fulfil socioeconomic rights.[546] According to this approach, the state's implementation of the right does not have to address the precise goods originating from the right itself, but merely whether the right is reasonable to implement.[547] It was this reasonableness approach that the Constitutional Court used in *Soobramoney v Minister of Health, KwaZulu-Natal* (hereinafter *Soobramoney*)[548] in a healthcare context. The same approach was developed further in *Government of the Republic of South Africa v Grootboom* (hereinafter *Grootboom*)[549] to examine the scope and content of the right to access housing guaranteed by section 26 of the *Constitution*.[550]

In both *Grootboom* and *Soobramoney*, the court did not interpret the section 26 and 27 rights respectively as conferring a right to a minimum basket of goods and services to all rights holders.[551] Instead, the reasonableness approach has the following impact:

> The implication is that individuals do not have a right to the provision of these socio-economic goods, but are merely entitled to have the state take reasonable steps to provide these goods progressively, within its available resources. In simple terms, the fact that a person is homeless, has insufficient food or water, has limited access to health care or social security is not sufficient to establish a limitation of her [sections] 26 and 27 rights. A limitation of these positive rights will have occurred only if the state's programmes to provide access to these goods are found to be unreasonable.[552]

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544 *Governing Body of the Juma Musjid Primary School v Essay NO*:par. 37. *Constitution*:sec. 27(2) states: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

545 McConachie & McConachie 2012:561.

546 Wilson & Dugard 2014:38.

547 Osei-Fofie & Herd 2021:396; Wilson & Dugard 2014:38. The court adopts a "reasonableness test" to evaluate the government's actions in fulfilling socioeconomic rights. The reasonableness test assesses whether the government's actions are fair and appropriate in the context of implementing these rights. The court, in applying the reasonableness approach, is concerned with whether the government's implementation of socioeconomic rights is fair and appropriate. This means that the government's actions don't necessarily have to precisely match the specific goods or benefits derived from the socioeconomic right. Instead, the emphasis is on whether the overall implementation is reasonable.

548 1998 (1) SA 765 (CC).

549 2001 (1) SA 46 (CC).

550 Wilson & Dugard 2014:39-40.

551 Wilson & Dugard 2014:39-40; Osei-Fofie & Herd 2021:396.

552 McConnachie & McConnachie 2012:562; McConnachie 2017:s.p.

Against this backdrop, the significance of Nkabinde J's interpretation of the right to basic education in *Governing Body of the Juma Musjid Primary School v Essay NO* becomes apparent.[553] Section 29(1)(*a*) specifically entitles all citizens to an actual public good, namely a basic education, rather than a right in respect of which the state is merely expected to adopt reasonable measures to implement the associated goods.[554]

Thus, the state has a positive duty to provide basic education and so ensure that the right to a basic education is realised.[555] This demands the state's priority attention, including budgetary allocations. To guarantee reasonable access to basic education for all, the state must provide a sufficient number of schools, educators and support services, and services incidental thereto.[556]

Arguably, the Constitutional Court decisions[557] that most directly and conspicuously exhibit the interpretational leitmotiv of transformative constitutionalism are those dealing with the state's obligation to implement socioeconomic rights, including the right to education. In *Grootboom*,[558] the court acknowledged that the socioeconomic rights enshrined in the Bill of Rights were justiciable. At the same time, it emphasised courts' obligation to enforce the entitlements in the Bill of Rights by creating appropriate orders with teeth to remedy government authorities' inability and/or disinclination to secure access to the commodities associated with the entitlements. The following paragraphs examine cases where the courts indeed used structural

553 Arendse 2019:105.

554 McConnachie & McConnachie 2012:564. However, the right may be limited in terms of section 36 of the *Constitution*. This is discussed under par 3.3.3.3.

555 *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (4) BCLR 537 (CC); 1996 (3) SA 165 (CC):paras. 8-9.

556 Cheadle *et al.* 2002:536; *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC); 2011 ZACC 13; *Madzodzo v Minister of Basic Education* (2144/2012) [2014] ZAECMHC 5; [2014] 2 All SA 339 (ECM); 2014 (3) SA 441 (ECM) (20 February 2014); *Equal Education v Minister of Basic Education* (22588/2020) [2020] ZAGPPHC 306; 2020 (4) All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020).

557 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC):paras. 73-74; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC):par. 142; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC):par. 77; *Governing Body of the Juma Musjid Primary School v Essa NO* 2011 (8) BCLR 761 (CC):par. 38.

558 2001 (1) SA 46 (CC). The Grootboom case provides an example where the court recognized the justiciability (capability of being resolved in court) of socioeconomic rights outlined in the Bill of Rights. Additionally, the court emphasized its duty to enforce these rights by issuing orders that have practical consequences and can address the government's failure or reluctance to ensure access to the resources associated with these entitlements.

interdicts to force the Department to provide access to essential components of education, such as textbooks and sanitation.

3.3.3.2 *Quality basic education*

According to Woolman and Fleisch,[559] basic education can be seen in two ways: as an educational period or as a standard of education.[560] The former would mean the compulsory period of education in South Africa, while the latter relates to the quality of education provided.[561] Under the *Schools Act*, compulsory education is restricted to Grades 1 to 9 or up until the learner has reached the age of fifteen, whichever comes first.[562] In its recent judgment in *Moko v Acting Principal of Malusi Secondary School*,[563] the Constitutional Court reaffirmed that the right to basic education is fundamentally important, both for the individual and society as a whole, which is why this right includes Grade 12.[564] Arendse, in turn, believes that the definition of basic education should not be determined by how long it takes to finish a qualification, but by the quality of the education that the state is expected to provide.[565]

But to what standard or quality of education does the right to basic education refer?[566] The Committee on Economic, Social and Cultural Rights (CESCR), linked to the United Nations, uses the four As of availability/adequacy, accessibility, adaptability

559 Woolman *et al.* 2014:57-15.

560 Osei-Fofie & Herd 2021:398; Woolman & Fleisch, as cited in McConnachie & McConnachie 2012:565.

561 Arendse 2019:108.

562 *Schools Act*:sec. 3(1): "Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first." In practice, however, the Department of Basic Education is responsible for education from Grade R to Grade 12, not just from Grade 1 to Grade 9. In section 3(1) of the *Schools Act*, the Constitutional Court appears to equate basic education with compulsory education. See *Governing Body of the Juma Musjid Primary School v Essay NO*:par. 38.

563 [2020] ZACC 30.

564 *Moko v Acting Principal of Malusi Secondary School*:par. 31.

565 Arendse 2019:108. There was no mention of an individual's age or grade level in the majority judgment in *Moko v Acting Principal of Malusi Secondary School and Others*. As a result of reviewing the international law position on the right to education, the court concluded that basic education should be described in terms of its content. It noted that basic education was a flexible concept that should be defined in such a way as to meet the needs of young adults and children alike, and should also provide access to nationally recognised qualifications.

566 Van Dijk & Van Hoof 1990:467.

and acceptability to assess whether a state has met its obligation to provide a basic education.[567]

Availability/adequacy

According to the CESCR's General Comment 13,[568] availability means that

> functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.

It would appear that the General Comment is chiefly concerned with the availability and adequacy of educational infrastructure. This underscores the fact that education quality, and ultimately social justice in education, is determined not only by the curriculum, but also by the material conditions in which learners receive their education. [569]

Accessibility

For schools to be accessible, they must be properly built, staffed with teachers, and stocked with textbooks. The concept of accessibility is divided into three categories: non-discrimination, financial access, and physical accessibility. A key aspect of accessibility is that it engages both negative and positive dimensions of the right to basic education. Besides not turning people away (unjustifiably), accessibility means taking measures to facilitate access for people from marginalised groups, or groups that have historically been excluded from educational institutions.[570] This is how social justice will be achieved for all.

Skelton[571] and others[572] argue that, against the backdrop of the number of challenges in basic education in South Africa, legal action or the threat of legal action may help

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567 The four As do not capture everything that makes up a basic education, but they do provide a useful practical framework for thinking about what a basic education entails.

568 CESCR 1999: par. 6.

569 Woolman *et al.* 2014:57-19; Mateus & Shange 2021:360.

570 Woolman *et al.* 2014:57-20.

571 Skelton 2013a:8.

572 Mateus & Shange 2021:360.

one achieve one's right to a basic education. Although litigation is often perceived as adversarial, it may result in an appropriate exchange with the executive, leading to improved access to basic education.[573]

Adaptability

It is essential for education to be "flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings".[574] Adaptation refers to the content of a curriculum and the method of implementing it. Curricula and school environments must also be adapted to accommodate diverse students – an obligation that is closely related to the right to non-discrimination. Learning accommodations for learners with disabilities are a prime example of the kind of adaptability required.[575] In *MEC for Education, KwaZulu-Natal v Pillay*,[576] Langa CJ specifically affirmed the constitutional obligation to ensure that differently abled people receive comparable education.

Disability often prevents individuals from participating in public or private life, as the means to do so are designed for able-bodied individuals. As a result, those with disabilities are easily marginalised, without any positive action being taken to remedy it, thus hampering the realisation of social justice.[577]

Acceptability

The state's responsibility to ensure that all schools meet the minimum criteria it has set represents one part of making education acceptable.[578] According to Veriava and Coomans,[579] acceptability in basic education:

> relates to whether or not curricula and teaching methods are sufficient to meet basic learning needs such as literacy, oral expression or numeracy. The scope of the acceptability of basic education has been broadened in international human rights jurisprudence to include a system of education that seeks to protect the individual rights

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573 Skelton 2013a:8.

574 CESCR 1999:par 6(d).

575 Woolman *et al.* 2014:57-32; *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and the Government of the Province of the Western Cape* 2011 (5) SA 87 (WCC).

576 2008 (1) SA 474 (CC).

577 *MEC for Education, KwaZulu-Natal v Pillay*:par. 74: "The idea extends beyond religious belief. Its importance is particularly well illustrated by the application of reasonable accommodation to disability law..."

578 Mateus & Shange 2021:360; Tomasêvski 2001:29.

579 Veriava & Coomans 2005:71.

> of learners on issues such as language rights, parental choice and discipline of learners.

Acceptable education, therefore, must be informed by the constitutional values that serve everyone's interests. It must address all learners' needs, abilities and preferences, which will inevitably involve equal opportunities and equal outcomes in education.

Woolman and Fleisch[580] add that "[a]cceptability also requires that learners are not treated in a manner that violates their dignity".[581] They caution that education may be manipulated to perpetuate human rights violations just as easily as it can be used to end such violations. In accordance with international law, education should aim to develop the human personality and enhance respect for human rights and fundamental freedoms. It should develop every child's full potential and help grow a child's personality and both mental and physical abilities.[582] Education should encourage children to respect themselves, other cultures, and the environment, preparing them to live in and contribute to a free society.[583] If children are to become adults who actively participate in the governance of society, they must be taught the value of human rights, and particularly the values of equality and diversity.[584]

Finally, Reyneke[585] emphasises the quality dimension of acceptability in education, stating that the right to education would be violated if learners are not provided with education of a high standard. A right to education implies a right to quality education, meaning education that is available, accessible, acceptable and adaptable to learners' needs. If the state cannot maintain and provide this level of quality, attending class would be pointless.[586]

The quality of education has a substantial impact on equality of opportunity, which is not only important for the fulfilment of the right to a basic education, but also for eliminating the inequalities inherited from apartheid as envisaged in South Africa's

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580 Woolman & Fleisch 2009:57-30; Mateus & Shange 2021:361.

581 For instance, it is against the law to use corporal punishment or initiation practices in schools in South Africa.

582 UNCRC 2001:sec. 28, 29.

583 UNCRC 2001:sec. 28, 29.

584 Woolman & Fleisch 2009:57-30.

585 Reyneke 2013:327.

586 Mateus & Shange 2021:356;

transformative *Constitution*.[587] Therefore, it is safe to conclude that the state is obligated to provide education that meets an 'acceptable' standard, which has been defined as education that provides a basis for ongoing personal development, civic engagement, and employment.[588]

The International Covenant on Economic, Social and Cultural Rights,[589] too, refers to a right to education that promotes the full development of the human being.[590] There, an acceptable education is described as an education that aids people in rising above the poverty cycle, helps them compete effectively in the labour market, enables them to understand and enjoy their democratic values, rights and freedoms, enables them to participate in and protect the fledgling democratic system, and enhances their sense of worth as human beings.[591] This will promote the realisation of social justice.

3.3.3.3 *Limitations on the right to basic education*

Any limitation on the right to basic education needs to comply with the general limitation clause in section 36 of the *Constitution*. Limitations should be carefully scrutinised, and the state should not be allowed to justify a limitation merely on account of a lack of resources.[592] Importantly, the specific limitation provision in respect of further education, permitting the state to move progressively towards full compliance, does not apply to basic education; the state is expected to comply with this right fully and immediately.[593]

Admission requirements are an example of a limitation that needs to comply with section 36. In this regard, the *Schools Act* prohibits admission tests,[594] and learners may also not be refused admission because their parents cannot afford school fees[595]

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587 Malherbe 2004:15; Woolman *et al.* 2014:57-32.

588 Chaskalson *et al.* 2013:38-3.

589 Keep in mind *Constitution*:sec. 39(1)(*b*), which states that international law must be considered when determining the content of a right.

590 Article 13. See also article 29 of the Convention on the Rights of the Child, and article 11 of the African Charter on the Rights and Welfare of the Child.

591 Malherbe 2004:16; Woolman *et al.* 2014:57-32.

592 Malherbe 2004:16; Woolman *et al.* 2014:57-9.

593 Mateus & Shange 2021:350; Malherbe 2004:16; Woolman *et al.* 2014:9; *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC).

594 *Schools Act*:sec. 5(2). Once a learner has been admitted, he or she may be tested with a view to a possible transfer to a school that could serve their interests better.

595 *Schools Act*:sec. 5(3)(a).

or do not subscribe to the school's mission statement.[596] Accordingly, these reasons are not considered reasonable and justifiable grounds for limiting a child's right to a basic education.[597] This in no way justifies the non-payment of school fees or non-adherence to the school's mission statement; what it means, though, is that these duties must be enforced through means other than refusing the child admission, which would restrict the child's right to education.[598]

South Africa's two-tiered school fee structure[599] has resulted in a poorly resourced education system for the poor, while the wealthy have access to independent and semiprivate public schools that serve mainly the elite.[600] Indeed, the new (post-1994) geographies of schooling inequality are a direct consequence of national policy. In an effort to retain the middle class within the system, the state has designed and implemented a differentiating and divisive educational system that ultimately limits some learners' right to quality education.[601]

An analysis of education outcomes post-1994[602] suggests that racial divides have become less obvious, while class and geographic inequities have become more prominent. The social exclusion of disadvantaged classes and groups is strongly linked to a lack of opportunity and limits the right to education, constituting indirect (unintentional) unfair discrimination under section 9(3).[603]

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596 *Schools Act*:sec. 5(3)(b).

597 *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng* 2016 (4) SA 546 (CC). In the FEDSAS case, the court had to rule on whether a regulation in the Gauteng admission policy that prevents schools from obtaining a confidential report regarding a learner prior to admission was justified. The court held that the purpose of the regulation was to address potentially unfair discrimination against troublesome learners, and therefore, the regulation was held to be rational, reasonable and justifiable (par. 33). However, what the court did not consider, was the meaning of "unfair discrimination" in terms of the *Constitution*. Since this is a very specific term, the court would have been well advised at least to consider its meaning in the context of the right to equality (sec. 9 of the *Constitution*) and the *Promotion of Equality and the Prevention of Unfair Discrimination Act* 4/2000.

598 Malherbe 2004:16.

599 Discussed under 3.5.2.4. South African schools receive government grants to help cover operational costs, such as maintaining school grounds, administrative costs, salaries, books, and extracurricular activities. Government grants are based on the school's quintile. In 2021, schools in quintiles 1-3 (the poorest) received R1 466 per child per year, while schools in quintiles 4 and 5 (the most affluent) received R735 and R254 per child per year respectively. The schools in quintiles 1-3 are not permitted to charge school fees, while schools in quintile 4 and 5 may charge fees to supplement the grant.

600 Badat & Sayed 2014:134.

601 Badat & Sayed 2014:134.

602 Discussed in detail below.

603 Badat & Sayed 2014:139.

Disciplinary measures such as suspensions and expulsions, or simply dismissing a student for misbehaving, could also be considered a limitation on the right to education[604] and must be justified under section 36. Most of these cases require weighing the individual's right to education against others' right to education, or against the relevant institution's duty to maintain order so that the education process can continue.[605]

As envisioned in our transformative *Constitution*, section 36 prescribes the shift of the legal culture from a culture of authority to a culture of reason. According to this section, rights may be limited only if this can be justified in an open, democratic society that emphasises human dignity, equality and freedom.[606] Therefore, the values of the *Constitution* must justify the limitation of a right.

Also relevant is the educational advantage of mother-tongue instruction. Ensuring equal access to education in a person's preferred language is essential for the achievement of equal educational opportunities.[607] To realise every person's right to education, mother-tongue education should not limit this right, but rather be viewed as another tool through which equal educational opportunities can be pursued.[608]

3.3.3.4 *Section 29(2): Education in one's preferred language*

South Africa's transformative *Constitution* recognises the country as one sovereign democratic state, establishes a common citizenship for all citizens of South Africa, and protects the diversity of South African languages and cultures.[609] Section 6 recognises and acknowledges the diversity of languages, while section 29(2) specifically guarantees everyone the right to an education in the official language or languages of their choice in public educational institutions where this is reasonably practicable for the state to provide.

The right to be taught in one's language of choice extends to all forms of education, not just basic education. Even higher education institutions must provide instruction in

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604 Chaskalson *et al.* 2013:38-10. On the proper procedures to be followed in such cases, see *Constitution*:sec. 33 and the *Promotion of Administrative Justice Act* 3/2000.

605 Malherbe 2004:17; Woolman *et al.* 2014:57-15.

606 Mateus & Shange 2021:360; Pieterse 2005:163.

607 Stoop 2017:5-13.

608 To be explored in the following paragraph.

609 Grant 2006:50.

the languages that students prefer.[610] However, the right applies only to the official languages of South Africa. While this would cater to most South Africans, it technically does not speak to a right to mother-tongue education.[611] Nevertheless, mother-tongue education[612] would be a key aspect of this right, not only to protect language rights, but also because it has been widely shown to be the preferred medium of instruction, especially in early childhood,[613] and therefore, is a legitimate means for creating equal educational opportunities.[614]

3.3.3.5 *Limitations on the right to education in one's preferred language*

Section 29(2) contains an important specific limitation provision, subjecting the right to education in one's language of choice to the requirement that education provision in such preferred language should be reasonably practicable. The state must fulfil this right unless such education is not reasonably practicable to provide, or the state can establish on other grounds that not providing such education would satisfy the general limitation provision.[615] Numerous factors may be relevant in determining whether, in a particular case, it is reasonably practicable to provide education in the chosen language, including learner numbers, costs, availability of resources, and distance to the nearest similar institution.[616]

According to section 29(2), and this was the compromise reached during the drafting of the *Constitution*, the state must consider all reasonable alternatives, including single-medium institutions, while taking into account equity, practicability and the need for redress of past discrimination to ensure effective accessibility and implementation of this right. The *Constitution* does not provide for a right to single-medium instruction, but it does impose a specific duty on government and any relevant organs of state.[617] State officials must consider all reasonable options in a bona fide manner, taking into consideration educational need as well as equity, practicability and the need for

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610 Osei-Fofie & Herd 2021:393; Malherbe 2004:21; Woolman *et al.* 2014:57-42.

611 Malherbe 2004:21; Woolman *et al.* 2014:57-42.

612 See 3.4.4 for more on language of instruction and the new move towards mother-tongue education.

613 Stoop 2017:5-13.

614 Malherbe 2004:21; Woolman & Fleisch 2009:13-15; Osei-Fofie & Herd 2021:393.

615 *Constitution*:sec. 36.

616 Malherbe 2004:21; Woolman *et al.* 2014:57-42.

617 All organs of state as defined in section 239 of the *Constitution* are bound by the Bill of Rights. *Constitution*:sec. 8(1); Malherbe 2004:21.

redress.[618] All these factors are equally important and must be balanced: What may be fair to all might not be practicable or educationally reasonable or appropriate, while what might be practicable might not address historical inequalities.[619] Accordingly, an education department or school authority should comply with section 29(2) when making decisions regarding the medium of instruction.[620] As the court pointed out in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*,[621] a proper understanding of language rights as incidental to the right to a basic education is of considerable importance to both the public and private sectors.[622] The court analysed section 29(2) as follows:

> The provision is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice. That right, however, is internally modified because the choice is available only when it is "reasonably practicable". When it is reasonably practicable to receive tuition in a language of one's choice will depend on all the relevant circumstances of each particular case. They would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its governing body has adopted, the language choices learners and their parents make and the curriculum options offered. In short, the reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the state has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification.[623]

The state, therefore, has the discretion to decide how to implement section 29(2).[624]

3.3.4 Section 9 – the right to equality

Transformative constitutionalism is aimed at promoting equality in South Africa, which necessitates an understanding of the systemic and entrenched power imbalances and

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618 Cheadle *et al.* 2002:540-541.

619 Malherbe 2004:21; *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

620 Education White Paper 2:par. 1.10. See *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC):par. 99, where it was stated that schools have an obligation to select a language policy keeping in mind the provisions of section 29(2) of the *Constitution*, sec. 6(2) of the *Schools Act*, and norms and standards prescribed by the Minister.

621 [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (hereinafter *Ermelo*). A more detailed examination of this case is thoroughly addressed in Chapter 5, par 5.4.2.2.

622 *Ermelo*:par. 44.

623 *Ermelo*:par. 52.

624 A discussion on the impact of language of instruction on social justice follows under 3.4.4 below.

inequalities.[625] Additionally, individuals should be examined in their group and socioeconomic context. The implications of inequality for vulnerable groups need to be considered, as well as remedial measures to uplift disadvantaged groups.[626] The *Constitution* provides in section 9(1) that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) then states that no one may be discriminated unfairly against on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

By protecting the right to equality, also known as the equality principle, section 9 prohibits any law or conduct that undermines the equal worth of all people.[627] As it recognises that individuals may be treated differently for valid reasons, it prohibits only unfair discrimination.[628] As defined by the Constitutional Court, unfair discrimination is unequal treatment that impairs human dignity or affects someone in a comparably serious manner.[629]

In post-apartheid South Africa, achieving equality poses a considerable challenge. As a result, several pieces of legislation have been enacted, including the *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA).[630] PEPUDA reiterates the state[631] as being responsible for promoting and achieving equality and, among others, taking measures, creating action plans and codes of conduct and enacting legislation to address unfair discrimination and promote equality.[632] Among the practices outlined in the schedule to PEPUDA are those that may result in unfair discrimination and that the state is supposed to address through legislation and other

625 Albertyn 2007:4; Kibet & Fombad 2017:356.

626 Mateus & Shange 2021:357; Pieterse 2005:158; Kibet & Fombad 2017:354.

627 *Bhe v Magistrate Khayelitsha* 2005 (1) BCLR 1 (CC): "The right to equality is related to the right to dignity. Discrimination conveys to the person who is discriminated against that the person is not of equal worth."

628 Malherbe 2004:24; Woolman & Fleisch 2009:41.

629 *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC):par. 33.

630 4/2000, promulgated in pursuance of section 9(4) of the *Constitution*. See Currie & De Waal 2016:225-229 and Cheadle *et al.* 2002:118-121 for a brief explanation of the provisions of PEPUDA. See for instance also the *Employment Equity Act* 55/1998.

631 Which includes all organs of state. *Constitution*:sec. 1.

632 *Constitution*:sec. 24, 25(1).

methods.[633] In terms of education specifically, the following unfair practices are cited:[634]

> (a) The unfair exclusion of learners, including those with special needs from educational institutions;
>
> (b) Students or other learners of a particular group who are identified by the prohibited grounds are unfairly denied scholarships, bursaries, or any other type of financial assistance;[635] and
>
> (c) Diversity in education is not reasonably and practically accommodated.

In chapter 2, it was stated that an emphasis on equal access to opportunities and rights reflects an approach to social justice that seeks to ensure that people are not excluded from life's opportunities and the activities of society (such as education) on an unfair basis (such as race, gender, sexual orientation, language, age, etc.). The following paragraphs will examine whether South African education indeed provides equal access to opportunities and rights under the current legal framework.

3.3.5 The right to equality applied to education

The protective ambit of the principle of equality underpins and overlaps with other rights in that it ensures their full and equal enjoyment.[636] Very often, the infringement of a specific right is also a violation of the equality principle and can be challenged solely on that basis.[637] Being so closely linked to other rights, including education, the right to equality affects education in different ways.[638] As shown above, the equality principle directly relates to equal access to education and educational facilities, which contributes to the realisation of social justice.[639] What follows in the sections below is an examination of the education measures and practices in South Africa to determine whether they promote equal educational opportunities.

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633 *Constitution:*sec. 29(1), (2), read with the schedule to PEPUDA.

634 PEPUDA:schedule, item 2.

635 The prohibited grounds are those mentioned in section 9(3) of the *Constitution*.

636 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC):paras. 32, 112.

637 Mateus & Shange 2021:362; Cheadle *et al*. 2002:77.

638 Malherbe 2004:25; Woolman & Fleisch 2009:41; Mateus & Shange 2021:362.

639 Single-sex schools are generally considered constitutional. Under the South African equality principle, it could probably be argued that although such schools differentiate on the basis of a ground listed in section 9(3), this does not amount to unfair discrimination.

3.3.5.1 *Foreigners and permanent residents*

Application of the equality principle is crucial to promote equal opportunities and challenge discriminatory practices in South African education.[640] In *Larbi-Odam v Member of the Executive Council for Education*,[641] the Constitutional Court established that the equality principle protected foreigners, and therefore, the court found unconstitutional the education regulations that excluded foreigners with permanent residence from being appointed as permanent teachers in South Africa. According to the court, permitting foreigners to settle permanently in the country, but excluding them from permanent employment is unfair discrimination and unjustifiable under section 36.[642] Such unequal treatment of individuals undermines their equal worth, which is inimical to social justice. Notably, the court explicitly excluded from this protection foreigners with only temporary residence in the country.[643]

3.3.5.2 *Undocumented learners*

In *Centre for Child Law v Minister of Basic Education*,[644] the court ruled on the provision of education to undocumented learners in South Africa. The matter revolved around the constitutionality of certain provisions of the National Admission Policy for Ordinary Public Schools and the *Immigration Act*[645] that required learners to submit identification documents, passports or permits upon applying for enrolment at a school. The court confirmed the right to education as an immediately realisable right that is applicable to every person in South Africa, not only those who are documented or have legally entered South Africa.[646] Therefore, the conditions imposed by the policy were found to be unconstitutional, as they failed to take into account the best interests of children and negatively affected the children's rights to dignity and equality because of differential treatment.[647] Utilising allocated resources to benefit only those learners with valid identity documents, passports or permits is inconsistent with the

640 Malherbe 2004:25; Woolman & Fleisch 2009:13-15.
641 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC).
642 *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*:paras. 25-26.
643 Paras. 35-38.
644 (2840/2017) [2019] ZAECGHC (12 Dec 2019).
645 13 / 2002.
646 *Centre for Child Law v Minister of Basic Education*:par. 94.
647 *Centre for Child Law v Minister of Basic Education*:par. 84.

Schools Act and the *Constitution*. Social justice in education must be guided by fair equality of opportunities for all, even those who are not documented.

3.3.5.3 *Sexual discrimination*

In addition to racial, gender and disability discrimination, sexual discrimination is another contentious issue relating to the equality principle in education.[648] In *Head of Department, Department of Education, Free State Province v Welkom High School*,[649] the court listed the principles that should be incorporated into a school's pregnancy policy. First, policies must allow for flexibility to accommodate individual cases, always keeping in mind the best interests of the children involved (the mother, the child, and other learners at the school). Additionally, any policy provision that prevents pregnant students from returning to school in the year following their pregnancy is unacceptable and amounts to the gender-based unequal treatment of learners.[650] Therefore, governing bodies may not implement policies that violate, among others, pregnant learners' rights to receive an education and to be free from unfair discrimination.[651] For social justice to be achieved in education, education equality and autonomy must be guaranteed, and every child must have access to the opportunity of becoming an autonomous individual.

3.3.5.4 *Discrimination based on race and class*

The state's failure to provide quality or adequate education to all learners, especially to the very poor in townships and rural areas, may also be considered a violation of their right to equal protection and benefit of the law and as a form of unfair discrimination on the basis of race and class.[652] A court of law may very well find that

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648 *Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (T).

649 [2013] ZACC 25. In the Welkom case, sexual discrimination might involve various aspects beyond just pregnancy, potentially encompassing discriminatory practices based on an individual's sexual orientation, gender identity, or other factors related to their sex. The court's emphasis on principles to be incorporated into a school's pregnancy policy suggests a concern with how the school addresses issues related to sexual and reproductive matters, making it an instance of sexual discrimination rather than just gender or pregnancy discrimination.

650 *Head of Department, Department of Education, Free State Province v Welkom High School*:par. *134.*

651 *Head of Department, Department of Education, Free State Province v Welkom High School*:par. 53. The Department published a policy on the prevention and management of learner pregnancy in schools that is underpinned by the *Constitution*, which guarantees children's inalienable right to access basic education. Therefore, pregnant learners and those who have given birth have the right to continue and complete their basic education.

652 Mateus & Shange 2021:362; Malherbe 2004:26.

such learners' equality rights are being violated as much as their education rights.[653] Merely pointing out the persistent inequalities relating to race and class would probably be as compelling as basing one's argument on the varied quality of education provided to different sections of the population.[654]

According to Arendse, South Africa undoubtedly has a bifurcated system of public education characterised by an explicit distinction between former white (Model C) schools and disadvantaged (former black) schools.[655] In this regard, Spaull states:[656]

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

The concept of education equality is rooted in the conviction that the state must ensure a set of liberties, implying that every child in South Africa has a right to education of an equal standard. South Africa's *Constitution* is intended to transform a society with deeply entrenched racism and sexism into a society that is based on equality, democracy, social justice, human dignity, and freedom for all.[657] To achieve this, the implementation of equal access to education should be accompanied by remedies aimed at correcting inequitable outcomes without damaging the underlying framework from which they originated.

3.3.5.5 *Affirmative action*

The *Constitution*[658] stipulates that legislative and other measures may be adopted to promote the achievement of equality by protecting or advancing people disadvantaged by unfair discrimination. One such measure is affirmative action, which allows preferential treatment of people who have been disadvantaged by apartheid so as to

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653 *Equal Education v Minister of Basic Education* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020):par. 53.

654 See Berger 2003:640-641, who argues that it should be easier to establish that the equality principle is being violated than one's education rights. See also Badat & Sayed 2014:138.

655 Arendse 2019:107.

656 2013a:6.

657 Veriava 2017:101; Pieterse 2005:158; Kibet & Fombad 2017:353.

658 Sec. 9(2).

reduce or eliminate the inequalities created by past discriminatory laws and practices.[659]

Nevertheless, affirmative action as it is currently applied in the South African education system presents a few ironies. It does little to assist the most disadvantaged (mostly black) children, most of whom are enrolled in schools that are inadequately funded (quintiles 1 to 3).[660] It also tends to benefit highly privileged students of colour, who commonly live in urban areas. Those who are fortunate to be born into a poverty-free family have access to early childhood development services and attend schools in quintiles 4 and 5, which in addition to government funding, also receive contributions from the upper and middle classes.[661] Parents from these echelons of society invest considerably in their children's education – something poorer families are unable to do. Those outside privileged neighbourhoods and networks face significant structural disadvantages, including under-resourced schools[662] with less-experienced teachers, fewer peers who raise expectations and demonstrate success behaviours, and exposure to violence.[663]

In the case of *Minister of Basic Education v Basic Education for All*,[664] the court highlighted the racial inequalities and segregation inherent in the original construction of the education system, emphasizing the obligation to rectify these historical injustices.[665] The court also recognized that the issue of textbook shortages was confined primarily to Limpopo province, where, as previously explained by the court, the majority of students were economically disadvantaged black children. The Department of Basic Education (DBE) reported that around 97% of students in the province had access to textbooks, indicating that at least 3% of students were subject to differential treatment.[666] The court deemed this differential treatment discriminatory

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659 Veriava 2017:101; Cheadle *et al.* 2002:76; Currie & De Waal 2001:223. Section 14(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000 reiterates section 9(2) of the *Constitution* without any further explanation. Woolman & Fleisch 2009:62.

660 Badat & Sayed 2014:138.

661 Mateus & Shange 2021:355; Badat & Sayed 2014:138.

662 *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC):par. 42.

663 Badat & Sayed 2014:138; Veriava 2017:101.

664 (20793/2014) [2015] ZASCA 198.

665 *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 par 48.

666 Minister of Basic Education v Basic Education for Al (20793/2014) [2015] ZASCA 198 par 28.

and unjustified, emphasizing that learners without access to textbooks were adversely affected.[667]

> Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools?

Several changes are needed in both the state and society to create a socially just dispensation that is based on equality. These include[668] the reallocation of power and resources to all people, dismantling of the economic inequality caused by the discriminatory provision of opportunities,[669] and harnessing measures such as affirmative action to empower vulnerable and disenfranchised individuals who suffered past discrimination.[670]

3.4 UNEQUAL ACCESS TO EDUCATION TODAY

Despite the formal abolition of apartheid in 1994, the public basic education system in South Africa continues to reproduce distinct patterns of inequality, predominantly based on race and class. As shown above, the constitutional framework to achieve redress, bring about greater equity and move towards a socially just society is more or less in place. Unfortunately, though, its suboptimal execution means that South African education currently fails to provide equal access to opportunities and rights, leading to unequitable outcomes. This hampers individuals' ability to grow into lifelong learners, develop their intellectual capabilities, function as effective members of society, and participate in democracy as engaged citizens.

The following paragraphs assess the shortcomings and failures in implementing the constitutional framework discussed above, as well as the extent of the persistent pattern of unequal access to education in post-apartheid South Africa that is obstructing the realisation of social justice.

667 Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198par 49.
668 Veriava 2017:101; Albertyn & Goldblatt 1998:248-249.
669 Albertyn & Goldblatt 1998:248-249.
670 Mateus & Shange 2021:355; Pieterse 2005:158.

3.4.1 Unequal quality and academic output

Recent international data underscores the challenges in South Africa's education system, revealing that mere school accessibility doesn't guarantee attendance, and attendance doesn't necessarily translate to quality education. Examining the latest findings, Spaull's[671] extensive research on South African learners reveals concerning trends. First, a majority of primary school students fall significantly below national literacy and numeracy standards.[672] Second, South Africa consistently lags behind other developing countries in international assessments, such as Kenya, Eswatini, and Tanzania.[673]

The 2014 Annual National Assessments (ANA) further expose the subpar quality of learning.[674] Grade 9 learners in South Africa scored a dismal average of 12.7% in Mathematics.[675] Notably, performance declines as students progress, with a marked difference between schools in quintiles 1 to 3 (attended by predominantly economically disadvantaged students)[676] and quintiles 4 and 5 (enrolling students from wealthier backgrounds). While the latter perform 10 to 15% better, their cognitive performance remains below international standards.[677]

In the 2021 Progress in International Reading Literacy Study (PIRLS), South Africa's Grade 4 students ranked the lowest, with 81% unable to read for meaning. Additionally, only 1% reached the advanced benchmark, showcasing a severe literacy gap. [678]It is also relevant to the social justice and equity debate in South Africa that learners receiving instruction in reading in their mother tongues perform better than other learners who do not do.

Various assessments, including PIRLS (in 2021, 2019, 2016, 2011, and 2006) and others like TIMSS and SACMEQ, consistently highlight South Africa's educational

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671 Spaull & Kotze 2015:12-24; Spaull & Taylor 2015a:133-165; Spaull & Taylor 2015b:47-59; Spaull 2013b:436-447.

672 Spaul 2013a:23.

673 Arendse 2019:111.

674 ANA is a census-based evaluation of school pupils conducted by the Department and involves 7,2 million students from 24 000 schools.

675 Badat & Sayed 2014:136; Osei-Fofie & Herd 2021:390.

676 In South Africa, every school receives funding based on its poverty score, which determines its quintile ranking. There are five school quintiles, with quintile 5 representing the wealthiest schools, and quintile 1 the poorest.

677 Osei-Fofie & Herd 2021:390; Badat & Sayed 2014:136; Van der Berg 2015:36.

678 DBE 2023: 1 – 10.

challenges. The 2019 TIMSS report indicates low proficiency levels in Mathematics (41%) and Science (36%), with the test administered to Grade 9s, unlike other countries testing Grade 8s.[679]

The 2017 SACMEQ survey[680] reveals that Grade 6 learners did not meet the benchmarks for reading and mathematics.[681] Only a small percentage achieved reading competence at level 3 or above,[682] and a mere 44.4% reached level 2 mathematics competence.[683] In 2011, South African learners ranked lower than significantly poorer countries, emphasizing the severity of the issue.[684]

The crisis extends to teachers, as seen in the SACMEQ 2011 study. While teachers excelled in basic language skills,[685] their performance declined in higher cognitive functions. In numeracy, scores dropped notably for complex arithmetic.[686]

Quality public education is essential to develop intellectual and other capabilities, encourage lifelong learning, enable economic and social productivity, and unlock participation as engaged citizens of democratic societies.[687] Only then can social justice be achieved. Yet based on the data above, the quality of learning in South Africa appears to be generally substandard. Although efforts to promote equity by leveraging resources are commendable, they fall far short of what is required. To achieve social justice, disadvantaged classes and groups must have increased access to education and equal outcomes.

3.4.2 Differential education provisioning

The formal desegregation of schools has been the most visible sign of change and increased participation in education in post-apartheid South Africa. However, differential access remains a problem. Students from the rural poor and working

679 Spaull 2013a:22-23

680 SACMEQ reports result in hierarchies of skills and knowledge based on the Rasch model. There are eight levels of achievement: Learners performing at a higher level demonstrate more understanding and competency than those performing at a lower level. The study involved fifteen countries in Southern and East Africa.

681 Moloi & Strauss 2005:65.

682 Basic reading. Moloi & Strauss 2005:67; Soudien 2016:582.

683 Emergent numeracy.

684 Hungi 2011:s.p.

685 Badat & Sayed 2014:136.

686 Badat & Sayed 2014:136.

687 *Constitution*:preamble.

classes remain at historically black institutions, while those from the middle and upper classes are concentrated at historically white institutions.[688]

Despite initiatives to reshape and redirect apartheid institutions,[689] historical geographic patterns of disadvantage and advantage continue to influence institutions' capacity to provide quality education and achieve equality of opportunities and outcomes. Moreover, the historical influence of race on equity of opportunities and outcomes is now also affected by geography and social class.[690]

As an indicator of quality education, Singh[691] refers to "adequate school infrastructure, facilities, and a positive school environment". This is a very broad description and could, therefore, include all aspects of education provisioning. Veriava and colleagues,[692] on the other hand, contend that education provisioning involves providing for the "educational inputs" required to achieve a quality education.[693] Provisioning is classified as:

> (i) infrastructural provisioning, which includes the building of schools, classrooms and the provisioning of water, sanitation and services; (ii) personnel expenditure, which includes educator salaries; and (iii) non-personnel recurrent expenditure, which includes capital equipment and consumables used inside schools for schools to function properly, such as textbooks, stationery and computers.[694]

A significant conclusion of chapter 2 was that an emphasis on equal access to opportunities and rights reflects a social justice approach that seeks to ensure that people can access life's opportunities and are not unfairly deprived of society's activities, including education. Indeed, while structural and systemic inequalities remain unaddressed, social justice will not be achieved.

The necessary inputs to achieve equal access, equal quality and ultimately social justice in the education setting, including infrastructure provision, personnel expenditure, and non-personnel recurrent expenditure, are discussed in the sections that follow.

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688 Mateus & Shange 2021:360; Badat & Sayed 2014:133-134.
689 Through the opening up of public schools.
690 Badat & Sayed 2014:134; Mateus & Shange 2021:360.
691 Singh 2012:7.
692 Veriava 2017:220.
693 Veriava 2017:220.
694 Veriava 2017:227.

3.4.2.1 *Infrastructure*

In *Governing Body of the Juma Musjid Primary School v Essay NO*,[695] the Constitutional Court lamented the poor state of infrastructure in former black schools as follows:

> The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.[696]

According to the court in *Madzodzo v Minister of Basic Education*,[697] the state's obligation to provide basic education goes beyond mere learner placements in schools. It includes providing the necessary resources, such as "schools, classrooms, teachers, teaching materials and appropriate facilities for learners".[698] Although South Africa has made some progress in addressing infrastructure problems,[699] many schools still lack basic facilities. According to a 2020 report,[700] more than 80 per cent of ordinary schools lack laboratories,[701] and over 70 per cent do not have libraries.[702] Veriava highlights that a close study of the data reveals a clear pattern, namely that the worst infrastructure challenges are experienced in the former Bantustans.[703] In Limpopo, for example, 93 per cent of schools do not have libraries; in the Western Cape, this figure is much lower at 37 per cent.[704]

Most of South Africa's so-called mud schools,[705] which were at the centre of the matter of *Centre for Child Law v Government of the Eastern Cape Province* (hereinafter "the

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695 2011 (8) BCLR 761 (CC).

696 Par 42.

697 (2144/2012) [2014] ZAECMHC 5; [2014] 2 All SA 339 (ECM); 2014 (3) SA 441 (ECM) (20 February 2014):par. 20.

