THE LEGAL STATUS OF SCHOOLS IN THE NEW SOUTH AFRICAN EDUCATION SYSTEM

Elmene Bray

1 Introduction

In 1994 South Africa changed from a Westminster system of government based on parliamentary sovereignty, to a constitutional democracy with a supreme constitution and a justiciable bill of rights.[1] The transformation process has brought fundamental changes to the entire spectrum of government and has impacted dramatically on the lives of all South Africans.

Education has been at the centre of transformation and is, undoubtedly, one of the most crucial and complex undertakings thus far. First of all, the previous education system(s) based on segregation and racial (ethnic) inequality, had to be transformed into a nondiscriminatory, democratic system which offers equal education opportunities to all. This meant that a fragmented, diverse system composed of nineteen education departments representing four provinces and several so-called `self-governing' and `independent' homelands, had to be rationalised into a unified (but decentralised) system with a national department of education, nine provincial education departments (which absorbed those of the homelands) and a network of regional boards and local agencies.[2]

Transition in education has been a slow and cumbersome process, but through ongoing negotiations and agreements in which most stakeholders were involved, a process of democratic and participatory change has evolved which augurs well for the ultimate achievement of a unified and democratic education system, promoting participatory and accountable governance in all spheres. To date, primary and secondary education (school education) has advanced much further than the other sectors of education (for example, pre-primary and tertiary education) but, notwithstanding this

---

1 Corder "Towards a South African Constitution" 1994 *Modern Law Review* 491-493

2 *White Paper on Education and Training GG* 16312 vol 357 15 March 1995 pp 18-19, *White Paper on the Organisation, Governance and Funding of Schools GG* 16987 vol. 368 14 February 1996 pp *10-11*

Open Rubric

fact, structural and organisational change rarely succeed without the will of the people (functionaries/stakeholders) to make it work. One should therefore not underestimate the huge tasks ahead, for example, of cultivating a human rights culture and reviving a learning culture, restoring the reputation and credibility of the education system, and promoting community participation and accountability as vital ingredients of education.[3]

Against this background, the focus will turn to the legal status of public schools in the new South African education system. A few brief remarks will be included on the status of independent (private) schools and, finally, a short summary on uncertainties and future challenges in education.

2 The place of schools in the new South African education system

Before examining the legal status of schools, the characteristics of the new education system have to be discussed to determine the place (legal position) of schools in it. Although education systems are influenced and shaped by, *inter alia,* political, socio-economic and purely educational factors, this discussion will highlight the legal framework that supports the South African education system and, consequently, determines the legal status of schools.

2.1 Constitutional framework of the education system

The Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution) came into operation in 1994 and was succeeded by the (final) Republic of South Africa Constitution Act, 1996 (Constitution). The interim Constitution provided the foundation for the new constitutional democracy, whereas the final Constitution reinforced and amplified these principles to ensure the growth and development of this new legal order. The Constitution is the supreme law of the country and incorporates a justiciable bill of rights,[4] which protects basic civil and political rights (for example, the right to life, equality, privacy and human dignity), socio-economic rights (for example, the right to education, employment and housing) and solidarity rights (also referred to as peoples' or collective rights) such as the right to a clean and healthy environment.[5]

South Africa has not opted for a federal system of government, although some

3 Cf the Preamble to the 1993 and 1996 constitutions; *White Paper* 1995 21-23
4 Chapter 2
5 S 7-39

distinct federal elements (i.e the provincial system) are present.[6] There are nine autonomous provinces with comprehensive powers which are constitutionally guaranteed.[7] However, provinces have concurrent legislative powers and Parliament retains legislative authority over them. The courts have review powers in cases of conflict.[8] In terms of this arrangement, Schedule 4 provides that "education at all levels, excluding tertiary education" falls within the concurrent legislative competence of the national and provincial legislature. In practical terms, it means that a provincial law on school education will generally prevail over a parliamentary law on the same topic, except in cases where national policy, norms and standards on school education require national, uniform (overall) regulation by parliament at national level.[9] This phenomenon underscores the principles of devolution of power (to the provinces) and decentralisation (of school education to the respective communities) as propounded in education policy and legislation.[10]

As the Constitution recognises and protects everyone's fundamental right to basic education,[11] the state should be regarded as the basic provider of education in South Africa. The most important legal source for determining the nature and scope of school education and, more importantly, the legal position of the school in a public education system is legislation.[12] This means that national and provincial school education legislation will have to be examined to determine the legal position of schools.

2.2 The place of schools in the education system

The education provisions of the Constitution deal with the overall institution of education as a public (state) function, the establishment of public education structures and their organisation (for example, national/provincial powers on education). The bill of rights reiterates the state's commitment to guarantee and protect educational (and related) rights and promotes a democratic education system based on equal access to educational institutions. Although no express reference is made to the categories of schools, the reference to independent schools[13] clearly indicates an intention to

6 De Villiers "The federal/unitary debate is there light at the end of the tunnel?" *The Human Rights and Constitutional Law Journal o f South Africa* 11-14..
7 S 103-104 and schedules 4 and 5 of the Constitution
8 146 - 150
9 In re The School Education Bill of 1995 (Gauteng) 1996 4 BCLR 537 (CC), as per Chaskalson, P
10 *White Paper (1996) 40-41, Memorandum to the SA Schools Bill 1996, SA Schools Act 1996*
11 S 29
12 *Wiechers Administrative Law (1985) 1-9*
13 S 29 (3)

streamline the diverse categories of schools into two broad categories, namely, public schools and independent schools.

