

**UNIVERSITY OF
PRETORIA**

Faculty of Education

**Department of Education Management
and Policy Studies**

1

**THE NEW SOUTH AFRICAN LEGAL FRAMEWORK
GOVERNING EDUCATION AND THE NEED FOR
EDUCATIONAL REFORM IN AFRICA**

Prof Johan Beckmann

Head: Department of Education Management and Policy Studies,
Faculty of Education,
University of Pretoria
and

Deputy-Director: Interuniversity Centre for Education Law and
Education Policy (CELP)

2

INTRODUCTION

1994 – New South African Government opportunity -

- To confirm and cement its location in and its commitment to Africa
- To show an awareness of educational reform needs in Africa.
- Transformation of the education system guided by new laws and policies

Question:

To what extent do selected post-apartheid South African education law and policy reflect South Africa's location in Africa break with its legacy?

3

ISSUES UNDER THE MICROSCOPE

Reflection on –

- Poverty
- Language
- Education provision to vulnerable groups including girls
- The battle against infectious diseases
- School funding
- Parent involvement
- Societies and communities in conflict
- Race, equality, ethnicity
- Religion

Remember limited power of law and limited application

4

PREPARING FOR A NEW DISPENSATION

NEPI Report

- **Non-sexism**
- **Non-racism**
- **Redress**
- **Democracy and**
- **A unitary system**

First coherent ANC statement on the education policy that would guide the actions of the ANC once it came to power in 1994.

5

WHITE PAPER ON EDUCATION AND TRAINING, 1995

Principles of education and training policy:

- **Education and training are basic human rights.**
- **Parents or guardians have the primary responsibility for the education of their children**
- **Parents' right to be consulted**
- **Obligation to provide advice and counselling**
- **Equal access to basic education for all.**
- **State's resources deployed according to the principle of equity.**

6

WHITE PAPER ON EDUCATION AND TRAINING, 1995 (continued) ...

- **Protection of the rights of teachers and students to equitable treatment.**
- **Restoration of ownership of education institutions to communities through establishment and empowerment of legitimate, representative (democratic) governance bodies.**
- **The active encouragement of mutual respect for diverse traditions**
- **Counter the legacy of violence**
- **Independent and critical thought**

Policy signals intention

7

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Preamble

The people of South Africa:

Recognise the injustices of our past;
Believe that South Africa belongs to all who live in it,
united in our diversity.

...

8

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (continued) ...

... 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; ...

9

S1: FOUNDING PRINCIPLES AND VALUES:

- a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b) Non-racialism and non-sexism.
- c) [The] (S)upremacy of the constitution and the rule of law.
- d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

S 2 the constitution is the supreme law of the Republic and that law and conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

10

Chapter 2 (Bill of Rights) enshrines and entrenches fundamental human rights of all people to:

- Equality including redress measures (affirmative action) (S 9)
- Human dignity (S 10)
- Freedom and security of the (S 12)
- Privacy (S 14)
- Freedom of conscience, religion, thought, belief and opinion (S 15)
- Freedom of expression (S 16)
- Assembly, demonstration, picket and petition (S 17)
- Freedom of association (S 18)
- Labour relations including the right to fair labour practices (S 23)
- An environment that is not harmful to their health or well-being (S24)

11

Chapter 2 (Bill of Rights) enshrines and entrenches fundamental human rights of all people to: (continued)

- Specific defined children's rights (persons under 18) (S 28).
- A basic education and the right to a language of education (S 29)
- Language and culture (S 30)
- Cultural, religious and linguistic communities (S 31)
- Access to information S 32)
- Just administrative action ("due process") (S 33)

All rights can be curtailed but only as prescribed in S 36

Resign the discriminatory and arbitrary way in which the majority of South Africans were treated in the past to the past

12

The National Education Policy Act, No. 27 of 1996 (NEPA)

Transformation of national system of education to serve needs and interests of **all** the people of South Africa and uphold their fundamental rights.