698 *Madzodzo v Minister of Basic Education*:par. 20.

699 Department of Education 2020:11.

700 2020 National Education Infrastructure Management System (NEIMS) report.

701 Table 8 of NEIMS report.

702 Table 7 of NEIMS report.

703 Veriava 2017:238.

704 Table 7 of NEIMS report.

705 Mud-walled huts serving as schools.

mud schools case"),[706] are located in the Eastern Cape, which comprises the two former Bantustans Ciskei and Transkei.[707] As Skelton[708] explains:

> Mud schools are, quite literally, schools in which the buildings are made of mud. They may consist of clusters of round mud huts, or in some cases are rectangular classrooms. While mud may not be the worst form of building material, the problem is that the mud schools are old and dilapidated. The roofs, often constructed from corrugated iron, have holes that have rusted through, causing children and classroom equipment to get wet when it rains. Books cannot be left in the classrooms, and when it rains, children simply cannot attend school. Mud schools also lack electricity, running water and sanitation, and most have old and insufficient classroom furniture.[709]

The mud schools case reached the court once it became known that a significant portion of the provincial budget set aside for the construction of schools was not being spent, and that there were no programmes to replace unsafe school structures.[710] In the out-of-court settlement reached in February 2011, the state agreed to provide "temporary and permanent infrastructure relief" for the affected schools within a set timeframe.[711] Additionally, the state invested R8 billion and developed a "plan of action" to eliminate roughly 445 unsuitable "school structures" within a three-year period.[712] Since that settlement, the Accelerated Schools Infrastructure Delivery Initiative (ASIDI) has become a government programme.[713] According to the Department, ASIDI strives to "[eradicate] the Basic Safety Norms backlog in schools without water, sanitation and electricity and to replace those schools constructed from inappropriate material… to contribute towards levels of optimum learning and teaching".[714]

Despite its importance, however, progress with ASIDI has been frustratingly slow.[715] The Department has cited various reasons for the delay, including inclement weather, "the rural nature of the sites and poor roads, the recruitment of contractors, problems with contractors, profiteering, and shortages of building materials".[716] Nevertheless, the state underspent on its school infrastructure backlog grant.[717] Abdoll and Barberton

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706 Eastern Cape high court, Bhisho unreported case no. 504/10 (2017), as referred to in Abdoll & Barberton:2017.
707 Abdoll and Barberton 2017:53.
708 Skelton 2013b.
709 Skelton 2013b:s.p.
710 Abdoll & Barberton 2017:53.
711 Abdoll & Barberton 2017:53.
712 Abdoll & Barberton 2017:53.
713 Abdoll & Barberton 2017:53.
714 Available at https://www.education.gov.za/Programmes/ASIDI.aspx (accessed 29 May 2021.)
715 Available at https://www.education.gov.za/Programmes/ASIDI.aspx (accessed 29 May 2021.)
716 Available at https://www.education.gov.za/Programmes/ASIDI.aspx (accessed 29 May 2021.)
717 Abdoll & Barberton 2017:42.

ascribe this to a lack of competence on the part of the Department to manage an infrastructure programme of this magnitude.[718] In 2023 alone, the Eastern Cape and Mpumalanga education departments have forfeited more than R400 million as a result of underspending on their school infrastructure grants. The funds have since been seized by National Treasury for redistribution to other provinces.[719]

In the 2018 matter of *Equal Education v Minister of Basic Education* (hereinafter *Equal Education*),[720] the Minister acknowledged the backlog in school infrastructure, stating that "significant numbers of schools still lack the most basic of resources, [including] water, sanitation and electricity".[721] As part of this case, applicant Equal Education[722] disputed several provisions of the Regulations relating to Minimum Norms and Standards for Infrastructure, which were promulgated in 2013.[723] The regulations outline various standards for infrastructure to be installed at public schools and stipulate deadlines by when the state ought to provide schools with the infrastructure they need.[724]

Arendse[725] highlights a significant aspect of the *Equal Education* judgment, namely its observations on school infrastructure, the nature and limits of the right to a basic education, and the state's responsibility under section 29(1)(*a*) of the *Constitution*. The court stressed the need for adequate infrastructure as a prerequisite to deliver basic education.[726] It rejected the Minister's argument that the implementation of the Minimum Norms and Standards for Infrastructure could be limited by budgetary constraints and a lack of cooperation from other state agencies.[727] In the court's view, such a claim goes against the nature of section 29(1)(*a*).[728]

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718 Abdoll & Barberton 2017:42.

719 Koka 2023.

720 (276/2016) [2018] ZAECBHC 6; [2018] 3 All SA 705 (ECB); 2018 (9) BCLR 1130 (ECB); 2019 (1) SA 421 (ECB) (19 July 2018).

721 *Equal Education*:par. 48.

722 A South African non-profit for learners, parents, teachers and community members who are dedicated to the improvement of South African education.

723 Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure GN R920 Government Gazette 29 November 2013. See *Equal Education*:paras. 35-45.

724 *Equal Education*:paras. 35 -45.

725 Arendse 2019:115.

726 *Equal Education*:par. 170.

727 *Equal Education*:paras. 180-185.

728 *Equal Education*:par. 185.

In its ruling, the court held that the Minister's claim that she was restricted in allocating resources for infrastructure was not justifiable under either section 36 or section 172(1)(*a*) of the *Constitution*.[729]

Furthermore, the Minimum Norms and Standards for Infrastructure were criticised as unclear, failing to clarify what was "meant by 'prioritisation' of schools built entirely from mud or materials such as asbestos, metal and wood".[730] The vague phrasing of the regulations posed the risk that schools partially constructed from mud, metal, asbestos and wood would not be given priority for infrastructure repairs or replacements.[731]

Equal Education was also critical of the ambiguity of the word 'prioritise' in the Minimum Norms and Standards requirement that the Department should prioritise schools that lack sanitation, electricity or water.[732] Responding to the Minister's argument that it was within her discretion to decide which schools ought to be prioritised, the court ruled that schools partly constructed from the inappropriate materials mentioned above posed the same danger as schools built entirely from them.[733] On this issue, the court was unequivocal:

> The crude and naked facts stairing (*sic*) us [in the face] are that each day the parents of these children send them to school as they are compelled to, they expose these children to danger which could lead to certain death. This is [a] fate that also stares the educators and other caregivers in the schools in the face.[734]

729 *Equal Education*:par. 185. The *amicus curiae* in the case, Basic Education for All, argued that "to the extent that the respondent is unable to discharge the right to basic education in full and immediately, it must justify such failure through the mechanism of section 36 of the Constitution. Also it could argue that an order compelling it to discharge the right in full and immediately would not be just and equitable". The court did not explain the applicability of section 172(1)(*a*). It is presumed to have meant to refer to section 172(1)(*b*) of the *Constitution*, which states that "[w]hen deciding a constitutional matter within its power, … a court may make any order that is just and equitable". In that context, the Minister might have claimed that a court order ordering her to fully adhere to section 29(1)(*a*) would not be "just and equitable".

730 *Equal Education*:par. 119.

731 Arendse 2019:113-116.

732 *Equal Education*:par. 137.

733 *Equal Education*:paras. 180-193.

734 *Equal Education*:par. 194.

Ultimately, the court amended[735] the Minimum Norms and Standards for Infrastructure[736] to give priority to the replacement of all "classrooms constructed entirely or substantially" of mud, wood, asbestos or metal.[737] Similar obligations were imposed on the state to guarantee an adequate supply of electricity, sanitation and water to all schools that lacked these services.[738] In addition, the judgment upheld the constitutional value of accountability by amending the regulations so as to require the Minister to make public plans and reports detailing how government is implementing the Minimum Norms and Standards for Infrastructure.[739]

Therefore, as shown by *Equal Education*, infrastructure inequalities and a lack of state accountability in remedying such inequalities are a major impediment to the pursuit of social justice in education.

3.4.2.2 *Textbooks*

Another concern in the provision of quality education is a lack of textbooks. In *Minister of Basic Education v Basic Education for All* (hereinafter *Basic Education for All*),[740] the Supreme Court of Appeal established that the right to education extends to textbooks in every subject area.[741] The court emphasised the importance of textbooks

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735 *Equal Education: 209- In the circumstances I grant an order in the following terms: 2. Subregulation 4(3)(a) read with reg 4(1)(b)(i) of the Regulations should read that all schools and classrooms built substantially from mud, as well as those built substantially from materials as asbestos, metal, and wood, must within a period of three years from the date of publication of the regulations, be replaced by structures which accord with the regulations, the National Building Regulations, SANS 10 – 400 and Occupational Health and Safety Act 85 of 1993; 3. Subregulation 4(3)(a) read with reg 4(1)(b)(i) of the regulations: B(i) is inconsistent with the Constitution and invalid insofar as it omits to deal with schools which are built partly from mud, asbestos, metal and wood, and must, within a period of three years from the date of publication of the Regulations, be replaced by structures which accord with the Regulations, the National Building Regulations, SANS 10 – 400 and C Occupational Health and Safety Act 85 of 1993 (OHSA); and (ii) the word 'entirely' whenever it appears in reg 4(3)(a) is struck out,alternatively, the phrase 'Schools built entirely' is struck out wherever it appears in regulation 4(3)(a), and is replaced with the words 'classrooms built entirely or substantially'.*

736 Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure GN R920 Government Gazette 29 November 2013.

737 *Equal Education*:par. 209.

738 *Equal Education*:par. 209. Within three years of the date of publication of the regulations, the court ordered replacements and improvements to occur. Since the Minimum Norms and Standards for Infrastructure had already been promulgated by 29 November 2013, the court's order effectively meant that compliance with the regulations was expected to be complete by 29 November 2016, further emphasising the urgency with which the state must comply with its obligations under section 29(1)(*a*) of the *Constitution*.

739 *Equal Education*:par. 209.

740 2016 (4) SA 63 (SCA).

741 *Basic Education for All*:par. 50.

not only to ensure learners' cognitive development, but also to guarantee "that Constitutional values are instilled".[742] Already in *Tripartite Steering Committee v Minister of Basic Education*,[743] it was held that without books from which to learn, the right to education was meaningless.[744] Also, the Department itself has called textbooks "integral to teaching the curriculum".[745]

Arendse[746] notes that in the post-apartheid education landscape, textbook-related problems have plagued disadvantaged schools. In *Basic Education for All*, it was stated that those affected by the state's failure to deliver textbooks were mainly from "poor communities and predominantly, if not exclusively, black learners".[747]

A lack of textbooks causes multiple challenges. Teachers are required to borrow textbooks from nearby schools and are unduly burdened with the responsibility of copying all relevant learning content onto a blackboard, which is impracticable.[748] Some students also have difficulty reading from a blackboard, rendering them unable to internalise the learning material. Moreover, since learners have no textbooks to take home, they are unable to "do their homework, prepare for lessons, or consolidate what they have learned in class".[749] A lack of textbooks deepens disparities in access to quality education, thereby jeopardising social justice and the right to education of an equal standard.

According to Stein,[750] learners' inability to access textbooks is often closely related to school infrastructure hampering textbook procurement, delivery and storage.[751] Because of the poor state of roads leading to schools in rural areas, trucks are often unable to deliver books,[752] while schools with inadequate infrastructure often do not

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742 *Basic Education for All*:par. 2.

743 2015 (5) SA 107 (ECG), par:18."In my view Kollapen J is correct. The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, textbooks from which to learn and transport to and from school at state expense in appropriate cases."

744 Par. 18.

745 Department of Education 2014:3.

746 2019:117.

747 *Basic Education for All*:par 3.

748 *Basic Education for All*:par 19.

749 *Basic Education for All:*par. 19.

750 Stein 2017:272.

751 Stein 2017:272; Osei-Fofie & Herd 2021:403.

752 Stein 2017:272.

have appropriate storage space for textbooks.[753] In 2013, for instance, floods in Limpopo destroyed a significant number of textbooks stored in makeshift structures.[754]

Another factor to consider is the method through which schools are required to report textbook shortages, which includes calling a hotline or sending forms by fax or email.[755] Schools in historically disadvantaged areas of Limpopo, for example, do not have access to these basic communication structures, and therefore, are unable to report shortages.[756]

3.4.2.3 *Early childhood development*

Early experiences affect a child's brain development, providing either strong or weak foundations for future learning, health and behaviour. Early childhood presents a critical window of opportunity to shape the trajectory of a child's holistic development and lay a foundation for their future.[757] To realise their full potential, as is every person's human right, children require healthcare, adequate nutrition, protection from danger, a sense of security, opportunities for early education, and responsive caregiving from an early age.[758] Early childhood development services play a crucial role in developing the brain and fuelling the growing body. They also guarantee access to equal education opportunities.

In South Africa, pre-primary schools and early childhood education services are probably the most notable indicators of access disparities. The majority of early childhood and Grade R education[759] is provided by community-based, private, for-profit organisations and non-governmental organisations, with registered centres receiving a subsidy.[760] However, as noted by the National Planning Commission, these services are

> unevenly distributed and do not yet reach the most vulnerable poor children, especially in rural areas. Fees also inhibit the poorest families from using what services are

753 Stein 2017:272.
754 Stein 2017:272.
755 Stein 2017:272.
756 Stein 2017:272.
757 UNICEF 2022:s.p.
758 UNICEF 2022:s.p.
759 A year before pre-primary education.
760 Badat & Sayed 2014:134.

> available. Early childhood development programmes need to expand, with government support, to reach all vulnerable children, including children with disabilities.[761]

The *Basic Education Laws Amendment Bill* (BELAB)[762] proposes an amendment to the *Schools Act* that will make Grade R compulsory. This is a necessary step for early childhood development and in line with the 2015 National Integrated Early Childhood Development Policy.

However, while pre-primary Grade R education is expanding,[763] Grade R teachers lack qualifications, and the quality of teaching varies.[764] In the long term, this unequal and differential access leads to inequity. Access to quality early childhood education is perhaps the most valuable equity measure for strengthening educational attainment in South Africa.[765]

3.4.2.4 *Funding models and equality*

After 1994, funding for the transformation of education became a major concern. An important target of the reform was the racially skewed allocation of resources in the education system. The development of a common, uniform funding formula ensured that resources were allocated to all schools and institutions, regardless of race.[766]

Equity has been incorporated into the allocation of basic education funding through a two-tier approach. First, a formula was introduced for determining equitable share between provinces. Both the rural population of the province and the population eligible for social security grants were evaluated and sized using a weighted poverty index.[767] In all provinces, regardless of their financial standing, the aim was to ensure equitable spending and resources for all students. Since each province makes their own decisions about how to allocate and spend their share across social services, actual education spending per learner differs from one province to the next.[768]

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761 NPC 2012:299.

762 B2/2022:par. 2. An explanatory summary and a prior notice of the introduction of BELAB were published by way of GN 705 Government Gazette 6 December 2021.

763 Coverage is estimated at about 81 per cent.

764 Kotzé 2015:21; Badat & Sayed 2014:135.

765 Mateus & Shange 2021:355; Badat & Sayed 2014:135.

766 Badat & Sayed 2014:137.

767 Kotzé 2015:5; Badat & Sayed 2014:137.

768 Badat & Sayed 2014:137.

A second measure of making funding more equitable is the National Norms and Standards for School Funding,[769] which rank schools by means of a quintile system,[770] classifying them into one of five quintiles based on the school community's socioeconomic and poverty status.[771] Those in the bottom three quintiles (quintiles 1 to 3) receive the largest allocation and are considered no-fee schools. The top two quintiles (quintiles 4 and 5) receive the least funding from government and charge school fees. The purpose of the approach is for the poorest 40 per cent of learners to be allocated 60 per cent of the available resources.[772]

The fees charged by schools in quintiles 4 and 5 are intended to make up for any shortfall and provide for additional services, and must be agreed to by at least 51 per cent of parents of learners in attendance at the school's annual budget meeting.[773] To prevent the exclusion of some poorer learners that inevitably follows from a fee scheme, the *Schools Act* creates a system for exemption from the payment of school fees. Schools that charge fees must, upon application by parents, grant full or partial exemption to those for whom the fees exceed a set percentage of their income.[774]

Although the efforts outlined above are commendable, they do not seem to advance equity as required. Equity financing poses several problems. First, as Roithmayr[775] rightly notes, schools do not always grant exemption to parents who cannot afford to pay school fees,[776] while parents who do not pay sometimes also experience discrimination. To many, having to admit poverty in an application for exemption is too embarrassing. Consequently, the fee exemption system does not help government fulfil its obligation to provide all citizens with a basic education.

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769 GN 869 Government Gazette 31 August 2006:par. 31.

770 The determination of quintiles is a national rather than a provincial function.

771 GN 869 Government Gazette 31 August 2006:par. 87.

772 In 2021, quintile 1 to 3 schools received R1 466 per learner from the state, while schools that do charge school fees received R735 (quintile 4) or R254 (quintile 5) per learner. The amounts for 2022 were R1 536 per learner, and R770 or R266 per learner respectively. Amended National Norms and Standards for School Funding GN 192 Government Gazette 10 March 2021.

773 *Schools Act:*sec. 39(1).

774 *Schools Act:*sec. 39(2)(*b*).

775 Roithmayr 2003:422; Woolman *et al.* 2014:57-25.

776 *MS v Head of Department, Western Cape Education Department* [2016] 4 All SA 578 (WCC).

In addition, the quintile ranking system has a number of flaws.[777] It is not regarded as a reliable measure of poverty.[778] Moreover, the differential allocation of resources only affects operating costs and is not the primary driver of inequality. Schools in quintiles 4 and 5 continue to benefit disproportionately from the deployment of qualified teachers.[779] The state's attempt to rationalise and redeploy teachers and their expertise in 1995 was a laudable step towards ensuring greater equity,[780] but suffered from poor implementation and was defeated in a landmark court case.[781]

When it comes to equity in education funding, the major concern is that the interventions targeted by the means test are not adequately funded.[782] The limited funding for institutional redress and for academic development and financial aid has compromised efforts to enhance access to quality education and improve equality of opportunities and outcomes for those from disadvantaged groups. Given the existing need, a more substantial commitment of resources is required for the state's equity interventions to achieve their objectives and make a tangible impact.[783] The historical and deep-seated inequalities that necessitate active funding redistribution strategies are not sufficiently addressed by the targeted means-tested equity interventions. In short, the funding of equity measures is based on a limited concept of social justice.

In addition, the financial equity measures discussed above do not take into account the middle and upper classes' (often substantial) contributions to schools in quintiles 4 and 5. Poor parents (normally in quintiles 1 to 3) cannot afford to spend the same amount of money on their children's education. Thanks to this additional income, former Model C schools can perform well despite the standardised funding formula.[784] Motala[785] concedes that "when fees are added to the state per capita expenditure per learner, enormous disparities along class lines emerge". She highlights the

777 Badat & Sayed 2014:138.
778 Chutgar & Kanjee 2009:18-19.
779 Badat & Sayed 2014:138.
780 McConnachie 2017:92; Badat & Sayed 2014:138.
781 *The Grove Primary School v Minister of Education* 1997 (4) SA 982 (CPD).
782 Badat & Sayed 2014:138.
783 Badat & Sayed 2014:138.
784 Veriava 2017:38-73; Badat & Sayed 2014:138.
785 Motala 2006:79-93; Motala 2009:185-202.

considerable variation in per-learner spending that is masked if one focuses solely on the state's per-capita expenditure data.[786]

Finally, a number of examples demonstrate that corruption among school principals, governing body members as well as education officials is not uncommon in South Africa.[787] Corrupt practices, in turn, are directly related to the failure to deliver quality public services, including allocating funding as required.[788]

3.4.3 A well-qualified, motivated and well-looked-after teaching force

As outlined in paragraph 3.3.3.2 above, the term 'basic education' does not only relate to a specific period of education, but also a certain standard of availability, accessibility, adaptability and acceptability.[789] To deliver this kind of socially just education, a school must, among others, be staffed with sufficient educators who are appropriately qualified. A high standard of teaching and learning must also be maintained both in the curriculum and in the school environment. The paragraphs below examine whether the state is fulfilling its obligation in this regard.

3.4.3.1 *Teacher qualifications*

The pre-1994 regime was characterised by racial disparities in the entire education system, including higher education.[790] State-owned, state-funded teacher colleges were the primary institutions responsible for training the majority of educators, with

786 Motala 2006:79-93; Motala 2009:185-202.

787 Corruption Watch 2022: *s.p.*

788 Turn to chapter 5 for a discussion on the social inequalities that result from this, impeding the delivery of social justice in and through education. Corruption Watch 2022: *s.p.*

789 CESCR 1999.

790 Schäfer & Wilmot 2012:41-46.

only a privileged minority undergoing university training.[791] Wilmot and Schäfer[792] highlight notable distinctions in the nature and quality of training for teachers, pointing out that white educators received comprehensive training that included a strong disciplinary knowledge base and academic skills. In contrast, the training for their black counterparts was oriented towards the "development of professional skills and teaching practices." This information is presented without suggesting that university training inherently provided superior preparation compared to teacher colleges.

The post-apartheid state implemented a number of interventions to enhance the quality of teacher qualifications and transform the entire higher education sector.[793] Between 1994 and 1999, three programmes were launched to ensure that teachers were properly qualified.[794] The first initiative focused on rationalising, redeploying and redistributing teachers already in the system rather than training new teachers.[795] Many teachers resisted redeployment and opted to leave the teaching profession.[796]

As a second initiative, government integrated teacher education into the higher education sphere, spurred by international developments and the inadequate quality of teacher training under apartheid.[797] All teacher colleges in South Africa were incorporated into higher education, rendering universities the custodians and drivers of all teacher training.[798] All teacher colleges across the country closed down as a result.[799] Although some commentators saw this move as necessary for streamlining the system, it was also claimed to have compromised the status of education faculties

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791 Schäfer & Wilmot 2012:42, 46. According to the authors, the post-apartheid government inherited a racially fragmented education system: “When the new government took over in 1994, it faced an enormous task: dismantling an inequitable, structurally inefficient, and geographically and racially fragmented apartheid teacher education system which consisted of over 281 institutions providing various forms of teacher training. It included more than 100 colleges of education. Within South Africa, 18 of these were for Whites, 16 for Coloureds, 2 for Indians, and 13 for Blacks. A further 77 colleges were for Blacks residing in the nine ‘homelands’ or ‘Bantustans’ created by the apartheid government. Alongside the various colleges of education, 36 universities also offered teacher training which was mostly discipline-based and post-graduate, focused on producing secondary school teachers; many also offered a four-year integrated undergraduate degree such as a Bachelor of Primary Education or Bachelor of Pedagogics. Whereas universities were mainly responsible for producing secondary school teachers, colleges of education were responsible for producing primary school teachers.”

792 Schäfer & Wilmot 2012:46-47.

793 Schäfer & Wilmot 2012:47.

794 Chisholm 2012:93.

795 Chisholm 2012:93.

796 Arendse 2019:121.

797 Chisholm 2012:93.

798 Schäfer & Wilmot 2012:47.

799 Chisholm 2012:93.

at universities.[800] As a result, teacher education was no longer considered a high-priority academic field in its own right, but as a "step-child of higher education".[801]

As part of the third programme, bursaries were introduced to make the teaching profession more attractive to new, young educators.[802] Currently, students can apply for a government bursary through the Funza Lushaka scheme, which allows them to obtain a teaching degree. Bursary beneficiaries are required to teach at a public school for the same number of years as their bursary sponsorship and are unable to select at which school they will be teaching.[803]

Whereas previously, a teacher qualification could be obtained by completing a "three-year qualification", students must now obtain either a "four-year Bachelor of Education degree" or top up another appropriate bachelor's degree with a one-year Postgraduate Certificate in Education (PGCE) before qualifying as teachers.[804] The introduction of a bachelor's degree as a "minimum entry requirement" for the educator profession seeks to alleviate concerns regarding quality.[805]

However, in recent standardised international and national tests, learners' poor performance calls into question teachers' pedagogical and subject knowledge[806] and seems to point to challenges in teacher training. The Council on Higher Education, for instance, has found that the PGCE programmes offered at South Africa's higher education institutions are of varying quality.[807]

In 2007 already, a McKinsey & Company report on the world's best-performing school systems famously stated: "The quality of an education system cannot exceed the quality of its teachers."[808] Indeed, one of the most important determinants of the quality of an education system is the quality of its educators, which ultimately affects the realisation of social justice in education.

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800 Schäfer & Wilmot 2012:47.
801 CHE 2010:14.
802 Chisholm 2012:93; Schäfer & Wilmot 2012:47.
803 Arendse 2019:122.
804 Schäfer & Wilmot 2012:48.
805 Schäfer & Wilmot 2012:48.
806 Chisholm 2012:93-94.
807 CHE 2010.
808 Barber & Mourshed 2007:s.p.

3.4.3.2 *Post provisioning*

Post provisioning refers to the procedure for assigning educators to schools in South Africa.[809] Several schools, especially in the Eastern Cape and Limpopo, are suffering from teacher shortages, despite case law confirming that teaching and non-teaching posts are core rights[810] associated with the fundamental right to a basic education.[811]

In South Africa, the provision of teacher posts is governed by various laws and policies, including the *Schools Act*, the *Employment of Educators Act*[812] and the *Labour Relations Act*,[813] as well as the Post Distribution Model for the Allocation of Educator Posts to Schools.[814] The latter model outlines a formula that is intended to facilitate the allocation of posts to specific schools in a province once the Member of the Executive Council (MEC) has determined the province's post establishment.[815] According to this formula, the number of posts distributed must correspond to the school's actual needs. Many factors have been built into the formula, including the ideal class size for a particular learning area or phase, the teacher's period load, the need to promote a particular learning area, the number of grades offered at the school, whether more than one medium of instruction is used, learner disabilities, access to the curriculum, poverty (more teachers should be assigned to poorer schools) and the funding allocation from the Department.[816]

Sephton[817] argues that even though the formula is needs-based, it still favours wealthier schools. More affluent schools, for instance, are better equipped to detect learners with special needs and provide additional support. They are also able to offer more subjects, as the school governing body can remunerate additional teachers.[818] Historically disadvantaged schools, on the other hand, can offer only core subjects

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809 Sephton 2017:249.

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

811 Sephton 2017:249.

812 76/1998.

813 66/1995.

814 Published as Regulation 1451 of 2002 under the *Employment of Educators Act*. Sephton 2017:249-250.

815 Sephton 2017:251. Section 5(1)(b) of the *Employment of Educators Act* provides: "Notwithstanding anything to the contrary contained in any law but subject to the norms prescribed for the provisioning of posts, the educator establishment of a provincial department of education shall consist of the posts created by the Member of the Executive Council."

816 Paragraph 3 of the Post Distribution Model. Sephton 2017:251.

817 Sephton 2017:251.

818 Sephton 2017:251.

due to an increase in learner numbers and a shortage of teachers funded by the state. The lack of teachers, coupled with inadequate infrastructure such as insufficient schools and classrooms, ultimately leads to the overcrowding of classrooms.[819]

Thus, the Post Distribution Model produces skewed learner-to-teacher ratios in different schools. In some schools, teachers can comfortably teach classes with fewer learners than the Department's recommended learner-to-teacher ratio,[820] while in others, classes are often much larger than recommended.[821]

Overcrowded classrooms pose a number of challenges to both students and teachers.[822] Teachers, for example, are unable to pay attention to all their students;[823] instead, they are engaged in maintaining discipline for most of the class period. Valuable teaching time is lost as a result of having to manage large, noisy and sometimes even violent classes. Unsurprisingly, therefore, overcrowding in classrooms negatively affects teachers' morale.[824] Further dampening teachers' spirit is when a Department makes an appointment, but fails to pay the appointee[825] – an occurrence that is particularly prevalent in the Eastern Cape.[826]

The failure to fill vacancies often results in classrooms with higher teacher-to-learner ratios, hampering the quality of education and the pursuit of social justice.[827] The Federation of South African School Governing Bodies (FEDSAS)[828] and the Centre for Child Law[829] are undisputed pioneers in using litigation to ensure that vacancies are filled and teachers are paid.[830] Schools that cannot afford to take legal action to

819 Sephton 2017:251.

820 Sephton 2017:251. The Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure prescribe the maximum class size to be 30 learners for Grade R and 40 for all other classes.

821 Marais 2016:2-3. The author reports that some schools in the Eastern Cape have up to 130 learners crammed into one classroom.

822 Marais 2016:2-3.

823 Marais 2016:2-4.

824 Marais 2016:3.

825 Sephton 2017:260.

826 Sephton 2017:260.

827 *Centre for Child Law v Minister of Basic Education 2012 (4) All SA 35 (ECG).*

828 *FEDSAS v MEC for the Department of Basic Education, Eastern Cape* (60/11) [2011] ZAECB.

829 *The Centre for Child Law and others v The Minister of Basic Education, Eastern Cape High Court: Grahamstown, (1749/2012) [2012] ZAECG.*

830 Sephton 2017:256-257.

protect and restore their learners' human rights rely heavily on organisations such as these to ensure that socially just education is achieved.

3.4.4 Impact of language of instruction

In a country like South Africa with its eleven official languages,[831] language is a pivotal factor in education. International surveys have shown that the performance of both South African learners and educators is among the lowest in the world.[832] Of the country's eleven official languages, English and Afrikaans are the only two that function as full-fledged academic and scientific languages and in which learners can write the National Senior Certificate (NSC) examinations.[833]

The benefits of mother-tongue education cannot be denied: In 2012, the Eastern Cape education department introduced a bilingual (English and isiXhosa) curriculum that included Mathematics and Science instruction in isiXhosa for Grade 4s in schools in Cofimvaba. In 2020, this culminated in a pilot project in which the mother-tongue-taught Grade 4 class from 2015 were allowed to complete the NSC in isiXhosa.[834] According to a spokesperson for the Eastern Cape department, learners showed significant improvements, particularly in the core subjects of Mathematics and Science: "They are performing very well. Their performance has been boosted by doing them [the core subjects] in their mother tongue."[835] Even though learners could not complete all their schooling in isiXhosa, this pilot project represents an important step towards mother-tongue education.

According to Census 2011,[836] less than a quarter of South Africans are mother tongue speakers of English or Afrikaans.[837] Therefore, for the majority of South African children to have the best chance of educational success, they must first acquire either Afrikaans or English,[838] which may not even be their second language, but their third

831 These include nine African languages (isiZulu, isiXhosa, isiNdebele, Sepedi, Setswana, Sesotho, SiSwati, Xitsonga, Tshivenda) and two European languages (English and Afrikaans, which evolved from the Dutch spoken by the early Cape settlers). In May 2023, the National Assembly adopted South African Sign Language as South Africa's twelfth official language.

832 Taylor & Von Fintel 2016:75.

833 Taylor & Von Fintel 2016:76.

834 Mafilika 2020:s.p.

835 Monama 2022:s.p.

836 At the time of writing this dissertation, the Census 2022 data had not yet been released.

837 Statistics South Africa 2012.

838 Taylor & Von Fintel 2016:76.

or fourth. Neither education policy nor legislation dictates which of the eleven official languages schools should use as their medium of instruction. It is up to school governing bodies, which comprise parents, the principal, staff members and, in secondary schools, learners, to determine the school's language policy.[839]

In most schools with learners with a home language other than Afrikaans or English, such learners are currently taught in their first language in Grades 1, 2 and 3 and then switch to English in Grade 4. However, the Department is working with the National Education Collaboration Trust to develop a strategy to promote all nine formerly marginalised official African languages as languages of learning and teaching beyond Grade 3.

In order to be able to acquire a second, third or further language, linguists and academics stress the importance of having a strong foundation in one's home language. In this regard, a study by Taylor and Von Fintel[840] discovered some compelling evidence about the impact of mother-tongue teaching in early grades in the South African context. According to the study, children who were taught in their home language in Grades 1 to 3 performed better in their English tests in Grades 4 to 6 than children who were taught in English from the start. The study was conducted among children enrolled in schools of a similar quality and with similar socioeconomic backgrounds.[841]

Therefore, the current language policy that encourages mother-tongue instruction in at least Grades 1, 2 and 3 is considered beneficial for the child's education and could contribute to social justice.

3.4.5 COVID-19 pandemic

Human Rights Watch conducted a study in response to the COVID-19 pandemic to determine the impact of the coronavirus on the right to education.[842] It was found that the school closures as a result of the pandemic had exacerbated pre-existing

839 *Schools Act*:sec. 6(2).
840 Taylor & Von Fintel 2016:75-89.
841 Taylor & Von Fintel 2016:78-80.
842 Mateus & Shange 2021:357.

inequalities, and children who were most at risk of not receiving a quality education had been disadvantaged.[843]

The distance learning methodologies adopted during the pandemic meant that it was common for students to study fewer topics or less content. Many students reported difficulties in adjusting to online learning.[844] Caregivers with no to low levels of formal education struggled to support their children at home. During school closures, children in rural areas were less likely to adapt and implement the necessary measures to continue their education.[845] Due to a lack of access to radios, televisions, computers, the internet and data, many students were unable to participate in remote learning, which became crucial to the education process.[846]

Also relating to COVID-19, the North Gauteng high court in the 2020 matter of *Equal Education v Minister of Basic Department of Education*[847] ruled that the Department should resume the National School Nutrition Programme and continue to feed millions of learners despite the pandemic. The court found that the Minister and MEC had a constitutional and statutory obligation to do so.[848] In its ruling, the court established school nutrition and education as unqualified rights, and further explained that school nutrition is a self-standing right that interacts with the right to education in the sense that it ensures effective learning.[849]

3.5 A CALL FOR COOPERATION

In the aftermath of 1994 and the dismantling of the old apartheid order, there were great expectations of a fundamentally transformed education system based on the Freedom Charter's edict "The doors of learning and culture are open to all".[850] Nearly 30 years later, there is still a long way to go in creating equal educational opportunities in South Africa that will allow learners from diverse backgrounds, with different abilities, needs and preferences, to reach their full potential within the complexity of modern society. In fact, despite a progressive rights framework enshrining equal access to

843 Human Rights Watch 2020:s.p.
844 Human Rights Watch 2020:s.p.
845 Human Rights Watch 2020:s.p.
846 Human Rights Watch 2020:s.p.
847 2020 (4) All SA 102 (GP).
848 Par. 103, as cited in Osei-Fofie & Herd 2021:406.
849 Osei-Fofie & Herd 2021:406.
850 ANC 1955:s.p.

quality basic education for all, a distinctive pattern of unequal access to quality education seems to have taken hold.

The persistence of poor-quality and unequal education has serious implications for the realisation of social justice in and through education. Addressing inequality and quality constraints requires collaboration in the form of cooperative governance to build a sustainable, coherent education system that cherishes democracy, human dignity, equality and human rights in the pursuit of a socially just school environment. The next chapter considers the factors that are currently inhibiting and enhancing the realisation of this constitutional imperative of cooperative governance in education.

CHAPTER 4: THE CONSTITUTIONAL IMPERATIVES OF COOPERATION AND COOPERATIVE GOVERNANCE

4.1 INTRODUCTION

The *Constitution* calls for past injustices to be corrected and for the establishment of a socially just society.[851] This call is rooted both in the vision of transformative constitutionalism[852] and government's constitutional duty to promote sustainable development.[853] South Africa's commitment to establishing a society based on social justice translates into a mandate that is government's responsibility to implement. As the South African government comprises three distinct, independent and interrelated spheres (national, provincial and local)[854] as well as organs of state (for purposes of this dissertation, public schools), this mandate automatically becomes a shared mandate, which should be carried out within a cooperative framework.[855]

As explained in chapter 2, social justice involves both a distributional and a relational dimension. In terms of the latter, social justice theories propose a shared responsibility between different spheres of government and state organs to address inequality in a just and equitable manner so as to benefit all. This chapter analyses the cooperative framework within which these spheres should function in order to meet the constitutional demands of social justice in the education environment, as outlined in chapter 3.

Chapter 3 of the *Constitution* establishes the cooperative framework, which has since been expanded through legislation, most notably the *Intergovernmental Relations Framework Act* (IRFA).[856] Yet IRFA does not govern the relationship between school governing bodies and the Department, particularly provincial education departments,

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851 *Constitution*:preamble.

852 Fuo 2013: 77. See par 3.3.1.

853 *Constitution*:sec. 24. "Everyone has the right – (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii*) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."* Own emphasis added. Although definitions of sustainable development are often conflicting, it is widely acknowledged that it seeks to achieve social justice, among others.

854 *Constitution*:sec. 40(1).

855 *Constitution*:sec. 40(2), 41.

856 13/2005.

and offers no guidance on alternative procedures to be followed should school governing bodies and education departments encounter conflict. The paragraphs that follow discuss the provisions of IRFA and whether these should be extended to the relationship with school governing bodies also.

Cooperative governance, according to Malan,[857] is the partnership between the national, provincial and local spheres of government and all state organs.[858] Each sphere or organ of state is responsible for fulfilling a specific role. Rather than ignoring differences in approach and opinion among the various levels of government, cooperative governance encourages healthy debate during consultation to address the needs of the people.[859] Cooperation between government spheres is crucial for the various spheres to be able to serve their people effectively and in their respective contexts.[860] To gain a better understanding of cooperative governance, this chapter discusses the concept in broad terms and then undertakes a detailed examination of the constitutional and institutional framework for cooperative governance, including the principles of cooperative governance enshrined in section 41(1) of the *Constitution.* This will help clarify the distributed locus of education control in South Africa.

In the context of cooperative governance, the concept of decentralisation expresses how the functions and powers of the different spheres of government are divided and shared, and is important for understanding the relationships between, and the operation of, the spheres of government within the cooperative framework.[861] Apart from facilitating cooperative governance, decentralisation also has wide-ranging implications for education delivery, since it involves the power and authority to control, legislate and allocate resources for the execution of the applicable functions.[862] This, in turn, contributes to the realisation of social justice in and through education. Therefore, this chapter analyses cooperative governance in terms of the dynamic relationships between the education partners, including decentralisation and

857 2005:229. See also Maluleke 2016:95.

858 As discussed in chapter 2, a functionary or institution that exercises a public power or performs a public function in accordance with legislation is regarded an organ of state. In providing education, a public school performs a public function, as education is a fundamental right that is enforceable against the state under section 29 of the *Constitution*.

859 Malan 2005:229; Maluleke 2016:95.

860 Maluleke, Sehoole & Weber 2017:37.

861 Maluleke *et al.* 2017:37.

862 Maluleke *et al.* 2017:37.

concurrent functions, in an effort to determine their likely influence on achieving social justice.

Case law over the past two decades[863] suggests that the different government spheres do not have a firm grasp on the notion of cooperative governance and its broader meaning as a system of governance in South Africa. Judging by some of the prominent court judgments, the cooperative governance principles do not find proper and adequate expression in the relationships between, and operation of, government spheres. This affects stakeholders' ability to deliver on their education mandate and achieve social justice.

4.2 EVOLUTION OF COOPERATIVE GOVERNANCE AND INTERGOVERNMENTAL RELATIONS IN SOUTH AFRICA

Prior to 1994, governance in South Africa was characterised by fragmented administrations that spent public resources and delivered services in manner compatible with a racialised society.[864] Socioeconomic rights were achieved through highly centralised budgets.

In the negotiations between the apartheid government and liberation movements[865] once the latter were unbanned in 1990, the nature of the South African state was one of the key issues.[866] After three centuries of racial discrimination and dominance, the liberation movements favoured a unitary state to transform South Africa.[867] The African National Congress (ANC) believed that only a centralised, unitary state would have the strength and resources to engage in the massive process of social and economic transformation that lay ahead. Fragmented and dispersed authority would make

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863 *Schoonbee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T); *Destinata Skool v Die Departementshoof: Departement van Onderwys Gauteng* case no. 23675/03 (2004-03-03); *Governing Body of Mikro Primary School v Western Cape Minister of Education* (332/05) [2005] ZAWCHC 14; 2005 JOL 13716 (C); 2005 (3) SA 504 (C); 2005 (2) All SA 37 (C) (18 February 2005); *Head of Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *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); *Member of the Executive Council for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC); *Member of Executive Council for Education in Northwest Province v FEDSAS* [2016] ZASCA 192; *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng* 2016 (4) SA 546 (CC).

864 Malan 2008:79; Makoti & Odeku 2021:45-50.

865 Such as the African National Congress.

866 Malan 2008:79; Makoti & Odeku 2021:46.

867 Malan 2008:79; Makoti & Odeku 2021:46.

decision-making more difficult and undermine the capacity to achieve reconstruction and development.[868] ANC leaders recognised the value of having effective provincial governments, both for the delivery of services and the empowerment of the people, complemented by strong national leadership.[869] The different parties to the negotiations embarked on a search for an appropriate system of constitutional government that would promote the principles of effective and efficient governance.[870] They agreed on a form of regionalism with concurrent powers, as well as a written agreement that the national government would have overriding powers (when necessary and in the national interest), and this went on to serve as the basis of the intergovernmental system in South Africa during that period.[871]

South Africa's transition to democracy through multi-party negotiations saved the country from the brink of collapse. Having learned from history, the negotiators knew that the country required appropriate ways of regulating public authority.[872] They realised that a cooperative governance system was to be applied to transform governance in the country.[873] This realisation was based on the assumption that change could not be brought about by a single entity, and that competing and complementary interests had to be acknowledged.[874] New structures needed to be created to promote cooperation among the different spheres of government, and that there needed to be a clear understanding of the different partners' responsibilities.[875]

To transform South African governance, the final *Constitution* had to align with the 34 constitutional principles agreed upon by the various parties to the multiparty negotiations,[876] as enshrined in schedule 4 to the interim (1993) *Constitution*. Almost all these principles pertained to government structure. In short, they implied that:

- government had to be divided into three levels: national, provincial, and local;

868 Murry & Simeon 2000:5.
869 Malan 2008:79.
870 Haysom 2001:47, as cited in Mhone & Edigheji 2003:158.
871 Malan 2008:79; Makoti & Odeku 2021:47.
872 Handley *et al.* 2008:191; Makoti & Odeku 2021:47.
873 Mpya & Ntlama 2017:3.
874 Mpya & Ntlama 2017:3.
875 Mpya & Ntlama 2017:3.
876 Mpya & Ntlama 2017:4.