The next step is to scrutinise national education laws to determine whether uniform national norms and standards have been drafted for schools. The National Education Policy Act[14] deals with the determination of national education policy and the monitoring and evaluation of education, whereas the South African Qualifications Authority Act[15] provides for the establishment of a national qualifications authority to oversee the development and implementation of a national qualifications framework. These laws do not deal directly with the legal position of schools. At present, the South African Schools Act[16] (the Act) is the most important ordinary piece of legislation pertaining to schools. It provides for a comprehensive system of school education in South Africa and a uniform system for the organisation, governance and funding of schools.

Many provincial school education laws have been finalised (for example, the Northern Province School Education Act,[17] the Western Cape School Education Law,[18] the Gauteng School Education Act,[19] and these laws will function within the parameters of the Act. However, finally, all laws are subject to the Constitution and must comply with its provisions regarding education. The ensuing discussion emphasises the legal position of schools in terms of the Act.

2.3 Schools in terms of the South African Schools Act

The Act came into operation on 1 January 1997 and constitutes overall national legislation for school education in the Republic, particularly, the organisation, governance and funding of schools. Its preamble reads:

> "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 talent 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

14 Act 27 of 1996.
15 Act 58 of 1995
16 Act 84 of 1996
17 Act 9 of 1995
18 Act 10 of 1994
19 Act 6 of 1995

> 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;"

The Act comprises various chapters which deal with matters such as Definitions and Application of the Act; Learners; Public Schools; Funding of Public Schools; Independent Schools; Transitional Provisions; General Provisions.

3 The legal status of public schools

3.1 The term 'legal status'

Generally speaking, `legal status' refers to the position the law affords to a person or body (entity). In other disciplines one encounters professional status or social status which refers to the professional or social standing of a person or body in the profession or community. To find out what `legal status' means, one has to determine what position the law affords to the body or person and how that position is recognised and protected in law. For example, the President of South Africa has a particular status in law, he is the Head of State, has special powers and duties and can be removed from office;[20] the law requires that a minor be assisted by a parent/guardian when participating in legal transactions;[21] the law recognises the status of an educator and attaches certain rights and obligations to that position.[22] As the Act may be regarded as the primary source of the legal status of public schools, the following aspects should be examined:

- legal nature of schools;
- legal competences (powers, functions and duties) attached to this status;
- the implications and consequences of legal status.

3.2 Legal nature of public schools

In terms of section 1 (xix) of the Act, a `school' is a public (or independent school) which enrols learners in one or more grades between grade zero and twelve. This means that all the various categories of schools which existed previously - except private schools - are now incorporated under the category of `public' school.[23] A public school may be an ordinary public school or a public school for learners with special education needs.[24]

20 *S 83-90 of* the Constitution
21 Common law; *s 28 of* the Constitution, Children's Act *1960*; Children's Status Act *1987*. 22.
22 Educators' Employment Act *1994*
23 S 52; White Paper (1995) 67-70
24 S 12(3)

A `public' school falls squarely within the public education system and represents the primary and secondary sector of education, generally referred to as the school sector (excluding pre-primary schools). Although national norms and standards are determined by parliament, the general regulation of school education primarily falls within the domain of the provincial governments. All public schools function within the parameters of the new constitutional dispensation and are as `organs of state' bound by the provisions of the bill of rights.[25]

3.3 The school: a juristic person'

In terms of section 15, every public school is a`juristic person' with the legal capacity to perform its functions in terms of the Act. In terms of the law, legal relationships exist between persons. A`person' in the eyes of the law can be a natural (human) person or an `entity' such as a company, university or school. These entities are called juristic persons because, as in the case of natural persons, the law regards them as legal subjects and therefore having the capacity to be bearers of rights and obligations. For example, a natural person may enter into a contract and purchase a car (a legal object). Similarly, the school may enter into a contract with another legal subject (a company) to purchase assets such as equipment and stock (legal objects). Naturally, the juristic person also carries all the responsibilities and liabilities attached to its status (for example, it has to fulfil its obligations and is liable in the case of breach of contract.[26]

As the juristic person is not a natural person, it cannot perform all the functions of a human person : it is not mortal and cannot enter into a contract of marriage or serve a jail sentence, for example. Unlike the natural person, the juristic person has perpetual succession and will continue to exist as an entity despite any change that may take place in its constituent parts.[27] This means that the members of the governing body of a school may change and parents and learners come and go, but the school as a juristic entity remains intact until its existence is legally terminated.

In terms of section 33, the Member of the Executive Council (MEC) may by notice in the *Provincial Gazette* close a public school.