13

S4(1) of NEPA expresses aims of national policy:

- a) the advancement and protection of the fundamental rights –
 - i. of all to be protected against unfair discrimination
 - ii. of every person to basic education and equal access to education institutions;
 - iii. of a parent or;
 - iv. of every child in respect of his or her education;
 - v. every student to be instructed in the language of his or her choice where this is reasonably practicable;
 - vi. of every person to the freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions

14

NEPA principles (continued) ...

- c) achieving equitable education opportunities and the redress of past inequality, including the promotion of gender equality and the advancement of the status of women;
- d) no person is denied the opportunity to receive an education to the maximum of his or her ability as a result of physical disability;
- ...
- h) recognising the aptitudes, abilities, interests, prior knowledge and experience of students;

15

S4(1) of NEPA principles (continued) ...

- i) encouraging independent and critical thought;
- j) promoting a culture of respect for teaching and learning in education institutions;
- ...
- m) ensuring broad public participation in the development of education policy and the representation of stakeholders in the governance of all aspects of the education system; ...

NEPA affirms the principles contained in the Constitution and compels the education authorities to give expression to them in the formulation of national education policy

16

The South African Schools Act, No. 84 of 1996 (SASA)

Aim:

To provide for a **uniform system** for the organisation, governance and funding of schools and to abolish the different separate and unequal racially-based systems of education provision that had existed in the country before 1994.

Preamble:

- redress past injustices in educational provision,
- advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance,

17

The South African Schools Act, No. 84 of 1996 (SASA) (continued) ...

- 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
- 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

18

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

Some explicit provisions to deal with aims:

- The definition of “parent” in S 1 makes provision for the many children who come out of families where the parents are either absent or are dead:

'parent' means-

- (a) the parent or guardian of a learner;
- (b) the person legally entitled to custody of a learner; or
- (c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school

19

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

Provision (c) could even include children who head child-headed families.

- S 3(1) places the obligation for school attendance on parents

20

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

- S 3(3-4) hints at the problems the new government might experience in providing educational opportunities and leaves it some leeway:
 - (3) Every Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school as required by sub (1) and (2).
 - (4) If a Member of the Executive Council cannot comply with sub (3) because of a lack of capacity existing at the date of commencement of this Act, he or she must take steps to remedy any such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so.

21

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

- S 5(1) deals with the admission of learners to public schools and possible discrimination in the following decisive manner:
 - (1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way

22

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

- S 5(2-3) provides further protection of the child in respect of admission tests or the payment of school fees:
 - (2) The governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test.
 - (3) No learner may be refused admission to a public school on the grounds that his or her parent-
 - a) is unable to pay or has not paid the school fees determined by the governing body under S 39.

23

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

- S 5A provides that the national Minister of Education may by regulation prescribe minimum uniform norms and standards for basic infrastructure and capacity in public schools.

These **minimum infrastructure standards** relate to matters classrooms, electricity, water, a library, laboratories for science, technology, mathematics and life sciences, sport and recreational facilities, electronic connectivity at a school; and perimeter security. In respect of the capacity of a school the minimum standards include the number of teachers and the class size, quality of performance of a school, curriculum and extra-curricular choices, classroom size; and utilisation of available classrooms of a school.

24

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

In respect of **provision of learning and teaching support material**, the standards relate to the availability of stationery and supplies, learning material, teaching material and equipment, science, technology, mathematics and life sciences apparatus, electronic equipment; and school furniture and other school equipment..

These standards are intended to ensure that all learners have access to high quality education and that the quality of infrastructure is satisfactory for all learners.

25

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

- S 6 provides that the Minister may determine norms and standards for **language policy** in public schools. The governing bodies of public schools may determine the language policies of their respective schools but may not practise any form of racial discrimination in implementing such policy.

In light of South Africa's past of using language as a method of exclusion, this provision is clearly aimed at preventing such practices.

26

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

- S 7 recognises **religious diversity** by permitting the conducting of religious observances at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary.

The National Policy on Religion and Education (Department of Education, 2003) curtails this right to a degree but the fundamental right remains.