- the final *Constitution* had to define the powers and functions of each sphere, and could not be substantially different from those in the interim *Constitution*;
- provincial and national governments held concurrent and exclusive powers;
- the allocation of a competency either to a national or a provincial sphere had to follow specific criteria;
- the national sphere was precluded from exercising its power if it encroached on the territorial, functional, and institutional integrity of the provinces; and
- it would be up to a court of law to resolve disputes concerning legislative powers concurrently allocated to the national and provincial spheres under the *Constitution*.[877]

Underpinning the entire process of transforming the system of governance, these principles are traceable to those of constitutionalism in the *Constitution.* The introduction of constitutionalism signified a change in how the structure of governance among the different spheres of government should be regulated within the framework of a new South African constitutional democracy.[878] As articulated by De Vos and Freedman,[879] constitutionalism has the following characteristics:

> - First, constitutionalism is concerned with the formal and legal distribution of power within a given political community in which a government is established by a written constitution.
> - Second, constitutionalism provides for the establishment of the institutions of government such as the legislature, executive and the judiciary.
> - Thirdly, constitutionalism bring about the creation of binding rules for the regulation of the political community, its institutions of governance and the governed.
> - Fourth, constitutionalism plays an important role in determining the nature and basis of relations that exist between institutions of governance and those they govern.
> - Last, … constitutionalism prescribes limits on the exercise of state power and provides mechanisms to ensure that the exercise of power does not exceed the limits set by the constitution.[880]

877 De Vos & Freedman 2014:270-271.
878 Mpya & Ntlama 2017:4.
879 2014:270-271.
880 De Vos & Freedman 2014:38-39.

The structuring and functions of the spheres of national, provincial and local government envisaged in chapter 3 of the *Constitution* and endorsed in IRFA[881] represent a quasi-federal form of government,[882] with the "distinctive, interdependent and interrelated" spheres[883] optimally integrated and aligned,[884] without trampling on one another's domain.[885] To Nzimakwe and Ntshakala,[886] the distinctiveness of the different spheres in the cooperative relationship "suggests the specificity that ensures that roles are best executed at a selected sphere of government".[887] Interdependence, they argue, entrenches cooperation between the spheres, which can "be done through communication, consultation, coordination and assisting each other in different ways [because] no sphere can operate in isolation".[888] Finally, interrelatedness signifies a holistic system within which "a solid and unified government" can flourish.[889]

These features were previously also interpreted and endorsed in the matter of *Premier of the Province of the Western Cape v The President of the Republic of South Africa*,[890] where the Constitutional Court held as follows:

> Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is "one sovereign, democratic State", and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.[891]

The principles of cooperative governance are entrenched in section 41(1) of the *Constitution*, which provides for the following:

> All spheres of government and all organs of state within each sphere must —
>
> (a) preserve the peace, national unity and the indivisibility of the Republic;

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881 The long title of IRFA provides the purpose of the act as follows: "To establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith."

882 Dube 2015:s.p.

883 *Constitution*:sec. 40(1).

884 Madumo 2015:158.

885 *Constitution*:sec. 40(2). "Every sphere of government must observe and adhere to the principles contained in this Chapter and must conduct its operations within its parameters."

886 2015:831.

887 Nzimakwe & Ntshakala 2015:831.

888 Nzimakwe & Ntshakala 2015:831-832.

889 Nzimakwe & Ntshakala 2015:832.

890 1999 (3) SA 657 (CC).

891 *Premier of the Province of the Western Cape v The President of the Republic of South Africa*:50.

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) cooperate with one another in mutual trust and good faith by —

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) coordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.

The significance of the inclusion of cooperative governance in the text of the Constitution is underlined by Currie and De Waal,[892] who state that

> the fact that the drafters of the 1996 Constitution opted for the system of co-operative governance envisioned the influence that the interpretation of the constitutional provisions may confer on the powers of the various spheres of government.[893]

As was highlighted in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,[894] the provisions in section 41(1) undoubtedly endorse

> the entrenchment of the distribution of authority among the spheres; ensure the independence of each sphere to exercise its powers and perform its functions within the parameters of its defined space; reinforce the imposition of a duty on each sphere not to assume any power or function except those conferred on it in terms of the Constitution and uphold the conferring of extensive powers on parliament including the

892 2016:124, 129-130.

893 Currie & De Waal 2016:124, 129-130.

894 2010 (6) SA 182 (CC).

> power to pass legislation on "any matter", excluding only those matters that fall within the functional areas of exclusive provincial competence set out in Schedule 5.[895]

Such a relationship involves establishing intergovernmental forums at national and provincial levels and addressing issues of alignment, integration and coherence. Additionally, national, provincial and local governments and organs of state need to adopt systems and processes to pursue their shared objectives. Lastly, joint work and common projects ought to be carried out to achieve common goals.[896] In this way, the spheres of government and organs of state can cooperate in the execution of their respective roles.[897] According to Malan,[898] this system

> does not ignore differences of approach and viewpoint among the different spheres but encourages healthy debate to address the needs of the people they represent by making use of the resources available to government.[899]

One of the many cases that have dealt with the core content of the principles of cooperative governance is *Uthukela District Municipality v President of the Republic of South Africa.*[900] The case emanated from a legal dispute between two organs of state, where the court had to clarify what the principles of cooperative government required of both the state and the courts. In laying the foundation for its decision, the Constitutional Court held that the spheres had an obligation to foster cooperation and avoid litigating against each other, as the gist of chapter 3 of the *Constitution* was to ensure the resolution of disputes at a political level rather than through adversarial litigation.[901] In this regard, it was held that the

> court will rarely decide intergovernmental disputes in fostering cooperation unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level.[902]

The court ruled that apart from avoiding litigation against each other, section 41(3) imposed a two-fold obligation on the organs of state to "make every reasonable effort to settle the dispute through the means and procedures provided for" and to "exhaust

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895 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*:par. 43. See also Freedman 2014:572.

896 Malan 2005:229; Malherbe 2008:19-28.

897 Mpya & Ntlama 2017:7.

898 Malan 2005:229.

899 Malan 2005:229.

900 2002 (11) BCLR 1220 (CC); 2003 (1) SA 678 (CC).

901 *Uthukela District Municipality v President of the Republic of South Africa*:13.

902 Dube 2015:s.p.

all other remedies before [approaching] the courts".[903] The judiciary, in turn, must review any rule, conduct or law that runs contrary to the prescripts of the envisaged collaborative relations.[904]

4.3 DEFINING RELEVANT CONCEPTS PERTAINING TO INTERGOVERNMENTAL RELATIONS AND COOPERATIVE GOVERNANCE

The governmental institutions in South Africa have been described as an interlocking series of mechanisms prevalent throughout society, all of which aim to establish a society based on social justice.[905] Their success, therefore, relies heavily on an effective system of intergovernmental relations and on the degree to which the government spheres and state organs can operate in harmony with one another.[906]

By creating and implementing institutional arrangements for intergovernmental relations, the spheres of government and state organs should continue to cooperate in mutual good faith and trust. On the other hand, if intergovernmental relations do not

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903 *Uthukela District Municipality v President of the Republic of South Africa*:19; Makoti & Odeku 2021:48.

904 *Constitution*:sec. 165, read with sec. 172. Section 165 provides: "(1) The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. (3) No person or organ of state may interfere with the functioning of the courts. (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. (5) An order or decision issued by a court binds all persons to whom and of organs of state to which it applies. (6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts." Section 172 provides: "(1) When deciding a constitutional matter within its power, a court: (*a*) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (*b*) may make any order that is just and equitable, including: (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. (2)(*a*) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. (*b*) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct. (*c*) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court. (*d*) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

905 Malan 2008:76; Maluleke 2016:24.

906 Malan 2008:76; Maluleke 2016:24.

function effectively, projects and programmes aimed at advancing and promoting social justice in South Africa will fail.[907]

The network of intergovernmental relations – relationships between and within the spheres of government and organs of state – fall within a particular normative framework. In essence, this framework assumes that decentralisation of state power in terms of the *Constitution* is not based on "competitive federalism", but rather on the principles of cooperative governance.[908] The following sections offer clarity on the notions of intergovernmental relations and cooperative governance.

4.3.1 Intergovernmental relations

Anderson,[909] who is considered one of the intellectual custodians of intergovernmental relations, describes intergovernmental relations as "a body of activities and interactions occurring among governmental units of all types and levels". To him, intergovernmental relations suggest that political systems are becoming increasingly complex and interdependent.[910] These more complex, interdependent systems are characterised by an increasing number and growth of government institutions, a greater variety and intensity of public officials involved in intergovernmental relations, a growing importance of officials' actions and attitudes, and a preoccupation with financial policy issues.[911]

In addition, intergovernmental relations are also largely formulated in terms of human relations.[912] At its core, intergovernmental relations are about individual interaction among public officials.[913] It follows, therefore, that there can be no intergovernmental relations if officials do not acknowledge the importance of their interaction with peers from other spheres.

One may argue that the nature of intergovernmental relations varies constantly in terms of the degree of cooperation. Indeed, the degree to which the key players participate, whether competitively or cooperatively, determines the ontological state of

907 Malan 2008:76.
908 Malan 2008:76.
909 1960:3. See also Agranoff & Radin 2015:139-159; Benton 2020:536-542.
910 Anderson 1960:3; Agranoff & Radin 2015:139-159.
911 Wright 1978:8; Agranoff & Radin 2015:139-159.
912 Malan 2005:228.
913 Wright 1978:2; Benton 2020:537; Agranoff & Radin 2015:139-159.

the intergovernmental system.[914] Often, governmental institutions rely on other institutions and officials for the necessary resources to formulate policy, render services, and promote public welfare and sustainable development,[915] implying that intergovernmental relations must accommodate and manage such interdependence.[916] Other factors to be considered and catered for are geographic and social diversity, as well as ongoing comprehensive transformation.[917] For this reason, as Wright correctly states,[918] intergovernmental relations cannot be a once-off or occasional occurrence defined by agreements, statutes or court decisions, but rather an ongoing pattern of contacts, knowledge sharing and information exchange.

All spheres of government and state organs in a cooperative governance system are expected to adhere to the following six main objectives of intergovernmental relations:[919]

- achieving key national policy goals, with clear objectives informed by provincial and local circumstances
- cost-effective and sustainable service provision, responsive to needs of communities and accessible to all
- clearly demarcated areas of responsibility and accountability for all state institutions
- deliberate management of devolution to provincial and local governments while exploring asymmetrical options for devolution when capacity is poor
- the encouragement of creativity for collaboration and partnership while strengthening performance and accountability of distinctive institutions
- elimination of wasteful and unnecessary duplication – avoiding 'turf battles'.[920]

As suggested by these objectives, in the education setting, it is important for the national and provincial departments and school governing bodies to understand that their concurrent functions imply that they must complement one another to effectively deliver on their education mandate to the nation. Jointly fulfilling their mandate largely hinges on how the different stakeholders interpret their constitutional, legislative and

914 Mentzel & Fick 1996:101.
915 Malan 2005:229; Maluleke 2016:25.
916 Malan 2005:228-229; Agranoff & Radin 2015:139-159.
917 Malan 2005:228-229; Agranoff & Radin 2015:139-159.
918 Wright 1978:2; Benton 2020:537.
919 Malan 2005:229.
920 See also Maluleke 2016:25.

policymaking responsibility and authority. It also depends on how the national and provincial departments accommodate each other in delivering public education functions within the cooperative governance system.[921]

Ultimately, therefore, intergovernmental relations serve as the means through which the values of cooperative governance may be achieved.[922]

4.3.2 Cooperative governance

Cooperative governance involves the basic values stipulated under section 41(1) of the *Constitution*, as well as the establishment of dedicated structures and institutions to implement these values.[923] All spheres of government and state organs must effectively collaborate to provide citizens of South Africa with services that benefit all[924] and address the challenges created by a separatist regime.[925] Cooperation among the spheres of government provides greater legitimacy to democratic regimes, their policies and outcomes, which are more likely to be achieved through accommodation, compromise and, occasionally, consensus rather than through the exclusion of key sectors of society.[926]

The fact that cooperative governance comprises relationships between institutions in certain policy areas may enhance the collective, while constraining individuals when it comes to the design and implementation of policies and laws.[927] As a result, corruption may be minimised and transformation enhanced. In other words, cooperative governance is not an end in itself, but rather a means to enhance development and improve people's standard of living, ultimately contributing to social justice.[928]

Intergovernmental relations and cooperative governance are conceptually distinct. The cooperative governance doctrine is a fundamental philosophy of government

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921 Maluleke 2016:47.

922 The White Paper on Local Government GN 423 *Government Gazette* 13 March 1998 defines intergovernmental relations as a set of formal and informal processes as well as institutional arrangements and structures for bilateral and multilateral cooperation within and between the spheres of government.

923 Malan 2008:78.

924 Malan 2008:78.

925 Maluleke 2016:22.

926 Mhone & Edigheji 2003:75; Maluleke 2016:27.

927 Malan 2008:78.

928 Mhone & Edigheji 2003:74.

(constitutional norm) that governs all aspects and activities of government, deconcentrates power into other spheres of government, and governs the organisation and exercise of political power at all levels of government.[929] More specifically, it involves the institutional, political and financial arrangements that enable interaction among government spheres and state organs.[930] Cooperative governance is based on participatory democracy and its values, which may include national unity, peace, effective communication, cooperation, collaboration, and the avoidance of conflict.[931] Intergovernmental relations, in turn, provide a way for this philosophy of cooperative governance to be institutionalised, entrenched in statute, and incorporated into the functions of executive and legislative governments.[932]

Judging by chapter 3 of the *Constitution*, cooperative governance should serve as a conceptual framework for promoting a development-oriented state. Viewed through the lens of education, this requires both strong collaboration and flawless coordination of activities between the national and provincial departments of education and school governing bodies to provide all learners with education of a progressively high quality, representing the relational dimension of a socially just education system.

4.4 PRINCIPLES OF COOPERATIVE GOVERNANCE ENTRENCHED IN SECTION 41(1) OF THE CONSTITUTION

The term “spheres” in chapter 3 of the *Constitution* signifies a clear shift away from hierarchical relationships among national, provincial and local governments and organs of state. In fact, in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*,[933] the Constitutional Court stated that all chapters of the *Constitution* following chapter 3 should be read and interpreted in light of all government spheres’ subjection to cooperative governance.[934] Whether national government, provincial government, local government or organ of state, all levels of government are called on to cooperate vertically and horizontally.[935] In education

929 Malan 2005:230.
930 Malan 2005:230.
931 Malan 2008:78.
932 Malan 2008:78; Department of Provincial and Local Government 1999:12.
933 [2000] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC).
934 Woolman *et al.* 2014:14-16.
935 Woolman *et al.* 2014:14-7.

terms, for instance, the provincial departments must not only cooperate with one another, but also with the national department as well as school governing bodies.

Section 41(1) lists a number of principles designed to promote coordination and cooperation, rather than fuel competition, between the various levels of government and state organs.[936] The section contains two basic propositions: First, cooperative governance does not erode the autonomy of any particular sphere of government.[937] Each part of the whole has its place, and coordinating the various parts is crucial for the whole to function.[938] Secondly, sections 41(1)(*e*), (*g*) and (h) specifically reinforce the notion of distinct spheres of government.[939]

Some of the key principles in section 41(1) and their relevance to the partnership between the national and provincial education departments and school governing bodies are briefly discussed next.

4.4.1 Section 41(a)(*d*): The rule of law

Section 41(1)*(d)* compels "all spheres of government and all organs of state within each sphere" to "be loyal to the Constitution, the Republic and its people". As an

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936 Note, however, that sections 40 and 41 of the *Constitution* do not represent the entire, exhaustive constitutional framework for cooperative governance. Schedules 4 and 5 to the *Constitution* specifically provide for concurrent and exclusive legislative competencies for the national and provincial governments. See Bronstein in Woolman *et al*. 2014:chapter 15. Although the interim *Constitution* made no express reference to cooperative governance, the Constitutional Court appeared to recognise the need for such a system. See *Ex Parte of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC):par. 34. In that matter, the court had to review an education policy bill that called for (executive) cooperation between the provinces and national government. The court ruled: "Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through cooperation." It was held that Parliament was entitled to make provisions for such cooperation on matters set out in schedule 6 to the interim *Constitution*, and therefore, the objection that the provisions encroached on the provinces' executive competence could not be sustained.

937 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC):par. 292. "The principles set out in section 41 are not invasive of the autonomy of a province in a system of co-operative government."*

938 In *Van Wyk v Uys NO* 2002 (5) SA 92 (C), the court held that because section 41(1) enjoined the central, provincial and local spheres of government to support and assist one another, the MEC for Local Government could not act *mero motu* in a case where the municipal council had already taken definite steps to investigate an alleged breach of the code of conduct by councillors. Rather, section 41(1) required the provincial MEC to await the outcome of the council's own investigation and take cognisance of the council's recommendations before acting in terms of item 14 of schedule 1 to the *Local Government: Municipal Systems Act* 32/2000.

939 Woolman *et al.* 2014:14-15.

adjunct to the Constitution's commitment to the rule of law and legality, this prescript has been given a similar interpretation.[940] In *Permanent Secretary, Department of Welfare, Eastern Cape, v Ngxusa*,[941] for instance, the court stated as follows:

> [W]hen an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies [ss 41(1)(d) and 195(1)(e) of] the Constitution, which commands all organs of State to be loyal to the Constitution and requires the public administration to be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard.

The principle of legality is a cornerstone of the South African constitutional order and of the exercise of public powers and the performance of public functions. In essence, the principle holds that the legislative and executive branches of government may not exercise authority or perform functions beyond their statutory authority.[942] In the education setting, this means that if a department of education or school governing body wishes to perform certain functions, it must be authorised by law to do so.

In the matter of *Governing Body of Mikro Primary School v Western Cape Minister of Education*,[943] Thring J remarked as follows with regard to the principle of legality:

> The principle of legality simply means that the state must obey the law. That is such a fundamental principle, and so important in any civilised country, that only in extremely rare cases, if ever, the rule of law may be "held hostage" if it proves to be in the children's best interests. Indeed, it is difficult to imagine how, in the long term, it could ever be in the best interests of children to grow up in a country where the state and its organs and functionaries have been elevated to a position where they regard themselves as being above the law, as far as they are concerned, the rule of law has been abrogated.[944]

Thus, it would seem reasonable to think of section 41(1)(*d*) – along with sections 41(1)(*b*) and (*c*) – as promoting fairness in state administration.[945] In fact, the court in

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940 The majority of cases in which the principles of cooperative governance were invoked involved private parties that sued one of the arms of government.

941 2001 (4) SA 1184 (SCA); 2001 (10) BCLR 1039 (SCA).

942 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998):par. 58.

943 2005 JOL 13716 (C).

944 The Rule of Law, in its most basic form, is the principle that no person is above the law. The rule follows from the idea that truth, and therefore law, is based upon fundamental principles which can be discovered, but which cannot be created through an act of will. The principle of legality is distinct from, but complements, the constitutional right of just administrative action. It is a constitutional principle based on the rule of law and requires that a public power may only be exercised in accordance with law (i.e. they may not exercise any power or perform any function that is not conferred upon them by law). See Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1998 (12) BCLR 1458 (CC).

945 Woolman *et al.* 2014:14-15

Hardy Ventures v Tshwane Metropolitan Municipality[946] concluded that the entire section 41(1) obligated each sphere of government and each organ of state to provide effective, transparent, accountable and coherent government.

4.4.2 Section 41(1)(*e*): Respect for institutional integrity

At least one court has held that section 41(1)(*e*) can be interpreted as reinforcing the separation of powers.[947] The high court in *Bushbuck Ridge Border Committee v Government of the Northern Province*[948] ruled that this provision strengthened the separation of powers, specifically the principle that the judiciary should not usurp the function of the legislature.

The principle of separation of powers holds that courts should not encroach on territory designated for the exercise of public power by another. Nevertheless, in South African society, the court plays an important part in protecting the most vulnerable by defining ideals that the rest of government and state organs should aspire to.[949] In several education cases,[950] the courts have shown a willingness to intervene where the state failed to facilitate the right to a basic education, fashioning their orders to compel another arm of government to fulfil its constitutional obligation.

4.4.3 Section 41(1)(*f*): Enumerated powers

Section 41(1)(*f*) prohibits government spheres and organs of state from assuming powers or functions other than those conferred on them by law. This provision is related to the provisions of sections 41(1)(*e*) and (*g*). These three subsections remind the departments of education and school governing bodies that the best way to realise cooperative governance is to ensure that all branches of government do exactly what they are empowered to do — nothing more and nothing less.

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946 *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T).

947 The separation of powers requires that the power of the state be split between three branches: the legislature (those who make the law at Parliament), the executive (those in government who give effect to the law) and the judiciary (those who interpret the law and resolve disputes in courts or other forums). Each branch has distinct powers.

948 1999 (2) BCLR 193:200-202.

949 Berger 2003:661.

950 *Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP); *Section 27a v Minister of Basic Education* [2012] ZAGPPHC 114; *Madzodzo v Minister of Basic Education* (2144/2012) [2014] ZAECMHC 5; [2014] 2 All SA 339 (ECM); 2014 (3) SA 441 (ECM) (20 February 2014).

4.4.4 Section 41(1)(*g*): Abuse of power

In terms of section 41(1)*(g)*, all spheres of government and organs of state "must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere". It requires, therefore, a distinction between legitimate disputes over the powers of a particular organ of state or sphere of government, and constitutionally forbidden encroachments on another organ's territory.[951]

This distinction the court in *Premier, Western Cape v President of the Republic of South Africa*[952] articulated as a distinction between how a power is exercised and whether or not it exists. According to this approach, section 41(1)(*g*) has relevance to a dispute only once the existence of the powers that the parties are relying on has been established.[953] Where a particular power does not exist, the dispute must be resolved on the basis that the party engaged in unlawful conduct. Only once it has been established that all parties have acted lawfully, the question of whether any one party has exercised its power in a way that encroaches on the geographical, functional or institutional integrity of another can be addressed.[954] According to the court, this assessment of the "functional or institutional integrity" of the different spheres ought to be conducted "with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government".[955]

In general, the *Schools Act* and other education legislation[956] clearly stipulate the respective education partners' roles. However, a problem arises when the partners conduct wrongful actions, do not know or understand the law, or proceed to act outside the established framework and encroach on others' terrains despite being familiar with

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951 Woolman *et al.* 2014:14-16.

952 (CCT26/98) [1999] ZACC 2; 1999 (3) SA 657; 1999 (4) BCLR 383 (29 March 1999).

953 *Premier, Western Cape v President of the Republic of South Africa*:par. 57.

954 Woolman *et al.* 2014:14-16.

955 *Premier, Western Cape v President of the Republic of South Africa*:par. 58.

956 Such as *Employment of Educators Act* 76/1998, *National Education Policy Act* 27/1996, National Admission Policy for Ordinary Public Schools GN 2432 Government Gazette 19 October 1998, and National Policy on HIV/Aids for Learners and Educators GN 1926 Government Gazette 10 August 1999.

the law. There are numerous court cases[957] where it was found that the Department had exceeded its powers and demonstrated a poor grasp of the roles of the school principal and the governing body respectively.[958] One example is *Head of Department, Department of Education, Free State Province v Welkom High School*.[959] In that matter, the Constitutional Court found that the Head of Department had acted unlawfully in instructing the principals of the respective schools to go against their schools' pregnancy policies. The court remarked as follows on the roles of the respective partners:

> Given the nature of the partnership that the Schools Act has created, the relationship between public school governing bodies and the state should be informed by close cooperation, *a cooperation which recognises the partners' distinct but inter-related functions*. The relationship should therefore be characterised by consultation, cooperation in mutual trust and good faith. The goals of providing high-quality education to all learners and developing their talents and capabilities are connected to the organisation and governance of education. It is therefore essential for the effective functioning of a public school that the *stakeholders respect the separation between governance and professional management*, as enshrined in the Schools Act.[960]

Therefore, it is imperative for the distinctiveness of the departments and school governing bodies to be preserved, with each party exercising their constitutional powers in a manner that does not interfere with the geographical, functional or institutional integrity of another.

4.4.5 Sections 41(1)(*h*), 41(3) and 41(4): The duty to avoid litigation

The relevant part of section 41(1)(*h*) reads:

> All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another.[961]

This principle is reinforced by section 41(3), which provides:

> An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures

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957 *Member of Executive Council for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC); *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC).

958 To be discussed in the next chapter.

959 2014 (2) SA 228 (CC).

960 *Head of Department, Department of Education, Free State Province v Welkom High School*:par. 124; own emphasis added.

961 Section 41(1)(*h*)(vi).

> provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

Section 41(4) then states:

> If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

The meaning of these provisions was examined in great detail in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* (hereinafter *Certification*).[962] The Constitutional Court held that section 41(1)(*h*)(vi) should be read together with section 41(3),[963] which implies that, wherever possible, disputes should be resolved at a political level rather than through adversarial litigation.[964] Importantly, however, the inclusion of this provision in the *Constitution* does not impede the courts' ability to hear intergovernmental disputes or deprive any government organ of its powers.[965]

The relationship between the partners in education must be characterised by consultation and collaboration in mutual trust and good faith, keeping in mind that the goals of providing high-quality education to all learners and developing their talents and capabilities are linked to education organisation and governance at all levels.[966] Should disputes between school governing bodies and provincial departments end up in court, the parties would at least need to be able to demonstrate all efforts undertaken to engage with each other in good faith.[967]

4.4.6 Section 41(1)(*h*)(ii) and (iii): The duty of support and the duty to consult

4.4.6.1 *Duty of support*

Section 41(1)(*h*)(ii) instructs all spheres of government to "co-operate with one another in mutual trust and good faith by assisting and supporting one another". Hierarchical support is not indicated. Therefore, this provision could be cited as a ground for a

962 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).
963 *Certification*:par. 291.
964 *Certification*:par. 291.
965 Woolman *et al.* 2014:14-18.
966 *Member of the Executive Council for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC):par. 72.
967 *Member of the Executive Council for Education in Gauteng Province v Governing Body of Rivonia Primary School*:par. 73; *Constitution*:sec. 41(1)(*h*)(vi).

provincial education department to support another organ within a certain framework, or even to assert that the education department of one province is obligated to aid the education department of another. A department that receives such assistance must consent to it and cooperate. Support is a bilateral enterprise: The recipient must actively participate in the process.[968]

4.4.6.2 *Duty to consult*

The basic norm of cooperative governance is arguably the duty in section 41(1)(*h*)(iii) of "informing one another of, and consulting one another on, matters of common interest". This provision establishes the obligation to consider the other party's views before taking any action.

Education White Paper 1[969] stated the following:

> The *rehabilitation* of the schools and colleges must go hand in hand with the restoration of the ownership of these institutions to their communities through the establishment and empowerment of legitimate, representative governance bodies.[970]

This statement of principle laid the foundation for the establishment of the democratic governance of schools in South Africa. Prior to that, very few schools had structures in which stakeholder groups could exercise their right to give meaningful and legitimate input regarding education matters. Education White Paper 1 developed this theme even further by stating:

> The principle of *democratic governance* should increasingly be reflected in every level of the system, by the involvement in consultation and appropriate forms of decision-making of elected representatives of the main stakeholders, interest groups and roleplayers. This requires a commitment by education authorities at all levels to share all relevant information with stakeholder groups, and to treat them genuinely as partners.[971]

In practice, however, it does happen that the Department randomly and unilaterally promulgates legislative amendments and regulations with a negative effect on its partners. A case in point is the Northern Cape education department's Circular 26/2017,[972] "Management of learner admissions to public schools in the Northern

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968 Woolman *et al.* 2014:22-133.

969 White Paper on Education and Training: Education and training in a democratic South Africa GN 196 Government Gazette 15 March 1995.

970 Education White Paper 1:chapter 4, par. 10.

971 Education White Paper 1:chapter 4, par. 11.

972 Dated 14 March 2016, even though the circular number referred to 2017.

Cape for 2017". The agreed consultative process (namely that the contents of circulars would be reviewed and consulted on beforehand) was never undertaken before the document was circulated. As a result, the partners' comments and inputs were never considered. The Federation of South African School Governing Bodies (FEDSAS), being a relevant partner, eventually turned to the court to have the circular set aside.[973]

4.5 FRAMEWORK FOR COOPERATIVE GOVERNANCE

In light of the above, the following constitutional principles of cooperative governance and intergovernmental relations may be identified as the framework that binds all spheres of government as well as all organs of state in each sphere of government.

First and foremost, every sphere is expected to be loyal to South Africa and its people, which implies a commitment to securing the wellbeing of the people of South Africa.[974] Secondly, the distinctiveness of each sphere must be respected, with each sphere remaining within its constitutional powers and exercising those powers in a manner that does not encroach on the geographical, functional or institutional integrity of another.[975] Thirdly, collectively, the spheres of government should practise effective and coherent governance.[976] Fourthly, intergovernmental relations must not hamper transparent and accountable governance.[977] The processes of cooperative governance and the functioning of intergovernmental forums must not impede efforts by constituencies to hold their executives accountable for their decisions and actions. Fifthly, spheres of government must cooperate with one another in mutual trust and good faith.[978]

The *Constitution* further provides that an act of Parliament must establish or provide for "structures and institutions to promote and facilitate intergovernmental relations" and provide for "appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes".[979] Finally, the duty to avoid litigation is elaborated on, expecting organs of state to make every reasonable effort to settle intergovernmental

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973 *Federation of Governing Bodies of South African Schools v Head of Department: Department of Education, Northern Cape Province* (887/2016) [2016] ZANCHC 28 (8 July 2016):par. 58.

974 *Constitution*:sec. 41(1)(*b*).

975 *Constitution*:sec. 41(1)(*e*)-(*g*).

976 *Constitution*:sec. 41(1)(*c*).

977 *Constitution*:sec. 41(1)(*c*).

978 *Constitution*:sec. 41(1)(*h*).

979 *Constitution*:sec. 41(2).

disputes before approaching a court. This is a duty that a court may effectively enforce.[980]

4.6 *INTERGOVERNMENTAL RELATIONS FRAMEWORK ACT* (IRFA) AND THE CORE DUTIES OF COOPERATION

Parliament passed IRFA[981] in 2005 in response to section 41(2) of the *Constitution*. IRFA establishes a framework for national, provincial and local government, including the national and provincial departments of education, to facilitate intergovernmental relations and resolve intergovernmental disputes.[982] Courts and all public institutions that do not fall within the national, provincial or local spheres of government are excluded from IRFA.[983] As public institutions falling outside the sphere of national, provincial and local government, schools are not subject to the provisions of IRFA.[984]

IRFA further develops the core duties of cooperation outlined in section 41(1)(*h*) of the *Constitution*, which can be summarised as follows:

First, the *Constitution* requires that all levels of government (and their constituent organs) maintain friendly relations with one another.[985] This most basic obligation of cooperative governance – the seeking of positive relationships rather than revelling in conflictual or antagonistic relations – is the most difficult to translate into positive steps, as friendly relations refer more to attitude than actions. However, friendly relations are fostered through the other positive obligations, such as frequent face-to-face consultation and communication.[986]

Secondly, the *Constitution* imposes a duty of mutual assistance and support.[987] Being an aspect of cooperative governance, support and assistance should be a bilateral enterprise, involving the active participation of all parties.

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980 *Constitution*:sec. 41(3), (4).
981 13/2005.
982 IRFA:long title.
983 IRFA:sec. 2(2)(*c*) and (*g*).
984 *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2005 JOL 14774 (SCA):par. 19, applying *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC).
985 *Constitution*:sec. 41(1)(*h*)(i).
986 IRFA:sec. 5(b).
987 *Constitution*:sec. 41(1)(*h*)(ii); IRFA:sec. 5(e).

The third core duty, informing one another of matters of common interest,[988] is more concrete. Information must be shared with other organs of state where they may have an interest in the matter. Providing information is only one aspect of the process, however. As part of a bilateral relationship, the other party has a corresponding duty to consider the information received before taking any action.

The fourth duty, "to consult one another on matters of common interest",[989] is probably the most frequent requirement of cooperative governance and has resulted in a range of consultative structures and procedures.

Fifth is the, arguably more demanding, duty to coordinate actions and legislation.[990] This implies that organs of state should avoid unnecessary duplication and jurisdictional conflicts.[991] Coordination is the minimum level of cooperation; closer levels of coordination would include joint programmes and projects.

Finally, organs of state should avoid litigating against one another, and instead seek other means of resolving intergovernmental disputes.[992]

4.7 CONSTITUTIONAL AND INSTITUTIONAL FRAMEWORK FOR COOPERATIVE GOVERNANCE AND INTERGOVERNMENTAL RELATIONS IN EDUCATION

Over the past nearly 30 years, South Africa has established a constitutional and institutional framework that facilitates cooperation, interaction, sound and harmonious relations and the resolution of disputes between its spheres of government and state organs.[993] The *Constitution* emphasises the importance of sound relationships among the spheres of government and state organs for efficient administration[994] and service

988 *Constitution*:sec. 41(1)(*h*)(iii); IRFA:sec. 5(e).
989 *Constitution*:sec. 41(1)(*h*)(iii); IRFA:sec. 5(b).
990 *Constitution*:sec. 41(1)(*h*)(iv); IRFA:sec. 5(c).
991 IRFA:sec. 5(d).
992 *Constitution*:sec. 41(1)(*h*)(vi); IRFA:sec. 5(f)(*ii*). The mechanisms and procedures created by IRFA to facilitate the settlement of intergovernmental disputes, thereby giving effect to section 41(2)(*b*) of the *Constitution*, are discussed in chapter 5 of this dissertation.
993 Maluleke 2016:78; *Constitution*:sec. 41(1)(*h*), 41(3), 41(4).
994 Makoti & Odeku 2018:102.

delivery to communities. All are expected to make reasonable and honest efforts to resolve intergovernmental disputes before litigation is initiated.[995]

In *Member of Executive Council for Education in Gauteng Province v Governing Body of Rivonia Primary School*,[996] the court was tasked with resolving the conflict between a school governing body and the Department regarding the school's admission policy for learners. Among others, the court found that the parties should have paid more attention to constitutional principles of cooperation and partnership to find workable solutions to persistent and complex problems.

The education setting presents a number of multilateral and bilateral collaboration structures between and within the spheres of government and organs of state, as discussed below.[997]

4.7.1 Intergovernmental forums: National and provincial education departments

Various intergovernmental structures promote cooperative governance and facilitate intergovernmental relations between national and provincial government departments, including those of education. These are governed by a number of laws and policies.[998]

Under IRFA,[999] any Cabinet member, including the Minister of Basic Education, may establish a national intergovernmental forum to facilitate and promote intergovernmental relations in the functional area for which (s)he is responsible. This forum, commonly known as MINMEC (Minister and Members of the Executive Councils), must be established to:

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995 *Constitution*:sec. 41(3), (4).

996 2013 (6) SA 582 (CC):par. 68.

997 National and provincial education departments and school governing bodies.

998 Edwards 2008a:70. Some of the legislation and policies promoting intergovernmental relations in South Africa include the White Paper on Reconstruction and Development GN 1954 Government Gazette 23 November 1994, the *National Qualifications Framework Act* 67/2008, the *Housing Act* 107/1997, the *National Water Services Act* 108/1997, the Integrated and Sustainable Rural Development Strategy of 2000, the White Paper on Transforming Public Service Delivery GN 1459 Government Gazette 1 October 1997, the *National Environmental Management Act* 107/1998, the *Skills Development Act* 97/1998, the White Paper on Municipal Service Partnerships GN 1689 26 April 2000, the *Constitution*, the annual *Division of Revenue Act*, the 1998 White Paper on Local Government, the *Public Finance Management Act* 1/1999, and IRFA.

999 13/2005:sec. 9.

(a) raise matters of national interest within that functional area with provincial governments and, if appropriate, organised local government and to hear their views on those matters;

(b) consult provincial governments and, if appropriate, organised local government on –

(i) the development of national policy and legislation relating to matters affecting that functional area;

(ii) the implementation of national policy and legislation with respect to that functional area;

(iii) the co-ordination and alignment within that functional area of –

(aa) strategic and performance plans; and

(bb) priorities, objectives and strategies across national, provincial and local governments; and

(iv) any other matters of strategic importance within the functional area that affect the interests of other governments; and

(c) to discuss performance in the provision of services in order to detect failures and to initiate preventive or corrective action when necessary.[1000]

Some structures established as part of MINMEC[1001] also assist in the formulation of intergovernmental line function policies and strategies (which may help the spheres of government formulate their own policies), the transfer of information, the allocation and utilisation of financial resources, the execution of policies and strategies, the alignment of legislation and programmes, and consultation about national minimum standards in joint projects.[1002]

The *National Education Policy Act*[1003] (NEPA), too, establishes an intergovernmental forum in the form of the Council of Education Ministers (CEM). The composition of the CEM is very similar to that of the forum contemplated in section 9 of IRFA.[1004] The CEM has indeed been established, and its functions are to:

(a) promote a national education policy which takes full account of the policies of the government, the principles contained in section 4, the education interests and

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1000 Section 11.

1001 The Budget Council, established and regulated by the *Intergovernmental Fiscal Relations Act* 97/, and the Committee for Environmental Coordination and the National Environmental Advisory Forum, established in terms of the *National Environmental Management Act* 107/1998.

1002 Malan 2005:233; Maluleke 2016:27.

1003 27/1996:sec. 9.

1004 NEPA:sec. 9(1): "(1) There is hereby established a council, called the Council of Education Ministers, consisting of – (a) the Minister, who shall be the chairperson; (b) the Deputy Minister of Education, if such Deputy Minister is appointed, who in the absence of the Minister shall be designated by the Minister as chairperson; and (c) every provincial political head of education."

needs of the provinces, and the respective competence of Parliament and the provincial legislatures in terms of section 146 of the Constitution;

(b) share information and views on all aspects of education in the Republic; and

(c) co-ordinate action on matters of mutual interest to the national and provincial governments.[1005]

The CEM provides a platform for some form of cooperative governance to take place, even though its scope is significantly smaller than that of MINMEC in terms of IRFA.

4.7.2 Public schools as organs of state

IRFA's failure to provide for school governing bodies raised the question of whether public schools are state organs subject to the principle of cooperative governance.[1006] Shortly after Parliament adopted IRFA, the Supreme Court of Appeal ruled in *Minister of Education (Western Cape) v Mikro Primary School Governing Body*[1007] that the provisions of section 41 of the *Constitution* were not applicable to disputes involving school governing bodies, as the latter were not subject to executive control in determining their schools' language and admission policies. This merely added to the confusion.

In the cases discussed below, the Constitutional Court clarified matters by declaring that schools, through their governing bodies, are indeed state organs, which are subject to the principles of cooperative governance.[1008] According to section 239 of the *Constitution*, a state organ is:

(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 provincial constitution; *or*

(ii) exercising a public power or performing a public function in terms of any legislation.[1009]

1005 NEPA:sec. 9(4).
1006 Du Plessis 2019:80.
1007 2005 JOL 14774 (SCA).
1008 Du Plessis 2019:80.
1009 Own emphasis added.

In *Head of Department, Department of Education, Free State Province v Welkom High School*,[1010] the Constitutional Court confirmed public schools' status as state organs by saying:

> The school governing bodies and [provincial] HOD are organs of state. In terms of section 41(1)(h) [of the *Constitution*] they have an unequivocal obligation to co-operate with each other in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-ordinating their actions, and avoiding legal proceedings against one another.

Both the school (as an institution and a juristic person) and the governing body (as a functionary) exercise a public power, and therefore, are bound by chapter 3 of the *Constitution* as organs of state, despite having been omitted from IRFA.[1011] In the cooperative relationship, schools and their governing bodies should enjoy equal respect as organs of state with their own constitutional and legislative rights. In this regard, an adaptation of the principles in IRFA should be considered to serve as a guideline for the relationship between all education partners, including school governing bodies.[1012]

4.7.3 Intergovernmental forums: National and provincial education departments and school governing bodies

Since school governing bodies were omitted from IRFA, different forums have been set up in an effort to facilitate formal negotiations, discussion and interaction between the education departments and *bona fide* organisations representing the governing bodies of public schools in South Africa. These forums include the National Consultative Forum (NCF) and the Provincial Consultative Forum (PCF).

The non-political and non-statutory NCF was established in 1999 following deliberations between FEDSAS[1013] and the then Minister of Education. The forum comprises the Minister of Basic Education, the Director-General and senior officials of the Department as well as representatives of school governing body organisations. Similar forums have since been established in all nine provinces. The PCFs consist of the particular province's Head of Department, departmental officials and provincial

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1010 [2013] ZACC 25 (CC):par. 141.