As a legal entity, the school participates in the law and may enter into different legal

[25] S 8,239 of the Constitution; *Baloro v University of Bophuthatswana* 1995 8 BCLR 1018 (B), s 5-7, 10 of the SA Schools Act 1996

[26] Cf Hosten et al *Introduction to South African Law and Legal Theory* (1995) 542-544

[27] Hosten et al 868-870

relationships with other legal subjects (natural persons or juristic entities). When it enters into a private contract to purchase sports equipment for the school, both parties agree to the contractual terms on an equal and voluntary basis, each party fulfilling its own (private) interests. This contractual relationship is called a private law relationship. Since the school is a public school and functions in the public education system, it operates primarily in the public-law sphere. Public law (or state law) regulates relationships between legal subjects where one subject is always an organ of the state and in an authoritative position. The relationship is therefore authoritative and coercive and performed with the public (education) interest in mind. For example, the Minister must, after consultation with the MEC and by notice in the *Government Gazette*, determine the date by which elections of members of governing bodies at all public schools in a province must be finalised.[28] Public schools are compelled to adhere to this notice because public education interests demand that schools function properly with duly elected governing bodies. It is also in the interest of public education that all learners receive compulsory basic education (a fundamental right protected by the state) and the parent (or responsible person) who fails to comply with this provision is guilty of an offence.[29]

It is clear that public schools operate as juristic persons in both the private and public sphere of law. Since private law provisions determine the rights and obligations of public schools in their private-law relationships (for example in a hire-purchase contract, contract of sale and liability in terms of breach of contract), the ensuing discussion will not focus on public schools acting in their private law capacity. Instead, the public law rights and obligations (in terms of the Act) will be scrutinised to determine the nature and scope of the public-law status of schools.

3.4 Public-law competences of schools

The Act (as a source of public law) has vested a public school with legal personality (that is, it is a juristic person as described above). This legal `person' is composed of its governing body, the principal, educators, staff and the parent and learner community. Nevertheless, as an entity (an artificial person) it is recognised in its own right, apart from its constituent parts. This means that the school participates in legal transactions and actions in its own name. However, as a result of its abstract and fictitious nature, it needs one of its constituent parts to formally act on its behalf and

[28] S 54

[29] S 3 (1) and (6). See Wiechers (1985) 7-9,46-50; Kleyn and Viljoen *Beginner's Guide for Law Students* (1995) 101-102

perform legal transactions in its name.[30] The Act provides that the governing body of a public school acts on behalf of the school. For example, when the governing body suspends the learner in terms of section 9 from attending school, the action against the learner is taken in the name of the school and the school as a legal entity (not the governing body or its disciplinary committee) is legally responsible for its conduct.[31]

3.4.1 The governing body

Evidently, an abstract entity itself cannot participate in the law in the same manner and to the same extent as a natural person. It has to act through its duly appointed agent. The Act provides in section 16 (1) that the governance of a public school is vested in its governing body. Furthermore, the governing body stands in a position of 'trust' towards the school and this simply means that a relationship of trust *(fidei commissum)* exists between the school and its governing body, similar to the relationship between a principal and its agent.

In terms of section 23, the governing body comprises representatives of all stakeholders (that is, parents, educators, staff and learners) and although the number of governors will vary, parents must comprise the majority vote. Special provision is made for learner representation on governing bodies of secondary schools and its legal implications,[32] and for the composition of the governing body of a public school providing education to learners with special education needs.[33]

The Minister (after consultation with the MEC) determines by notice in the *Government Gazette*, the final date for the election of governing bodies in all public schools,[34] but existing governing bodies will continue their work until the election of new bodies, subject to certain conditions.[35] The MEC determines the process for the nomination and election of members of the governing body.[36] The governing body elects its own office bearers (chair, treasurer and secretary) and the chairperson must be a parent not employed at the school.[37] Governing bodies also establish committees to assist them in their work and may even co-opt persons who are not on the governing body. The term of membership of a parent is a maximum of three years, while

30 Hosten et a1553-554
31 S 9
32 S 11 and 32
33 S 24
34 S 54
35 S 54 (3) and (4)
36 S 28
37 S 29

learners and office bearers serve for a maximum of one year Nevertheless, any member of the governing body or an office bearer may be re-elected or co-opted and no specific term is prescribed.[38]

3.4.2 Capacity-building programme

Since local (school) communities share in the management of schools, they are also responsible for efficient and effective school governance through their representative governing bodies. The governing body is responsible for the proper governance of the school and the provision of quality education at the school.[39] It is therefore imperative that special training be provided for governing bodies (particularly parents) who have thus far had very little knowledge or experience in the governance of a school.

To this effect, section 19 of the Act provides that out of funds appropriated for this purpose by the provincial legislature, the Head of Department (HoD) must establish a programme to provide introductory training for newly elected governing bodies to enable them to perform their functions. Furthermore, continued training must be given to governing bodies to promote effective performance of their functions and to enable them to assume additional functions. The HoD must also ensure that principals and other officials of the education departments render all necessary assistance to governing bodies in the performance of their functions

3.4.3 Public-law competences of governing bodies

'Governance' of a school refers *inter alia* to the determination of school policy. The school principal, on the other hand, is in charge of the 'professional management' of the school, usually the day-to-day running of the school The professional management of the school is undertaken by the principal under the authority of the HoD.[40] As an *ex officio* member of the governing body, the principal must also, together with the other officers of education departments, render the necessary assistance to governing bodies in the performance of their functions.[41]

There are still many questions regarding the role of the principal and the relationship

38 S 31
39 S 16, 20 and 36
40 S 15 (3)
41 S 19 (2)

between the principal (professional manager) and the governing body (policy maker), particularly with regard to the nature and scope of and demarcation (division) of powers between them.