27

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

- Ss 8 and 9 protect learners from arbitrary and cruel punishment and suspension and expulsion by providing for a code of conduct and the manner in which it should be drafted. Suspensions may only be imposed by the governing body of a school in cases of serious misconduct as defined and after a fair and just disciplinary hearing. Learners may only be expelled by the provincial heads of department acting upon recommendations by governing bodies. Even if learners are expelled in a lawful manner, the head of department still needs to provide alternative education placement for such learners.

28

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

- S 10(1) expressly prohibits any person from administering corporal punishment at a school to a learner. S 10(2) provides that any person who contravenes sub S (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

This is in line with the Constitutional provision that guarantees freedom and security of the person and protects learners even against cultural or parental traditions that might approve of such practices which often degenerate into assault.

29

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

S 10A affords the learner further protection of the physical integrity of the learner by providing that no person may conduct or participate in any **initiation practices** against a learner at a school or in a hostel accommodating learners of a school. The tradition of “initiation” or “orientation” of learners was fairly strong in the former “white” schools but was largely absent in the former “Black” schools and its presence in integrating schools could foreseeable lead to unwanted racial tensions. However, this S **does not prohibit the cultural initiation** (including male circumcision) practised in certain communities. Had it done so, it would have strengthened the protection of the physical integrity and educational opportunities of male youth even more as these practices often take boys away from school and deaths from these practices exceed the limits of reasonableness.

30

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

- S 16(1) provides that the **governance** of every public school is vested in its governing body. However, it may perform only such functions and obligations and exercise only such rights as prescribed by the Act. S 16(2) provides that a governing body stands in a position of trust towards the school.

This is a marked departure from the past where the majority of parents had little or no say in the provision of education to their children. The majority of the membership of a governing body (SGB) has to be parents and the functions of SGBs include (S 20) recommending teachers for appointment, determining the duration of the school day and making curricular choices for the school within given frameworks. Some SGBs may even request more functions regarding the school facilities and text books as well or may be given such functions by the head of department in question (S 21).

31

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

S 36 and further contain a number of provisions which empower SGBs to, among others, levy compulsory **school levies** (fees) payable by parents in respect of learners in public schools. Parents who default may be dealt with by force of law. This power of SGBs is aimed at alleviating the problem of a lack of funds that the state has to provide education and it gives effect to the principle of a partnership in respect of school funding. Even though this recognises that the emerging South African state does not have sufficient funds to provide free and compulsory education to children of school going age, it protects indigent learners by providing that their parent may be exempted from school fees. This chapter of SASA also protects children from victimisation in cases where their parents cannot or do not pay school fees.

32

**The South African Schools Act, No. 84 of 1996 (SASA)
(continued) ...**

The **National Norms and Standards for School Funding** (most recently amended in 2008) provide for further assistance to destitute learners and parents. It divides schools into 5 quintiles from most poor to least poor and makes provision for bigger state per capita contributions to the poorer schools than to the less poor schools. The government has also recently declared about 60% of the schools as “**no fee**” schools meaning that the SGBs of such schools may not levy school fees and that these schools will receive a minimum threshold of funding from the government to enable them to provide appropriate funding.

33

Employment Equity Act, No 55 of 1998

The **long title:** promoting the constitutional right of equality and the exercise of true democracy, eliminating unfair discrimination in employment, ensuring the implementation of employment equity to redress the effects of discrimination and achieving a diverse workforce broadly representative of our people.

Its purpose is to counter the effects of long-standing purposeful discrimination against certain groups in the country.

34

Employment Equity Act, No 55 of 1998 (continued) ...

S 2 of the Act therefore articulates its **purpose** as -

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing **affirmative action** measures to redress the disadvantages in employment experienced by **designated groups**, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

S 1 of the Act defines **designated groups** as black people, women and people with disabilities and it explains black people as a generic term which means Africans, Coloureds and Indians. A recent court decision has recently added Chinese to this group.

35

Employment Equity Act, No 55 of 1998 (continued) ...