1011 Du Plessis 2019:80.

1012 A set of proposed guidelines is presented in chapter 7 of this dissertation.

1013 A voluntary association of school governing bodies in South Africa, as contemplated in the *Schools Act.*

representatives of school governing body organisations. Note, however, that these forums are non-statutory bodies that were established informally and therefore that there is a need for a structured and statutory platform for dialogue and collaboration between various stakeholders.[1014]

The founding document of the NCF[1015] reads as follows:

> WHEREAS the Ministry of Education of the Republic of South Africa is desirous of establishing a forum to facilitate formal negotiations, discussion and interaction between itself and *bona fide* organisations representing governing bodies of public schools in the Republic of South Africa at a national level;
>
> AND WHEREAS the said Ministry seeks, by establishment of such a forum, to promote communication with such organisations concerning national educational issues affecting the interests of public schools, in general, and the governance of public schools, in particular, in pursuance of the notion of partnership in education between the State and stakeholders in public schools, as represented by such governing bodies; …

All matters of mutual interest, matters affecting stakeholders in public schools as well as matters affecting the interests of public schools in general and the governance of public schools in particular may be submitted to the NCF. Any matter that falls within the sole competency of a provincial legislature by virtue of prevailing laws or the *Constitution* must be submitted to the relevant PCF.

4.8 RELEVANCE OF COOPERATIVE GOVERNANCE TO THE EDUCATION SECTOR AND PUBLIC SCHOOLS

The *Constitution*, through section 29, grants every citizen the right to a basic education and requires government to respect, protect, promote and fulfil this right.[1016] The state has an enormous responsibility to ensure social justice in and through education, being a vital part of meaningful human existence.

Beckmann[1017] emphasises the difficulty of providing high-quality education to all, given the large scale of the task, and the impossibility of the state doing so alone. To alleviate

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1014 NEPA:sec. 11 does provide for a statutory advisory body called the National Education and Training Council (NETC). This provision, however, is subject to the Minister's discretion. Interestingly, section 11 has been amended by the *Education Laws Amendment Act* 31/2007. Initially, the section compelled the Minister to establish such a body, but has now been formulated as an option available to the Minister. Although the NETC was established in 2009, it has never been populated.

1015 Department of Education 1999: *s.p.*

1016 *Constitution*:sec. 7.

1017 2006:182.

the burden on the state, the *Constitution*[1018] provides, among others, for the establishment of supporting organisations or institutions and the distribution of responsibilities.[1019] Accordingly, basic education has been designated as a concurrent functional area for which provincial and national governments share responsibility, while adhering to the principles of cooperative governance in exercising their respective education authority.[1020] Indeed, as confirmed by the Constitutional Court in *Certification* case,[1021] cooperative governance is implicit in any system where powers are shared across levels of government. The *Schools Act*, in turn, proposes a partnership between the state, parents, educators and learners regarding the funding, governance and organisation of schools, which has resulted in the creation of public school governing bodies.[1022] Therefore, by devolving powers and responsibilities, the state ensures "the achievement of social justice in education at a macro level by providing schools under provincial authorities and at a micro level by exercising the statutory powers of SGBs [school governing bodies]".[1023]

In *Schoonbee v MEC for Education, Mpumalanga*,[1024] the court regarded the "new" system of cooperative governance as a shift away from a dispensation where schools were completely dependent on the state's assistance, to one where greater responsibility and accountability could be assumed.[1025] In *Christian Education South Africa v Minister of Education*,[1026] it was also described as a radical break with South Africa's history of authoritarianism.

To understand the levels of decentralisation and school autonomy in the South African education system, with particular reference to the relationship between the education departments and school governing bodies, the background to decentralisation in education as well as decentralisation and local decision-making authority are explored next.

1018 108/1996.
1019 *Constitution*:sec. 104.
1020 *Constitution*:sec. 40(2).
1021 1996 (4) SA 744 (CC):paras. 287-290.
1022 Serfontein 2010:94.
1023 Visser 2003:340.
1024 2002 (4) SA 877 (T).
1025 Serfontein 2010:94.
1026 2000 (4) SA 757 (CC).

4.8.1 Background to decentralisation in education in South Africa

Decentralisation has been a key element of modernisation[1027] and has had a significant impact on all sectors of government, including education.[1028] The trend towards decentralisation post-apartheid has coincided with the promotion of democratic principles and stakeholder participation in the education system.[1029]

To make the education process more democratic, Sayed[1030] argues that all sectors and stakeholders need to be involved in the decision-making process and governance structures at local school level, and that accountability, legitimacy and democracy should be ensured through increased local representation. These principles can be found in the preamble to the *Schools Act*, which states that the South African school system ought to promote partners' acceptance of responsibility for school organisation, governance and funding. NEPA[1031] also stresses the importance of broad public participation in the development of education policies and ensuring stakeholder representation in all areas of the education system.

The *Constitution* regulates the exercise of government authority in harmony with the goal of decentralisation.[1032] Organs of state involved in an intergovernmental dispute are also compelled to exhaust all other remedies before they turn to the courts for assistance.[1033] Nevertheless, in the past decade, the Constitutional Court has had to preside over a number of significant cases dealing with the distribution of powers between education authorities and school governing bodies.[1034] This seems to corroborate Weiler's[1035] argument that "decentralizing the making and implementing of educational policy has profound consequences for the … state, especially its ability to deal with the dual problems of policy conflict and erosion of its own legitimacy".

1027 Dyer & Rose 2005:105; Phatlane 2021:59-86.
1028 Karlsen 2000:525; Phatlane 2021:59-86.
1029 Du Plessis 2019:73.
1030 1997:722.
1031 Section 4(m).
1032 Malherbe 2006:238; Phatlane 2021:59-86.
1033 *Constitution*:sec. 41(3).
1034 Du Plessis 2019:74.
1035 Weiler 1990:435.

4.8.2 Decentralisation and local decision-making authority

Decentralisation causes a shift in the location of those who govern.[1036] It entails transferring authority, responsibilities and tasks from higher levels of management to lower levels of management, or from one organisation to another,[1037] redistributing political power, resources and functions.[1038] As such, it is closely related to concepts such as deregulation, de-concentration, delegation, de-bureaucratisation and independence.[1039] In education, it involves the devolution of certain responsibilities to local schools and communities,[1040] thereby not only restructuring the state, but also listening to its people.[1041] By granting schools more autonomy, decentralisation has been hailed as a way to empower them.[1042]

Sayed[1043] argues that decentralisation redistributes, shares and extends power and enhances participation in education decision-making. Bimber,[1044] too, emphasises decision-making authority as central to the decentralisation process:

> Decision-making authority is the crux of decentralisation. To decentralise is to shift authority for the making of decisions downward from the topmost levels, or centre, of a hierarchy toward the bottom, or local levels. Most ideas associated with decentralising, such as streamlining hierarchy, creating initiative, and increasing control by workers, can be reduced to the problem of determining who has the authority to make which decisions.[1045]

Karlsen,[1046] in turn, describes decentralisation as a changed locus of authority over the formal rights to make education decisions.

As per section 16(1) of the *Schools Act*, public schools are governed by their school governing bodies. In Maile's[1047] view, school governance is the act of defining the policies and procedures by which a school is organised and controlled, and ensuring that such policies and rules are carried out legally and effectively. However, governing

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1036 Dyer & Rose 2005:105; Phatlane 2021:59-86.
1037 Hanson 1998:112.
1038 Dyer & Rose 2005:105.
1039 Karlsen 2000:526; Nompumelelo 2015:20.
1040 Fullan & Watson 2000:453.
1041 Makara 2018:23.
1042 Robinson 2015:471.
1043 2002:37.
1044 1993:7.
1045 Bimber 1993:7.
1046 2000:526.
1047 2002:326.

bodies' discretionary decision-making powers at the local level are limited by law.[1048] Dworkin explains the notion of discretionary decision-making[1049] as follows:

> The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority. Discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, 'Discretion under which standards?' or 'Discretion as to which authority?'. Generally, the context will make the answer to this plain, but in some cases the official will have discretion from one standpoint, though not from another.[1050]

Karlsen[1051] cautions that a shift in authority from the central to the local level, and *vice versa,* usually leads to tensions, "not only between central and local bodies, but also among various institutions and groups at the central and local levels". Often, decentralisation results in increased oversight by central administrative staff.[1052] Nevertheless, this does not mean that accountability in a decentralised system can only be enforced by those closer to the core;[1053] the periphery[1054] also has the right to criticise the state and hold the state accountable.[1055]

4.9 SOUTH AFRICA'S JURISPRUDENCE ON COOPERATIVE GOVERNANCE IN EDUCATION

NEPA[1056] provides that the Minister of Basic Education should ensure broad public participation in the advancement of education by including all stakeholders in education policymaking and governance. The *Schools Act*,[1057] in turn, envisages a partnership between three education stakeholders[1058] concerning school funding, governance and organisation. The details of this partnership were clarified by the court in *Head of Mpumalanga Department of Education v Hoërskool Ermelo* (hereinafter *Ermelo*),[1059] who described the three crucial partners as:

1048 Du Plessis 2019:75.
1049 Decision-making power or autonomy.
1050 Dworkin 1978:31.
1051 2000:526.
1052 Robinson 2015:471.
1053 National and provincial levels.
1054 Local levels.
1055 Makara 2018:24.
1056 Section 4(m).
1057 Preamble.
1058 *Schoonbee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T):883D/E.
1059 2010 (3) BCLR 177 (CC):par. 56.

- the national government, represented by the Minister of Basic Education;
- the provincial governments, who act through the respective MECs for Education, together with the provincial Heads of Department; and
- the school governing body, which represents the parents of learners at the school and members of the community in which the school is located, and is "democratically composed and is intended to function in a democratic manner".[1060]

The same notion was emphasised in *Head of Department, Department of Education, Free State Province v Welkom High School* (hereinafter *Welkom*),[1061] where the Constitutional Court concluded that public schools are run by "a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant HOD and MEC, and the Minister,"[1062] which makes it a partnership involving "state, parents of learners and members of the community in which the school is located".[1063] This kind of partnership requires democratic participation and proper debate with all stakeholders before decisions are made.[1064]

The full impact of both *Ermelo* and *Welkom* is discussed in chapter 5, which examines the challenges and failures that impede the constitutional imperative of cooperative governance in education. The following paragraphs, however, are dedicated to the matter of *MEC for Education, Gauteng Province v Governing Body of Rivonia Primary School* (hereinafter *Rivonia*),[1065] which helped shape the principles of cooperative governance in education, including clarifying the respective roles of the national and provincial education departments and school governing bodies.

1060 *Ermelo*:par. 57.
1061 2013 (9) BCLR 989 (CC).
1062 *Welkom*:par. 36.
1063 *Welkom*:par. 49.
1064 *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 (3) SA 504 (C); *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).
1065 2013 (6) SA 582 (CC).

4.9.1 The *Rivonia* matter

4.9.1.1 *Summary of the facts and main arguments*

A central issue in *Rivonia* was the division of powers between the school governing body and the provincial education department. The matter involved a learner who had been waitlisted after being told that the school was full. Having interacted with the school several times, the learner's parent appealed to the Head of Department (HOD). Due to various administrative delays, the school year had already started by the time that the HOD became aware of the problem. By then, 124 students had already been admitted to five Grade 1 classes, contrary to the school's policy of admitting 120. Each Grade 1 class had 24 to 25 learners. Nevertheless, the HOD was of the view that the learner should be admitted. The school's decision to deny the learner admission was overturned and the school was instructed to admit her immediately.

When arriving at the school in full uniform, however, the learner was refused admission by the principal. Within days, the Gauteng HOD allegedly withdrew the principal's admission function, and departmental representatives placed the learner in one of the school's Grade 1 classes, where she sat at an empty desk designed for a student with attention and learning difficulties.

This dispute over the school's maximum capacity led the school governing body to take the matter to court, arguing that the governing body had sole power to determine the school's maximum capacity.[1066] The high court rejected the claim, holding that the Department had the authority to determine the maximum capacity of a public school in Gauteng. Where children faced the risk of being deprived of schooling, the court said, the Department had the power to intervene and provide them with access. According to the court, the Department acted fairly and reasonably.[1067]

The Supreme Court of Appeal, however, reversed the high court's decision. The court held that the governing body's admission power necessarily included the power to determine the school's capacity, and that the HOD's powers had to be exercised in accordance with the school's admission policy. It also found that the Department could

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1066 *Rivonia*:par. 17.

1067 *Rivonia*:par. 18.

not make use of any additional capacity at Rivonia Primary, as such additional capacity had been created through additional funds raised by the Rivonia governing body: "It would be a disincentive for parents to contribute to school funds if the increased capacity created by these funds could be used to accommodate more learners than the Rivonia Governing Body wanted to admit."[1068] Ultimately, the HOD's instruction to the principal to admit the learner contrary to the school's admission policy as well as the Department's subsequent placement of the student at the school were declared unlawful.

4.9.1.2 *Constitutional Court ruling*[1069]

Having been defeated in the Supreme Court of Appeal, the Gauteng MEC for Education appealed to the Constitutional Court, who found[1070] that the provincial education department retained responsibility for admissions,[1071] although the school governing body had the power to determine the school's capacity.[1072] In this respect, therefore, the Constitutional Court overruled the SCA by finding that the HOD had the authority to instruct the principal of a public school to admit a student in excess of the capacity limit in the school's admission policy.[1073]

However, to override an admissions decision, the Department should have acted in a reasonable and procedurally fair manner in accordance with the *Promotion of Administrative Justice Act* (PAJA).[1074] The duty of procedural fairness would have included providing the principal with an opportunity to respond on issues such as the impact of the learner's proposed admission on the quality of education provided to other learners at the school, how the learner could access resources, and how much time might be required to accommodate the learner.[1075] Considering the time lag between the principal's initial supply of reasons for rejecting the learner's application for admission and the HOD's intervention in terms of the Gauteng regulations almost

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1068 *Rivonia*:par. 49.

1069 This case followed in the wake of two other Constitutional Court judgments, *Ermelo* and *Welkom*, where it was found that the parties had failed to engage with each other in good faith, to uphold the principles of cooperative governance, and to comply with their concomitant duty to avoid litigation.

1070 As per Mhlantla AJ, as she was then.

1071 In terms of both the *Schools Act* and provincial education regulations.

1072 *Rivonia*:paras. 35-45.

1073 *Rivonia*:par. 81, order 3(a).

1074 3/2000. *Rivonia*:paras. 48-68.

1075 *Rivonia*:par. 64.

three months later, when the new school year had already started, this duty was particularly pressing.[1076] In addition, since the principal's tenth-day admission statistics were already available at the time of the intervention, he ought to have been given a hearing in order to address the Department about the interpretation of these statistics, and the implications of the actions contemplated in light thereof.[1077] This legitimate expectation of a hearing prior to the intervention meant that the intervention violated procedural fairness.[1078] Lastly, the Constitutional Court was also not convinced that the consultations held between the Department and the school during the previous school year satisfied the procedural fairness requirements. Following those consultations, the departmental officials appeared to support the school's position that the learner would need to be waitlisted; in fact, the district director indicated his willingness to assist with alternative placements for the learner, if her parents agreed.[1079] To the school, who had been under the impression that the matter was resolved, the Department's actions in February of the following year came as "a rude shock".[1080]

In addition to the duty of procedural fairness, the court held that "the partnership and cooperation framework" envisioned in the *Schools Act* also created a duty of collaboration to resolve systemic capacity constraints in public schools.[1081] To protect learners' interests and guarantee basic education, the rule of thumb is for conflicts between school governing bodies and national or provincial governments to be resolved through cooperation.[1082] In its majority judgment, the court highlighted that engagement between all stakeholders was critical to realising the right to education[1083] and guaranteeing enough school places against the backdrop of systemic capacity issues in public schools. Therefore, when a government department requires a school to admit learners beyond the limits stated in the school's admission policy, all parties have a duty of "proper engagement".[1084] By referring to the main and concurring

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1076 Liebenberg 2016:31. A clear example of how cooperative government complicates decision making and causes school leadership and management problems and could obstruct the realisation of learners' educational interests (and, consequently delay the achievement of social justice).

1077 *Rivonia*:par. 65.

1078 *Rivonia*:par. 68.

1079 *Rivonia*:par. 66.

1080 *Rivonia*:par. 67.

1081 *Rivonia*:par. 69.

1082 *Rivonia*:par. 69.

1083 *Rivonia*:paras. 70-71.

1084 *Rivonia*:par. 72.

judgments in *Welkom*, the court emphasised the purpose and importance of good-faith engagement in disputes.[1085] In the majority's view, the HOD's actions undermined the engagement that had taken place in the previous school year and represented a high-handed, unilateral intervention that disregarded the partnership model of school governance established by the *Schools Act*.[1086]

Yet the court also criticised the governing body's reaction, resorting to litigation to safeguard its authority rather than putting the learner's interests first. While it would not have been unduly burdensome to admit one additional student, the governing body opted to seek not only declaratory relief regarding its own powers, but also requested that the learner be placed in another primary school until Rivonia Primary was able to accommodate her.[1087] According to the court, the duty to cooperate to reach an amicable settlement was intimately related to the child's best interests.[1088] The young, vulnerable learner could likely have been traumatised by this dispute. Cooperative governance, therefore, is not just a tool to ensure smooth intergovernmental relations, but also to protect citizens.[1089] Rather than approaching the court with every dispute, a united effort should be made to find workable solutions to complex structural problems in the education system that affect learners' constitutional rights.[1090]

4.9.1.3 *Commentary on the judgment*

Commentators have hailed the Constitutional Court's majority judgment as innovative, an important precedent, and based on a value-based approach to statutory interpretation as mandated by section 39 of the *Constitution*, which calls for the promotion of "values that underlie an open and democratic society based on human dignity, equality and freedom".[1091] The ruling is said to encompass both the ideal and practice of cooperative governance outlined in chapter 3 of the *Constitution* and the requirement of procedural fairness outlined in section 33.[1092] It has left no room for doubt that cooperative governance is, at its core, premised on negotiation and

1085 *Rivonia*:paras. 72-73.
1086 *Rivonia*:par. 75.
1087 *Rivonia*:par. 76; Liebenberg 2016:32.
1088 *Rivonia*:par. 77.
1089 *Rivonia*:par. 77.
1090 *Rivonia*:par. 78.
1091 Devenish 2015:504.
1092 Devenish 2015:504.

compromise, which should be used continually and consistently to resolve difficult disputes.[1093] While this does not preclude using the courts to adjudicate, approaching the court should be the very last resort.

Moreover, the *Rivonia* judgment has shown that cooperative governance does not only apply to government spheres' interaction with one another.[1094] Ultimately, chapter 3 of the *Constitution*[1095] states that "[a]ll spheres of government must … *conduct their activities* within the parameters that the Chapter provides".[1096] This implies that cooperative governance also applies to the way in which each individual sphere of government interacts with stakeholders, public institutions and public officials.[1097] Clearly, therefore, the principle of cooperative governance is not limited to intragovernmental relationships, but equally applies to the relationship between education departments (in this instance, the Gauteng department) and school governing bodies (in this instance, that of Rivonia Primary).[1098]

The court further explained that if the main driver behind *Rivonia* was a power struggle between the governing body and the Department, rather than an honest effort to foster a "partnership to meet the educational needs of children",[1099] all stakeholders failed in their duty. The idea of partnership is also intrinsic to the provisions of the *Schools Act*, which "are carefully crafted to strike a balance between the duties of the various partners in ensuring an effective education system".[1100] This partnership should not be a mere formality; instead, stakeholders' efforts should live up to both the letter and spirit of the principle of cooperative governance, and should not be thrown off by an initial impasse.[1101] A very determined effort must be made by all stakeholders to engage in good faith to ensure that any deadlock is resolved. This will necessarily require both flexibility and perseverance, as is evident from the court's finding that "the Gauteng HOD was required to go further in the circumstances of the case".[1102]

1093 Devenish 2015:504.
1094 Devenish 2015:504.
1095 Section 40.
1096 Own emphasis added.
1097 Devenish 2015:504.
1098 Devenish 2015:504.
1099 *Rivonia*:par. 2.
1100 *Welkom*:par. 36.
1101 Devenish 2015:504.
1102 *Rivonia*:par. 62.

4.10 COOPERATIVE GOVERNANCE AND ITS PARTNERSHIP PRINCIPLES

As stated before, Education White Paper 1 requires the state's involvement in school governance to be based on cooperative governance and participative management.[1103] Additionally, Education White Paper 2[1104] makes clear that "public school governance is part of the country's new structure of democratic governance". As stated in the preamble to the *Schools Act* and confirmed by the courts time and again,[1105] this requires a true partnership between the spheres of government and state organs; between the state, all learners, parents and educators.

According to the *Good Practices in Educational Partnerships Guide*,[1106] any true partnership in the education setting complies with ten basic, universal principles.[1107] These principles should also be applied to the partnership between the national and provincial education departments and school governing bodies, working towards their aim of achieving social justice in and through education. A brief discussion of the ten principles and their relevance to the partnership between the education stakeholders in South Africa follows below.

4.10.1 Shared ownership of the partnership

This principle requires that the goals and expectations of all parties involved in the education partnership be set out clearly. A clear and explicit focus on the best interests of the child must be maintained, as well as a shared understanding of the role of education in achieving social justice. This also includes understanding everyone's responsibilities in protecting, promoting and fulfilling the rights of the people enshrined in the *Constitution*. Extensive discussions between partners must take place before decisions are made. Efforts must be made to gain mutual insight into the various partners' expectations. No decision regarding another partner may be made without first consulting such other partner. Partners must participate jointly in every decision-

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1103 White Paper on Education and Training: Education and training in a democratic South Africa GN 196 Government Gazette 15 March 1995:70.

1104 The Organisation, Governance and Funding of Schools GN 130 Government Gazette 14 February 1996:18.

1105 Including in *Rivonia, Welkom* and *Ermelo*.

1106 Wanni *et al.* 2010. The document was the product of a United Kingdom-Africa partnership that researched a range of socioeconomic and other issues, including higher and continuing education.

1107 Wanni *et al.* 2010:33.

making process and must listen to one another's concerns, suggestions and needs.[1108]

With reference to the partnership between the education departments and school governing bodies, this would require that the parties meet on a regular basis to discuss their goals and expectations regarding social justice. This, in turn, would imply that the necessary structures for such meetings need to be in place.[1109]

Furthermore, the *Schools Act* contains clear provisions with regard to the various partners' roles. Therefore, any and all expectations of compliance by the partners would be justified. In practice, this means that the Department cannot make decisions that could drastically affect the realisation of social justice in schools without discussing it with the representative bodies in advance. Yet it often happens that the Department issues amendments and regulations with a detrimental effect on its partners, without any prior consultation.[1110]

4.10.2 Trust and transparency among partners

Partners should have frank and transparent discussions about partnership goals, the rationale for specific actions within the partnership, issues of management and governance, access to resources, and budgeting.[1111] In terms of the partnership between the Department and the school community, all parties have a duty to be honest with one another at all times.

In *Governing Body, Hoërskool Overvaal v Head of Department of Education, Gauteng Province*,[1112] the Gauteng education department attempted to place 55 learners at Overvaal High School with the expectation that the learners be taught in English, knowing full well that Overvaal uses Afrikaans as its medium of instruction. The school had no capacity to receive the learners, let alone effectively convert into a dual-medium school overnight. It is regrettable that the Gauteng department failed to consult with the governing body and consider the school's resources. This damaged

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1108 Wanni *et al.* 2010:34-35; Maluleke 2016:91-97.

1109 See 4.7 above for a discussion on the available structures in the South African setting.

1110 *Federation of Governing Bodies of South African Schools v Head of Department: Department of Education, Northern Cape Province and Others* (887/2016) [2016] ZANCHC 28 (8 July 2016).

1111 Wanni *et al.* 2010:36-37; Maluleke 2016:28.

1112 [2018] 2 All SA 157 (GP).

relationships and broke trust, both of which are necessary elements for establishing real collaboration and ensuring social justice and quality education.

The Department must remain transparent with schools regarding available resources and their distribution. In practice, though, education departments often send out circulars, without any discussion, indicating that they do not have the available capacity (whether financial or otherwise) to meet their obligation of allocating resources in terms of the *Schools Act.*[1113] This normally catches schools off guard and overthrows their budgets, having to provide the resources themselves. Schools in quintiles 1 to 3, who have no other income, are fully dependent on departmental support to cover all school expenses. If that support is not forthcoming, these schools are left without water, electricity and often even the most basic stationery. These failures by education departments are not only a threat to quality education, but are a direct violation of children's basic right to education.[1114]

4.10.3 Understanding each partner's cultural and working environment

Partners must understand one another's context and what they can realistically expect of one another. Establishing a baseline of capacity for all partners is essential for planning and managing expectations. Insufficient knowledge of a partner's context may result in an overestimation of capacity or an underestimation of time, thus slowing down and limiting the scope of the partnership.[1115]

This is equally true for the education context. The Department must understand that South African schools are diverse and that a one-size-fits-all approach will not necessarily contribute to the realisation of social justice in every school. There are functional and dysfunctional schools, which implies that there are functional and dysfunctional governing bodies. The Department regularly tries to address all schools' frustrations with one set of rules, while the mere existence of a single set of rules is often the source of the frustration.[1116] Schools, in turn, need to understand and

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1113 Van der Merwe 2012:97.

1114 In the 2022 school year, the Eastern Cape education department failed to deliver teaching and learning support materials, including textbooks and stationery, to schools on time. Through a circular dated 12 January 2022, they informed schools that textbooks would only be delivered in May of that year, citing an unprecedented budget shortfall as the reason. Govender 2022:s.p.

1115 Wanni *et al.* 2010:38-39; Maluleke 2016:28.

1116 Van der Merwe 2012:98.

appreciate the Department's circumstances, including that there may be a shortage of human resources and expertise,[1117] and that the Department has the responsibility to ensure equality and non-discrimination.

4.10.4 Clear division of roles and responsibilities

Each partner's roles and responsibilities should be clearly defined based on their abilities and skills, and agreed upon. In some cases, certain partners may have to undergo training to ensure that they fulfil their roles in the partnership optimally. A system must also be put in place through which partners can hold one another accountable for the fulfilment of their respective roles.[1118]

The *Schools Act* and other education legislation[1119] largely solve this problem by setting out the roles of the different stakeholders. However, a problem arises when partners do not know or understand the law, or proceed to act outside the established framework and encroach on others' terrains despite being familiar with the law.[1120] Moreover, most school governing bodies have illiterate parents among their members, whose role is undervalued.[1121] Heads of Department often also neglects their duty under section 19 of the *School Act* to provide training for governing bodies to enable them to carry out their responsibilities.[1122] This kind of failure has devastating consequences: It perpetuates social injustice and violates dignity.

Finally, the fact that the staff component of the governing body's membership are in some instance employed by the Department may lead to an imbalance of power in the relationship.[1123] Partners should regard one another as equals.[1124]

1117 In her 2020 budget speech, the Minister of Basic Education acknowledged that the provision of education resources and the readiness and ability of civil servants to implement policies and legislation effectively were obstacles to the improvement of the learning and education environment.

1118 Wanni *et al.* 2010:40-41; Serfontein & De Waal 2015b:2332.

1119 Other legislation includes the *Employment of Educators Act* 76/1998, NEPA, the National Admission Policy for Ordinary Public Schools GN 2432 Government Gazette 19 October 1998, and the National Policy on HIV/Aids for Learners and Educators GN 1926 Government 10 August 1999.

1120 Van der Merwe 2012:99; Maluleke *et al.* 2017:41.

1121 Kruger *et al.* 2022:318.

1122 Kruger *et al.* 2022:321.

1123 *Employment of Educators Act*:sec. 6(3).

1124 In chapter 5 of this dissertation, specific cases where partners have acted outside their power and refuse to acknowledge one another as equals are discussed.

4.10.5 Effective and regular communication

Monitoring and strengthening a partnership requires communication and dialogue. Regular, effective communication between partners must be maintained to ensure a smooth flow of information and to see to it that all challenges and problems are reported, that partners understand one another's perspectives, and that partners' results are communicated to all. Of course, sound communication is also necessary to build trust.[1125]

The importance of this principle for the South African education partnership cannot be overstated. The necessary structures for communication, such as the NCF and PCFs referred to earlier, are available; it is up to the partners to optimally utilise them. Many court cases could have been avoided had there been effective communication between the partners involved.[1126]

4.10.6 Joint strategic planning and implementation

Partnership success depends on sustainable strategic planning and implementation. Problems and challenges that need addressing must be identified. In larger partnerships, it may be helpful to set up a representative committee to refine strategic planning and harness all parties' expertise.[1127] In a partnership context, strategic planning means:

- reaching consensus on partnership goals;
- deciding on the desired results for each goal;
- developing an action plan for the partnership;
- establishing realistic timeframes for the various phases of the plan;
- agreeing on project management and delivery; and

1125 Wanni *et al.* 2010:42-44; Maluleke *et al.* 2017:44.
1126 Van der Merwe 2012:99; Maluleke *et al.* 2017:44.
1127 Wanni *et al.* 2010:45.

- choosing a partnership framework, which may be a memorandum of understanding or informal agreement.[1128]

The objectives of the partnership should be reviewed regularly, and the partners need to communicate their frustrations and difficulties in achieving their goals. Why do partners not meet certain deadlines? Why are certain results not achieved? What can one partner do to ease another's burden? These are the kind of questions that the national and provincial education departments and school governing bodies should ask one another.[1129] At the same time, partners must keep in mind that they are all pursuing the same goal, namely the realisation of social justice in education, which must be reflected in strategic planning.

The Department's latest five-year strategic plan covers the planning horizon 2020 to 2024.[1130] It sets out six outcomes as priority focuses up to 2024. One of these is to "[c]ommunicate information to, and partner with, relevant stakeholders in better ways". Moreover, one of the Department's action plan goals is to "[i]mprove parent and community participation in the governance of schools", while a ministerial priority is to "[s]trengthen partnerships with all stakeholders".[1131] In the plan, the Department also declares "[c]o-operating with one another and with our partners in education in an open and supportive way" as one of its values.

4.10.7 Strong commitment from both management and staff

A partnership can put pressure on the various partners on multiple levels. Therefore, its long-term success depends on strong commitment. There must be interest in the partnership for it to be sustained and to effect long-term change. This requires senior management commitment. At the same time, however, a partnership cannot be decided from the top down without the support from other employees. A group of dedicated individuals with the necessary expertise and time are needed to ensure the

1128 Wanni *et al.* 2010:45.
1129 Van der Merwe 2012:100; Maluleke *et al.* 2017:44.
1130 Department of Education 2020.
1131 Department of Education 2020:47.

partnership's success.[1132] This also implies that education officials and office-bearers, including the Minister, must be readily accessible and engaged.[1133]

4.10.8 Supportive institutional infrastructure

Having a keen interest in and commitment to the partnership is not enough to guarantee success. For partnerships to be successful, educational institutions must create a supportive environment. It is imperative for partners to work together to ensure that all stakeholders have sufficient time, skills and capacity to achieve the partnership's objectives. To identify these needs, the parties must discuss them in a transparent manner. Some individuals in the institution may lack the skills required for a particular task or aim in the partnership. In such a case, training programmes could be arranged to improve and transfer skills. Having a support structure helps address resource and skills imbalances in the partnership.[1134]

This principle is equally essential for a sound partnership between the Department and school governing bodies. Education is a specialised area, and if departmental officials lack sufficient knowledge of education practices and the law, this could jeopardise the pursuit of social justice in education. Likewise, governing bodies should be properly trained for their task. Section 19 of the *Schools Act* compels the Head of Department to develop a programme to introduce newly elected governing bodies to their functions. Governing bodies must also receive continuous training to facilitate the ongoing efficient performance of their functions.

In addition to the imperative considerations for successful partnerships between educational institutions and government departments, the matter of legal offices in the various departments also needs attention. The role of legal offices in advising officials who make critical decisions, often acting *ultra vires*, is crucial. These legal advisors play a pivotal role in ensuring that the actions taken by departmental officials align with legal frameworks and regulations. A comprehensive understanding of education practices and laws is essential for departmental officials to pursue social justice in education effectively. The legal offices should provide guidance to officials, helping

1132 Wanni *et al.* 2010:51.
1133 Van der Merwe 2012:101.
1134 Wanni *et al.* 2010:55-57; Maluleke 2016:196.

them navigate the complex legal landscape and make decisions that are not only aligned with the law but also contribute to the overarching goals of the educational system.

Similarly, it is imperative for SGBs to consult with legal experts to ensure that their proposed actions comply with relevant laws, regulations, and educational policies. This proactive approach ensures that their decisions align with the legal framework governing schools. Regular access to legal counsel and continuous training on legal aspects, facilitated through enrolment with SGB associations, can enable governing bodies to make informed and legally sound decisions, contributing to the effective and lawful governance of schools.

4.10.9 Monitoring and evaluation

A successful partnership requires monitoring and evaluation to measure progress and identify obstacles. Monitoring and evaluation also ensures that overall partnership goals remain aligned. As part of good management practice, monitoring should be an ongoing process that is carried out regularly. Success indicators must be determined jointly and applied periodically. Good partnerships continue to evolve, and leaders should evaluate the partnership regularly and identify new opportunities for collaboration. Partners should discuss the mechanisms for monitoring and evaluation to ensure that they are practical, clear and appropriate.[1135]

The partnership between the Department and school governing bodies is unique in that the partners change frequently,[1136] and the one partner – the Department – is, to a certain extent, in a position of authority in relation to the other. Ultimately, principals, who also serve on the governing body, are departmental employees, and governing body members are bound by regulations issued by the Minister, as the political head of the Department. This power imbalance is also reflected in the provision for monitoring and evaluation. The *Schools Act* prescribes procedures according to which governing bodies are to be monitored and evaluated. Under section 25, for instance,

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1135 Wanni *et al.* 2010:58-60; Makoti & Odeku 2021:46.

1136 *Schools Act*:sec. 31 stipulates that the term of office of a member of a governing body, other than a learner member, may not exceed three years. Therefore, governing body elections take place, and new members are elected, triennially. It also frequently happens that provincial departmental officials do not complete their terms. In the Eastern Cape, for example, there has been no Head of Department who completed their full five-year term.

a Head of Department may withdraw a governing body's functions if it is established on reasonable grounds that the governing body has ceased to perform the functions it was assigned by law. However, the only way for a governing body to hold the Department accountable for the performance of its duties is through appropriate legal action, which is both time-consuming and costly.[1137] As a result, governing bodies have no real measures to protect them against abuse of departmental power, particularly at the district level.

On 23 December 2011, the Minister of Basic Education published the *National Education Evaluation and Development Unit (NEEDU) Bill* for comment.[1138] In terms of the bill, NEEDU is a juristic person with legal capacity. Among others, the body is expected to point out those factors that prevent or promote school development, study the influence of historical and social factors on education, evaluate the support that schools, school governing bodies, professional managers and educators receive from districts and provincial and national departments, and assess the current status of South African schools. The unit must also make proposals regarding the correction of shortcomings in education, eliminating barriers to quality education, implementing good practice, and improving provincial and national departments' support offering to school governing bodies, professional managers and educators.[1139]

NEEDU comprises persons involved in school education, members of organisations involved in school education as well as members of the public and should go some way towards filling the current gap in measures available to school governing bodies to hold the Department to account. However, twelve years later, the NEEDU Bill is yet to be enacted by Parliament, leaving governing bodies with only legal avenues to follow if the Department or its officials do not fulfil their role as partners.[1140]

4.10.10 Sustainability

A partnership without a sustainable resourcing plan is doomed to fail, no matter how religiously all of the other principles are applied. How many resources will be required to run the partnership sustainably will depend on the objectives and activities agreed

1137 Van der Merwe 2012:102.
1138 Government Gazette 23 December 2011.
1139 Van der Merwe 2012:102.
1140 Van der Merwe 2012:102.

among the partners. In determining these, it is important to be realistic about the resources available and not to exceed any one partner's capabilities. A resource imbalance and a lack of opportunities to overcome it may necessitate a scaling down in activities or an extension in the allocated time, which could cause frustration among partners.[1141] Again, communication is key.

4.11 THE RELATIONSHIP BETWEEN COOPERATIVE GOVERNANCE AND THE REALISATION OF SOCIAL JUSTICE IN EDUCATION

As discussed in chapter 3 above, the *Constitution*[1142] states social justice as one of the cornerstones of the society it seeks to establish – the equal enjoyment of all rights and freedoms, reflected in the fair, just and equitable distribution of all opportunities, benefits, privileges and burdens. Social justice also acknowledges the need for fair institutions and institutional frameworks to address all forms of inequality. Among those who share the responsibility to achieve a socially just South African society are those involved in education and its governance, including the national and provincial departments of education as well as school governing bodies. Although this is a concurrent function of the education departments and governing bodies, each partner has their own, exclusive functions and powers to govern, manage and deliver equal education opportunities for learners within the context of cooperative governance.

In South Africa, cooperative governance is a system of government that determines and guides how the various spheres of government and state organs should work together in delivering services – including education – to the nation. As enshrined in the *Constitution*, cooperative governance determines the powers and authorities that are conferred on the spheres of government and state organs, which, in turn, determine the nature of policies, regulations and strategic objectives each can develop. Additionally, cooperative governance defines the specific roles and responsibilities of each party, as well as the nature of their relationship.[1143] Government's service delivery through its departments and state organs is affected by the plans developed by such departments and state organs based on their respective constitutional and legislative powers and authorities, and by the nature of the

1141 Wanni *et al.* 2010:61.
1142 Preamble.
1143 Maluleke 2016:223.

relationship (coordination, cooperation and consultation) between them.[1144] All of this takes place in a context of cooperative governance, which implies that the spheres of government and state organs are distinct yet interdependent and interrelated.[1145] Thus, cooperative governance is a conduit for service delivery (including the delivery of equal education opportunities) and, ultimately, the achievement of social justice, and the manner in which this system of government is understood, interpreted and implemented affects how services (including education services) are delivered.[1146]

As this chapter has shown, cooperative governance in the South African education sector leaves room for improvement. From the examples and cases described above, it appears that the Department often disregards the partnership relationship and enacts legislation or regulations without properly consulting school governing bodies. The high volume of case law also indicates that governing bodies fail to engage the Department in good faith and to fulfil their duty to avoid litigation.[1147]

With this as backdrop, chapter 5 proceeds with a critical discussion of the failures and challenges that inhibit the realisation of the constitutional imperative of cooperative governance in education, and their impact on the realisation of social justice.

1144 Maluleke 2016:223.
1145 *Constitution*:sec. 40(1).
1146 Maluleke 2016:223-224.
1147 *Constitution*:sec. 41.

CHAPTER 5: FAILURES AND CHALLENGES THAT INHIBIT THE REALISATION OF THE CONSTITUTIONAL IMPERATIVE OF COOPERATIVE GOVERNANCE IN EDUCATION

5.1 INTRODUCTION

As discussed in chapter 4, cooperative governance and intergovernmental relations in South Africa are based on a constitutional concept in which the spheres of government[1148] and organs of state are interdependent, remaining aware that, for the government to function effectively, it must function as a cohesive whole.[1149] The principles of intergovernmental relations and cooperative governance contained in chapter 3 of the *Constitution* imply that the spheres are distinctive yet interrelated and interdependent. It is imperative for the spheres of government and state organs to cooperate, while respecting one another's status, power and functions, fostering friendly relations, assisting and supporting one another, educating and consulting on common interests, coordinating actions and legislation, adhering to the agreed procedures, and avoiding legal proceedings against one another.[1150]

In the education setting, therefore, it is vital that school governing bodies and the education departments fully understand one another's legal powers and responsibilities, trust in one another's ability to make sound, objective and timely decisions, consult with one another, and refrain from infringing on one another's territory.[1151] It is the responsibility of public schools, along with the education departments, to provide a high-quality public education in an equitable manner. For this to happen, all partners need to follow the principles and requirements of cooperative governance and intergovernmental relations.

It should be re-iterated that the aim of this study and chapter is not to assign blame and determine who is ultimately responsible for the lack of social justice and lack of cooperation, but to highlight some of the most important instances of conduct of SGBs and PDEs. Both parties played a role in social injustice and lack of proper cooperation

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1148 National, provincial and local.

1149 *Constitution*:sec. 40(1). See also 4.3.2 under chapter 4 of this dissertation.

1150 *Constitution:*sec. 41(1)(*e*), (*h*) and 41(1)(*h*)(i)-(vi).

1151 Visser 2006:365.

at some point in the past which influenced the relational dimension of social justice, which is the focus of this study.

Unfortunately, practical experience in the education sector does not seem to point to effective cooperation. Common challenges that frequently inhibit the realisation of the constitutional imperative of cooperative governance are:

- overreach and abuse of administrative power;
- tension relating to power and authority;
- failure to consult and meaningfully engage;
- deficient intergovernmental structures and mechanisms for dispute resolution; and
- immoral and unethical leadership.

In discussing these challenges, this chapter firstly explores the expectations generated by the constitutional principles of cooperative governance. A review of relevant case law then provides an overview of the challenges, constitutional challenge-based interventions, continued acceptance of the cooperative governance principles, and the successes and frustrations in pursuit of equal education. Finally, the impact of the challenges and failures on the realisation of social justice is evaluated.

5.2 OVERREACH AND ABUSE OF ADMINISTRATIVE POWER

Importantly, the establishment of school governing bodies represents a significant decentralisation of power in the South African education system. Even though such decentralisation may well increase democratic participation in school governance, however, this is not necessarily the case. Du Plessis argues that in order to assert themselves to a greater extent in a decentralised regime, the state and its functionaries frequently overreach and abuse administrative power,[1152] thus preventing the implementation of democratic principles and the philosophy of the state-parent partnership.[1153] Serfontein,[1154] in turn, asserts that parents feel as if government does

[1152] *Schoonbee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T); *Governing Body, Hoërskool Overvaal v Head of Department of Education Gauteng Province* (86367/2017) [2018] ZAGPPHC 258 (12 February 2018).