The functions of governing bodies are listed in section 20. All governing bodies must perform these functions which include to promote the best interests of the school and strive to ensure its development through the provision of quality education for all its learners; to adopt a constitution for the school and a code of conduct for learners; to develop a mission statement for the school; to support the principal and staff members in the performance of their professional functions; to determine school times consistent with applicable conditions of employment of the staff; to administer and control the school's property and buildings and grounds occupied by the school; to encourage parents, learners, educators and other staff to render voluntary services to the school; to recommend to the HoD the appointment of educators and non-educators subject to relevant employment legislation; to allow (at the request of the HoD), the reasonable use under fair conditions of the facilities of the school for educational programmes not conducted by the school; and to discharge other functions consistent with the Act as determined by the Minister or MEC. Governing bodies may also join voluntary associations representing governing bodies of public schools.[42]

In terms of section 21, a governing body may also apply to the HoD to be allocated any of the following functions : the maintenance and improvement of the school's property, buildings and grounds; the determination of the extra-mural curriculum of the school and the choice of subject options in terms of provincial curriculum policy; purchasing of textbooks, educational materials or equipment for the school; and other functions consistent with the Act and any applicable provincial law. The HoD may approve such an application unconditionally or subject to certain conditions, or refuse such an application if the governing body does not have the capacity to perform such function. The decision by the HoD must be in writing and reasons must be furnished. A person aggrieved by the decision of the HoD may appeal to the MEC. The MEC may, by notice in the *Provincial Gazette* determine that some governing bodies may exercise one or more functions without applying for the allocated functions, for example, in a case where the governing body has the capacity to perform such a function effectively and there is a reasonable and equitable basis for doing so.[43]

[42] S 20 (3)
[43] S 21 (6)

Furthermore, if the MEC decides that it is in the best interests of school education at particular schools, the governance of two or more public schools will vest in a single governing body, subject to certain procedures being followed.[44]

Any function of a governing body may be withdrawn by the HoD on reasonable grounds, provided the correct procedures have been followed.[45] Although the HoD may in urgent cases withdraw a function immediately and follow the prescribed procedures afterwards, such action may also be reversed or suspended. An aggrieved person may appeal against the decision of the HoD to the MEC.[46] In the case of a failure by a governing body to perform its functions (reasons for failure are not mentioned), the HoD must appoint persons to perform such functions.[47] There is no indication who these `persons' may be, but the HoD must ensure that a governing body is elected within one year after the appointment of these persons.

It is apparent that a governing body is not vested with any `powers' but that it only performs the `functions' listed in section 20. It may also apply for additional functions depending on its capacity, and certain governing bodies may, with the permission of the MEC, perform some of these allocated functions without applying for them, but subject to certain conditions. Since no mention is made of any powers that are vested in the school, the meaning of its status of 'juristic person' becomes blurred. Whether functions, duties and responsibilities can exist without a source of `powers', is doubtful. Since many governing bodies may not be able to perform all their functions and some functions may also be withdrawn, the legal implications for schools of the changing content of their juristic personality owing to the varying functions and capacities of their governing bodies, need to receive much more attention in future.

In furthering the interests of the school, a governing body must take all reasonable measures within its means to supplement the resources supplied by the state to improve the quality of education provided by the school to all its learners.[48] The governing body may determine and charge school fees, provided it is adopted by the majority of parents at the general meeting of parents.[49] The resolution, adopted by the majority of parents, must provide for the amount of fees to be charged and equitable criteria and procedures for the total, partial or conditional exemption of parents who are

[44] S 17
[45] S 22 (1) and (2)
[46] S 22 (5)
[47] S 25
[48] S 36
[49] S 39

unable to pay. The Minister must issue regulations regarding equitable criteria and procedures for exemption of payment of school fees. Once the payment of school fees has been determined in terms of section 39, parents who must pay are liable to pay such fees and the governing body has the power to enforce payment of fees on behalf of the school by process of law.[50] An aggrieved parent may appeal to the HoD against the decision of the governing body regarding exemption from paying school fees. A governing body must prepare a budget according to guidelines determined by the MEC, but before the budget is approved by the governing body, it must be considered and approved by a majority of parents at a parents' meeting.[51]

According to the Act and the various provincial school laws, provincial departments must issue regulations to govern specific school issues in their provinces. During the beginning of the year, provincial regulations were issued on *inter alia* the governance of schools and the process of establishing governing bodies at public schools. For example, the regulations of the Gauteng Department of Education set out the principles underpinning governance in Gauteng provincial schools, the composition of governing bodies, election process, duties and functions, and general and transitional matters.[52] The regulations may differ from province to province, depending on the particular needs, priorities and circumstances in the province However, all these regulations must fall within the framework of provincial and national education legislation and, ultimately, within the parameters of the Constitution and the bill of rights, in particular.