Chapter 2 prohibits unfair discrimination in the workplace. S 5 of in this chapter provides that an employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

S 6(1) lists the grounds on which employers may not unfairly discriminate against employees as follows: No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

36

Employment Equity Act, No 55 of 1998 (continued) ...

This provides explicit protection not enjoyed previously in the workplace to women, pregnant women, disabled people, and people of colour, various religious groups and people choosing different sexual orientations. All of these have in the past in various parts of Africa and South Africa itself led to conflicts and clashes and could, if not handled carefully, threaten the fragile democracies emerging in South Africa and elsewhere on the continent.

37

Employment Equity Act, No 55 of 1998 (continued) ...

S 6(2) provides clearly that it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act.

S 9(3) of the Constitution legitimates affirmative action steps by providing that, to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

38

The Employment of Educators Act, No. 76 of 1998

This Act gives **effect to S 195(1) of the Constitution** which expresses the basic values and principles governing public administration. It states that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the principle that public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

39

The Employment of Educators Act, No. 76 of 1998 (continued) ...

S 7 of the Employment of Educators Act further provides that -

- (1) **In the making of any appointment or the filling of any post** on any educator establishment under this Act due regard shall be had to equality, equity and the other democratic values and principles which are contemplated in S 195 (1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and which include the following factors, namely-
 - (a) the ability of the candidate; and
 - (b) the need to redress the imbalances of the past in order to achieve broad representation.

40

**The Employment of Educators Act, No. 76 of 1998
(continued) ...**

Chapter 5 provides explicitly that educators may be **dismissed** on account of incapacity and misconduct. S 17(1) provides that an educator **must** be dismissed if he or she is found guilty of-

- (a) theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports;
- (b) committing an act of sexual assault on a learner, student or other employee;
- (c) having a sexual relationship with a learner of the school where he or she is employed;

41

**The Employment of Educators Act, No. 76 of 1998
(continued) ...**

- (d) seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee;
- (e) illegal possession of an intoxicating, illegal or stupefying substance; or
- (f) causing a learner or a student to perform any of the acts contemplated in paragraphs (a) to (e).

42

**The Employment of Educators Act, No. 76 of 1998
(continued) ...**

Although these grounds for dismissal may also occur in legislation informing education systems on other continents, it is unlikely that their occurrence is of such a nature as to warrant such harsh steps and compulsory dismissal.

These represent some of the serious ailments of our continent that inhibit progress and prosperity in general and the provision of quality education in particular.

43

**The Employment of Educators Act, No. 76 of 1998
(continued) ...**

Even if these harsh measures are contained in law, educators are still protected against arbitrary and unfair action by provisions insisting on due process and fair disciplinary hearings (in Schedule 2 of the Act).

44

**The Employment of Educators Act, No. 76 of 1998
(continued) ...**

S 18 refers to examples of misconduct not likely to occur in other educational settings such as the following:

- (o) without authorisation, sleeps on duty
- (r) assaults, or attempts to or threatens to assault, another employee or another person
- (s) incites other personnel to unprocedural and unlawful conduct

45

**The Employment of Educators Act, No. 76 of 1998
(continued) ...**

It is not hard to imagine the **amazement or amusement** on the part of someone who reads these provisions in e.g. North America or Europe. Of course we realize that teachers can be expected to be tired at school, having to walk long distances to school or spending long times on less than adequate public transport. Furthermore long times of political strife, violent protest against oppression and fierce repressive measures but past colonial powers have spilled over on to schools and have left almost indelible impressions on school cultures.

46

CONCLUSION

- Extent to which selected laws governing education in South Africa reflect the uniquely African environment
- Compelling evidence of attempts to give expression to the peculiar demands and circumstances
- A preliminary scan of education legislation from some Anglophone countries in Sub-Saharan Africa
 - The legislation is dated and still follows colonial models very closely Could as well have been imported as is from former colonial powers. The indigenisation or inadequate
 - Indigenous character of South African education also under-developed.

47

CONCLUSION (continued) ...

Regional research and intervention projects conducted by African academics and practitioners necessary?

48