[1153] Du Plessis 2019:72.

[1154] Serfontein 2010:100.

not truly value their partnership. Parents' concern about this has been pointed out by the Constitutional Court in the several disputes between school governing bodies and education authorities it has had to adjudicate. In *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng*,[1155] the Constitutional Court stated:

> The Schools Act carves out an important role for parents and other stakeholders in the governance of public schools. School governing bodies are made up in a democratic and participatory manner and ordinarily would advance the legitimate interests of learners at a school. The Constitution and the Schools Act also entrust vital tasks related to the education of our children to the MEC and HOD. In the past, this Court has correctly cautioned against undue dominance of school governing bodies by the Provincial Executive. We have called for cooperative governance between statutory creatures – school governing bodies and the MEC and HOD – entrusted with effective and universal access to basic education.

In the paragraphs that follow, reference is made to the concept of overreach to discuss abuses of administrative power by education authorities. A brief description of the rule of law is provided, as well as a discussion of where legislative and administrative authority lies in education in terms of the *Constitution* and other laws. After examining a few seminal cases relating to the distribution and exercise of power,[1156] the possible implications of overreach for the realisation of social justice in education are considered.

5.2.1 Principle of cooperative governance: The rule of law

The rule of law is a fundamental component of cooperative governance. As discussed in chapter 4, section 41(1)(*d*) of the *Constitution* stipulates that all spheres of government, as well as all organs of state within each sphere, must be loyal to the *Constitution* and the people of South Africa,[1157] which has been interpreted in line with the *Constitution*'s commitment to legality and the rule of law.[1158]

1155 2016 (4) SA 546 (CC).

1156 This dissertation focuses on cases that illustrate power issues relating to the appointment of educators, school governing bodies' powers relating to such appointments, as well as financial accountability and school policies.

1157 See 4.4.1 under chapter 4.

1158 It is important to note that the majority of cases in which cooperative governance principles were invoked did not involve disputes between different levels of government or government organs. In most of these cases involved private parties suing a government agency.

In its simplest form, the rule of law can be described as the principle that no one is above the law. In explaining the concept, Mogoeng[1159] states that public power cannot be exercised without compliance with the *Constitution*, being South Africa's supreme law, and with the doctrine of legality, which forms part of that law. The exercise of public power is regulated through the doctrine of legality, which is incidental to the rule of law. Therefore, both the legislative and executive branches are subject to the principle that they can only exercise those powers and perform those functions conferred on them by law. As such, by enshrining the principle of legality, the *Constitution* provides the basis for the control of public power.[1160]

Rautenbach introduces the distinction between formal and substantive legality.[1161] Formal legality pertains to the limitation on legislatures and executive branches from exercising powers beyond those authorized by law. On the other hand, substantive legality emphasizes that, even when government authority adheres to legal rules, the content of actions must meet specific requirements to align with the principle of substantive legality.

As the Constitutional Court explained in *Rivonia*,[1162] a government official or functionary has certain powers in terms of the *Schools Act* or other legislation to intervene in a governing body's policymaking processes if this is considered necessary. However, such intervention must always occur within the limits of the power conferred. Interventions that exceed such powers will be considered *ultra vires*. In *Welkom*,[1163] too, Khampede J underlined this as a critical aspect of the rule of law. An organ of state may not simply use any means to achieve what may turn out to be a correct outcome. The rule of law always requires proper legal process.

Any discussion on the principle of legality would be incomplete without reference to administrative justice. Section 33 of the *Constitution* guarantees every person's right to be treated fairly and lawfully in administrative proceedings and has been given effect

1159 Mogoeng 2013:s.p.
1160 Mogoeng 2013:s.p.
1161 Rautenbach 2012: 9.
1162 2013 (6) SA 582 (CC).
1163 2014 (2) SA 228 (CC).

to by the *Promotion of Administrative Justice Act* (PAJA).[1164] PAJA extends the right to fair administrative action and provides remedies to defend it.[1165]

The right to fair administrative action comprises the three basic principles of legality, reasonableness and procedural fairness. As stated above, the principle of legality implies that a public official may only act in accordance with the law.[1166] When the Department or the school governing body takes action, one first needs to determine whether the Department (or departmental official) or the governing body (member) concerned has the right to do so.[1167] This is because all these stakeholders are creatures of statute.[1168]

In defining the second requirement for fair administrative action – reasonableness or rationality – section 6(2)(*h*) of PAJA states that an action is unreasonable if it could not have been undertaken by a reasonable person. According to section 6(2)(*f*), action will also be considered rational if it is rationally related to the purpose for which the action was performed, the purpose for which the authorising provision was invoked, the information available to the administrator, or the reasons given by the administrator for performing the action. The court in *The Pharmaceutical Manufacturers Association of SA: In re: ex Parte President of the Republic of South Africa*[1169] also elaborated on this principle. Executive and other functionaries cannot exercise public power arbitrarily. Decisions must be rationally related to the purpose for which they were issued, otherwise they would appear arbitrary. It follows, then, that any exercise of public power by the executive or other government official must, at the very least, comply with this reasonableness or rationality requirement to pass constitutional scrutiny.

The third requirement – procedural fairness – embodies the principles of natural justice, namely the *nemo iudex in sua causa* rule as well as the *audi alteram partem* rule.[1170] Applying the natural justice principles, an individual has the right to participate in decisions that will affect them. Such participation implies the opportunity to influence

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1164 3/2000.
1165 Currie & De Waal 2016:647-648; Van der Merwe 2012:121-122; Burns & Beukes 2006:6.
1166 Dlamini 2000:707; Burns & Beukes 2006:175.
1167 Colditz 2003.
1168 Van der Merwe 2012:122.
1169 2000 (2) SA 674 (CC).
1170 Currie & De Waal 2016:663.

the content and outcome of the decision.[1171] *Audi alteram partem* requires that any person adversely affected by a decision be given the opportunity to state their case, whether before the decision is made to obtain a favourable outcome, or afterwards to bring about change, or both.[1172] *Nemo iudex in sua causa* principle, in turn, requires decisions to be made in an impartial manner.[1173] Impartiality means not having any personal, financial or political motives.[1174]

Several court rulings have highlighted the obligation to adhere to the rule of law in the relationship between school governing bodies and the national and provincial education departments. A few examples follow below.

5.2.2 Cases involving overreach and abuse of administrative power in the education sphere

5.2.2.1 *Schoonbee v MEC for Education, Mpumalanga*

In the matter of *Schoonbee v MEC for Education, Mpumalanga* (hereinafter *Schoonbee*),[1175] the Mpumalanga Head of Department (hereinafter HOD) exercised unlawful power, believing he had the authority to challenge a school principal, being an accounting officer, regarding matters pertaining to school funds (which, in terms of the *Schools Act*, fall within the governing body's jurisdiction). The matter also dealt with the exercise of statutory executive power.

In short, the MEC for Education in Mpumalanga had requested the provincial auditor-general to conduct a forensic audit of Ermelo High School. The auditor-general issued a management letter to the school on 3 September 2001, in which the school was asked to respond by 15 October 2001. On 25 September, however, the HOD insisted that the principal of the school demonstrate good cause why he should not be suspended. The governing body responded to the auditor-general's letter on 15 October, as required, and the final forensic report was made available to the HOD on

1171 Dlamini 2000:713; Burns & Beukes 2006:318.
1172 *Doody v Secretary of State for the Home Department and Other Appeals* 1993 3 All ER 92 (HL):par. 106d-h; Burns & Beukes 2006:321-330.
1173 Currie & De Waal 2016:663.
1174 Van der Merwe 2012:123; Dlamini 2000:715; Burns & Beukes 2006:302-307.
1175 2002 (4) SA 877 (T).

11 December. Both the principal and deputy principal were suspended by the HOD and the governing body was dissolved the very next day.[1176]

In his judgment, Moseneke J[1177] revisited the well-established test for evaluating administrative actions applied by the South African courts. Elements of the test include the following:

- The action must comply with the law, meaning that the official taking the action must consider any material procedure or requirement prescribed by law.
- Administrative action should be procedurally fair.
- An erroneous interpretation or application of the law should not undermine the action.
- In making an administrative decision, the official should not be influenced by factors other than those relevant to the decision. There should be no regard or consideration for any ulterior purpose, motive or irrelevant consideration. The official must act in a rational and honest manner, rather than arbitrarily or capriciously.
- An administrative action must be accompanied by a reason.
- The intended administrative action must be disclosed to the affected parties in a timely manner so that they have the opportunity to make any appropriate representations.[1178]

Upon reviewing the HOD's actions, the court concluded that the suspension of the deputy principal was not justified and that the principal's suspension resulted from a misappreciation of the principal's dual role as an *ex officio* governing body member as well as a departmental employee.[1179] Accordingly, the HOD could not hold the principal and deputy principal responsible for the governing body's statutory obligations. Additionally, the court found:

1176 *Schoonbee*:par. 1.

1177 *Schoonbee*:paras. 7-8.

1178 PAJA 3/2000 gives effect to the right to administrative action that is lawful, reasonable and procedurally fair.

1179 In terms of *Schools Act:*sec. 23 and *Employment of Educators Act*:sec. 3 respectively. Beckmann & Prinsloo 2006:487.

> no proportionality between the acts or conduct of the SGB [school governing body] which in the view of the second respondent [the HOD] compelled him to take certain administrative action … and the administrative action which was actually taken; the action of the wielder of power [the HOD] in dissolving the SGB is disproportionate to the conduct which was intended to be corrected or the result aimed at.[1180]

The HOD was also criticised for having failed to afford the governing body even the smallest chance to respond to the intended action.[1181]

The court set aside the two suspensions and the dissolution of the governing body and ordered the MEC and HOD to pay the applicant's costs on a party-by-party basis rather than on an attorney-by-client basis. According to the judge, the Department's action had undermined efforts to establish a constitutional state that is characterised by, among others, rationality, reasonableness, fairness and transparency.[1182]

As outlined in the *Schools Act,*[1183] a school governing board must open and maintain a bank account to manage and administer a school fund. Although he is an *ex officio* member of the governing body, the principal *is not* the governing body, and therefore, the HOD was wrong to expect the principal to account for the management of the school fund. Section 19(2) of the *Schools Act* may be said to obscure the exact location of power somewhat, providing that the HOD must ensure that principals and other officials of the education department provide all necessary assistance to governing bodies in performing their functions in accordance with the act.[1184] The court provided welcome clarity, ruling that a careful examination of the provisions of the *Schools Act*, which were by no means exhaustive or complete, revealed no specific duty entrusted to or vested in the principal with regard to assets, liabilities, property or financial management. In the court's view, the principal was entrusted with the responsibility of facilitating, supporting and assisting the governing board in fulfilling its statutory duties regarding the assets, liabilities, property and financial management of the school, and was also someone to whom specific elements of the governing body's duties may be delegated. Under either of these interpretations, the principal would be accountable to the governing body, and not the Department. Generally, the governing body is

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1180 *Schoonbee*:par. 8.

1181 Beckmann & Prinsloo 2006:487; Prinsloo 2016:5-7.

1182 Prinsloo 2016:5-7; Beckmann & Prinsloo 2006:487.

1183 Section 37(3).

1184 Beckmann & Prinsloo 2006:487.

responsible for calling principals to account for financial and property matters that are not expressly entrusted to them.[1185]

As part of his evaluation of the conduct of those wielding statutory executive power, Moseneke J also gave the following interpretation of the term 'overreach':

> In a society such as ours where we seek to create a constitutional State, rationality, reasonableness, fairness and openness are very important considerations in evaluating the conduct of wielders of statutory executive power when under judicial review. One would readily find these principles in the Promotion of Administrative Justice Act 3 of 2000. Such administrative actions have to be supported by reasons. The intended administrative action has to be disclosed timeously to the affected party to allow him or her to make such representation as he or she may find to be appropriate. Failure to do so by an official acting within the ambit of a statute, wielding power entrusted to him in advancement of one or other public purpose, is fatal to that administrative act. These statutory injunctions must be observed and failure to do so of necessity leads to abortive administrative action.[1186]

According to chapter 3 of the *Constitution*, all spheres of government are expected to uphold the rule of law and to refrain from assuming powers or functions beyond those conferred on them by law.[1187] This is crucial to achieve cooperative governance.

5.2.2.2 *Governing Body, Hoërskool Overvaal v Head of Department of Education, Gauteng Province*

In *Governing Body, Hoërskool Overvaal v Head of Department of Education, Gauteng Province* (hereinafter *Overvaal*),[1188] the governing body of the school concerned filed an urgent application with the Gauteng high court for the review and setting aside of an instruction that the district director of the Sedibeng East district of the Gauteng education department had issued for the admission of 55 English-speaking Grade 8 learners with effect from 17 January 2018. The governing body argued that the school, an Afrikaans-medium institution, had already exceeded its capacity and that neighbouring English-medium schools were capable of accommodating the learners. In addition, the governing body considered the instruction to admit the learners to be procedurally flawed and illegal, and in violation of the school's admission and language

1185 *Schoonbee*:par. 8.
1186 *Schoonbee*:par. 8.
1187 See 4.4.1 and 4.4.3 under chapter 4 of this dissertation.
1188 (86367/2017) [2018] ZAGPPHC 258.

policies. The court ultimately declared null and void the district director's instruction.[1189]

In reaching its decision, the court considered sections 5 and 6 of the *Schools Act*, which empower the governing bodies of public schools to determine their schools' admission and language policies. Moreover, departmental officials and functionaries must exercise their powers and duties according to the national admission regulations and other laws, subject to the legality principle, and since such exercise of powers and duties constitutes administrative action, it is also subject to review in terms of PAJA. The *Gauteng School Education Act*[1190] also stipulates that a public school's language policy must be determined by the governing body, who must submit a copy of the policy to the MEC within 90 days of the governing body assuming office. Should the governing body's policy violate legislation or the principles of the *Constitution*, the MEC, having consulted the governing body, may direct them to amend the policy.[1191]

The court agreed with the governing body that the school was indeed full, and held that the district director was not authorised to alter the school's language policy unilaterally. In doing so, the court said, the district director (and possibly also the HOD and MEC) had violated constitutional legality principles.

The district director's actions presented a number of grounds for review in accordance with section 6 of PAJA. In particular, the Gauteng education department failed to consider the school's ability to accommodate additional learners; the empowering provisions of the *Schools Act* did not permit the district director's actions; irrelevant considerations were taken into account, while relevant ones were disregarded, and the district director's actions were not rationally related to the purpose for which they were taken.[1192]

For their failure to adhere to the principles of cooperative governance, the rule of law and just administrative action, the HOD and district director were ordered to pay the governing body's costs. The court motivated the cost order by criticising the manner in which the respondents chose to litigate, for example by failing to respond to letters

1189 *Overvaal*:157-158.
1190 6/1995.
1191 *Overvaal*:158.
1192 *Overvaal*:180-181.

and bona fide suggestions, and putting fellow state organs – with whom they were supposed to be in a cooperative relationship – under unreasonable and undue pressure.[1193]

5.2.3 Personal liability of officials

Unfortunately, most judgments against the state are brought too late and too far removed from the individuals who engaged in the wrongdoing to have any effect on them. In most cases, damages are paid from state coffers, and there is no mechanism for internal liability.[1194] Although the state is frequently found to be in the wrong, very few cost orders (if any, at least in the education setting) have been issued directly against civil servants to date. The state ends up paying damages even where the officials were aware of their wrongful conduct.[1195]

In *Coetzeestroom Estate and GM Co. v Registrar of Deeds*,[1196] the court established that a *de bonis propriis*[1197] order would be appropriate where an official acted in mala fide, unreasonably, or demonstrated gross negligence. In other words, a cost order *de bonis propriis* would be justified in the event of a material deviation from official responsibilities. In *Coetzee v The National Commissioner of Police*,[1198] for instance, a *de bonis propriis* order was granted against police officers who had made unlawful arrests. The court noted the following regarding the public servants' actions:

> Government officials who act with impunity cannot simply and should not be allowed to do what they please, and thereafter be exonerated from their actions because of the fact that the relevant government institution is held responsible for payment of damages and the costs caused by their unlawful actions.[1199]

A *de bonis propriis* cost order may also be granted for actions that result in unnecessary litigation or unnecessary costs, and that are unreasonable, reckless or dishonest. It is proposed that the introduction of a punishment cost order against

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1193 *Overvaal*:181.

1194 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

1195 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

1196 *Coetzeestroom Estate and GM Co. v Registrar of Deeds* 1902 TS 216.

1197 Loosely translated as "out of one's own pocket", meaning a judgment against an administrator or executor that must be paid out of the administrator or executor's own funds.

1198 (70259/09) 2010 ZAGPPHC 155; 2011 (1) SACR 132 (GNP); 2011 (2) SA 227 (GNP) (11 Oct 2010).

1199 *Coetzee v The National Commissioner of Police*:par. 66.

education officials who act unlawfully would encourage fair administrative action, which, in turn, would advance social justice.[1200]

5.2.4 Impact of overreach and abuse of administrative power on the realisation of social justice in education

The values enshrined in the *Constitution*, especially section 1(c), which articulates the supremacy of the *Constitution* and the rule of law as founding values of South Africa, will not be easily achieved if overreach and abuse of administrative power by education and other government officials persists.[1201] Even only a cursory analysis of the two cases discussed above already indicates that children's rights are undermined, if not violated, when officials abuse their administrative power and commit overreach.

Overvaal is a stark illustration of the adverse effects of overreach and abuse of power. The instruction to admit additional learners would have resulted in the school exceeding its capacity. Overcrowding in schools and classrooms has been shown to hamper student learning in a number of ways.[1202] It adversely affects learners' concentration and puts a strain on essential learning resources. In most instances, overcrowded schools are forced to use non-classroom facilities such as the school hall or the media centre as classrooms. Some even have to make do with the outdoors if there are no other facilities are available. Generally, these spaces are not equipped with whiteboards, desks or other resources required for effective teaching. Overcrowded classrooms, where learners are in closer proximity to one another, also pose too many distractions from learning, while higher teacher-to-learner ratios negatively affect the quality of education – a crucial factor for achieving social justice.

In an update on the *Basic Education Laws Amendment Bill*[1203] (BELAB) submitted to Parliament, the Parliamentary Portfolio Committee on Education stated that BELAB sought to provide for "system improvements in terms of admission of learners to public schools".[1204] Clause 4(d) proposes amending section 5(5) of the *Schools Act* by introducing a provision that seeks to limit the governing body's power to determine the

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1200 Van der Merwe 2012:155.

1201 Beckmann & Prinsloo 2006:495.

1202 See 3.4.3.2 under chapter 3 of this dissertation.

1203 B2/2022. An explanatory summary and a prior notice of the introduction of BELAB were published by way of GN 705 Government Gazette 6 December 2021.

1204 Parliament of RSA 2023:5.

school's admission policy. In essence, the new proposed section 5(5)(*a*) of the *Schools Act* states that the HOD, having consulted with the governing body, would have the "final authority" to admit a learner to a public school. This proposed amendment is not a mere "system improvement". In fact, it is out of keeping with the scheme contained in the *Schools Act* and unduly limits the governing body's ability to serve their school and community as best they can. The governing body is best placed to be able to determine admission policy: They know the area, the school's budget and the community's needs, and they are aware of the various interrelated factors to be considered in planning and governing these aspects. The governing body's power to formulate admission policy is not unfettered either. Sections 5(5), 6(1) and 58C of the *Schools Act* provides for reasonable and proportional oversight functions by the HOD and MEC.

Ironically, most admission disputes between governing bodies and provincial education departments have little to do with the school's admission policy. Conflicts typically arise when schools are asked to admit additional learners when this is not financially and/or administratively feasible for the school or there simply is no more space available. As a result, the central point of contention is whether the school has the capacity to accept additional learners. Given the cooperative governance model envisaged in the *Constitution*, it is imperative that national and provincial education departments and school governing bodies are given clear directions on the determination of school capacity.

Schoonbee, in turn, resulted from tension between the governing body and the provincial education department, which created conditions that would have impeded quality learning and teaching. Had the education department succeeded in removing the principal and deputy principal, the learners would have lost the services of experienced teachers.[1205] This action went against the very nature of a partnership and disregarded the interests of the learners enrolled at the public school. As explained in chapter 3, the basic right to education ought to be of a good quality, which means that it should be available, accessible, adaptable and acceptable.[1206] The

[1205] Beckmann & Prinsloo 2006:495; Prinsloo 2016:5-7.

[1206] See 3.3.3.2 under chapter 3.

curriculum and school environment must maintain a high standard of teaching and learning. If not, social justice will not be achieved.

In addition, the provincial department's actions could have had another, more subtle yet even more destructive consequence, namely that of sowing uncertainty as to how secure educators' appointments are, being exposed to capricious actions and a legitimate perception of unfair treatment.[1207]

5.3 TENSION RELATING TO POWER AND AUTHORITY

Cooperation between spheres of government can only succeed if there is a clear understanding of the object and manner of cooperation. This would reduce the likelihood of governments and organs of state working at cross-purposes instead of side by side. Furthermore, the success of the pursuit of social justice in education depends on interaction, cooperation and interdependence between the spheres of government, and the various combinations and permutations of this relationship.

Yet cooperation remains a challenge. It is influenced by the dynamics of bureaucracy, the interplay of politics, and the way in which, and the degree to which, officials in government and school governing bodies understand the concept of cooperative governance.[1208]

The sections below discuss the tensions relating to power and authority in the education context against the backdrop of government spheres' and state organs' shared responsibility and their duty to pursue a common outcome, being a key principle of cooperative governance. The authority-related challenges in prioritising the delivery of education are considered, along with their impact on the realisation of social justice.

5.3.1 Principle of cooperative governance: Shared responsibility and the pursuit of an agreed upon outcome

Under cooperative governance, all spheres of government are expected to collaborate in order to strengthen and improve the delivery of government services (including

1207 Beckmann & Prinsloo 2006:495.
1208 Maluleke *et al.* 2017:43.

education).[1209] Thus, the government spheres need to perform their respective roles in the context of shared responsibility, which calls for synergy.[1210] Synergy would imply coordinating and aligning policies to ensure efficient and effective service provision. In this regard, it is essential for all spheres of government to realise that they do not only share a responsibility to deliver education, but that they also need one another to do so effectively and successfully. This means that they have a duty to ensure that their policies and activities are properly coordinated and aligned.[1211]

The national and provincial governments share the responsibility for education delivery.[1212] While the national department is responsible for formulating policies and determining regulatory frameworks, including the setting of standards and norms, the provinces are called on to implement those policies in order to realise their intended impact on society, as schools and learners are provincially controlled.[1213] The provinces are also responsible for controlling the resources required to implement national policies.

As a result, close cooperation and consultation between the two is critical. Meeting expectations would depend on the nature of the relationship between the national and provincial spheres, the extent to which they collaborate and align their activities, and how well cooperative governance is understood and implemented in practice.[1214] Often, the apparent discrepancy between the national legislative intention and subsequent provincial implementation can be attributed to different understandings and interpretations of concurrent and cooperative governance provisions.[1215]

The different spheres' shared responsibility determines how they should relate to one another, approach their respective roles, and address any challenges they may face when fulfilling the education mandate on an individual and collective basis.[1216] To

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1209 *Constitution:*sec. 41(1)(*h*)(v).
1210 *Constitution*:sec. 41(1)(*c*).
1211 Maluleke 2016:92.
1212 *Constitution*:sec. 7(2), which stipulates that the state is required to respect, protect, promote and fulfil the rights guaranteed by the Bill of Rights, which include the right to education.
1213 Layman 2003:8.
1214 Maluleke 2016:92.
1215 Maluleke 2016:93.
1216 Maluleke 2016:93.

ensure successful education delivery, therefore, the spheres of government should complement one another and encourage synergies between them. [1217]

However, practical implementation of this imperative presents a number of challenges, as the following paragraphs illustrate.

5.3.2 Challenges relating to power and authority

Since the national and provincial departments share powers in the area of policy and lawmaking, and provinces have autonomy in determining education delivery, tensions and confusion regarding the ultimate authority to determine education priorities do arise.[1218] Education is the responsibility and accountability of the national Minister of Education, and all institutions involved in education delivery are expected to follow and implement a shared set of priorities and directives. At the same time, though, most provinces also have their own targets to meet, as determined by their Premiers, who report to the President, and not the Minister of Education.[1219]

As Maluleke[1220] rightly argues, the tension resulting from the parallel determination of education priorities by the two spheres of government raises serious questions about their purported consultations. Among others, these consultations should be facilitating consensus regarding the priorities in the education system. In addition, as most of the provinces are affiliated with the ruling party, their political mandates and manifestos are similar, which should also facilitate sound collaboration.

Nevertheless, conflict often arises from provinces' insistence that they are entitled to make and administer decisions without undue interference from the national department, based on the fact that the Premier's office may issue instructions that differ from those issued by the Minister.[1221] In most instances, the Premier, being the

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1217 Maluleke 2016:92.

1218 As part of the cooperative governance system, the provincial education departments have the authority to make autonomous decisions regarding education delivery and are provided with the benefits of (a) taking and implementing decisions in matters allocated to the provinces by the *Constitution* without undue interference by the national department, (b) respect for their institutional integrity, including their constitutional and political structures and government departments, and (c) respect for their territorial integrity.

1219 Maluleke *et al.* 2017: 48.

1220 Maluleke 2016:136.

1221 Maluleke *et al.* 2017:48.

provincial party-political chair, wields more political power than the Minister.[1222] Therefore, it should not surprise when certain national priorities are not implemented at provincial level. Politically, the Premier's instruction is considered more important than the Minister's, and therefore, is given priority in terms of implementation.[1223]

The operational challenges and tensions that result from this dual management of education delivery, policymaking and the setting of priorities adversely affect the rigour of education delivery. Additionally, the dichotomy between national and provincial education systems, each of which has exclusive powers to make education policy decisions, creates yet another dimension that needs to be accounted for and reported on. This 'split' regime makes collaboration between the spheres of government essential for the education system to function effectively and efficiently.[1224]

As outlined in chapter 4, the principle of decentralisation encourages departments to work collaboratively, align and coordinate their activities and priorities, and consult with one another on matters of common concern to avoid working at cross-purposes. However, collaboration between the different spheres of government does not always adhere to the principles of cooperative governance.[1225]

5.3.3 Impact of the challenges on the realisation of social justice in education

From the discussion above, it is clear that provincial departmental officials are often required to serve two 'masters', each with their own authority and powers. This presents them with a problem of divided loyalty, frequently ending up choosing to follow the orders of the MEC or HOD at the expense of national projects and programmes. The result may be the non-delivery of certain functions,[1226] resulting in

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1222 Maluleke *et al.* 2017:48.

1223 Maluleke *et al.* 2017:48. The national department, for example, would set up a medium-term expenditure framework, for example 2020-2024, stating its priorities. Yet some national priorities may not be implemented at the provincial level, since the provinces would be expected to follow the Premier's instructions.

1224 Maluleke *et al.* 2017:48.

1225 Maluleke *et al.* 2017:48.

1226 Maluleke 2016: 114. "The lack of this understanding affects us quite drastically… for instance the DBE constitutionally doesn't have the direct mandate to deliver in schools … it has got an oversight function .. so the extent to which the provinces are not working is the extent to which it will affect the DBE.

frustration among national officials, who realise that they have limited authority to compel their provincial counterparts to comply.[1227]

The basic principles of partnership[1228] include joint strategic planning and implementation, and monitoring and evaluation of partner functions to measure progress and identify obstacles. Both partners should ensure that the overall goals of the partnership (in this instance, quality education and social justice) remain aligned and that all stakeholders remain on track in pursuing those goals. However, although the national education department relies on the provinces to implement its mandate, it has no authority to enforce compliance and efficiency on the provinces' part.[1229] As a result, there is no accountability. Moving further down the line, education is delivered by schools, which are also under provincial departments' management and control. Therefore, if not addressed sensibly, the issue of power and authority will continue to impede service delivery by compromising accountability, reporting, monitoring and evaluation.[1230] This will see both the general performance of the education sector and the quality of education provided to the nation adversely affected, rendering social justice in education an unattainable goal.

5.4 FAILURE TO CONSULT AND MEANINGFULLY ENGAGE

Fose v Minister of Safety and Security[1231] is a prime example of how the Constitutional Court encourages the South African judiciary to craft remedial tools that will effectively vindicate constitutional rights. Courts have a responsibility to formulate effective remedies when it is established that constitutional rights have been violated, particularly in an environment where "so few have the means to enforce their rights through the courts".[1232]

The need for remedial innovation is especially acute against the backdrop of the complex set of education rights[1233] that are at issue in school governance disputes. These disputes have highlighted the tensions between redressing the legacy of

1227 Maluleke *et al.* 2017:43.
1228 As discussed under 4.10 in chapter 4.
1229 Maluleke *et al.* 2017:43.
1230 Maluleke *et al.* 2017:44.
1231 1997 (3) SA 786 (CC).
1232 *Fose v Minister of Safety and Security*:par. 69.
1233 Enshrined in section 29 of the *Constitution*.

apartheid education on the one hand[1234] and respecting the integrity of local school governance on the other.[1235]

The three key education rights judgments in *Ermelo*,[1236] *Welkom*[1237] and *Rivonia*[1238] stemmed from challenges brought by school governing bodies against provincial HODs who had intervened respectively in the schools' language, pregnancy and admission policies. In resolving these disputes, the Constitutional Court stressed the importance of engagement and cooperation between the parties.[1239] Meaningful engagement and consultation in these contexts may facilitate decisions, rules and laws that benefit all and provide innovative ways to address constitutional infringements of education rights.[1240]

The following paragraphs assess the value of consultation and meaningful engagement in decision-making and the enactment of legislation, and as a constitutional remedy in dispute resolution. Selected court judgments and the provisions of IRFA are then evaluated in light of these principles, concluding with an examination of how meaningful engagement contributes to the achievement of social justice in education.

5.4.1 Principle of cooperative governance: Consultation and meaningful engagement

Arguably the most basic tenet of cooperative governance is the duty to inform and consult one another on matters of mutual interest.[1241]

1234 Schools in former 'white' and 'black' areas experience stark disparities in education resources and access. See Spaull 2013b.

1235 Liebenberg 2016:3.

1236 2010 (2) SA 415 (CC).

1237 2014 (2) SA 228 (CC).

1238 2013 (6) SA 582 (CC). Almost three months after *Welkom*, the Constitutional Court handed down the *Rivonia* judgment. As this case was discussed in detail in chapter 4, only the most important aspects are highlighted here.

1239 Meaningful engagement was pioneered in eviction disputes involving section 26 of the *Constitution*. See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC); *Pheko v Ekhurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC).

1240 Other rights were also affected in these disputes, including the right not to be unfairly discriminated against (sec. 9(3)), the right to just administrative action (sec. 33) and the principle of the best interests of the child (sec. 28(2)).

1241 As set out in section 41(1)(*h*)(iii) of the *Constitution.*

IRFA defines consultation as "a process whereby the views of another on a specific matter are solicited, either orally or in writing, and considered".[1242] It is important to note that this definition reflects the common-law understanding of the concept. The Cape high court, in turn, endorsed the following definition in *Robertson v City of Cape Town; Truman-Baker v City of Cape Town*:[1243] "The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice …".[1244] The form of consultation is not prescribed. In this regard, the high court in *Hayes v Minister of Housing, Planning and Administration, Western Cape*[1245] stated that "as long as the lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another, the form of such consultation will usually not be of great import".

These dicta suggest three basic elements of consultation, namely:

- an invitation to a particular group (or the public as a whole) to express their views on a specific topic;
- ample opportunity to submit considered opinions; and
- the inviting party's responsibility to consider all submissions in good faith.[1246]

5.4.1.1 *Invitation to hear views*

Parties may be invited to express their views in one of two ways. A passive invitation may be extended to all interested parties or to the general public, setting a deadline for responses, which leaves the addressee with an option to respond or not. A more active approach would be to seek out the opinions of specific stakeholders.[1247]

Active consultation requires a higher degree of effort to secure stakeholder views. In this regard, the high court *in Robertson v City of Cape Town; Truman-Baker v City of Cape Town*[1248] noted that consultation was a "bilateral process" that required proper engagement with the party consulted. In this instance, the court found government's

1242 Section 1(1).
1243 2004 (9) BLCR 950 (C):par. 108.
1244 Originally from *Maqoma v Sebe NO* 1987 (1) SA 483 (Ck).
1245 1999 (4) SA 1229 (C):1242J-1243A.
1246 Woolman *et al.* 2014:22-134.
1247 Woolman *et al.* 2014:22-134.
1248 2004 (9) BLCR 950 (C).

consultation regarding amendments to the *Municipal Structures Act* to have been lacking,[1249] as neither Parliament nor the Minister of Local Government had consulted the Financial and Fiscal Commission.[1250] The latter was not formally requested to engage in consultations, and the Minister's attitude was that it would only do so if Parliament requested it.

This case has established that an obligation to consult with a particular body necessitates a conscious effort to fulfil that obligation. Moreover, an engagement to consult should conceivably comprise more than a mere invitation to submit views, although tardiness on the part of the party consulted may not unreasonably delay the consulting party's decision-making process.[1251]

5.4.1.2 *Opportunity to submit considered views*

Section 59(1)(*a*) of the *Constitution* stipulates: "The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees." Section 72(1)(*a*) imposes the same duty on the National Council of Provinces, and section 118(1)(*a*) on provincial legislatures. These three sections are collectively referred to as the public involvement provisions. By virtue of the positive obligations contained in the public involvement provisions, public participation is considered a fundamental right.[1252]

To introduce legislation in Parliament or a provincial legislature, a draft must first be published for public comment.[1253] The call for comment invites everyone to participate, and it is the government's responsibility to facilitate such broad participation.

5.4.1.3 *Considering submissions in good faith*

When the education departments consider legislation that would affect the other education partners, all submissions received in the course of the structured consultation process must be duly considered. This consideration includes having

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1249 117/1998.

1250 *Robertson v City of Cape Town; Truman-Baker v City of Cape Town*:par. 109.

1251 Woolman *et al.* 2014:22-136.

1252 Woolman *et al.* 2014:17-64.

1253 Thereafter, there is no further provision for representations regarding any changes made during the legislative process. One might argue that a fundamental change to the legislation during the legislative process should trigger a need to request additional comments.

regard to "the impact that such policy or legislation might have on the functional, institutional or financial integrity and coherence of government in the local sphere of government in the province".[1254]

5.4.2 Cases involving a failure to consult and meaningfully engage in the education sphere

5.4.2.1 *Welkom*

Summary of the facts

The schools involved in the *Welkom* matter[1255] had adopted pregnancy policies modelled on the national guidance, which the Department presented as constitutionally compliant. Towards the end of 2010, the schools applied their respective policies to determine that, based on the policy provisions, two pregnant learners needed to be excused from school attendance for a certain period.[1256] The HOD intervened and pronounced the schools' policies unconstitutional. He ordered the principals to take the learners back without resorting to any of the powers provided by the *Schools Act* or to the courts. In doing so, he showed a complete disregard for the provisions of the schools' policies and of legislation.[1257]

In response, the schools successfully secured an order from the Free State high court declaring the HOD's actions unconstitutional and unlawful. The HOD's subsequent appeal to the Supreme Court of Appeal failed. Neither the high court nor the Supreme Court of Appeal considered the constitutionality of the respective policies. The HOD proceeded to request leave to appeal to the Constitutional Court, which ended in the dismissal of the application.[1258]

Court ruling

Khampepe J, author of the main judgment for the majority, held that the *Schools Act* envisaged an education partnership involving the state, the parents of learners, and members of the local school community. Creating "checks, balances and

1254 IRFA 13/2005:sec. 36(2).
1255 2014 (2) SA 228 (CC).
1256 Deacon *et al.* 2016:157.
1257 Deacon *et al.* 2016:100.
1258 Deacon *et al.* 2016:157.

accountability" is a key component of the *Schools Act*, which governs the roles and interactions of the parties.[1259] A school's governing body is responsible for adopting policies and programmes to guide the management of the school, and to foster an environment in which the right to education can be realised. This includes the authority to adopt a policy governing learner pregnancy.[1260] The governing bodies in *Welkom* were not permitted to adopt policies or exercise powers that were inconsistent with pregnant learners' fundamental right to be free from unfair treatment.[1261] However, the *Schools Act* also did not permit the HOD to bypass the school governing bodies and issue direct instructions to the principals to act contrary to the relevant school policies.[1262] Section 22 of the *Schools Act* outlines the circumstances and manner in which an HOD may intervene directly and assume responsibility for a school's governance or policy formulation functions.[1263]

To exercise the power in section 22 of the *Schools Act*, the HOD was required to consult with the relevant governing bodies based on the reasonable belief that the governing bodies' function of formulating the pregnancy policies had to be taken over.[1264] Alternatively, the HOD could seek redress in court by challenging the allegedly unconstitutional policies.[1265] Even though the HOD purportedly acted in accordance with section 7(2) of the *Constitution* to protect the pregnant learners' fundamental rights, his failure to follow the procedures above violated the principle of legality.[1266] For this reason, the majority of the court found that the schools had a right to the interdictory relief that the lower courts had granted.[1267]

1259 *Welkom*:par. 49.

1260 *Welkom*:paras. 57-70. The court specified the possible provisions of such a pregnancy policy in paragraph 64 of the judgment.

1261 *Welkom*:par. 71. As a result of section 9 of the *Constitution* read with section 1 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000, which was passed to give effect to this constitutional right, pregnancy, sex and gender are explicitly recognised as prohibited grounds of unfair discrimination.

1262 *Welkom*:paras. 72-82.

1263 Liebenberg 2016:21.

1264 As provided in section 22 of the *Schools Act* (cited at footnote 41 of *Welkom*), ex post facto representations may be made in urgent cases.

1265 *Welkom*:paras. 90, 97.

1266 *Welkom*:par. 105.

1267 Liebenberg 2016:22.

The lower courts were remiss in their duty by failing to address the serious constitutional concerns regarding the school's pregnancy policies.[1268] In accordance with section 172(1)(*b*) of the *Constitution*, the Constitutional Court proceeded to examine the policies and their impact on pregnant learners' constitutional rights and found a number of *prima facie* violations of constitutional rights.[1269] Due to these constitutionality concerns, the court held that the governing bodies and the HOD were required "to engage meaningfully in order to provide clarity".[1270] The court found further justification for its engagement order in the principles of cooperative governance in chapter 3 of the *Constitution* as well as the general scheme of the *Schools Act*.[1271]

In their separate concurring judgment, Froneman and Skwyeyiya JJ emphasised the importance of cooperative governance and meaningful engagement between the various bodies involved in the education system in order to resolve disputes. They stressed the partners' duty to engage in good faith on education matters prior to turning to the courts,[1272] and highlighted the key role of participation and engagement as part of the constitutional requirements of cooperative governance.[1273]

The concurring judgment proceeded with a detailed analysis of the parties' actions to determine whether they had failed to comply with the demands of cooperative engagement and the advancement of the learners' best interests.[1274] The emphasis here was on the importance of timely, structured and sustained engagement between the parties to prevent such disputes from arising in the first place and protect learners' interests from being compromised.[1275]

1268 Liebenberg 2016:22. According to section 172(1)(*b*) of the *Constitution*, the court is vested with a broad, equitable remedial discretion to address the underlying constitutional concerns. A judge's discretion to grant relief "on the basis of claims that have not been raised (directly, fully, or in any way) by the parties" is not unlimited and must be exercised cautiously and in a judicial manner to ensure that justice is done.

1269 *Welkom*:par. 112.

1270 *Welkom*:par. 119.

1271 *Welkom*:paras. 120-126.

1272 *Welkom*:par. 135.

1273 *Constitution:*sec. 40. All spheres of government and all organs of state are required to uphold the principles of cooperative governance and intergovernmental relations enshrined in the *Constitution*. This includes the duty to "co-operate with one another in mutual trust and good faith by – (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another." Being organs of state, school governing bodies and HODs are bound by these duties (*Welkom*:par. 141).

1274 *Welkom*:paras. 154-166.

1275 *Welkom*:par. 166.