3.5 *Legal consequences of public-law status 3.5.1 Overall state control, responsibility and liability*

The state bears overall responsibility for *inter alia* the funding of all public schools.[53] This responsibility has its origin in the position of the modern state as an 'administrative state': it provides for the development of public functions (for example, health and education) through the establishment of infrastructures and the provision of resources.[54]

The state owns the immovable property of all public schools, except in the case of public schools on private property.[55] The immovable property of former state aided

50 S 41
51 S 38
52 Provincial Gazette 28 February 1997
53 S 34
54 Henning "Die administratiewe staat 1968 THRHR 1, Wiechers (1985) 9, '4
55 S 55-57

schools (for example, model-C schools) which had vested in the schools, reverts back to the state on a date determined by the Minister, after the correct procedures had been followed.[56] The rights of third parties in such immovable property are protected.[57] The Act provides for an agreement with the owner of the private property on which a public school is situated and the Minister must issue regulations regarding the minimum requirements of such an agreement. The agreement must provide *inter alia* for the provision of education and the performance of the normal functions of a public school, the governance of the school including the relationship between the governing body of the school and the owner, and the protection of the owner's rights in respect of the property occupied, affected or used by the school.[58] A religious organisation which is the owner of the private property of a public school may require that the above agreement must recognise the religious character of the school.[59] The state may even expropriate land for educational purposes, for example, the MEC is empowered to expropriate land or real rights in or over land for any purpose related to school education in the province but the correct procedures for expropriation and the determination of compensation must be followed.[60]

The state (Minister) determines the norms and standards for funding by means of correct procedures,[61] and must furnish financial information to enable schools to plan their budgets for the next year.[62] During the transitional period, assets and liabilities of a school (which became a public school) and which had vested in the school, will continue to vest in the school. Funds and other moveable assets of a school which belonged to the state, will remain at the disposal of the school and will devolve on the school on a date and subject to conditions determined by the Minister.[63]

Section 34 provides that the state must fund public schools on an equitable basis to ensure the proper exercise of the rights to education of all learners and the redress of past inequalities in education provision. This provision reflects the state's responsibilities in terms of its position as protector of fundamental rights in a constitutional democracy: it recognises and protects individual fundamental rights in terms of the bill of rights.[64]

56 S 55 (1)
57 S 55 (7)
58 S 14
59 S 57
60 S 58
61 S 35
62 S 34 (2)
63 S 52
64 Rautenbach and Malherbe *Your Rights in the Constitution* (1994) iff

In the light of the state's control over and liability for public education, and the position of the public school in this system. the significance of section 60 becomes clear. This clause provides for the overall liability of the state, and stipulates that the state is liable for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school and for which such a school would have been liable but for the provisions of section 60. The provisions of the State Liability Act, 1957, apply to any such claim. Section 60 did not appear in the original Bill and it is uncertain why it was included in the Act. There are many questions regarding state liability and its application in the proposed school system. For example, what is included in the term 'educational activity' which is not defined in the Act; what is the meaning of 'juristic person' and the scope of the school's legal personality in this context; is state liability a'catch all' to protect schools and their governing bodies from liability (including purely delictual liability in their private-law relationships); what type of control will be exercised over governing bodies (and schools) to prevent unnecessary (and costly) state liability which depletes the public revenue fund ?

Finally, the state may terminate the legal personality of a public school. The MEC may by notice in the *Provincial Gazette* close a public school.[65] The correct procedures must be followed and all assets and liabilities (subject to conditions of trusts, donations, etc) devolve on the state unless agreed otherwise between the MEC and the governing body of the school (for example, the case of a public school on private land).

3.5.2 Responsibilities and liabilities of the school

As a juristic person, the public school is vested with rights and obligations to participate in the law (discussed above). Obviously, by means of these rights and obligations a school also incurs responsibilities and liabilities. Governing bodies are responsible for taking all reasonable steps within their means to supplement the resources supplied by the state to improve the quality of education provided by the school to all its learners.[66] This provision clearly illustrates the operation of the 'partnership' between the state and the community in school management.
The ensuing section will concentrate on the public-law responsibilities and liabilities of the school, as it acts via its governing body. Only a few examples are discussed.

[65] S 33
[66] S 36

(a) Public-law relationships (internal)

Within the public education hierarchy (for example, national and provincial departments, regional boards, local agencies and schools), various administrative procedures exist to deal with grievances within these structures. For example, if the school (its governing body) is dissatisfied with the allocation by the HoD of certain functions to its governing body, or the withdrawal of other functions, the school may appeal against the decision of the HoD to the MEC.[67] This is an 'internal matter and will be reviewed *in toto*, following the correct departmental procedures. The MEC may approve the decision by the HoD, reject it, or, give instructions on how to amend or review the decision. In this way the HoD's duties and responsibilities are checked and evaluated and if certain duties and responsibilities have been neglected, the HoD will be reprimanded or disciplined in terms of departmental regulations.

Another example is that the HoD may only withdraw the functions of a governing body on reasonable grounds, provided the correct procedures have been followed: the HoD must inform the governing body of the intention to withdraw its functions and of the reasons for it, offer a reasonable opportunity to it to make representations, and give due consideration to such representations.[68] In urgent cases, the HoD may withdraw a function immediately but have to follow the prescribed procedures afterwards. Since an aggrieved person (school) may appeal against the decision of the HoD to the MEC, the same internal administrative procedures (above) have to be followed to determine whether the decision by the HoD was a valid administrative decision.