Commentary on the judgment

Fredman[1276] criticizes the SGB and argues that the SGB, as an organ of the State, had an obligation to respect, protect, and promote the rights entrenched in the Bill of Rights. However, the SGB acted in breach of its obligations by violating the rights of pregnant learners through exclusion policies. Fredman[1277] also highlights the weakness of the consultative process, as the SGB in these cases was intransigent and resistant to intervention. She suggests that relying solely on local democracy and the decision-making power of the SGB is insufficient to protect the rights of vulnerable learners. Instead, she emphasizes the need for a more authoritative declaration of the unconstitutionality of exclusion policies and greater consideration for the rights of pregnant learners who have been excluded in previous years.[1278]

The main and concurring judgments in *Welkom* emphasised cooperation and engagement as fundamental to the resolution of school governance disputes,[1279] thereby ensuring quality education. Engagement also provides a structured process for correcting policies that raise serious constitutional concerns, and for avoiding public confrontation and litigation.[1280] In their concurring judgment, Froneman and Skweyiya JJ were at pains to point out the link between good-faith engagement and institutional processes designed to protect constitutional rights.[1281] Their concurring judgment stressed the importance of patient, persistent and good-faith engagement not only for sound school governance, but also to ensure that learners' interests are protected and advanced.[1282]

By preserving a realm of choice for the school governing bodies to design a new, constitutionally compliant pregnancy policy, the engagement order also gave effect to the doctrine of the separation of powers. In addition, *Welkom* illustrates the effectiveness of participatory remedies for redressing constitutional rights violations

1276 Fredman, 2016: 169 – 199.
1277 Fredman, 2016: 169 – 199.
1278 Fredman, 2016: 169 – 199.
1279 Liebenberg 2016:26.
1280 *Welkom*:par. 125.
1281 *Welkom*:par. 139.
1282 *Welkom*:paras. 145-147, 164-166.

where sustained cooperation and engagement among a wider range of stakeholders is required to ensure a lasting, effective remedy.[1283]

During the initial term of 2022, the Department implemented the National Policy on the Prevention and Management of Learner Pregnancy in Schools,[1284] aiming to rectify the legislative vacuum responsible for discriminatory and exclusionary practices that led to learner dropouts. Paragraph 5.10 of the policy explicitly emphasizes the necessity of a partnership among key stakeholders, such as education departments and school governing bodies, to protect, support, and advance the interests of pregnant learners in basic education. This collaborative effort aligns precisely with the cooperative governance concept outlined in the *Constitution.*

5.4.2.2 *Ermelo*

Summary of the facts

The Constitutional Court matter of *Ermelo*[1285] arose from the Mpumalanga HOD's appeal against a judgment of the Supreme Court of Appeal. The Constitutional Court had to consider whether or not the HOD had acted unlawfully in revoking Hoërskool Ermelo's authority to determine the school's language policy and assigning it to an interim committee instead.[1286] The HOD purported to act in accordance with sections 22(1), 22(3) and 25(1) of the *Schools Act*.[1287] The Supreme Court had overruled the HOD's intervention and the interim committee's decision to amend the school's language policy from Afrikaans single-medium to English and Afrikaans parallel-medium.[1288]

The underlying controversy in the matter pertained to government's power to intervene in school governance with regard to classroom and learner capacity.[1289] A shortage of classrooms and over-enrolment had resulted in much higher learner-to-teacher ratios

1283 Liebenberg 2016:28.
1284 GN 704 Government Gazette 3 December 2021.
1285 2010 (2) SA 415 (CC)
1286 Liebenberg 2016:12.
1287 *Ermelo*:par. 21
1288 *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* 2009 (3) SA 422 (SCA).
1289 Compared to the national average of 35:1, the schools had a learner-to-classroom ratio of 23:1. *Ermelo*:paras. 7-10, 15, 20.

in schools in the Ermelo circuit catering primarily to English-speaking learners,[1290] and the new language policy for Hoërskool Ermelo was adopted without consulting the school governing body, the teaching staff, the learners already enrolled at the school, or their parents.[1291]

Court ruling

According to the Constitutional Court, the Supreme Court of Appeal had erred in finding that the HOD had no power to withdraw the governing body's authority to determine the school's language policy in terms of sections 22(1) and (3) of the *Schools Act*.[1292] Where there are "reasonable grounds"[1293] and the procedural fairness requirements of section 22(3) have been met,[1294] the Department indeed has the power to withdraw a function of the governing body, including that of determining the school's language policy.[1295]

Yet the Constitutional Court agreed that the HOD had acted unlawfully in appointing an interim committee to determine the school's language policy under section 25 of the *School Act*,[1296] which "contaminated" the HOD's recourse to section 22 of the *Schools Act*.[1297] Even if the appointment itself were legal, the manner in which it was made and the process by which the new language policy was established failed to comply with the prescripts of procedural fairness.[1298]

1290 *Ermelo*:par. 11. This reality demonstrates the vast disparity in education resources and quality as a result of apartheid. As Moseneke DCJ put it, inequality in education has profound social consequences, since it "entrenches historical inequity as it perpetuates socio-economic disadvantage". Ermelo:par. 2.

1291 Liebenberg 2016:13. *Ermelo*:par. 27.

1292 *Ermelo*:paras. 63-81.

1293 *Schools Act*:sec. 22(1). In par 74 of *Ermelo*, the court outlined the factors that informed its assessment of reasonableness.

1294 *Ermelo*:par. 75.

1295 This conclusion is supported by an integrated interpretation of section 29 of the *Constitution*, which implies that school language policies ought to be sensitive to the complex interplay between education in one's chosen language, access to basic education, and not discriminating unfairly against any learners seeking admission to a school. It remains imperative that historical redress and transformation be undertaken in the schooling system. Liebenberg 2016:14; *Ermelo*:paras. 76-78.

1296 Section 25(1) of the *Schools Act* permits the HOD to appoint individuals to perform the functions of a governing body that has ceased or failed to fulfil the responsibilities assigned to it under the *Schools Act*. There were no grounds in *Ermelo* for concluding that the school's governing body had ceased to perform any functions or failed to adopt a language policy. *Ermelo*:par. 86.

1297 *Ermelo*:par. 89.

1298 *Ermelo*:par. 92.

Considering all factors, the court found it just and equitable for the governing body to reconsider and determine the school's language policy. Against the backdrop of declining enrolments at Hoërskool Ermelo, and the need to rectify the unequal access to education perpetuated by its Afrikaans-only language policy, the school governing body was urged to give serious consideration to adapting its language policy to accommodate more learners and accept greater responsibility for meeting the community's needs.[1299]

The HOD's appeal was dismissed and some ancillary orders were issued. The first required the governing body to rework their language policy in accordance with section 6(2) of the *Schools Act* and the *Constitution*, and to submit a copy of such revised policy to the court within three months. The HOD, in turn, was also given three months to provide the court with a report "setting out the likely demand for grade 8 English places at the start of the school year in 2010 and setting out the steps the Department has taken to satisfy this likely demand for an English or parallel medium high school in the circuit of Ermelo".[1300]

Commentary on the judgment

While the judgment and supervisory orders in *Ermelo* did not expressly refer to meaningful engagement, their spirit clearly pointed to the need for participation and consultation. In revising its language policy in accordance with the *Constitution* and other relevant legislation, the governing body was required to take into account both the existing school community and the needs of the broader community in which the school was located. The provincial education department, too, had to gather information and consult extensively to report on the steps taken to satisfy the expected

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1299 Liebenberg 2016:14; *Ermelo*:par. 80: "It is correct, as counsel for the school emphasised, that section 20(1) compels a governing body to promote the best interests of the school and of all learners at the school.70 Counsel also emphasised, rightly, that the statute places the governing body in a fiduciary relation to the school.71 However, a school cannot be seen as a static and insular entity. Good leaders recognise that institutions must adapt and develop. Their fiduciary duty, then, is to the institution as a dynamic part of an evolving society. The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution."

1300 *Ermelo*:par. 106. The Department was specifically instructed to include information and statistics regarding enrolment levels at other high schools in the area in accordance with the learner-to-class ratio standards established by the Minister of Education. Ermelo:par. 104; Liebenberg 2016:15.

demand for Grade 8 English places in the subsequent school year, as per the court order.[1301]

The court issued the ancillary supervisory order in recognition of a structural problem relating to education quality and access in the Ermelo district. This problem necessitated wide participation to obtain the necessary information from stakeholders, resolve differences through fair deliberation, and foster broad buy-in for the proposed policy and programmatic solutions.[1302]

Ideally, however, the judgment and orders should have stated unambiguously that both the governing body and the Department had a duty to engage meaningfully with each other and with other stakeholders in education rights in the Ermelo area. This would have clarified that the process of developing policy and planning should be conducted through a participatory process involving all individuals, organisations and institutions whose input was required to ensure that the supervisory orders achieved their objectives.[1303]

5.4.3 Consultation and meaningful engagement and the realisation of social justice in education

There is still some way to go to redress the apartheid legacy in South African education. As Moseneke DCJ[1304] has stated so powerfully:

> In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.

Achieving transformation and social justice in education requires, among others, addressing language, gender and admission barriers to quality education. By affirming that all parties had a duty to cooperate and engage meaningfully, the Constitutional Court attempted to drill down to the underlying substantive issues in both *Welkom* and *Ermelo*. Engagement is not only a valuable mechanism for dispute resolution, but also

1301 Liebenberg 2016:16.
1302 Liebenberg 2016:16; *Ermelo*:par. 97.
1303 Liebenberg 2016:17.
1304 *Ermelo*:par. 47.

for the structured, participatory amendment of policies to ensure that learners' right to education is respected.[1305]

Involving a broad range of education stakeholders in meaningful engagement and consultation increases the likelihood of constitutionally compliant education policies. Collaborative (rather than top-down and unilateral) policymaking is considered more legitimate by affected stakeholders, and therefore, is more likely to succeed in the long run.

Sustained communication between all parties is critical to protect learners' interests in a dispute regarding school governance.[1306] Consultation and meaningful engagement is among the most powerful tools available to enhance all children's access to quality education and achieve social justice in the South African education system.

Ermelo in particular clearly illustrates the negative effect of a failure to engage meaningfully on the pursuit of social justice. In its decision, the court noted that the Ermelo school district lacked sufficient classroom space to accommodate all learners who preferred English as their primary language of instruction.[1307] This situation was likely to persist unless a concerted effort was made to remedy it, which arguably required more than merely providing additional places at Hoërskool Ermelo.[1308] Effectively addressing this structural issue and achieving social justice required participation, allowing stakeholders to provide input, deliberate and take ownership of policy and programmatic solutions.

5.5 DEFICIENT INTERGOVERNMENTAL STRUCTURES AND MECHANISMS FOR DISPUTE RESOLUTION

To provide equal education requires the involvement of more than one sphere of government and multiple state organs. Consequently, ensuring social justice in education requires an effective intergovernmental system. As discussed in chapter 4, a number of intergovernmental structures have been established for the purpose of promoting and facilitating cooperative governance between the various spheres of

1305 Liebenberg 2016:36.
1306 *Welkom*:paras. 166-167.
1307 See 3.4.2.1 under chapter 3 for a discussion on the importance of adequate infrastructure for the delivery of quality basic education to all.
1308 Liebenberg 2016:15.

government and organs of state.[1309] While serving as consultative bodies designed to facilitate intergovernmental interaction, these structures also help avoid litigation. But how effective are these structures in establishing intergovernmental relations, and why do partners still end up instituting formal legal proceedings? The following sections briefly consider the cooperative governance principle of avoiding litigation, followed by a discussion of the challenges that prevent intergovernmental structures from operating optimally.

Moreover, although IRFA[1310] provides procedures and mechanisms to facilitate dispute resolution, it does not cover disputes between school governing bodies and the Department. Therefore, these procedures and mechanisms are also discussed and consideration given to whether and how they may be extended to state organs.

The section concludes by considering the impact of the challenges in intergovernmental relations and dispute resolution on the realisation of social justice.

5.5.1 Principle of cooperative governance: The duty to avoid litigation

Successful cooperative governance entails a reciprocal relationship, good-faith cooperation and mutual trust between organs of state and spheres of government. It is essential that they maintain friendly relations and provide assistance, support and information to one another. Consultations regarding mutual interests should take place, actions and legislation be coordinated, and procedures be followed as agreed.[1311]

Should intergovernmental disputes arise, section 41(3) of the *Constitution* compels the parties to exhaust all other remedies[1312] before seeking judicial assistance. This must include making every reasonable effort to resolve the dispute through mechanisms and procedures provided for this purpose. In addition, section 41(4) provides that where a court is not satisfied that the requirements in section 41(3) have been met, it may refer the dispute back to the organs of state involved.

1309 See 4.7.1 and 4.7.2 under chapter 4.

1310 13/2005.

1311 Malherbe 2006:244.

1312 *National Gambling Board v Premier of KwaZulu-Natal* 2002 (2) BCLR 156 (CC); *MEC for Health v Treatment Action Campaign* 2002 (10) BCLR 1028 (CC).

5.5.2 Challenges that inhibit the successful functioning of the constitutional and institutional framework for cooperative governance

5.5.2.1 *Intergovernmental disputes: National and provincial education departments*

Chapter 4 of IRFA provides clear guidelines regarding the settlement of intergovernmental disputes. These apply to all levels of government, including national, provincial and local. In addition to detailed prescripts as to the duty to avoid intergovernmental disputes,[1313] the guidelines specify the consequences of declaring formal disputes,[1314] the role of a facilitator in resolving such disputes,[1315] requests for assistance by Ministers and MECs,[1316] and judicial proceedings.[1317]

In section 45(1), IRFA stipulates:

> No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful.

Nevertheless, as discussed earlier,[1318] as schools fall outside the spheres of local, provincial and national government, they are not covered by the provisions of IRFA.

5.5.2.2 *Disputes: Public schools as organs of state*

It is worth noting that the *Schools Act* is largely silent on how disputes between school governing bodies and departments ought to be dealt with. This, however, does not absolve the respective parties from the responsibility to ensure lawful, reasonable and procedurally fair administrative decisions, as stipulated in section 33 of the *Constitution*.

An HOD's supervisory authority may manifest itself in a direct intervention in a dispute at a public school under sections 22 and 25 of the *Schools Act*, as the Constitutional Court in *Welkom* confirmed. An HOD may withdraw any function exercised by a school

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1313 IRFA:sec. 40.
1314 IRFA:sec. 42.
1315 IRFA:sec. 43.
1316 IRFA:sec. 44.
1317 IRFA:sec. 45.
1318 See 4.6 under chapter 4.

governing body, on reasonable grounds and in a procedurally fair manner, as provided for in section 22 of the *Schools Act*. In *Welkom*,[1319] the main judgment established the following guidelines for the application of section 22:

> In the event of an urgent need to withdraw a school governing body's function, compliance with the procedural fairness requirements may be delayed until after the withdrawal has occurred, provided that the governing body is given sufficient opportunity at a later stage to make the appropriate representations to the relevant HOD. An HOD's powers of withdrawal under section 22 are broad, and extend to "any function" conferred on a school governing body. Once an HOD withdraws a particular function, that function vests in his or her office and he or she is "duty-bound to exercise it in furtherance of a specified goal permitted by the Schools Act". It goes without saying that these broad powers must be exercised in strict compliance with the requirements of the Schools Act.
>
> Section 25, on the other hand, empowers an HOD to intervene where a school governing body has become dysfunctional – where the governing body has "ceased to perform functions allocated to it in terms of [the Schools Act] or has failed to perform one or more of such functions". Thus section 22 regulates the situation where a school governing body has purported to exercise its functions, but has done so in a manner warranting intervention, whereas section 25 obtains where a school governing body has failed to perform its functions, in whole or in part.

Sections 22 and 25 of the *Schools Act* govern only matters initiated by the provincial HOD, while the MEC has appellate authority. There is no provision for a school governing body to initiate or declare a dispute with the government, except that they may seek an audience with and/or make written submissions to the relevant officers of the provincial departments in accordance with the principles of just administrative action. Schools may have to resort to litigation if such actions prove unsuccessful.

One may argue that the lack of provision for the handling of disputes initiated by the governing body is covered by the provision allowing governing bodies to affiliate with registered representative associations.[1320] Yet these associations represent only their affiliated members and act in their constituents' best interests. Moreover, as there are no other options to resolve disputes, they, too, are often forced to approach the courts. This renders the partnership between education authorities and governing bodies unbalanced and unequal.

As noted earlier,[1321] the PCFs were established to facilitate formal negotiations, discussions and interactions between provincial authorities and bona fide

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1319 Paragraphs 47-48.

1320 *Schools Act*:sec. 20(3).

1321 See 4.7.2 under chapter 4.

organisations representing the governing bodies of public schools. The communication facilitated covers both general provincial education issues and more specific governance matters that affect public schools, and occurs in the context of the partnership between the state and stakeholders in public schools. In essence, PCFs are replicas of the NCF and do not possess any statutory powers; therefore, agreements reached in these forums are not binding.[1322]

The high incidence of court cases between school governing bodies and provincial education departments reflects the challenges with the existing dispute resolution mechanisms and procedures. Over the past two decades, at least fifteen reported cases[1323] of departmental interference in both school management and governance[1324] reached our courts.

For instance, even after the watershed 2002 high court decision in *Die Laerskool Middelburg v Die Departementshoof: Mpumalanga se Departement van Onderwys*,[1325] the courts were called on to prevent education departments from interfering with school governing bodies' function of determining their schools'

1322 Du Plessis 2019:92.

1323 *Douglas High School v Premier, Northern Cape* 1999 (4) SA 1131 (NK); *Eikendal Primary School v WCED* (394/09) [2009] ZAWCHC; *Federasie van Beheerliggame van Suid-Afrikaanse Skole, Vrystaat v Departementshoof, Departement van Onderwys, Vrystaat* [2004] JOL 12827 (O); *FEDSAS v MEC for the Department of Basic Education, Eastern Cape* (60/11) [2011] ZAECB; *Federasie van Beheerliggame van SA Skole Limpopo v Departement van Onderwys Limpopo* (30801/03) [2003]; *Governing Body of Unity Primary School v MEC, Department of Education, Limpopo Province* (22179/07) [2007]; *Hartswater High School v Head of the Department of Education: Northern Cape* (765/2006) [2006] ZANCHC; *Hoërskool Marquard v Departementshoof, Departement van Onderwys, Vrystaat* (1465/09) [2009] ZAFB; *Hoërskool Namakwaland v Lid van die Uitvoerende Raad vir Onderwys, Opleiding, Kuns en Kultuur in die Noord-Kaapse Provinsiale Regering* (1241/2001) [2002] ZANCHC; *Johnson v The HOD of Education, Northern Cape* case number 11/2017, 29 June 2017; *Kimberley Junior School v The Head of the Northern Cape Education Department (*278/08) [2009] ZASCA; *Observatory Girls Primary School v Head of Department of Education, Gauteng* 2003 (4) SA 246 (W); *Settlers Agricultural High School v Head of Department: Department of Education, Limpopo Province* [2002] JOL 10167 (T); *The Governing Body of Point High School v The Head of the Western Cape Education Department* (584/07) 2008 ZASCA 48; 2008 (5) SA 18 (SCA); 2008 (3) All SA 35 (SCA); *P J Olivier High School v The Member of the Executive Council, Department of Education, Eastern Cape Province, Eastern Cape Division Bisho* (214/2011) [2011]); *The Centre for Child Law v The Minister of Basic Education, Eastern Cape High Court: Grahamstown* (1749/2012) [2012] ZAECG).

1324 School governing body functions as per section 16(1) of the *Schools Act*.

1325 *Die Laerskool Middelburg v Die Departementshoof: Mpumalanga se Departement van Onderwys* [2002] JOL 10351 (T).

language policies.[1326] In 2005,[1327] 2009,[1328] 2014[1329] and 2016,[1330] the courts had to remind education departments that they did not have the authority to determine these policies on governing bodies' behalf. Similarly, in 2012,[1331] 2016,[1332] 2018[1333] and 2023,[1334] a few courts had to set straight education departments who had failed to acknowledge governing bodies' admission policy functions.

The lack of statutory guidelines to resolve disputes between governing bodies and education departments needs to be addressed. This is so not only in light of the constitutional imperative to avoid litigation, but also the Constitutional Court's recognition of the importance of cooperative governance, the rule of law and just administrative action, and the requirement that every effort be made to resolve disputes. Therefore, clear mechanisms and procedures are required that will enable governing bodies to resolve disputes with provincial education departments.[1335]

Interestingly, the *Basic Education Laws Amendment Bill* (BELAB),[1336]which is not law yet, includes a new provision regarding the establishment of dispute resolution procedures between the HOD and the school governing body. It provides that the disputing parties must engage meaningfully with each other. Where the dispute cannot be resolved through initial engagement, the BELAB recommends that a nominated representative from each party meet to resolve the matter.[1337] The inclusion of this provision in the BELAB may be interpreted as an acknowledgement of past failures to

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1326 *Schools Act*:sec. 20.

1327 *Governing Body of Mikro Primary School v Western Cape Minister of Education* (332/05) [2005] ZAWCHC 14; 2005 (3) SA 504 (C); 2005 (2) All SA 37 (C).

1328 *HOD: Mpumalanga Department of Education v Hoërskool Ermelo* 40/09 [2009] ZACC 32.

1329 *Governing Body, Hoërskool Fochville v Centre for Child Law* 2014 (6) SA 561 (GJ).

1330 *Federation of Governing Bodies of South African Schools v Head of Department: Department of Education, Northern Cape Province* (887/2016) [2016] ZANCHC 28 (8 July 2016).

1331 *Christians v Dale College Boys Primary School* 2012 (2) All SA 224 (ECG); *FEDSAS v Member of the Executive Council, DBE, Gauteng Province* (43163/2012).

1332 *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (4) SA 546 (CC); *Federation of Governing Bodies for South African Schools v Head of the Department for Education, Northern Cape* (887/2016) 8 June 2016.

1333 *Governing Body Hoërskool Overvaal v Head of Department of Education* (86367 2017) [2018] ZAGPPHC.

1334 Ellisras High School brought an urgent court application regarding the unlawful placement of learners, but the case was settled out of court.

1335 Du Plessis 2019:92.

1336 B2/2002.

1337 BELAB:clause 39.

adhere to the principles of reasonableness and fairness and to prevent actions that may be considered *ultra vires*.

5.5.3 Impact of the challenges on the realisation of social justice in education

The principle of cooperative governance needs to be extended to schools to secure the right to education and enable school governing bodies to achieve social justice in partnership with the state. This has been highlighted by both the Constitutional Court and the BELAB.

Nevertheless, repeated violations of the constitutional principles of legality and just administrative action by various education departments threaten not only the mutual goodwill implied by cooperative governance, but also the legitimacy of the education system as entrenched in the *Constitution*. Likewise, school governing bodies who fail to consider both the existing school community and the needs of the broader surrounding community when formulating and implementing their policies also violate constitutional principles.

It is essential to establish a statutory mechanism and procedure for the resolution of disputes between schools (as organs of state) and education departments (as spheres of government) in accordance with section 41(3) of the *Constitution*, which requires that every reasonable attempt be made to resolve intergovernmental disputes. Evidently, this need has been recognised by the inclusion of a dispute resolution mechanism in the BELAB. For the process to succeed, the disputing parties must be committed to engaging with each other in good faith and understand their constitutional obligations, which include the duty to act in a legally and procedurally sound manner.

5.6 IMMORAL AND UNETHICAL LEADERSHIP

Nurturing ethical leadership in South Africa to maintain a healthy democracy is everyone’s responsibility. Because of their authority, positional leaders in the public and private sectors as well as many other institutions are particularly well placed to influence the system. Leaders who occupy prominent positions in society are expected to serve as role models for the rest of society. Through their actions, they should be

able to teach others what is appropriate and desirable[1338] and promote sound, transparent, effective and prudent governance practices.

The paragraphs that follow discuss accountability and responsibility as a principle of cooperative governance against the backdrop of pervasive nepotism, maladministration, mismanagement, corruption and a lack of accountability in the South African setting,[1339] including education. Unethical leadership in the country's education system is also considered, as it has a direct impact on the provision of quality education and the realisation of social justice.

5.6.1 Principle of cooperative governance: Accountability and responsibility

It is a principle of cooperative governance that "[a]ll spheres of government and organs of state must provide effective, transparent, accountable and coherent government for the Republic as a whole".[1340] To achieve this, public representatives and public servants must be accountable to the electorate.[1341]

According to Napier,[1342] accountability is "the study to explain or answer for one's conduct and being subject to a constant monitoring process either by higher or lower governmental authorities". Burger[1343] notes a distinction between external and internal accountability. The former refers to the way in which each sphere of government is externally accountable to their constituencies and for the manner in which funds are utilised. The latter, in turn, refers to the management of government internally and accountability to the executive branch or another sphere of government, especially where funds are transferred between them. Public managers should account for their financial management activities,[1344] and there must be internal control systems in place for resources to be used effectively, efficiently, economically and transparently.[1345]

1338 Napier 2007:376; CDE 2023:5-7.
1339 Napier 2007:376.
1340 *Constitution*:sec. 41(1)(*c*). Also discussed extensively under chapter 4 of this dissertation.
1341 Napier 2007:376; CDE 2023:5-7.
1342 CDE 2023:5-7; Napier 2007:376.
1343 2001:68.
1344 Burger 2001:68-69.
1345 Coetzee 2010:94.

Of course, accountability goes hand in hand with responsibility. Vyas-Doorgapersad and Ababio[1346] define responsibility as the way in which individuals perform their tasks, the value they attribute to those tasks, and their attitude towards the people they interact with while performing them.

Leaders should be accountable not only to those who put them in their positions of authority, but also to those who are affected by their actions. To be an earnest and responsible leader, accountability is non-negotiable.[1347] Stefkovich and O'Brien[1348] as well as Webb[1349] emphasise the importance of school leaders modelling exemplary ethical behaviour.[1350] Yet the Minister of Basic Education is on record for having expressed concern over

> poor accountability mechanisms in different spheres of the education system: poor planning, monitoring and evaluation [along with] poorly designed institutional structures, [which make] it difficult to deliver on the key mandate of the department; [as well as] disturbing safety levels at schools.[1351]

As outlined in De Klerk's[1352] report,[1353] South African schools and education departments are plagued by a lack of morality as a result of non-accountability and ethical knowledge deficits.

5.6.2 Challenges associated with immoral and unethical leadership

In carrying out national policy to meet the needs of the community and ultimately ensure social justice, public officials must always conduct themselves in a manner that promotes the interests of society as a whole. Likewise, public leaders are required to serve public needs and not advance their personal interests.[1354] This is also true for the school governing body, who, as key local leaders, must serve the community.

Sadly, however, the South African public service, including both the national and provincial departments of education as well as school governing bodies, is often

1346 Vyas-Doorgapersad & Ababio 2006:391.
1347 Kessler 2010:527-550.
1348 Stefkovich & O'Brien 2004:197-214.
1349 Webb 2005:151-165.
1350 CDE 2023:5-7.
1351 Serfontein & De Waal 2015a:3.
1352 CDE 2023:5-7.
1353 Serfontein & De Waal 2015a:3.
1354 Dorasamy 2010:56-64.

accused of unethical conduct. Examples of common complaints include failure to respond to the people's needs, dishonesty in the performance of duties, inefficiency and ineffectiveness, financial mismanagement, and corruption.[1355] Moreover, unethical behaviour in government often begins at the top with managers who do not embody and promote the values of the public service.[1356]

Despite government requirements that all departments establish ethics infrastructures, unethical practice remains highly prevalent.[1357] A case in point is the education departments of the Eastern Cape, Northwest and Limpopo that have been placed under administration within the past ten years.[1358] Clearly, these provincial departments are incapable of exercising effective cooperative governance as specified in section 41(1)(*c*) of the *Constitution.*

A 'textbook' example of unethical leadership in a provincial education department is *Section 27 v Minister of Education*,[1359] where it was found that the state's failure to provide textbooks to learners in Limpopo had violated the children's right to a basic education. According to Chisholm,[1360] Limpopo's textbook shortage is due to "the general fraud, maladministration, corruption and incompetence in the provincial government".

The Minister of Basic Education, MECs, provincial HODs as well as school governing bodies should ensure that their departments and schools practise accountability and responsibility in their day-to-day activities. This will pave the way for others to learn from these leaders' ethical conduct and behaviour, and will facilitate the delivery of quality education and the attainment of social justice.

In 2011, financial mismanagement and corruption plunged the Eastern Cape education department in crisis, having overspent on salaries by some R625 million.[1361] Due to the subsequent lack of funds, the more than 6 000 temporary teachers required that year could not be appointed. Schools were forced to close and the number of

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1355 Mafunisa, cited in Dorasamy 2010:56-64; CDE 2023:5-7.
1356 Mafunisa, cited in Dorasamy 2010:56-64.
1357 CDE 2023:5-7; Dorasamy 2010:56-64.
1358 PMG 2017:s.p.
1359 (24565/2012) [2012] ZAGPPHC 114; 2012 (3) All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP).
1360 Chisholm 2013:8
1361 Govender 2011.

children per class increased to unmanageable levels: At Sanctor High School in Port Elizabeth, for instance, there were 105 children in one class.[1362] As a result, FEDSAS and the South African Teachers' Union filed an urgent application at the high court in Bhisho to order the Eastern Cape department to appoint the 6 282 temporary teachers immediately.[1363]

Then MEC for Education Mandla Makapula explained that the lack of funds had resulted from 5 000 incidents where teachers were suspended with full pay, leaving inadequate funds to appoint the temporary employees.[1364] In its ruling of 22 February, the high court ordered the Eastern Cape department to fill all 6 282 vacant teaching posts by 2 March.[1365] Having appealed and failed, the Department was finally instructed to appoint the temporary teachers by 11 March.[1366]

Provincial education departments have a concurrent responsibility and equal yet separate accountability for education provision. A cooperative governance model can only succeed if all spheres of government are capable of participating effectively in intergovernmental relations. To ensure an effective, transparent, accountable and coherent government, all spheres must take all reasonable steps required to ensure their institutional capacity and effectiveness.

Public schools, too, are beset with corruption. Since 2012, Corruption Watch, a government initiative to combat corruption, has been working to uncover corruption in the education sector. Since its launch, they have received over 26 000 reports of corruption, 22% of which relate to allegations of corruption and maladministration in schools specifically.[1367] Embezzlement and mismanagement of funds, unlawful employment practices and procurement irregularities are among the most common forms of corruption reported at schools.[1368] To combat this, monitoring and evaluation mechanisms are required to ensure checks and balances in the cooperative relationship.

1362 Hendriks 2011a, 2011b.
1363 *FEDSAS v MEC for the Department of Basic Education, Eastern Cape* (60/11) [2011] ZAECB.
1364 Venter & Otto 2011.
1365 *FEDSAS v MEC for the Department of Basic Education, Eastern Cape* (60/11) [2011] ZAECB:par. 83.
1366 Spies 2011:49.
1367 Corruption Watch 2020:15; CDE 2023:5-7.
1368 Corruption Watch 2020:15.

The latest figures from the South African Council for Educators (SACE) also confirm that school management irregularities are a daily occurrence, with 413 complaints lodged in the 2019/20 academic year.[1369] According to the SACE report, the majority of complaints originated in the Western Cape and Gauteng, followed by KwaZulu-Natal and the Eastern Cape. Some reports related to the misappropriation of funds allocated for the maintenance of school buildings, upgrading of learning materials, and student feeding schemes. Others pertained to theft of goods, procurement irregularities (including the payment of ghost educator salaries), and corruption in the bidding processes for school supplies and construction.[1370]

In aiming to ensure accountability, transparency and sound financial management in schools, the *Schools Act*[1371] requires principals at public schools to introduce all practical measures to prevent financial mismanagement and the maladministration of funds. Principals are also required to inform the HOD should any such event occur.[1372] School governing bodies are responsible for keeping accurate records of funds received and for auditing the school's financial statements and records.[1373] The *Schools Act* specifies a number of procedures that must be followed to hold governing bodies accountable.[1374] If it is established on reasonable grounds that a governing body has ceased to perform the functions it was assigned by law, the HOD, as partner, may withdraw the governing body's duties.[1375]

Governors are held accountable through cooperative governance.[1376] In reviewing cooperative school governance in *Welkom*,[1377] the Constitutional Court emphasised the need for checks, balances and accountability mechanisms between the education partners. To safeguard learners' rights to a basic education, education partners must not only be accountable for their own role, but should also expect accountability, transparency and responsiveness from the other partners. To ensure sustained progress and success in enhancing the quality of education for all South African

1369 SACE 2020:38.
1370 Serfontein & De Waal 2015a:4.
1371 Section 16A(2)(*i*).
1372 *Schools Act*:sec. 16A(2)(*j*), (*k*).
1373 *Schools Act:*sec. 42, 43.
1374 Section 22.
1375 Section 25.
1376 *Constitution*:sec. 41(1)(*c*).
1377 2014 (2) SA 228 (CC):par. 49.

learners, all education partners must accept responsibility and accountability for their concurrent statutory powers and fulfil complementary roles.[1378]

The lack of monitoring and reporting in provincial education departments and school governing bodies results in a lack of clarity on intergovernmental and cooperative governance roles and responsibilities, as well as weaknesses in support and oversight.[1379] Until these issues are addressed, education delivery will remain stagnant, since the underlying causes of poor cooperative governance and intergovernmental conflict remain unresolved.[1380]

Naidu and colleagues[1381] state that leadership has a fundamentally moral component. In distinguishing schools as moral communities, and education as a moral undertaking, schools and education departments should require their leaders[1382] to demonstrate morally authoritative leadership and hold all education partners accountable.

5.6.3 Impact of unethical and immoral leadership on the realisation of social justice in education

As the examples above demonstrate, the South African education sector is far from immune to corruption. In fact, the education sector is among the most corrupt spheres, particularly among principals, governing body members and departmental officials.[1383] Corrupt practices are directly linked to a failure to deliver quality public services, including the failure to deliver infrastructure and textbooks, provide funding in accordance with the norms and standards, and appoint educators. As discussed in chapter 3, this causes inequalities,[1384] which hamper the achievement of social justice in and through education.

In addition, there is a need to scrutinise top leaders' actions, as many of their critical decisions require moral and ethical judgment. Leadership misconduct of any kind induces unethical behaviour at lower levels. In addition to being harmful to the delivery

1378 *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).
1379 See 4.10.9 under chapter 4.
1380 Coetzee 2010:98.
1381 Naidu *et al.* 2008:s.p.
1382 Principals, provincial HODs and MECs.
1383 CDE 2023:5-9;
1384 CDE 2023:5-9;

of quality education, unethical conduct is also detrimental to individual employee morale and job satisfaction.

In light of the essential role that education leaders play in providing role models to future citizens, indirectly influencing the social system of tomorrow, no unethical behaviour on their part can be tolerated. To achieve social justice in education, education leaders must consistently practise accountability as a principle of cooperative governance and commit to acting responsibly at all times.

Summary

In order for the spheres of government and organs of state to be successful in realizing social justice in education, they must be able to fulfill their mandates within the constitutional framework of cooperative governance. It is important to maintain cooperation between government spheres so as to improve the alignment of activities and to clarify the purpose of each. As a result, education is delivered more effectively and efficiently.

Due to the fact that the spheres of government and organs of state are supposed to work together in good faith, they should be able to handle the dynamics that arise from these relationships more effectively. It is imperative that they not be distracted from their common objectives by differences among them, or be affected or influenced by bureaucratic dynamics and political interference. Therefore, the importance of sound working relationships between the various spheres of government and state organs has been emphasized.

Further, these relationships should have the capability of resolving disputes amicably without resorting to litigation. According to the Constitutional Court, meaningful engagement is essential when resolving educational disputes. A set of guidelines that apply to schools as state organs must be established in the same way as the IRFA sets out mechanisms and procedures for conflict resolution between government spheres. By implementing this remedy, it can be used as a powerful tool for advancing systemic policy reforms that can enhance access to quality education for all learners.[1385]

[1385] *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) para 166 – 167.

Governments and officials cannot ignore the legitimate exercise of rights, competencies, and functions by SGBs in their unbridled effort to exercise power and authoritarian control in a constitutional democracy. It is important for the various spheres of government and state organs to work together and cooperate if they are to accomplish their mandates. Moreover, because education is an area of concurrent responsibility, those spheres of government and state organs will not be able to successfully fulfill their concurrent functions if their powers are overreached and abused.

Ethics is deeply rooted in the principles of cooperative governance, which form part of the public sector's responsibility and accountability and needs champions and perfectionist as leaders towards ensuring that the service performs optimally in delivering education.[1386]
As a consequence, education partners must take responsibility and accountability for their own roles, as well as demand accountability, transparency, and responsiveness from other partners in order to ensure learners' right to a basic education.

In order to overcome the challenges and establish a South African society based on and dedicated to social justice, it is necessary to match the ideals and constitutional commitments of cooperative governance – which are to respect the rule of law; coordinate activities and legislation towards the pursuit of a common outcome; keeping each other informed about matters of mutual interest, and consulting one another on these matters; to avoid litigation by meaningfully engaging with one another; and act in a responsible and accountable manner. All of these measures are intended to facilitate a successful and productive working relationship between the spheres of government and state organs that will benefit society as a whole. It is evident, however, that the principles of cooperative governance have not been implemented in practice, creating a paradox of the imagined relationship between the spheres of government and state organs that negatively impacts the delivery of education and the realization of social justice.

[1386] Edwards 2008: 79.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS FOR ENHANCING COOPERATIVE GOVERNANCE AND SOCIAL JUSTICE IN EDUCATION

6.1 INTRODUCTION

Both the preamble and section 1 of the *Constitution* aim to establish a democratic society based on social justice, dignity and equality, which will ultimately advance human rights and freedoms. These listed values must inform and guide all governance endeavours, including those in education, from determining policies and laws to implementing them in practice. The Bill of Rights[1387] entrusts our multi-tiered government with the responsibility to protect, fulfil, promote and respect the provisions and values of the *Constitution*. Cooperative governance is the key to achieving this.

However, as indicated in the problem statement in chapter 1, the reality of South African education provision often reflects neither the ideals of cooperative governance nor social justice.[1388] Thus, this dissertation is primarily concerned with answering the question: What are the cooperative governance requirements for realising social justice in public education in South Africa?

To this end, the previous chapters aimed to:

- define social justice in South African education and assess the extent to which social justice is realised within the current legal framework governing education;
- determine what the relationship between school governing bodies and the national and provincial education departments should look like to comply with the constitutional imperative of cooperative governance, and thereby achieve social justice in education; and
- develop guidelines as an aid for stakeholders to apply the principles of cooperative governance in their pursuit of social justice in and through education.

1387 *Constitution*:sec. 7(2).

1388 See 1.2 under chapter 1.

Chapter 2 introduced the different views of social justice gleaned from philosophical and historical research and considered how these interpretations inform our understanding of what a fair and equitable school system might or should look like. The chapter also examined the meaning of social justice in education, as well as the principles, ideals and values associated with it. This occurred through applied research, analysing and considering social justice from a theoretical, practical and holistic perspective.[1389] Chapter 3 established how the South African education system relates to the constitutional demands of social justice.

Having established that social justice is a key objective for the national and provincial education departments and school governing bodies, and that cooperation is essential to achieving it, chapter 4 proceeded to examine the imperative of cooperative governance in the South African public school sector.[1390] Chapter 4 also considered key court judgments relating to cooperative governance that have clarified the requirements for achieving social justice in the education landscape.[1391]

Chapter 5 focused on the specific challenges that tend to impede cooperative governance between the spheres of government and organs of state.[1392] This chapter, too, included detailed discussions of important court rulings on the imperative of cooperative governance in education.[1393] In discussing each challenge, its effect on social justice was also considered.[1394]

This now leads to the formulation of legal doctrines to provide clarity on the cooperative governance requirements to realise social justice in public education in South Africa.

6.2 DEFINING THE CONCEPT OF SOCIAL JUSTICE IN SOUTH AFRICAN EDUCATION AND ASSESSING ITS REALISATION

In chapter 2, it was established that, to achieve social justice, an equitable distribution of opportunities, benefits, privileges and burdens across all groups and societies is required so that all rights and freedoms are enjoyed equally. Two social justice

1389 See 2.2 and 2.3, chapter 2.
1390 See 4.2, 4.4 and 4.10, chapter 4.
1391 See 4.8, chapter 4. See also 5.2.2 and 5.4.2, chapter 5.
1392 See 5.2-5.6, chapter 5.
1393 See also 5.2.2 and 5.4.2, chapter 5.
1394 See 5.2.4, 5.3.3, 5.4.3, 5.5.3 and 5.6.3.

dimensions were subsequently identified, namely the distributional and the relational dimension.

6.2.1 Dimensions of social justice

The distributional dimension of social justice requires that quality public education be made available for all. This is essential for cultivating lifelong learners,[1395] developing people's intellectual and other capabilities, and enabling them to function as productive individuals and participate as citizens of the South African democracy, ultimately making them autonomous.[1396]

Distributional social justice means that people may not be unfairly excluded from social activities and life's opportunities, including education. This necessitates going beyond merely eliminating the educational inequalities[1397] that have arisen due to the underdeveloped, unequal institutions of the apartheid era.[1398] The state also has a positive duty to provide basic education and to ensure the enjoyment and fulfilment of the right to a basic education by all, thereby advancing social justice.[1399]

Section 9(1) of the *Constitution* states: "Everyone is equal before the law and has the right to equal protection and benefit of the law." Section 9(2) then stipulates: "Equality includes the full and equal enjoyment of all rights and freedoms."[1400] Formal equality alone – with its focus on standardisation and sameness – will not succeed in eradicating the inequities in education as long as structurally embedded, systemic inequalities are ignored. What is required to achieve true social justice is substantive equality, which is concerned with just and fair treatment.[1401]

Relational social justice, in turn, emphasises the shared responsibility to address inequality. To regulate social arrangements in a fair and just manner, social justice

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1395 South Africa uses the term 'learners' to refer to school students. However, this dissertation uses 'students' and 'learners' interchangeably.

1396 See 2.4.2.2, chapter 2; Badat & Sayed 2014:128.

1397 Systemic, historical and structural.

1398 Badat & Sayed 2014:128.

1399 *In re: The School Education Bill of 1995 (Gauteng)* 1996 (4) BCLR 537 (CC), 1996 (3) SA 165 (CC):paras. 8-9. See section 7(2) of the *Constitution*, which provides that the state must "respect, protect, promote and fulfil the rights in the Bill of Rights".

1400 Without addressing the failures identified in this research, the promise of full and equal enjoyment of rights and freedoms is empty in terms of achieving social justice.