(b) Public-law relations (external)

Section 40 stipulates that once a parent is liable to pay school fees (or is exempted from paying), an aggrieved parent may appeal to the HoD against the decision of the governing body. A learner (or parent) who has been refused admission to a public school by the HoD, may appeal to the MEC against this decision.[69] A learner (or parent) may appeal to the MEC against the decision of the HoD to expel him or her from school.[70]

It is clear that special administrative channels (for example, to the HoD and MEC) may be used by learners (parents) and other 'external' parties to lodge their administrative complaints with the school or department. These enquiries are held in

[67] S 21 (5) and 22
[68] S 22 (2)
[69] S 5 (9)
[70] S 9 (4)

terms of departmental regulations, but must be lawful, reasonable and fair in terms of sections 33 (administrative justice) and 195 (basic values in public administration) of the Constitution. Another example where parents or other persons may use administrative channels for redress, is where a parent's (or any other person's) request to a public school to make available information for inspection, is turned down.[71] If the parents or other persons do not find satisfactory answers to their grievances or certainty about their problems within the administrative system of control, they may approach a court of law for a judicial review of their case.

There are many instances where parents or other persons would have the right to approach a court of law for a final and authoritative judicial evaluation of their case. This will happen most frequently in decisions involving human rights issues,[72] such as discriminatory admission policies,[73]administering corporal punishment,[74] refusal of access to information,[75]and denial of administrative justice.[76] Public schools are bound by the provisions of the bill of rights and will in these cases be liable in terms of their status as 'organs of state'.[77]

On the other hand, the school (as a juristic person) may collect school fees and the parent is liable to pay such fees.[78] The school may even enforce such payment through legal proceedings. A parent (or designated person) who, without just cause and after a written warning by the HoD, fails to send the child to attend school, is guilty of an offence and upon conviction liable to a fine or imprisonment.[79] These examples illustrate that the school as a juristic person and an 'organ of state' (where fundamental rights are at stake) may institute legal proceedings against the parent or other persons in terms of the Act and subject to the Constitution.

In the light of the above and the discussion on the responsibilities and liabilities of the school as a 'juristic person', questions on the scope and extent of state liability and the demarcation (or delimitation) of school liability in this context, crop up again. In short, what is the relationship between state liability on the one hand, and the liability of a juristic person in this context, on the other and, where is the dividing line between state

71 S 43 (6) and 59
72 Chapter 2 of the Constitution
73 S 9, 15 and 29
74 S 12
75 S 32
76 S 33
77 The Baloro Case; S 8 and 239 of the Constitution
78 S 40 and 41
79 S 3 (6)

liability and the liability of a juristic person in the public sphere? This 'dual' relationship (legal status) of the public school will remain a thorny issue.

4 The legal status of independent schools

The field of private schooling in South Africa is complex and mostly underresearched. The following discussion highlights only some aspects of the legal position of independent schools, as provided for in the Act.

4.1 Legal nature of independent schools

4.1.1 General

Independent schools consist of the private schools in the previous school system and independent schools that have since emerged. In terms of the Act, former private schools registered under a law regulating school education in the Republic and which existed immediately prior to the commencement of this Act, are deemed to be independent schools.[80] The MEC may enter into an agreement with the owner of an independent school to convert it into a public school.[81] Notice of the changed status must be published in the *Provincial Gazette*. The Act does not make provision for the declaration of a public school as an independent school.

Subject to certain provisions, any person may, at his or her own cost, establish and maintain an independent school.[82] Although these schools are 'independent' and therefore not public schools, they are subject to direct and indirect means of state control (for example, through registration and funding). The question that is often posed is, therefore, how private (independent) are private (independent) schools? Although they have a free choice in the type of education they provide (for example, special, religious- or culture-based) they have to meet certain conditions for registration and without registration they cannot (legally) survive.[83] The conditions for registration have not been spelled out, but it is clear that in a constitutional democracy which promotes a human rights culture, discrimination purely on the basis of race will not be tolerated .[84]

The Private Schools Act[85] has dealt with the recognition and registration of previous

80 S 53
81 S 49
82 S 45
83 S 46
84 S 29 (3)
85 Act 104 of 1986

private schools and is now being amended to incorporate independent schools within the new school system in South Africa. Since the South African Schools Act deals with overall standards and norms for school education in South Africa, it also contains important national provisions regarding independent schools. Independent schools in a particular province will in future also be regulated by the provincial government.

4.1.2 Registration and subsidisation

No person may establish or maintain an independent school unless it has been registered by the HoD.[86] The MEC must determine by notice in the *Provincial Gazette* the grounds for the granting and withdrawal of registration, and the HoD must register an independent school if he or she is satisfied that the standards maintained in the independent school are not inferior to those of comparable public schools; its admission policy does not discriminate on the ground of race; and it complies with the grounds for registration determined by the MEC.[87] Any person who contravenes this section is guilty of an offence and liable to a fine or imprisonment for a period of three months.[88]

A withdrawal of registration is not valid unless the correct procedures have been followed:[89] the owner of the school must be notified of the intention to withdraw and reasons for such withdrawal, an opportunity for written representations must be granted and the representations must be duly considered. The owner of the school may appeal to the MEC against the withdrawal of the registration.[90]

The MEC must determine requirements for the admission of learners at independent schools to examinations conducted by the education department, the keeping of registers and other documents by the school, criteria of eligibility, conditions and manner of payment of any subsidy to the school, and any other matter which must or may be prescribed.[91] Different requirements may be made in respect of different schools, and affected parties must be allowed a reasonable time to comment on any requirements the MEC intends to determine.[92]

86 S 46 (1)
87 S 46 (2) See s 29 (3) of the Constitution
88 S 46 (40
89 S 47
90 S 48 (5)
91 S 50
92 S 50 (3)

The Minister (in following the correct procedures), may by notice in the *Government Gazette* determine norms and minimum standards for the granting of subsidies to independent schools.[93] Subsidies may be granted by the MEC out of funds appropriated by the provincial legislature to qualifying schools. The HoD may terminate or reduce a subsidy if conditions were not complied with, but only after the correct procedures have been followed.[94] The owner of an independent school may appeal to the MEC against the termination or reduction of a subsidy to the school.