1401 See 2.2.3, chapter 2.

theories propose a joint responsibility for establishing fair institutions and institutional frameworks, which requires the involvement of all stakeholders. In the education setting, these include the national and provincial education departments and school governing bodies,[1402] all of whom have a responsibility to pursue and achieve social justice.[1403]

These two dimensions were subsequently used to evaluate the extent to which social justice is realised within the current legal framework governing education.

6.2.2 The realisation of social justice within the current legal framework of education

To achieve quality public education for all, and thereby realise social justice, everyone must enjoy equal rights and opportunities to prevent unfair exclusion from life's activities and opportunities,[1404] including education.

Section 29 of the *Constitution* establishes the right to education as one of the so-called economic and social rights entrenched in South Africa's supreme law.[1405] Section 29 also articulates a desire for equality in a diverse society.[1406] But, as held in *Governing Body of the Juma Musjid Primary School v Essay NO*,[1407] the right to basic education is also distinct from other socioeconomic rights.[1408] Unlike the latter, which are subject to limitations such as "progressive realisation", "availability of state resources" and "reasonable legislative measures", the right to a basic education is immediately realisable.[1409]

Furthermore, the quality of education has an important impact on equality of opportunity, which, as envisioned by the *Constitution,* is not only important for the fulfilment of the right to education, but also for eliminating the inequalities inherited

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1402 *Ermelo*:par. 56.
1403 See 2.4.1, chapter 2.
1404 See 2.4.2, chapter 2.
1405 See 3.3.3, chapter 3.
1406 Malherbe 2004:12; Woolman *et al.* 2014:57-6; see 3.3.3, chapter 3.
1407 *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC).
1408 *Governing Body of the Juma Musjid Primary School v Essay NO*:par. 37.
1409 *Governing Body of the Juma Musjid Primary School v Essay NO*:par. 37. *Constitution*:sec. 27(2): "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

from apartheid.[1410] In this regard, the state is responsible to provide an adequate, accessible, adaptable and acceptable education to its citizens.[1411]

Nevertheless, despite a progressive rights framework enshrining equal access to quality basic education for all, a distinct pattern of unequal access to quality education seems to have taken root. This is evidenced by the results of national and international tests,[1412] as discussed in chapter 3.[1413] There is a vast gap between learner performance in schools in quintiles 3, 2 and 1, which are primarily attended by children from low-income families, and that in quintile 5 and 4 schools, where children from more affluent backgrounds are enrolled.

Several deficiencies and failures have hindered the implementation of the rights framework that enshrines equal access to quality basic education. These include the availability of qualified educators and staff members,[1414] a poor understanding of the pedagogical value of the language of instruction,[1415] inadequate infrastructure (classrooms and physical space),[1416] financial constraints and the quintile category of schools,[1417] and insufficient early childhood education.[1418]

Persistently poor and unequal education has serious implications for the realisation of social justice.[1419] Social justice in and through education will remain a pipe dream without equal educational opportunities and rights for all. Addressing inequality and the obstructions that impede the delivery of high-quality education requires a cooperative venture. To create a socially just education environment, cooperative governance strategies must be developed to build a sustainable and coherent education system that is based on values such as democracy, equality and human dignity, and that advances human rights.[1420]

1410 Malherbe 2004:15; Woolman *et al.* 2014:57-32.
1411 See 3.3.3.2, chapter 3.
1412 2017, 2007 & 2000 SACMEQ; 2021, 2019, 2016, 2011 & 2006 PIRLS; 2014 ANA; 2019, 2011 & 2003 TIMSS.
1413 See 3.4.1, chapter 3.
1414 See 3.4.3.1 & 3.4.3.2, chapter 3.
1415 See 3.4.4, chapter 3.
1416 See 3.4.2.1, chapter 3.
1417 See 3.4.2.4, chapter 3.
1418 See 3.4.2.3, chapter 3.
1419 See 3.5, chapter 3.
1420 See 2.4.1, chapter 2; 4.9 & 4.11, chapter 4.

For purposes of this dissertation with its focus on cooperative governance, which denotes the relational dimension of social justice, the distributional dimension was not explored beyond chapter 3. Nevertheless, as illustrated in that chapter, South African education still has a long way to go to achieve distributional social justice, and education partners need to take joint action in this regard.[1421]

The following section adopts the relational approach to social justice in tackling the secondary question as to what the cooperative governance imperative entail in the South African public school education sector.

6.3 THE COOPERATIVE GOVERNANCE IMPERATIVE IN THE PUBLIC SCHOOL EDUCATION SECTOR

As highlighted in chapter 4,[1422] cooperative governance is not an end in itself, but rather a means to enhance development and improve people's standard of living, ultimately contributing to social justice. The following core constitutional principles of cooperative governance and intergovernmental relations were identified as the framework that binds all spheres of government as well as all organs of state in each sphere of government:

- Every sphere must be committed to securing the wellbeing of the people of South Africa.[1423]
- The distinctiveness of each sphere must be respected.[1424]
- As a collective, the spheres of government and organs of state should provide effective and coherent governance.[1425]
- Intergovernmental relations must not hamper transparent and accountable governance.[1426]

1421 See 3.4, chapter 3.
1422 See 4.4 & 4.5, chapter 4.
1423 *Constitution*:sec. 41(1)(*b*).
1424 *Constitution*:sec. 41(1)(*e*)-(*g*).
1425 *Constitution*:sec. 41(1)(*c*).
1426 *Constitution*:sec. 41(1)(*c*).

- The processes of cooperative governance must not impede constituencies' efforts to hold their executives accountable.[1427]

- Spheres of government and organs of state must cooperate in mutual trust and good faith.[1428]

To give effect to these principles, and in response to section 41(2) of the *Constitution*, Parliament passed IRFA, which establishes a framework for intergovernmental relations between the national and provincial education departments.[1429] However, being organs of state, public schools are excluded from IRFA's scope.[1430] For social justice to be achieved, the constitutional principle of cooperative governance, not only as it appears in the *Constitution*, but also as developed in IRFA, needs to be extended to school governing bodies as well.[1431]

Chapter 4 also explained how IRFA further developed the core duties of cooperation outlined in section 41(1)(*h*) of the *Constitution*. These duties include maintaining friendly relations, providing mutual assistance and support, informing one another of matters of common interest, consulting one another on matters of common interest, coordinating actions and legislation, and avoiding litigation against one another. [1432] The execution of these duties is premised on two conditions: First, effective cooperative governance can only be achieved if these duties, both as they appear in the *Constitution* and as developed in IRFA, are extended to governing bodies, and all partners are capable of participating effectively. State organs must implement all reasonable measures to ensure that they have effective procedures and adequate institutional capacity to be able to consult, cooperate, share information, and respond promptly to requests for cooperation, consultation or information sharing.[1433]

1427 See 4.4.1, 4.5 & 4.10.9, chapter 4.
1428 *Constitution*:sec. 41(1)(*h*).
1429 See 4.6, chapter 4.
1430 See 4.6, chapter 4.
1431 See 4.6 & 4.7.2, chapter 4; 5.5, chapter 5.
1432 See 4.6, chapter 4.
1433 IRFA:sec. 5(e). See also 4.6, 4.7.1 & 4.7.2, chapter 4.

Secondly, the organs of state must adhere to the established rules[1434] and take an active part in the intergovernmental structures to which they belong.[1435]

Social justice in education depends on the ability of the spheres of government and state organs to execute their mandate within the constitutional framework of cooperative governance. Yet, as noted in chapter 5, due to a number of factors, including the fact that IRFA does not apply to school governing bodies, the education sector does not operate within that framework.[1436] The main challenges that inhibit the realisation of the constitutional imperative of cooperative governance in education are:

- overreach and abuse of administrative power;[1437]
- tension relating to power and authority;[1438]
- failure to consult and meaningfully engage;[1439]
- deficient intergovernmental structures and mechanisms for dispute resolution;[1440] and
- immoral and unethical leadership.[1441]

To overcome these challenges and establish a South African society based on, and dedicated to, social justice, the spheres of government and state organs must unconditionally follow and adequately implement the principles of cooperative governance. In this endeavour, the following five principles should receive priority attention: a commitment to the rule of law,[1442] coordinating activities and legislation towards a common outcome,[1443] informing and consulting each other on matters of common interest by engaging meaningfully,[1444] avoiding litigation,[1445] and acting in a

1434 *Constitution*:sec. 41(1)(*h*)(v). See also 4.4.1 & 4.4.5, chapter 4.
1435 IRFA:sec. 5(f)(i). See also 4.4.2 & 4.7, chapter 4.
1436 See 5.2-5.6, chapter 5.
1437 See 5.2.1-5.2.4, chapter 5.
1438 See 5.3.1-5.3.3, chapter 5.
1439 See 5.4.1-5.4.3, chapter 5.
1440 See 5.5.1-5.5.3, chapter 5.
1441 See 5.6.1-5.6.3, chapter 5.
1442 See 4.4.1, chapter 4; 5.2, chapter 5.
1443 See 4.2 & 4.6, chapter 4; 5.3, chapter 5.
1444 See 4.2, 4.4.6, 4.6 & 4.7.1, chapter 4; 5.4, chapter 5.
1445 See 4.2, 4.4.1 & 4,5, chapter 4; 5.5, chapter 5.

responsible and accountable manner.[1446] These five principles are examined below so as to answer the secondary question: What inhibits or enhances the realisation of the constitutional imperative of cooperative governance in education?

6.4 FACTORS THAT INHIBIT OR ENHANCE THE REALISATION OF COOPERATIVE GOVERNANCE IN EDUCATION

6.4.1 The rule of law

Both chapters 4 and 5 emphasised the importance of the rule of law as a fundamental aspect of cooperative governance.[1447] It was further explained that the rule of law also encompasses the principle of legality. It was in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[1448] that the Constitutional Court first identified legality as incidental to the rule of law. The court held that the principle of legality generally conveyed the idea that "the exercise of public power is only legitimate where lawful"[1449] and that the "legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[1450] Although it was initially envisaged as a backstop or safety net,[1451] the principle of legality has acquired a life of its own and now extends far beyond mere lawfulness. It provides that public power must be exercised in accordance with the law. Therefore, the exercise of a public power by a functionary will have been unlawful if that functionary had no authority to do so.

Chapter 5 examined a few seminal cases relating to the distribution and exercise of power and offered a stark illustration of the adverse effects of overreach and the abuse

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1446 See 5.6, chapter 5.

1447 See 4.4.1, chapter 4; 5.2.1, chapter 5.

1448 1998 12 BCLR 1458 (CC). See also *President of the RSA v SARFU* 1999 (10) BCLR 1059 (CC):par. 148; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000 (3) BCLR 241 (CC):par. 85; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (7) BCLR 652(CC):par. 35; *Affordable Medicines Trust v Minister of Health* 2005 (6) BCLR 529 (CC):par. 49; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC):par. 613; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2006 (11) BCLR 1255 (CC):par. 68; *Minister of Justice & Constitutional Development v Chonco* 2010 (2) BCLR 140 (CC):par. 27; *Law Society of SA v Minister of Transport* 2011 (2) BCLR 150 (CC):par. 32; *Head of Department, Department of Education, Free State Province v Welkom High School* 2013 (9) BCLR 989 (CC):par. 1; *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (3) BCLR 333 (CC):paras. 28-29.

1449 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*:par. 56.

1450 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*:par. 58.

1451 *Minister of Health v New Clicks SA (Pty) Ltd*:par. 97.

of power.[1452] From the case law, it is concluded that overreach is primarily the result of inadequate human resources (capacity),[1453] a lack of meaningful engagement and consultation,[1454] as well as a breakdown of relationships between the partners.[1455]

6.4.2 Shared responsibility and the pursuit of a common outcome

As defined by the *Constitution*, the different spheres of government and organs of state are expected to cooperate in good faith, assist, support and consult one another, and coordinate their activities.[1456] It is essential for all spheres and organs of state to realise that they not only share a responsibility to deliver education, but also need one another to do so effectively and successfully.

As chapter 5 indicated, however, the relationships in practice are not always consistent with the *Constitution*. Issues of divided loyalty and the tensions that result from the dual management of education delivery (with national formulating policies, and provinces being expected to implement them) have a substantial impact on the way in which the spheres of government and state organs carry out their mandates. Ultimately, a lack of good faith results in poor delivery of benefits or services.[1457] This again underscores the need for guidelines to assist the Department and school governing bodies to achieve the principles of cooperative governance.

6.4.3 Consultation and meaningful engagement

As pointed out in chapter 3,[1458] the *Constitution* establishes that the state needs to implement reasonable measures to ensure that education is realised immediately.[1459] In accordance with a series of Constitutional Court rulings,[1460] these measures include

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1452 See 5.2.2, chapter 5.
1453 See 5.2.2, chapter 5.
1454 See 4.4.6, chapter 4; 5.2.3 & 5.4.2, chapter 5.
1455 See 5.2.2.1 & 5.2.2.2, chapter 5.
1456 *Constitution*:sec. 41(1)(*h*)(vi).
1457 See 5.3.2, chapter 5.
1458 See 3.3.3, chapter 3.
1459 See 3.3.3.1, chapter 3.
1460 *Rivonia*; *Welkom*; *Ermelo*; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

consultation and meaningful engagement between all spheres of government and organs of state,[1461] as a principle of cooperative governance.[1462]

6.4.4 The duty to avoid litigation and the settlement of intergovernmental disputes

Chapter 4 and 5 referred to the dual obligation imposed by section 41(3) of the *Constitution* on organs of state involved in an intergovernmental dispute. To resolve the dispute, they must use the mechanisms and procedures provided for that purpose, and must exhaust all other possible remedies before approaching a court to resolve the matter.[1463] When these requirements are not met, courts may refer a dispute back to the parties for resolution.[1464]

Section 41(2)(*b*) of the *Constitution* states the need for an act of Parliament to provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes. This function is fulfilled by IRFA, although public schools, as organs of state, are not included in its ambit.[1465] Therefore, achieving social justice in education also depends on the establishment of a dedicated dispute settlement system that includes school governing bodies.[1466] Such a system should provide for appropriate dispute settlement procedures and mechanisms,[1467] for officials to be held personally liable,[1468] and for the recognition of national and provincial consultative forums as statutory structures.[1469]

In this regard, the proposed guidelines in chapter 7 are intended as an innovative approach to intergovernmental relations for the effective governance of education, and as a means to help resolve disputes between the Department and school governing bodies.

1461 See 4.4.6, chapter 4; 5.4.2.1 & 5.4.2.2, chapter 5.

1462 *Constitution*:sec. 41(1)(h)(iii). See also 4.4.6, chapter 4; 5.4.2.1 & 5.4.2.2, chapter 5.

1463 See 4.4.5, chapter 4; 5.5.1, chapter 5. See also *Uthukela District Municipality v President of the Republic of South Africa* 2002 (11) BCLR 1220 (CC):par. 19.

1464 *Constitution*:sec. 41(4).

1465 See 5.5.2, chapter 5.

1466 Proposals for such a system are included in part 2 of the recommended guidelines in chapter 7.

1467 See 5.5, chapter 5.

1468 See 5.5, chapter 5.

1469 See 4.7, chapter 4.

6.4.5 Accountability and responsibility

The challenges outlined in chapter 5 reveal that government and schools have been plagued by ethical problems for the past two decades. Judging by case law and news reports, public school education is beset with challenges relating to unethical leadership, corruption and mismanagement. This has led to a call for reform in a number of areas, including morality.[1470]

6.5 IMPACT OF COOPERATIVE GOVERNANCE ON SOCIAL JUSTICE IN EDUCATION

The sections that follow are dedicated to the secondary question about how cooperative governance affects social justice in education, relating each of the five principles of cooperative governance outlined above to the pursuit of socially just education.

6.5.1 The role of the rule of law in achieving social justice

The notion of a constitutional state implies governance systems of which the operation can be "rationally tested against or in terms of the law".[1471] Therefore, applying the law to education governance is justified based on its rational connection to the education delivery function of the spheres of government and organs of state.[1472] Respecting the principle of the rule of law promotes fairness, reasonableness and equity in the delivery of education.[1473] This, in turn, will ensure a well-performing education sector, capable of equipping the nation with the necessary skills to become active and autonomous citizens, ultimately achieving social justice.

1470 See 5.6.2, chapter 5.
1471 *S v Makwanyane* 1995 (6) BCLR (CC):par. 156.
1472 See 5.2.1, chapter 5.
1473 See 4.4.1, chapter 4; 5.2.1 & 5.2.4, chapter 5.

6.5.2 The realisation of social justice through shared responsibility and the pursuit of a common outcome

Cooperation between government spheres and organs of state improves the alignment of activities in education delivery, provides goal clarity, and eliminates duplication of efforts,[1474] resulting in a more effective and efficient education service.

The duty to cooperate in good faith and maintain good relations implies that spheres of government and organs of state should be able to deal with the dynamics of their relationship.[1475] Differences of opinion should not impede education delivery.[1476] Instead, since education is an area of concurrent responsibility, the relationship between the spheres of government and organs of state should be collaborative to the core, with each partner's activities and efforts geared towards the shared outcome of quality education for all.[1477] If not, the system is bound to be plagued by cross-purposes,[1478] unhealthy competition,[1479] duplication[1480] and confusion,[1481] ultimately affecting the quality of education provided.[1482]

Judging by the case law discussed, a limited understanding of cooperative governance often results in conflict that paralyses education delivery and renders social justice unattainable. This is something the proposed guidelines on the practical implementation of cooperative governance in chapter 7 are intended to help remedy.

6.5.3 Realisation of social justice through meaningful engagement and consultation

Meaningful engagement provides each of the spheres of government and organs of state with a means to hold one another (internally) accountable and influence decisions that affect them.[1483] Through facilitating political participation, it also creates the potential for stronger public (external) accountability, ensuring that all education

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1474 See 5.3.1, chapter 5. See also Maluleke 2016:92.
1475 See 5.3.1, chapter 5. See also Woolman *et al.* 2014:22-134; *Welkom*:paras. 145-147, 164-166.
1476 See 4.3.2, 4.4.6, 4.5 & 4.6, chapter 4; 5.3.1, chapter 5. See also Maluleke 2019:103.
1477 See 4.6, chapter 4; 5.3.1, chapter 5. See also Malan 2008:78; *Welkom*; *Rivonia*; *Ermelo*; Maluleke 2016:92.
1478 See 4.4.6 & 4.10.6, chapter 4; 5.3 & 5.3.2, chapter 5.
1479 See 4.4, chapter 4.
1480 See 4.3.1 & 4.6, chapter 4.
1481 See 5.3.2, chapter 5.
1482 See 5.3.3, chapter 5; Maluleke 2019:103.
1483 See 5.4, chapter 5.

partners fulfil their obligations to realise the right to education.[1484] In addition, meaningful engagement helps disrupt power imbalances between the spheres of government and organs of state in cases pertaining to education rights as well as in conflicts between government and the socioeconomically disadvantaged. Finally, it can help solve problems by enhancing insight into the circumstances and needs of those affected.[1485] This enables the development of appropriate solutions, echoing the *Constitution*'s commitment to the "will of the people".[1486]

6.5.4 The obligation to avoid litigation and the realisation of social justice

Even though the *Constitution* clearly states that the spheres of government and organs of state should avoid conflict and foster closer cooperative working relationships, many disputes between the Department and school governing bodies still end up being litigated in court.[1487] No matter how well defined the division of power between the different spheres of government and organs of state is, there will always be some overlap. If not properly managed in line with the *Constitution* and other legislation, this will continue to pose a risk of litigation and destructive conflict that harms efforts to achieve social justice in and through education.[1488] The current lack of statutory guidelines for dispute resolution between school governing bodies and education departments does not aid matters. The proposed dispute resolution procedures in chapter 7 are meant to help overcome this.

6.5.5 The role of accountability and responsibility in achieving social justice

Widespread corruption and mismanagement in the education sector[1489] impedes quality service delivery. The failure to provide infrastructure, textbooks, funding and educators prevents the realisation of the constitutionally entrenched right to a basic education. This, in turn, causes inequalities,[1490] which hamper the achievement of social justice.

1484 Chenwi & Tissington 2010:17.
1485 See 4.9.1, chapter 4; 5.4.1 & 5.4.3, chapter 5.
1486 Liebenberg 2010:314.
1487 Makoti & Odeku 2021:49.
1488 Makoti & Odeku 2021:49.
1489 See 5.6.2, chapter 5.
1490 See 3.4, chapter 3.

Moreover, immoral and unethical behaviour among those in leadership positions induces similar conduct at lower levels of the education partnership. To achieve social justice in education, no unethical behaviour can be tolerated on the part of education leaders. Attaining social justice for all through education is a formidable challenge within the current political, legal, and educational systems; although the issue can be addressed, achieving a comprehensive resolution may prove unattainable in a reasonably short timeframe.

6.6 PRACTICAL GUIDELINES TO ENHANCE COOPERATIVE GOVERNANCE AND SOCIAL JUSTICE IN EDUCATION

The last secondary research question explored the guidelines that should be adopted to enhance cooperative governance and social justice in education. Below are the findings.

6.6.1 Compliance with the rule of law

6.6.1.1 *Developing sound human resource practices, including capacity building of governing bodies*[1491]

School governing bodies and departmental officials who are new to school governance should be trained on the contents and conditions of the *Schools Act* as well as their respective responsibilities and duties. To build the capacity of governing bodies as contemplated in section 19(4)(*a*) and 25(4) of the *Schools Act*, it is proposed that provincial education departments enter into an agreement with recognised school governing body associations in terms of sections 19(4)(*b*)(i) to (iii) to help the Department fulfil its obligation of training newly elected governing bodies. Professional and meaningful training will ensure a sound knowledge base and practical competence among those responsible for delivering basic education.[1492]

In addition to engaging with school governing body associations, it is imperative for education departments to recognize the potential contributions of universities in providing comprehensive training for both new and experienced school governance participants. Universities possess a wealth of knowledge and expertise in education,

1491 Beckmann & Prinsloo 2006:495.
1492 Clase *et al.* 2007:260.

and many already offer relevant short courses and programs that cater to the needs of school governance. Collaborating with universities could significantly enhance the training programs, incorporating academic insights, research findings, and innovative educational methodologies. This partnership would not only contribute to the theoretical understanding of governance but also foster the development of practical skills necessary for effective school management.

Furthermore, education departments should explore partnerships with universities that have established networks of experienced presenters and facilitators. These individuals can bring a diverse range of perspectives and practical experiences to the training sessions, enriching the learning process for school governing body members and departmental officials. In doing so, the training becomes a dynamic and interactive platform that addresses the multifaceted aspects of school governance.

It is also crucial for education departments to consider language diversity in their training initiatives. Recognizing that many SGB members may not be proficient in English, efforts should be made to provide training materials and sessions in multiple languages. This inclusive approach ensures that all participants can fully grasp the content and actively engage in the training process, fostering a more equitable and accessible learning environment.

6.6.1.2 *Consultation and meaningful engagement*

The need for remedial innovation is particularly acute when it comes to school governance disputes, where the complex set of education rights outlined in section 29 of the *Constitution* are at stake.[1493]

Three significant Constitutional Court judgments regarding education rights[1494] resulted from challenges brought by school governing bodies in response to abuse of power on the part of government. In all instances, the court stressed the importance

[1493] Liebenberg 2016:2.

[1494] *Ermelo*; *Welkom*; *Rivonia*..

of engagement and cooperation between the parties as a constitutionally required approach to resolving these disputes.[1495]

6.6.1.3 *Stimulation of mutual trust and a positive disposition towards one another*

As stated in chapters 4 and 5, national and provincial consultative forums have been established at the insistence of FEDSAS in order to facilitate formal negotiations between governing bodies and the Department with the explicit intention of resolving conflict.[1496] To promote good intergovernmental relations, these forums should be recognised as formal statutory structures and be characterised by the representation of all interest groups as equal partners, consensus-based decision-making instead of majority voting, and regular and direct communication between the Department and school governing bodies.[1497]

6.6.2 Shared responsibility and the pursuit of a common outcome

6.6.2.1 *Cooperation*

In order for the spheres of government and organs of state to achieve their mandates, collaboration must be the defining feature of their relationship.[1498] A lack of cooperation will prevent them from successfully carrying out their concurrent function of education delivery.[1499]

6.6.2.2 *Power relations*

Based on the discussion in chapter 5, the way in which the powers bestowed on the provincial education departments and school governing bodies are exercised creates

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1495 Meaningful engagement was pioneered in eviction disputes involving the housing rights contained in section 26 of the *Constitution*. See for example *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC); *Pheko v Ekhurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC).

1496 See 4.6.2, chapter 4; 5.5.2, chapter 5.

1497 Clase *et al*. 2007:259-260.

1498 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC); *Pheko v Ekhurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC).

1499 Maluleke 2019:94. See 5.3.3, chapter 5.

frustration and tensions that hamper efficient and effective service delivery.[1500] Moreover, as provincial HODs are first and foremost accountable to the Premiers who selected and appointed them, the Minister of Basic Education has little authority to hold HODs accountable. This complicates reporting and accountability, making it challenging to monitor whether education norms and standards are being complied with.[1501]

A solid shared understanding of cooperative governance is essential for the spheres of government and organs of state to realise that, in addition to fulfilling their respective responsibilities, it is equally important to use their powers to complement each other's functions for the benefit of the nation.[1502] This requires a single clear set of legislative guidelines.

6.6.2.3 *Shared responsibilities*

The quality of education is determined by both the level at which and the way in which the parties' allocated functions are carried out within the framework of their relationship.[1503] As outlined in chapter 3, the education system faces an array of implementation challenges involving resources, capacity and preparedness, which impede the delivery of quality and equitable education.[1504] Monitoring and public accountability is essential to ensure that the different spheres of government are responsible in their behaviour, actions and decisions[1505] and that their conduct is acceptable to society.[1506]

The complexities and intricacies of the distinct, interrelated and interdependent relationship between the spheres of government and organs of state call for the recognition of, and adherence to, the lines of accountability.[1507] While the Minister is responsible for ensuring that all learners in the country receive an education, the

1500 Karlsen 2000:526; Maluleke *et al*. 2017:48; 5.3.2, chapter 5.
1501 Maluleke 2019:97.
1502 *Constitution*:sec. 40(1).
1503 Arendse 2019:108; Woolman *et al*. 2014:57-15.
1504 See 3.4, chapter 3.
1505 See 4.10.5 & 4.10.9, chapter 4; 5.3.3 & 5.6.1, chapter 5.
1506 Maluleke 2019:99; Napier 2007:376.
1507 Burger 2001:68-69; Maluleke 2019:99.

practical delivery of education, policy decisions and the control and management of education activities are all areas under concurrent authority.[1508]

6.6.2.4 *Coordination of activities*

When the education partners fail to consult with each other and coordinate their activities, this leads to unnecessary duplication, delays and misallocation of resources.[1509] Practising the principle of coordination would create synergy and improve effectiveness, efficiency and productivity in education delivery.[1510]

6.6.3 Consultation and meaningful engagement

6.6.3.1 *Consultation and meaningful engagement in dispute resolution*

In *Ermelo*, *Rivonia* and *Welkom*, the Constitutional Court emphasised the importance of cooperative governance in the making of policy relating to education rights.[1511] Courts encourage extrajudicial engagement, urging parties to engage prior to instituting legal proceedings in order to keep matters out of court as far as possible.[1512] This minimises the adverse effect that litigation may have on parties, including delays, the high cost and duration of hearings, the limited range of possible outcomes, and the harm done to the future relationship between the litigating parties.[1513]

Therefore, government should initiate engagement early on in the process of developing policies or programmes that affect education rights.[1514] This kind of proactive engagement eliminates, or at least reduces, the need for litigation.[1515] It is also an extremely effective vehicle to craft the multifaceted and robust policies needed

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1508 Edwards 2008b:79.

1509 See 3.4, chapter 3; 5.3.1, chapter 5.

1510 Maluleke 2019:101.

1511 See 4.8.1, chapter 4; 5.4.2.1 & 5.4.2.2, chapter 5.

1512 Note, however, that extrajudicial engagement involves more than mere avoidance of court proceedings. Rather, it involves engagement in all policy processes affecting socioeconomic rights delivery. Mahomedy 2020:52.

1513 See 5.5, chapter 5.

1514 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC):par. 30.

1515 Ray 2008:707.

to facilitate social justice in and through education,[1516] provided that the engagement is properly framed.[1517]

6.6.3.2 *Consultation and meaningful engagement in decision-making and the passing of legislation*[1518]

Counting among the hallmarks of democracy,[1519] meaningful engagement and consultation is essential in making decisions and developing policies and laws that affect people's lives.[1520] To facilitate meaningful participation in decision-making and the passing of laws and policies,[1521] it is proposed that an invitation be extended to hear people's views,[1522] that those interested be afforded an opportunity to submit input,[1523] and that all submissions be considered in good faith.[1524]

Such a participation process needs to be properly managed to ensure that the deliberations facilitate improved education for all South Africans. For this reason, the proposed guidelines in chapter 7 also include guidance in this regard as well as how to deal with the inputs received on the legislation.

6.6.4 Appropriate dispute settlement procedures and mechanisms

Cooperative governance and constructive conflict resolution are inextricably linked to the duty to avoid litigation.[1525] Chapter 7 provides a step-by-step guide based on IRFA to facilitate the resolution of conflicts between school governing bodies and the Department. Moreover, since dispute resolution is closely related to meaningful engagement, implementing the measures and processes outlined in the guide will also advance meaningful engagement.

1516 Ray 2008:707.
1517 Mahomedy 2020:53.
1518 See 4.10, chapter 4.
1519 Liebenberg 2010:301. See also 4.4.4 & 4.4.5, chapter 4; 5.4.1, chapter 5.
1520 Ray 2008:707; Chenwi & Tissington 2010:17.
1521 See 5.4.1 & 5.4.2, chapter 5.
1522 See 5.4.1.1, chapter 5.
1523 See 5.4.1.2, chapter 5.
1524 See 5.4.1.3, chapter 5.
1525 *Constitution*:sec. 41(1)(*h*), 41(3), 41(4).

In addition, to strengthen existing dispute resolution mechanisms, it is proposed that the BELAB[1526] grant the Minister the authority to determine and regulate dispute resolution through national regulations, for which the guidelines in chapter 7 may serve as a point of departure. The guidelines offer advice and explain how parties may utilise intergovernmental forums for the promotion and facilitation of intergovernmental relations, and propose mechanisms and procedures for preventing and resolving disputes.

6.6.4.1 *Personal liability of officials*

The case law discussed[1527] reveals that most disputes result from officials' own perception of their powers and ignorant application of the law.[1528] Overreach and abuse of power leads to illegal, unfair and unreasonable actions and decisions,[1529] which ultimately require adjudication.[1530]

In this regard, it may be appropriate to grant a *de bonis propriis* cost order where an individual official's actions resulted in unnecessary litigation, unnecessary costs, or were unreasonable, reckless or dishonest. Knowing that they may face punishment cost orders may spur education officials to adhere to the requirements of fair administrative action, which will defuse potential conflict between education stakeholders.[1531]

6.6.4.2 *National and provincial consultative forums recognised as statutory structures*

To guarantee meaningful consultation and negotiations and acknowledge national school governing body organisations as legitimate dialogue partners, it is recommended that formal statutory structures be established for governing body

1526 B2/2022.
1527 See also 5.2.3, chapter 5.
1528 See 4.7, chapter 4; 5.2.2 & 5.4.2, chapter 5.
1529 *Constitution*:sec. 33.
1530 Beckmann & Prinsloo 2015:4. See also 5.2, chapter 5.
1531 Van der Merwe 2012:155.

organisations both nationally and provincially.[1532] The Minister should be tasked with issuing regulations governing the operation and funding of these forums.[1533]

6.6.5 Ethics in the education departments and school governing bodies

The organisational culture in the national and provincial education departments and school governing bodies should not only support ethical behaviour, but also leave no room for doubt as to what is considered right and wrong, both in terms of individual actions and institutional conduct. Ethics training for officials and governing body members will go a long way towards ensuring that they provide effective, efficient, ethical and accountable service.[1534]

6.7 CONCLUSION AND RECOMMENDATIONS: THE COOPERATIVE GOVERNANCE REQUIREMENTS TO REALISE SOCIAL JUSTICE IN PUBLIC EDUCATION IN SOUTH AFRICA

To overcome the challenges of a distinct pattern of unequal access to quality education (impeding distributional social justice)[1535] and insufficient cooperation by the partners involved in education delivery (hampering relational social justice),[1536] South Africa must implement the principles of cooperative governance. The following five principles offer the greatest potential for legal reform:

6.7.1 Respect for the rule of law

To advance respect for the supremacy of the *Constitution* and adherence to the rule of law in the exercise of power, this study proposes effective human resource practices (including training for education officials and school governing body members), consultation and meaningful engagement, as well as the development of mutual trust and a positive disposition among education departments and governing bodies.[1537]

1532 See 4.7.1-4.7.3, chapter 4; 5.5.2.1 & 5.5.2.2, chapter 5.
1533 See 4.7.1-4.7.3, chapter 4; 5.5.2.1 & 5.5.2.2, chapter 5.
1534 See 5.6, chapter 5. See also Ndlovu *et al.* 2020:30.
1535 See 2.2, chapter 2; 3.4, chapter 3.
1536 See 5.2-5.6, chapter 5.
1537 See 5.2, chapter 5.

6.7.2 Shared responsibility and the pursuit of a common outcome

Ultimately, the success of the spheres of government and state organs in achieving the common goal of delivering quality education depends on their power relations, understanding of their shared responsibilities, and the extent to which they cooperate and coordinate their activities. Getting this right will enable them to carry out their respective mandates.[1538]

6.7.3 Meaningful engagement

Extrajudicial engagement is essential to realising the right to education, and more specifically, to ensuring that education is of a high quality. Meaningful engagement is recommended to increase participation by those facing education rights deprivations and violations, reduce the power imbalance between spheres of government and organs of state, increase accountability, and facilitate constructive problem-solving.[1539]

6.7.4 Avoid litigation

Whenever an organ of state exercises its statutory powers or performs its statutory functions, it should make every reasonable effort to avoid intergovernmental disputes, and where disputes do arise, to resolve them without resorting to judicial proceedings. To this end, a dispute resolution mechanism or procedure tailor-made for South Africa's unique system of education governance must be developed.[1540]

6.7.5 Moral and ethical leadership and accountability

Leadership based on moral and ethical principles is the key to sound, transparent, efficient and effective governance. Greater emphasis should be placed on accountability and performance by strengthening existing monitoring, evaluation and reporting mechanisms[1541] so as to incorporate the duties of all spheres of government and organs of state.

1538 See 5.3, chapter 5.
1539 See 5.4, chapter 5.
1540 See 5.5, chapter 5.
1541 See 5.6, chapter 5.

Moreover, the fact that IRFA, which establishes a framework for the national and provincial education departments to facilitate intergovernmental relations and resolve intergovernmental disputes, does not apply to school governing bodies is problematic. To promote social justice, the constitutional principle of cooperative governance, both as it appears in the *Constitution* and as elaborated on in IRFA, should be extended to school governing bodies.

Chapter 7 proposes a practical guide to help government spheres and state organs put into practice the principles of cooperative governance discussed throughout this dissertation. The guide offers a fresh approach to intergovernmental relations and a framework for effective collaboration between the Department and school governing bodies as a vehicle to achieve social justice in education.

CHAPTER 7: GUIDELINES FOR THE NATIONAL AND PROVINCIAL DEPARTMENTS OF EDUCATION AND SCHOOL GOVERNING BODIES TO GIVE EFFECT TO THE PRINCIPLES OF COOPERATIVE GOVERNANCE

INTRODUCTION

This final chapter contains a proposed practical guide to the implementation of the cooperative governance principles discussed throughout this dissertation, tailor-made for government spheres and state organs involved in basic education delivery. IRFA establishes a framework for the national and provincial education departments to facilitate intergovernmental relations and resolve intergovernmental disputes.[1542] However, IRFA does not apply to school governing bodies. This, therefore, points to a need for a set of guidelines for cooperative governance and conflict resolution that includes schools, as state organs.[1543]

School governing bodies are also excluded from the various intergovernmental structures that promote cooperation and good relations between the national and provincial departments of education. These consultative structures include the Minister and Members of the Executive Councils (MINMEC) and the Council of Education Ministers (CEM).[1544] And while the national and provincial consultative forums (NCF and PCFs) established at the insistence of FEDSAS can be used to facilitate formal negotiations, discussions and interaction between provincial authorities and school governing bodies,[1545] they are not considered formal statutory structures. Therefore, it is recommended that the Minister issue regulations governing their operation.[1546]

The guide has been developed to provide a framework for effective cooperative governance between the national and provincial education departments (spheres of government) and public schools (organs of state)[1547] and to set out how the NCF and

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1542 See 4.6, chapter 4.

1543 See 4.6 & 4.7.2, chapter 4; 5.5.2, chapter 5; 6.3, chapter 6.

1544 See 4.6.1, chapter 4.

1545 See 4.7.3, chapter 4; 5.5.2.2, chapter 5; 6.6.4.2, chapter 6.

1546 See 5.5, chapter 5.

1547 To the extent that they exercise a public power or perform a public function in accordance with legislation.

PCFs, as administrative mechanisms, may be utilised to enhance cooperative governance. It emphasises the partnership principles (part A), dispute resolution procedures (part B) and consultation and meaningful engagement (part C) required to achieve social justice in education.

As a concrete output of this research, the guide provides practical and actionable steps that the education partners can take to enhance their intergovernmental relations and cooperative governance practices.[1548]

[1548] Most of the footnotes in this chapter refer back to previous chapters of the dissertation and are not meant for inclusion in the guideline in practice.

GUIDELINES FOR THE IMPLEMENTATION OF COOPERATIVE GOVERNANCE PRINCIPLES BY NATIONAL AND PROVINCIAL EDUCATION DEPARTMENTS AND SCHOOL GOVERNING BODIES

Preamble

South Africa's pursuit of a society based on social justice translates into a mandate that government must implement. Since the governance of basic education in South Africa comprises three distinct, independent and interrelated spheres (national Department of Basic Education, provincial education departments, and public schools), this mandate automatically becomes a shared mandate that should be carried out within a cooperative framework. In carrying out this shared mandate, the national and provincial education departments (spheres of government) and public schools (organs of state) must cooperate, respect each other's status, powers and functions, foster friendly relations, assist and support each other, inform and consult on matters of common interest, coordinate their actions, policies and legislation, adhere to agreed procedures, and avoid litigation against each other.[1549]

It is important, therefore, that the spheres of government and organs of state fully understand each other's legal powers and levels of responsibility, have confidence in each other's ability to make sound, objective and timeous decisions, consult with each other, and refrain from infringing on each other's terrain.[1550] Public schools and the education departments are expected to work side by side to provide public education in an equitable manner, but cannot adequately function as a cohesive whole unless the principles and requirements for cooperative governance and intergovernmental relations are adhered to.[1551]

The challenges that inhibit the realisation of the constitutional imperative of cooperative governance include overreach and abuse of power, tension relating to power and authority, a failure to consult and meaningfully engage, deficient intergovernmental structures and dispute resolution mechanisms, and immoral and unethical leadership.[1552] To help the education partners overcome these challenges,

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1549 *Constitution*:sec. 41(1)(*e*), (*h*), 41(1)(*h*)(i)-(vi). See 4.4.1-4.4.6, chapter 4.
1550 Visser 2006:365. See 5.2-5.4, chapter 5.
1551 See 4.10, chapter 4.
1552 See 5.2-5.6, chapter 5.

enhance the principles of cooperative governance envisaged in the *Constitution*, and ultimately advance social justice, these guidelines comprise the following three parts:

- Part A: Partnership principles to achieve a common outcome and hold partners accountable
- Part B: Settlement of intergovernmental disputes and the obligation to avoid litigation
- Part C: Consultation and meaningful engagement in decision-making and the passing of legislation

Definitions

Dispute: For the purpose of these guidelines, a dispute:

- involves one or more education departments and one or more public schools, as organs of state, and excludes disputes involving parents or departmental officials in their personal capacity;

- comprises a disagreement regarding a fact, law or policy in which one party asserts or claims something, while the other counterclaims or refuses or denies it, therefore implying a deadlock on a specific issue rather than a broad and general disagreement;[1553] and

- is considered intergovernmental for a public school when the school acts in its capacity as an organ of state, either performing a statutory function or exercising a statutory power, being any function or power assigned by or derived from the *Constitution*, an agreement, or any other legal instrument.[1554]

If the dispute is not resolved in terms of these guidelines, it may be decided by a court.

These guidelines do not apply to the settling of disputes regarding interventions pursuant to section 100 of the *Constitution*.[1555]

1553 *National Gambling Board v Premier of KwaZulu-Natal* 2002 (2) BCLR 156 (CC):par. 19

1554 For example the school governing body in executing its statutory functions relating to the assets, liabilities, property and financial management of a public school, as assigned by the *Schools Act*.

1555 When a province cannot or does not fulfil an executive obligation in terms of the *Constitution* or another law, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation.

National Consultative Forum (NCF): NCF refers to the platform established between the national Department of Basic Education and recognised school governing body organisations to facilitate formal negotiations, discussion and interaction. The forum seeks to promote communication on national education issues affecting the interests of public schools in general, and the governance of public schools in particular. This occurs against the backdrop of the education partnership between the state and stakeholders in public schools, as represented by school governing bodies. The NCF comprises the Minister of Basic Education, the Director-General and senior officials of the Department of Basic Education, as well as representatives of school governing body organisations.[1556]

Partners: The partners in education are the national and provincial education departments (spheres of government) and public schools (organs of state),[1557] who are jointly responsible for education and its administration and are bound by the principles of chapter 3 of the *Constitution.*

Provincial Consultative Forum (PCF): The PCF is the platform established between a provincial education department and recognised school governing body organisations to facilitate formal negotiations, discussion and interaction. The forum seeks to promote communication on provincial education issues affecting the interests of public schools in general, and the governance of public schools in particular. This occurs against the backdrop of the education partnership between the state and stakeholders in public schools, as represented by school governing bodies. The PCF consists of the province's Head of Department for education, officials of the education department, as well as provincial representatives of school governing body organisations.[1558]

Social justice: Social justice involves a distributional and relational dimension. The distributional dimension focuses on ensuring equal opportunities and rights for all individuals, preventing people from being excluded unfairly from life's opportunities and society's activities. Achieving distributional social justice necessitates the

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1556 See 4.7.3, chapter 4.

1557 To the extent that they exercise a public power or perform a public function in accordance with legislation.

1558 See 4.7.3, chapter 4.

elimination of structural and systemic inequalities (formal equality) as well as efforts to provide fair and just treatment to all (substantive equality). To achieve distributional social justice through education, it is important to create fair institutions and institutional frameworks that regulate social arrangements in an equitable and just manner. The relational dimension, in turn, refers to participation by the stakeholders responsible for education and its governance, including the national and provincial education departments and school governing bodies, who must pursue social justice in education through cooperative governance.[1559]

[1559] See 2.4, chapter 2.

PART A – PARTNERSHIP PRINCIPLES TO ACHIEVE A COMMON OUTCOME AND HOLD PARTNERS ACCOUNTABLE

As required in terms of the *Constitution*, the relationship between the spheres of government and state organs must be characterised by mutual trust and good faith, assisting, supporting and consulting one another, holding each other accountable, and coordinating their activities in accordance with agreed policies and procedures. This section provides guidance on the cooperative partnership principles required to build a productive and successful working relationship and hold partners accountable for achieving social justice in and through education.[1560]

1. Shared ownership of partnership

1.1 This principle requires the goals and expectations of all parties in the partnership to be clearly set out. The partners must:

1.1.1 consider and prioritise the best interests of all children;

1.1.2 determine common goals;

1.1.3 recognise their responsibility to respect, protect, promote and fulfil learners' right to education; and

1.1.4 be aware of the need to address inequality and the need for social justice.

2. Trust and transparency among partners

This is achieved by:

2.1 having honest and transparent discussions on partnership goals, motivations for specific actions within the partnership, issues of management and governance, access to resources, and budgeting issues;

2.2 sharing information freely (including resources, data and best practices);

[1560] See 4.9, chapter 4.

2.3 treating each other with respect and professionalism, including respecting each other's roles, responsibilities and perspectives; and

2.4 regularly reviewing and evaluating the partnership to identify areas for improvement.[1561]

3. Understanding the working environment

3.1 The partners should respect each other's context and responsibilities to provide quality education for all children and realise social justice. To this end, partners should:

3.1.1 acknowledge and understand the interrelated and independent roles of the departments and school governing bodies in achieving their shared goal; and

3.1.2 enhance and promote the other partner's work to fulfil their responsibilities, without frustrating their efforts.

3.2 The partners should make a concerted effort to know and understand each other's working environment. Activities to promote this include:

3.2.1 training;

3.2.2 team-building activities;

3.2.3 the establishment and maintenance of proper communication channels in the circuit, district, province and at national level; and

3.2.4 quarterly meetings of the NCF and PCFs.

4. Clear division of roles and responsibilities

Departmental officials and members of school governing bodies must have a clear understanding of their roles and responsibilities to achieve social justice as defined by the law, and respect each other's responsibilities.[1562]

1561 See 5.6.1, chapter 5.

1562 See 4.4.2-4.4.4, chapter 4; 5.2, chapter 5.

4.1 The NCF and the PCFs must be recognised as statutory bodies, by the Minister of Basic Education, through which partners can hold each other accountable for the fulfilment of their respective roles to achieve social justice.[1563] Accountability can be achieved through the following:

4.1.1 Establishing measurable goals to enhance social justice in every school. The Department and school governing bodies should develop measurable goals, which must then be tracked and evaluated over time to hold each other accountable.

4.1.2 The NCF and PCFs should monitor and evaluate progress towards partners' goals. Check-ins, progress reports and evaluations must be conducted at regular intervals. In the event that a partner or partners fail to meet their expected responsibilities within the established framework, the dispute resolution process should be followed to address and rectify the situation.

4.1.3 Partners should work together to resolve issues or challenges as they arise. In this way, issues are more likely to be resolved before they escalate and threaten the partnership.

5. Effective and regular communication[1564]

5.1 Effective and quarterly communication must be maintained as follows:

5.1.1 Plan regular check-ins: Regular meetings are to be held to discuss the progress of the partnership, any issues that have arisen, and improvements that have been implemented. The PCFs and NCF structures must be utilised for this purpose.

5.1.2 Establish clear expectations: Ensure that the Department and school governing bodies are aware of their respective roles and responsibilities within the partnership.

1563 Wanni *et al.* 2010:40-41; Serfontein & De Waal 2015b:2332.

1564 See 4.10.5, chapter 4.

5.1.3 Communicate openly and honestly: The Department and school governing bodies should be frank in expressing their thoughts and concerns. It is essential that issues and challenges are addressed openly and solutions are found together.

5.1.4 Find effective communication channels that work for both the Department and school governing bodies: These could be phone calls, videoconferences or in-person meetings.

6. Joint strategic planning and implementation

6.1 To achieve social justice, the obstacles and challenges must be assessed and a strategic plan developed to address them.

6.2 All partners must consider the sustainability of the strategic plan. This can be achieved through:

6.2.1 the development of specific, measurable, achievable, relevant and time-bound goals and targets to achieve social justice;

6.2.2 using data and evidence to ensure that the strategic plan is grounded in a solid understanding of social justice; and

6.2.3 continually reviewing and updating the strategic plan as new data and evidence become available to ensure that it reflects changing circumstances.

6.3 The partners must communicate regularly about their frustrations and challenges in achieving social justice goals.[1565]

7. Strong commitment from staff and management

7.1 The partners must be committed to the pursuit of social justice in education and understand who is responsible for which specific duties for the partnership to succeed.[1566]

[1565] See 4.2, chapter 4; 5.3.1, chapter 5.

[1566] See 2.4, chapter 2, which explains the social justice concept.

7.2 Departmental officials and governing body members must be interested in the partnership for it to be sustained and to effect long-term change. It is crucial for partners to have senior management buy-in, including that of the Minister of Basic Education, MECs, HODs and the chairs of school governing bodies.

7.3 Partners should be acknowledged and treated as equals, and all employees of the partner institutions should be trained not to abuse their power or exceed their authority.[1567]

8. Supportive institutional infrastructure

8.1 For the partnership to succeed, partners must create a supportive environment. This requires a culture of collaboration, communication and shared goals.

8.2 It is imperative that partners work together to ensure that those involved in the partnership have adequate time, skills and capacity to achieve the partnership's objectives. This can be achieved by:

8.2.1 assessing the skills and resources necessary for the partnership to succeed;

8.2.2 establishing clear roles and responsibilities for each partner and ensuring that all partners understand what is expected of them and what they are able to contribute to the partnership; and

8.2.3 offering training and development opportunities, such as introductory and continuous training for governing bodies and departmental officials.[1568]

9. Monitoring and evaluation

A successful partnership requires monitoring and evaluation to measure progress and identify obstacles.

[1567] See 4.10.7, chapter 4.

[1568] See 4.4.6, chapter 4; 5.2.2.1, chapter 5.

9.1 To ensure that the overall goals of the partnership remain aligned, it is important to monitor and evaluate the partnership regularly. As part of good management practice, monitoring should be an ongoing process.

9.2 Partners must communicate their thoughts about the partnership through the established communication channels, which include:

9.2.1 quarterly PCF and NCF meetings, held either in person or virtually to discuss progress made, share information, and resolve issues;

9.2.2 email, used for the exchange of information about the partnership, such as updates, reports and other documents; and

9.2.3 phone calls, which serve as one-on-one conversations to clarify questions or discuss urgent issues.

9.3 Success indicators must be jointly determined and applied periodically. Partners should discuss monitoring and evaluation mechanisms to ensure that they are practical, clear and appropriate.

9.4 Partners are expected to continue looking for new opportunities for collaboration, being the hallmark of a successful partnership.[1569]

[1569] Wanni *et al.* 2010:58-60; Makoti & Odeku 2021:46.

PART B – DISPUTE RESOLUTION

The *Constitution* requires cooperative governance, which calls on governments and state organs to:

- implement policy and legislation in a coordinated manner;
- cooperate in good faith and mutual trust;
- avoid legal action against one another; and
- amicably resolve their disputes.[1570]

This section offers advice and illustrations of how the spheres of government and state organs can use intergovernmental forums as a structure for facilitating sound intergovernmental relations, and of the mechanisms and procedures for preventing and resolving disputes, in compliance with the *Constitution.*

1. The principles of cooperative governance

Cooperative governance is enshrined in the *Constitution*. It is based on the notion that government and organs of state are more effective, efficient and responsive in delivering on the social justice mandate when they act in a collaborative and cooperative manner. Cooperation and collaboration between spheres of government and organs of state requires procedures, institutions and expertise to resolve disputes through meaningful consultation and engagement.[1571] The paragraphs below discuss conflict management practices, methods for avoiding and preventing conflict, and practical steps for resolving disputes between the spheres of government.

2. Rationale for the duty to avoid litigation

2.1 Cooperative governance and constructive conflict resolution are inextricably linked to the duty to avoid litigation. There are ample reasons for avoiding litigation, including:

1570 See 6.3, chapter 6.

1571 See 4.4.5 & 4.4.6, chapter 4; 5.4.1, chapter 5.

2.1.1 the delays in resolving matters;

2.1.2 the high cost associated with legal proceedings;

2.1.3 the protracted nature of hearings;

2.1.4 the limited range of outcomes; and

2.1.5 the negative impact on the future relationship between the litigating partners.[1572]

2.2 Partners should act bona fide at all times and must agree on alternative dispute resolution processes, such as mediation, conciliation, arbitration, and the like.[1573]

2.3 All reasonable efforts should be made to preserve good relationships, generate alternative creative solutions, and resolve disputes in a timelier and more cost-effective manner. Alternative processes are especially beneficial when cooperation between partners in conflict has to continue after the dispute has been resolved, as is the case with school governing bodies and provincial education departments.[1574]

3. Best practice in conflict management

Based on the Intergovernmental Dispute Prevention and Settlement Practice Guide[1575] published by the Department of Provincial and Local Government, the following best practices are proposed for the relationship between education departments and school governing bodies:

3.1 The best course of action in most disputes is prevention, as it is less expensive and less damaging to relationships. Procedures and strategies for dispute prevention should be used both before an issue arises and as soon as it occurs to keep it from escalating into a more complicated dispute.

1572 See 5.5, chapter 5.
1573 See 4.4.5, chapter 4; 5.5, chapter 5.
1574 See 4.4.5, chapter 4; 5.5, chapter 5.
1575 GN 491 Government Gazette 26 April 2007:3-4.

3.2 Where disputes cannot be prevented, there are well-recognised ways of containing, settling and resolving them effectively and efficiently. Paragraph 4 below provides guidance in this regard.

3.3 Conflicts and conflict situations that might develop into disputes should be addressed as early on as possible. Early intervention prevents a dispute from becoming complex, intractable, or costly to resolve.

3.4 Deliberate steps should be taken to prevent disputes from escalating and to de-escalate existing disputes. To prevent disputes from turning into larger problems, all partners must make every effort to engage each other on a bona fide basis to resolve any deadlock.[1576]

3.5 Conflict resolution is always resource-constrained, and cost-efficiency is as critical here as it is in other areas of government activity. Therefore, low-cost processes such as direct engagement or negotiation between disputing partners should be prioritised over high-cost processes such as arbitration or litigation.[1577]

3.6 While partners are engaged in resolving a dispute, they must continue conducting business as usual, delivering their education mandate and fulfilling their obligations towards each another. Partners in education are expected to follow these steps if a dispute is declared between them:

3.6.1 The dispute should be separated from other joint activities to prevent it from affecting ongoing operations.

3.6.2 To ensure that discussions relating to the dispute do not interfere with ongoing activities, both partners should establish communication protocols as set out in part 1, paragraph 5, to deliver their education mandate. A specific time or channel for communication regarding the dispute must also be set up.

1576 See 4.8.1.1-4.8.1.3, chapter 4.

1577 See 5.4.2, 5.5.1 & 5.5.2, chapter 5. The discussion of the case law in chapter 5 demonstrated the disadvantages of litigation, such as the high cost, delays, duration of hearings, limited options, and the negative effect on ongoing relationships.

3.6.3 Delivery of the education mandate requires both partners to continue cooperating and fulfilling their obligations towards each other while they resolve the dispute.

3.6.4 The partners should prioritise resolving the dispute through direct engagement or negotiation. Alternatively, arbitration could be pursued, if necessary.

3.7 The partners engaged in dispute resolution must make every effort to maintain good interpersonal and institutional relationships. This requires them to focus on the dispute and not on the individuals or personalities involved.

3.8 The evaluation of possible outcomes should be based on objective criteria and independent assessments. In a dispute over technical matters, the partners should do the following:

3.8.1 Work together to figure out a way of using the same, non-partisan and independent experts to resolve the issue.

3.8.2 Use the minibus technique[1578] if each side has engaged their own experts. This technique involves a joint meeting where experts are invited to present their viewpoints on disputed issues, ask questions, and be questioned. After discussing everything, they must create a report together. This report shows where they all agree and where they still have differences. They explain why they do not agree on certain things. Both sides use this report to figure out what they still need to solve and decide on the best way to do it, like using an outside expert or settling the matter.

3.8.3 Issue their final single joint report that identifies the areas where they agree and disagree, along with reasons for disagreeing. Upon reviewing the report, the disputing partners narrow the issues down and select a method of resolving them, such as arbitration or consulting an independent expert.

[1578] Intergovernmental Dispute Prevention and Settlement Practice Guide:4.

3.8.4 Ensure that the best interests of children always take precedence, along with the constitutional mandate of realising social justice.

3.9 Every dispute resolution process must be subject to a time limit, and there must be indicators for deciding when to move from one process to another, such as from negotiation to arbitration. See the guidelines in paragraph 5 below.

3.10 For the prevention and settlement of intergovernmental disputes, there needs to be a systems approach rather than an ad hoc one. A systems approach to conflicts involves anticipating, preventing, containing and managing disputes by establishing permanent structures, procedures and personnel for this purpose. This again underscores the need to recognise national and provincial consultative forums as statutory structures.[1579]

4. Avoidance and prevention of conflict

4.1 Statutory obligation

When exercising statutory powers or performing statutory functions, the education departments and school governing bodies must seek to avoid disputes to achieve the objectives of the *Constitution*.[1580] Partners are therefore obligated to follow the avoidance strategies below.

4.2 **Avoidance strategies for different categories of disputes**

The possible challenges that can lead to conflicts and disputes between the education departments and school governing bodies include:

- problems with communication or information;
- conflicts caused by politics and bureaucracy;
- conflicts of power; and
- distance and animosity between the partners.[1581]

1579 See 6.6.1, chapter 6.
1580 Sections 41(1)(*h*), 41(3) & (4).
1581 See 5.2-5.4, chapter 5.

The following preventative strategies must be followed should any of the above challenges arise.

4.2.1 **Problems with communication or information**

A conflict can arise when there is a lack of communication, a lack of information, or a lack of information exchange. Efforts must be made to promote effective communication and information sharing between partners so that misunderstandings, miscommunications and other breakdowns can be avoided. Information on matters of common interest must be shared in a timely manner. By doing so, consultation and coordination will be facilitated and conflicts avoided.[1582]

As a key principle of cooperative governance, all departments of education and school governing bodies are required to engage in preventative communication. This includes exchanging information about legislation that may affect other partners and consulting them on such legislation to avoid any potential repercussions. A department or governing body must ensure that they actively engage in preventative communication with the other partners to promote cooperation and collaboration.

4.2.2 **Conflicts caused by politics and bureaucracy**

To avoid conflicts arising from opposing political interests, partners must consult on matters of common interest. In this way, transparency and participation in decision-making will be promoted, ensuring that partners recognise the legitimacy of the decision-making process regardless of the outcome.

Participating in consultation goes beyond simply sharing information. It is essential that all interested partners are informed of the proposed decision, are invited to comment, and that their views are considered. To achieve social justice, both partners' interests must be taken into account when making a final decision. Ultimately, the decision must synergise efforts to enhance and improve the nation's education system. To ensure effective participation in consultations, education stakeholders should take the following steps:

[1582] See 4.9.5, chapter 4.

4.2.2.1 Ensure that all necessary information regarding the proposed decision is provided to interested partners.

4.2.2.2 Make the proposed decision available for comment, and share it with the interested partners.

4.2.2.3 Take into account all comments and viewpoints shared by interested partners.

4.2.2.4 Ensure that both partners' interests are considered when making the final decision.

4.2.2.5 The final decision should prioritise efforts to strengthen and improve the country's education system in order to achieve social justice.[1583]

4.2.3 **Conflicts of power**

Power struggles may arise as a result of the division of responsibilities and powers between various partners. To avoid power struggles between school governing bodies and the Department, the following steps should be taken:

4.2.3.1 Each party's roles and responsibilities should be clearly defined. To do so, refer to relevant legislation and policy documents.[1584]

4.2.3.2 Newly elected governing bodies and departmental officials involved in school governance should receive training on the content and conditions of relevant legislation, existing mutually accepted practices, and the scope of their respective duties and responsibilities.

4.2.3.3 Create effective communication channels between the school governing body and the Department. Have regular meetings to keep all partners informed of developments.[1585]

1583 See 5.5.1, chapter 5.

1584 See 4.4.1, chapter 4; 5.2.1, chapter 5.

1585 The establishment of procedures and structures for consultation, coordination and decision-making will also facilitate the management of power relations and prevent conflicts from developing. As discussed in chapters 4 and 5, the NCF and PCFs have been established at the insistence of FEDSAS to facilitate formal negotiations and resolve conflict. To promote and facilitate good intergovernmental relations, these structures should be recognised as formal statutory structures. See 4.6.2, chapter 4; 5.5.2, chapter 5.

4.2.3.4 All partners should promote transparency and accountability. This builds trust and helps avoid power struggles.

4.2.3.5 All partners should work together to achieve their shared goal. The Department should provide the necessary resources and guidance to enable the school governing body to fulfil its responsibilities,

4.2.4 **Distance and animosity between the partners**

Minor disagreements can turn into serious disputes if the partners are on bad terms, if misunderstandings or a lack of communication result in harm for the other party, or if the conflict is conducted publicly to gain political support.[1586] To minimise distance and animosity between them, the partners must:

4.2.4.1 communicate regularly and openly;

4.2.4.2 develop personal relationships and foster friendly relations;

4.2.4.3 acknowledge and address each other's concerns in a constructive manner;

4.2.4.4 provide reciprocal assistance and support to each other whenever possible; and

4.2.4.5 make every effort to resolve disputes by engaging in constructive communication and collaboration, and refrain from conducting a dispute publicly.[1587]

5. Settlement of disputes

A dispute between partners can be resolved by following the steps below -

5.1 **Step 1: Determine whether there is a dispute**

Establish whether a dispute exists as defined under "Definitions" above.

1586 Intergovernmental Dispute Prevention and Settlement Practice Guide:14-15.

1587 See 5.5.1, chapter 5.

5.2 **Step 2: Negotiate**

5.2.1 The spheres of government and organs of state must make all reasonable efforts to settle the dispute in a manner that ensures a quick and satisfactory resolution.[1588] This includes initiating direct negotiations with the other party which can take place through meetings, correspondence or in any other suitable format.

5.2.2 Partners may include in the settlement negotiations all matters that they consider necessary or important, such as commercial and financial needs, administrative demands, and maintaining good relations with the other party.

5.2.3 Direct negotiations provide an opportunity for partners to have complete control over every aspect of the process, as there are no standardised rules of procedure. To ensure effective negotiations, partners should begin by identifying:

5.2.3.1 procedural issues, such as the partners involved;

5.2.3.2 the time and place for the negotiations, and the topics to be discussed; and

5.2.3.3 the information to be exchanged beforehand.

5.2.4 Direct negotiations on procedural elements of the dispute (the 'how') should establish a solid basis for subsequent negotiations on substantive questions (the 'what'). Depending on the circumstances, negotiations may be casual, quick and simple, as long as they are conducted in good faith.[1589]

5.2.5 All issues relating to mutual interest, stakeholders in public schools as well as the interests and governance of public schools must be submitted for discussion at the NCF.

[1588] The BELAB also recommends positive engagement between aggrieved partners.

[1589] Refer to 5.7 below for how to ensure that negotiations are conducted in good faith.

5.2.6 Matters that fall under the sole competency of any provincial legislature in terms of existing laws or constitutional provisions must be presented for discussion at the PCF.

5.2.7 Effective and regular communication is essential for effective negotiations. The negotiating partners must:

5.2.7.1 accept and keep in mind the pre-eminence of the national priority of delivering quality education for all learners in South Africa;

5.2.7.2 identify and address the underlying needs and interests to achieve social justice in education; and

5.2.7.3 look for creative solutions to resolve issues, which may include monitoring, supporting, regulating, and supervising each other's governance practices and delivery of education mandates.

5.3 **Step 3: Declare a formal dispute**

A declaration of a dispute comes after an informal dispute settlement process. By declaring a formal dispute, the partners acknowledge their inability to resolve the matter themselves through negotiations, and their need for external assistance.

5.3.1 **Declaration requirements**

5.3.1.1 A formal intergovernmental dispute is declared when negotiations have failed and one party notifies the other of the formal dispute in writing.

5.3.1.2 Notices must be sent to the recipient party's usual address.

5.3.1.3 A party who declares a formal dispute should send a copy of such notice to:

- the Minister, if one of the partners falls under the national government sphere;

- the MEC for education, if one of the partners falls under the provincial government sphere; or

- the chairperson of the governing body, if one of the partners is an organ of state.

5.3.1.4 In the notice, the party must do the following:

- State the reasons for the declaration of the dispute, including the reasons for the failure of the negotiations discussed in paragraph 5.2 above, and for the subsequent deadlock.

- Describe the dispute in sufficient detail for the other party to understand what the dispute is about and what has caused the deadlock.

- Confirm that the notifying party has adhered to the cooperative governance principle of meaningful engagement, as entrenched in the *Constitution*. The following three basic elements must specifically be confirmed:

    - That an invitation was extended to hear the views of a particular party on a specified matter

    - That such party was afforded adequate opportunity to submit input

    - That the views submitted were considered in good faith[1590]

- The dispute notice must request a meeting with the other party for the purpose set out in step 4 below as soon as is reasonably practicable (although no later than ten working

[1590] See 5.4.1, chapter 5. For guidance on good-faith engagement, see 5.7 as well as part 3.

days of receipt of the notice) and must suggest a suitable venue or platform for such meeting.

- To comply with these guidelines, notice should be given using the form in annexure A, unless circumstances dictate otherwise.

5.3.2 **Duty to respond to a declaration**

The recipient must acknowledge receipt of a declaration of dispute in writing within five business days of receiving the notice from the notifying party.

5.4 **Step 4: Convene a meeting**

Upon receiving notice of a formal intergovernmental dispute, the partners or their representatives must promptly convene a meeting at an appropriate location. Meetings are both partners' responsibility, not just that of the party who declares the dispute. The meeting will be chaired by the notifying party. Once the partners have successfully convened a meeting, they should proceed to step 5.

5.4.1 **Failure to convene**

If a meeting is not convened, the partners must approach:

- the Minister, if one of the parties is the national Department of Basic Education; or

- the MEC for education, if one of the parties is the provincial education department.

The Minister or MEC has the discretion to decide whether or not to convene a meeting if approached by one of the partners. Should the Minister or MEC convene a meeting, they may proceed to step 6 if the partners fail to attend.

5.5 **Step 5: Identify the issues and dispute settlement mechanisms or procedures: Preliminary decisions at a meeting**

Step 5 follows when the parties have reached a deadlock (as established in step 3) and a meeting has been convened by the parties themselves or by the Minister or MEC (as indicated in step 4).

5.5.1 **The first decision: The issues**

Together, the partners must decide:

- the nature of the dispute;
- the specific issues at stake;
- undisputed material issues; and
- interested partners/institutions who should participate.

Once there is a clear understanding of the issues and parties involved, an appropriate dispute resolution procedure or mechanism must be identified.

5.5.2 **The second decision: Selection of mechanisms and procedures**

At the meeting, partners must identify any available mechanisms or procedures that could help resolve the dispute. Where mechanisms or procedures already exist, these must be used rather than other options.

5.5.2.1 **Agreed mechanisms or procedures**

In the absence of existing statutory mechanisms and procedures, partners must agree on a suitable mechanism or procedure to resolve the dispute. One of the following must be selected by mutual agreement:

(a) **Intergovernmental forums**

Where an intergovernmental forum (NCF or PCF) appears to be an appropriate institution for the settlement of the dispute in question, the partners should submit the matter to the

appropriate forum for resolution in accordance with its procedures for settling intergovernmental disputes.[1591]

Forums may be used to -

- facilitate formal negotiations, discussions and interactions;
- promote communication regarding national education issues;
- attempt to resolve issues;
- appoint a fact-finding commission if the conflict involves factual issues; and
- appoint a special task team of experts if the conflict involves the potential impact of a policy or law, ensuring that each partner is represented equally.

Flowing from the above, the forum may provide the partners with a finding of facts or recommendations, which can be considered as a basis for settlement. If the matter is not settled after forum intervention, the partners must use the information and advice obtained during the process to contain the conflict and initiate alternative dispute resolution processes.

(b) **Alternative dispute resolution (ADR) processes**

In the absence of any existing dispute resolution mechanisms, the partners must select an ADR process, such as conciliation, mediation or arbitration. This will necessitate the appointment of a facilitator by mutual agreement.[1592]

5.6 Step 6: Appoint a facilitator and determine their role

[1591] See 4.3, chapter 4.

[1592] See 5.4, 5.4.2 & 5.5.2.2, chapter 5; 6.6.3.1 & 6.7, chapter 6.

5.6.1 **Designation of facilitator**

The partners must appoint a facilitator at the meeting envisaged under step 5. If requested to do so, the Minister or MEC must assist both partners in choosing a facilitator in a neutral and objective manner.

5.6.2 **Role of facilitator**

The facilitator is responsible for helping the partners resolve the dispute in whatever way necessary. A facilitator should be skilled and experienced in conflict management, negotiation, conflict resolution, and mediation. The facilitator's areas of expertise should include cooperative governance, education law and education practice. The partners must determine the facilitator's role, which may include assistance with the following:

5.6.2.1 **Preparing for the appropriate dispute resolution process**

- Identifying the issues of contention and non-contention. Dispute clarification is an important component of constructive conflict management and involves identifying the issues in dispute, appropriately defining and framing those issues, and also acknowledging what is not at issue between the partners.[1593]

- Conducting formal or informal investigations to establish the facts that are disputed. To this end, the facilitator must have access to all relevant documents and information, each party must provide evidence, the partners must have the opportunity to comment on the evidence, and a final report must be developed.

- Documents and reports must be exchanged. In this regard, the facilitator helps the partners identify documents, reports, records and other written or digital information, helps them exchange these in an appropriate manner, and helps

[1593] Intergovernmental Dispute Prevention and Settlement Practice Guide:11-12.

resolve any differences between the partners if they cannot agree on a specific disclosure.

5.6.2.2 Providing and identifying the most suitable dispute resolution process

The facilitator is responsible for helping to identify the most appropriate process for dispute resolution, which may include mediation, conciliation or arbitration, which will also be led by the facilitator.

Mediation: A mediator helps parties communicate, facilitates negotiations, considers options, encourages settlement, and contributes to decision-making. The mediator provides structure and formality to the negotiation process and helps parties define the issues, communicate effectively, negotiate constructively, and consider various settlement options. Mediators have no binding decision-making authority and usually only advise and evaluate parties.[1594]

Mediation is a suitable option when the parties are committed to finding a mutually acceptable solution and are willing to work together with the assistance of a neutral third party. Additionally, mediation may be appropriate when the parties wish to maintain an ongoing relationship, as it allows for a confidential and informal process that can preserve goodwill and foster communication.[1595]

Conciliation: Conciliation aims to achieve a resolution that meets the interests and needs of all parties without having to resort to litigation or other adversarial processes. Conciliation involves a third party (the conciliator) who actively participates in the negotiations and tries to facilitate agreement. Unlike a mediator, a conciliator may offer suggestions or propose solutions. The process of conciliation can also be

[1594] See 5.5.2 & 5.5.3, chapter 5. See also Intergovernmental Dispute Prevention and Settlement Practice Guide:28.

[1595] Intergovernmental Dispute Prevention and Settlement Practice Guide:29.

more formal than mediation and may involve the preparation of written agreements or legal documents.

Conciliation is particularly appropriate in complex disputes or conflicts where the parties require assistance in identifying and understanding the issues involved and exploring possible solutions. A neutral third-party conciliator normally facilitates better communication, reduces tension, and sparks creative solutions to problems.[1596]

Arbitration: In arbitration, a binding decision is made once the relevant facts, circumstances and legal rules have been established and the appropriate principles applied. Arbitration may be suggested for a dispute that involves technical or legal issues and cannot be resolved through factual negotiations, where there are significant policy or value differences between the partners, or where there is a need to shift the decision-making responsibility to a third party.[1597] The option of arbitration may only be exercised where mediation or conciliation has failed.

5.7 Step 7: Good-faith participation in dispute settlement

Participants in dispute settlement processes are required to participate in good faith by engaging in meaningful and reasonable efforts to resolve the dispute, avoiding merely going through the motions, and not using manipulation, ulterior motives or other bad-faith tactics. Participating in good faith does not imply waiving any rights and interests or coming to an agreement. In practice, good-faith participation means that partners should be prepared to settle, have the authority to do so, participate properly in the negotiation process, and consider offering and responding to proposals.[1598]

5.7.1 Preparation for dispute resolution

It is important that disputing partners prepare for dispute resolution in good faith, which should include the following steps:

1596 Intergovernmental Dispute Prevention and Settlement Practice Guide:29.
1597 Intergovernmental Dispute Prevention and Settlement Practice Guide:29.
1598 See *Constitution*:sec. 41(1)(*h*).

5.7.1.1 All documents and reports must be prepared and disclosed to the other parties.

5.7.1.2 Each party must make sure that the other is aware of their interests, needs and priorities.

5.7.1.3 Only if there are legal issues involved in the dispute, a lawyer should be retained.

5.7.1.4 Expert reports and recommendations should be exchanged between the partners. An example would be the interpretation of education legislation. This also ensures adherence to the rule of law and the principle of legality.[1599]

5.7.1.5 Each party must designate participants and representatives in the dispute resolution process in accordance with their respective internal procedures.

5.7.1.6 Participants in a dispute resolution process must make every reasonable effort to ensure that individuals have the authority to settle the dispute.

5.7.2 **Keeping documents confidential**

Documents prepared and communications issued during a dispute resolution process are legally privileged and may not be used against the partners in any subsequent litigation.[1600]

5.7.3 **Reaching a settlement**

The following must be kept in mind in seeking a settlement:

5.7.3.1 Communication of interests: Each party should make the other side aware of their interests, as outlined above, and not focus solely on legal rights and obligations.

[1599] See 5.2.1, chapter 5.

[1600] Intergovernmental Dispute Prevention and Settlement Practice Guide:31.

5.7.3.2 Take creative measures to resolve the dispute: Each party must consider creative methods of resolving the dispute.

5.7.3.3 Plan for the future: Both partners should focus not only on past problems, but also on ways to improve their future relations, including ways to avoid a recurrence of the current problem. To achieve cooperative governance, partners must work purposefully to ensure the wellbeing of learners by providing effective education services.[1601]

5.7.3.4 Negotiation and compromise: Both partners should negotiate constructively and be prepared to compromise and work together to achieve a win-win outcome.[1602]

5.7.3.5 Record the agreement: The partners should document in full all agreements reached, along with a list of all issues that could not be resolved.

5.7.3.6 Dispute resolution outcome reporting: Representatives who participate in the dispute resolution process must report the outcomes to the responsible officials in writing, including a copy of the settlement agreement.[1603]

5.7.3.7 Orders of court: The agreement should be made an order of court when the court's enforcement is required or when the partners want the agreement to be legally binding and enforceable.

5.8 **Step 8: Implement and monitor the agreement**

5.8.1 The implementation of the agreement is the responsibility of the governing body chair, HOD, MEC or Minister.

1601 See 6.3, chapter 6.

1602 See 4.8, chapter 4.

1603 See 6.6.3, chapter 6. See also Intergovernmental Dispute Prevention and Settlement Practice Guide:32.

5.8.2 The NCF or PCF should monitor the implementation of the settlement agreement and communicate with partners if the agreement is not being carried out.

5.8.3 As part of the principles of cooperative governance and conflict prevention, the partners are required to review and evaluate dispute settlement activities in accordance with the principles of conflict management described in these guidelines. Reviews and training will be made available to relevant partners to enable them to learn from experience, identify recurring problems, and prevent future disputes.[1604]

5.8.4 The representatives of the partners involved in the dispute settlement procedures must provide the senior officials with information on what went well during the process and what could be improved.

5.8.5 Where the partners reach a binding agreement, each party has the normal legal remedies to enforce their agreement.

5.9 **Last resort: Approach the court**

5.9.1 Partners must exhaust all other remedies, mechanisms and procedures to resolve the dispute before approaching a court for assistance.[1605]

5.9.2 In determining whether the partners acted in good faith, a court will consider whether they exhausted any and all remedies and procedures set out in these guidelines before seeking judicial relief.

5.9.3 It is the duty of the partner seeking judicial relief to demonstrate that the dispute settlement requirements as described in these guidelines have been complied with.

5.9.4 Where the requirements have not been met, the court may refer the case back to the partners.[1606]

1604 See 4.9.4, chapter 4.

1605 *Constitution*:sec. 41(3).

1606 *Constitution*:sec. 41(3).

5.9.5 Reports prepared as part of a dispute resolution process, and any communications made during the dispute resolution process, are legally privileged and may not be used in judicial proceedings.[1607]

5.9.6 A facilitator or intermediary may not be called as a witness in judicial proceedings without the partners' consent.[1608]

5.9.7 The partners retain all their legal rights, despite their participation in the dispute settlement procedures outlined in these guidelines.[1609]

5.9.8 Even with a pending court case, partners are encouraged to continue engaging in communication, negotiation, meaningful engagement, mediation or any other process that might help them reach a settlement.

1607 IRFA:sec. 42(2); Intergovernmental Dispute Prevention and Settlement Practice Guide:35.
1608 IRFA:sec. 45(2); Intergovernmental Dispute Prevention and Settlement Practice Guide:35.
1609 Intergovernmental Dispute Prevention and Settlement Practice Guide:35.

PART C – CONSULTATION AND MEANINGFUL ENGAGEMENT IN DECISION-MAKING AND THE PASSING OF LEGISLATION

To provide assistance to all partners tasked with initiating and conducting consultations on decisions and legislative drafts, these guidelines offer realistically achievable recommendations for the South African context and in line with the *Constitution*.

1. Why is public consultation and engagement important?

If new laws are enacted without consulting affected partners, civil society and experts, the laws are likely to be ineffective, incomplete, contradictory and in violation of human rights, and will ultimately inhibit the realisation of social justice. As a result, they will be subject to constant amendment or even calls for their repeal. Potentially costly legal challenges by victims and interest groups may also arise if a law's impact on human rights was not fully anticipated and assessed during their development.[1610]

The basic norm of cooperative governance is the duty of "informing one another of, and consulting one another on, matters of common interest", as stipulated in section 41(1)(*h*)(iii) of the *Constitution*. An effective public consultation process helps legislative drafters better understand the policy problem(s) they seek to address. In addition, it helps identify all available policy options (solutions), assess their corresponding costs and benefits, and determine whether specific solutions are feasible in the existing environment. It facilitates a balance between conflicting or opposing interests. Moreover, meaningful public consultation is essential in assessing the full impact of draft legislation, including its effect on different social groups and their human rights, as well as identifying potentially unintended effects and previously undetected weaknesses in its content.[1611] In addition to its value as a dispute resolution

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[1610] For instance, in *Federation of Governing Bodies of South African Schools v Head of Department: Department of Education, Northern Cape Province* (887/2016) [2016] ZANCHC 28 (8 July 2016), the Northern Cape education department failed to consult and meaningfully engage with partners, as discussed in chapter 4. The court granted an order for consultation, and the circular was set aside. See 4.4.6, chapter 4.

[1611] See the discussion of *Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) under 5.4.2.2, chapter 5. The court in *Ermelo* made it clear that effective, sustainable solutions to structural problems required a broad-based participatory process, garnering the requisite information from stakeholders, resolving differences through fair deliberative processes, and fostering broad buy-in to the proposed policy and programmatic solutions.

mechanism, the process of consultation and meaningful engagement is also one of the most powerful tools available to enhance cooperation between education partners, facilitate access to quality education for all South African children, and achieve social justice in and through education.

2. Principles of consultation and meaningful engagement

Consultation and meaningful engagement is a bilateral process that involves engaging with the party whose counsel is sought. Education departments must conduct consultations and engagements, and consider all input so received, prior to making decisions and laws that affect other education partners. Consultations and engagements must be appropriately focused and take into account the likely implications that a decision, proposed policy or law will have on the integrity of government, institutional coherence, the functionality of cooperative governance, and the realisation of social justice in and through education. To facilitate meaningful engagement and consultation,[1612] the following guidelines must be adhered to:

2.1 Invitation to hear views

The invitation to hear the views of other partners may take one of two forms:

2.1.1 Passive form: The party consulting must extend a general invitation to interested partners or the broad public. By determining a closing date for responses, it is up to the addressees whether or not they wish to respond. Note that the legislative process may be invalidated if the window for submitting input is too short for meaningful participation.

2.1.2 Active form: A more active approach is to solicit the views of particular partners.[1613]

2.2 Opportunity to submit input

2.2.1 Public participation in the legislative process is a fundamental right.

[1612] This is a bilateral process in accordance with the principles of cooperative governance. See 5.4.1, chapter 5.

[1613] Woolman *et al.* 2014:22-134.

2.2.2 Prior to being introduced in Parliament or a provincial legislature, draft legislation must be gazetted for public comment.

2.2.3 All relevant information must be made available to stakeholders in advance.[1614] This includes information about the consultation process and reference to other materials that would enable stakeholders to participate.[1615]

2.3 **Considering all input in good faith**

Partners must make a deliberate effort to consider views in good faith. To achieve this, the following is important:[1616]

2.3.1 Openness: Departments or school governing bodies must have an open and timely consultation process in place and be willing to consider input from partners and stakeholders.[1617]

2.3.2 Accountability: Partners' input and feedback must be compiled and analysed, shared with stakeholders, and brought to decision-makers' attention.

2.3.3 Transparency: Partners must be given access to relevant information about the process, stakeholder engagement and input, as well as the outcome of consultations. When an input is rejected, a reason for such rejection must be supplied. Feedback must be provided as to how an input has been or will be incorporated.[1618]

All partners affected by a decision must be reasonably informed of the consultation process and be provided with sufficient time to comment and participate.

2.3.4 Accessibility: A consultation method should be suitable for all stakeholders, including those with special needs. In addition, the

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1614 See 4.4.6, chapter 4.
1615 See 5.4.1, chapter 5.
1616 See 4.8, chapter 4; 5.4.1, chapter 5.
1617 See 5.4.1, chapter 5.
1618 See 4.9.2, chapter 4.

information provided to stakeholders should be understandable and in plain language.[1619]

3. Consultation methods

To select the most appropriate consultation method, it is critical to consider a range of factors, including the purpose of the exercise, the subject matter, the range of stakeholders, and the scope and duration of consultation. To effectively address the needs of all people, methods must be appropriate for the intended stakeholders, including hard-to-reach groups and persons with special needs, and be communicated on a suitable level of technical and academic detail. Using more than one consultation channel and method is often helpful, even if this might require more planning and administration.

By incorporating various methods, access is broadened and diverse groups are included. Methods that may be utilised include, though are not restricted to:

- written submissions;
- public meetings or hearings;
- focus group discussions with a particular type of stakeholder;
- qualitative and quantitative surveys; and
- participation in existing discussion forums.[1620]

[1619] See 4.8, chapter 4.

[1620] See 4.4.6 & 4.6, chapter 4; 5.4.1, 5.4.2 & 5.4.3, chapter 5.

Annexure A

Declaration of dispute

(This pro forma notice must be used to serve a declaration of dispute on another party. Adjustments may be made as needed.)

XYZ

[Address]

XX/XX/XXXX

Cc: *Minister/MEC/Chairperson*

By fax/e-mail/hand

Dear Sir/Madam

Notice is hereby given of a dispute between the **ABC** and the **XYZ** in relation to [**identify the dispute**].

It is put on record that the partners have attempted to resolve the dispute through negotiations, but have not succeeded in reaching a settlement. The partners have complied with the provisions of the guidelines, having conducted negotiations during the period [**insert dates**].

The **ABC** wishes to convene a meeting at a mutually convenient time between [**insert dates**].

Kindly acknowledge receipt of this notice within five business days.

Yours sincerely

ABC

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