4.1.3 Legal status of independent schools

There are various categories of independent schools, including educational (charitable) trusts, close corporations and companies. The legal status of an independent school will therefore depend on its legal position in terms of the law that regulates its existence : for example, in the case of a company or close corporation, the Companies Act, *1973*, or the Close Corporations Act, *1984*, respectively, will determine the nature of the school, its rights, obligations and liability in terms of the law. However, over and above these prescriptions, independent schools also function as a category of school within the legal framework of the South African education system and are compelled to adhere to public law provisions (legislation) which regulate overall (national) education norms and standards, as mentioned above. Other forms of state control exist in regard to registration and funding, the registration of educators, educators' labour relations and regulation by means of provincial legislation.[95]

The 'dual' role (legal status) of independent schools in the private and public sector, and the extent of state control where issues such as national education norms and standards, registration and subsidisation, educators' employment, and the status of the school as an institution or functionary 'exercising a public power or performing a public function in terms of any legislation' are at stake, have not yet been resolved and will remain topical for some time.[96]

5 Uncertainties and future challenges

First, the parliamentary standing committee on education proposed several

93 S 48 (1)
94 S 48 (3)
95 Squelch *Private Education in South Africa The Legal Status and Mangement of Private Schools* (Ded thesis Unisa 1997) 84-110, 133-156
96 S 239 (1) (b) (ii) of the Constitution

amendments to the Schools Bill Most of these amendments were approved by parliament and now forms part of the Act. If one traces the various stages and development of the Bill, it is clear that this legislation is the product of transition in school education and came about through a process of negotiation, consultation and agreement by all the stakeholders involved (for example, the section 247-negotiations in terms of the interim Constitution) In fact, the whole process has illustrated democracy-in-action and culminated in the establishment of a democratic school system with built-in principles of openness, participation (partnership) and accountability. Although the standing committee acted within its powers in proposing certain amendments, these amendments could (and may still) affect the negotiated product, and in this sense the committee must have realised that it has a responsibility in terms of the process that has taken place.

The proposals that were included and which may have an influence on the governance of the public school, generally seem to have tightened control by the state over public schools. For example, a new provision that the Minister may by notice in the *Government Gazette* determine the age requirements for admission to a school or different grades at a school;[97] the power of the Minister (previously governing body) to determine norms and standards for language policy in public schools;[98] a learner at a public school may, subject to any applicable provincial law, be expelled by the HoD (previously the governing body);[99] a new provision that the MEC must determine by notice the nature of serious misconduct, disciplinary procedures and due process procedures;[100] a new provision that the constitution of a public school must comply with minimum requirements determined by the MEC;[101] the MEC must determine the designation of an officer (previously, the HoD had to designate the principal or another officer) to conduct the process for the nomination and election of members of the governing body;[102] the Minister must make regulations regarding equitable criteria and procedures for total, partial or conditional exemption of parents who are unable to pay school fees (previously, the Minister could determine guidelines to assist governing bodies in matters relating to the charging and collection of and exemption from paying school fees).[103] These provisions may become the topic of heated debate and even be contested in courts of law.

97 S 5 (4)
98 S 6 (1)
99 S 9 (2)
100 S 9 3)
101 S 18 (1)
102 S 28
103 S 39 (4)

Secondly, the devolution of powers to the provinces and decentralisation of school management powers and responsibilities to local communities are new concepts in South African education. Although successfully practised overseas, the question remains whether the proposed `partnership' between the state and the community is the correct choice in South African education right now. We are grappling with massive demands for education at all levels, a high percentage of adult illiteracy, a dwindling education budget and widespread poverty in many rural communities. Although local communities will have direct participation in the management of their schools, they will also be burdened with the heavy responsibilities of partnership, namely, financial responsibilities which will have a direct impact on the quality of education provided at their school. A danger exists that existing cleavages and polarisation in this regard will continue and become worse.

Although the Act is now in operation, new provincial school laws (for example, Gauteng, Mpumalanga, Western Cape), which were in operation before the Act was promulgated, may continue to apply until a conflict arises between the provincial law and the Act. This may also affect recent regulations issued in terms of such provincial laws, particularly those related to the establishment of governing bodies at public schools. To determine which law shall prevail, section 146 of the Constitution will have to be complied with. New provincial school legislation (adopted after January 1997) will have to be in line with existing national school laws.

Thirdly, an enormous task awaits governing bodies of public schools, a fact borne out by the detailed and specialist `duties' and `functions' listed in the various provincial regulations dealing with governing bodies. The school and its community have to place their trust and support in the governing body and, in return, will demand expert and professional service to the school, including the enhancement of the quality of education provided by the school. It seems that a multi-disciplinary team with expert skills, particularly in the fields of financial management and legal matters, is required and that the work planned by the capacity-building programme in this regard, should be regarded as one of the vital contributions to the transformation of schools and democratisation in general.

Empirical research on the problems encountered by the governing bodies of the previous model-C schools has revealed the following : ignorance by members of the governing body in comprehending the legal nature and implications of their actions, a lack of awareness of the law and a fear or avoidance of addressing legal issues. The

increasing importance of education law as an essential subject in teacher training was also stressed.[104]

Fourthly, although all schools are classified into two categories (public and independent), a transitional phase is introduced to enable governing bodies to continue their present functions (as stipulated in the Act) and gradually attain more functions depending on their capacities. The proposed capacity-building programme for public schools, spearheaded by the government, will play a crucial and on-going role in this regard.

Fifthly, the debate on whether independent schools will be subject to the bill of rights (its so-called `horizontal seepage') is not over yet, though it seems that its application in private-law relationships will have to be examined with circumspection and on an individual basis.[105] Nevertheless, the Constitution now offers more certainty on the horizontal application of the bill of rights, although its application in the case of independent schools must be determined individually.[106]

The brief discussion on independent schools provided ample proof of state control over private education in South Africa. However, the question is how much state control (direct or indirect) will be exercised over these schools (for example, by means of conditions set for registration and subsidies) ? Much will depend on the nature of these conditions and their impact on the governance and management of the school. The importance of independent schools in a democratic society, and the quality of education they provide, cannot be questioned. However, in the South African context it is doubtful whether the bulk of these schools will be able to function properly without substantial state subsidies. With only limited financial resources available, independent schools will find it hard to maintain the standard and quality of education they became known for. The independence of these schools and their status and role in a system of democratic education, should be upheld and respected : they should not be forced to sacrifice their independence in exchange for registration and subsidisation.[107]

---

104 Giles "The responsibility of the governing body of the state-aided school" in conference papers on International Perspectives on Education Law Law as an Instrument for Order in Education June 1995 55 – 59

105 Strydom "The private domain and the bill of rights" 1995 *SA Public Law* 52, Van der Vyver "The private sphere in constitutional litigation" 1994 *THRHR* 378, *Du Plessis v De Klerk* 1996 3 SA 850 (CC)

106 S 8 and 239 of the Constitution, Wolhuter "Horizontality in the interim and final Constitution" 1996 *SA Public Law* 512 522

107 Squelch 238-248

Sixthly, many issues have not been resolved by the Act (for example, the school finance plan, funding in general, and educators' labour relations) and several important and serious questions remain on its content and interpretation. For example, what are the `powers' of public schools (or governing bodies), and how can they perform their functions (and `duties') without a power base? The concepts of `power', `authority', `capacity' and "unction' used in the Act remain ambiguous and should be clanfied, particularly in the public law context."[108]

`State liability' is a difficult concept particularly in the context used in the Act. For example, what is the meaning of 'juristic person' of a public school and the scope of such legal personality; is state liability a`catch all' provision to protect schools and their governing bodies from liability; what type of control will be exercised over governing bodies to prevent unnecessary (and costly) state liability which ultimately devours the taxpayer's money? The present formulation of the public school as a 'juristic person' limits the rights of schools as juristic persona and pays lip-service to the real meaning of the concept of a juristic person. It has been proposed that the public school as a juristic person should have all the legal capacities that are normally associated with this concept, excluding those in a specific list."[109]

Seven, one could argue that we are entering the new era of the `benefactor state' *(Leistungsverwaltung)* where the state, through governmental, non-governmental and co-opted private bodies, actively promotes educational and other interests to ensure a better quality of life for all its people (for example, its affirmative action programmes, recognition of socio-economic rights and protection of the environment). Nevertheless, many questions remain on the functions and liabilities of the benefactor state and its functionaries in their new role of `beneficial' administration.

However, with a foundation of constitutional democracy, a justiciable bill of rights and the stimulation of openness and public participation, the full application and effect of the benefactor state must be realised by "both a civil service that is dedicated to making this new administrative law an instrument of well-being and betterment, and judges who are imbued with a spirit of imagination and innovation".[110]

Finally, the transformation process is not completed and development and

---

108 Wiechers (1985) 2-5, 174-175, Baxter *Administrative Law* (1984) 75-77

109 SATED "Kommentaar op die Suid-Afrikaanse Skolewetsontwerp, 1996" 25ff

110 Wiechers "Administrative law and the benefactor state" 1993 *Acta Juridicl* 176 250_'1_ 261-262

negotiations must continue. New policies and legislation have to be tested, redrafted and refined as school education progresses and practical results and evaluations become known. The ultimate goal, however, remains a proper functioning democratic school system that provides quality education for all. In achieving this objective, the importance of understanding and promoting the principle of 'partnership' between the state and communities, and the need for democratic participation, openness and accountability by all role players, should never be underestimated or undermined.

Transformation in education cannot commence without the realisation that a much more fundamental and comprehensive cultivation of a human rights culture has to take place, especially in education. Ultimately, it is not systems or structures that work, but the functionaries (stakeholders) that implement the system and their dedication in achieving the best products and results.