


**CHAPTER 1**



# **THE CONSTITUTION AND THE RIGHT TO A BASIC EDUCATION**

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## THE CONSTITUTION

South Africa has had two Constitutions since 1994.

The 'interim Constitution' (Constitution of the Republic of South Africa, Act 200 of 1993) paved the way for our new democracy.

The interim Constitution was replaced by the Constitution of the Republic of South Africa, 1996. The 1996 Constitution refined and developed many of the rights and principles contained in the interim Constitution.

When we talk about 'the Constitution' in this chapter, we are referring to the 1996 Constitution.



## INTRODUCTION

The South African Constitution is described as a 'transformative' document. This means that our Constitution seeks to change South Africa for the better, rather than keeping things as they are.

These transformative aims extend to our education system. The Constitution guarantees that everyone in South Africa has the right to a basic education, requiring active measures to improve education in the country.

Apartheid left South Africa with a deeply unequal and dysfunctional education system. More than 25 years into democracy, the pace of change has been slow. A fortunate

few receive a world-class education. For the majority, basic education remains a hope rather than a reality.

In this chapter, we provide a broad outline of the constitutional right to a basic education, explaining its place in the South African Constitution, the meaning of this right, and how it relates to other rights. We will also explain the important legal concepts and principles that will be used in the chapters to follow.

## A BRIEF INTRODUCTION TO THE CONSTITUTION AND THE BILL OF RIGHTS

The right to a basic education is found in Section 29(1)(a) of the Constitution. Before we explore this right in greater detail, it is helpful to understand the nature of the South African Constitution and some important principles of constitutional law.

### THE CONSTITUTION

The Constitution is the supreme law of South Africa. This means that all other laws and conduct must be consistent with the Constitution. No person may act in a way that conflicts with the Constitution, not even Parliament or the president.

### THE BILL OF RIGHTS

The Bill of Rights is contained in Chapter 2 of the Constitution. It sets out the fundamental rights of all people in South Africa, which include the right to a basic education.

South Africa is one of the few countries in the world that guarantees 'socio-economic' rights in their constitutions. Socio-economic rights are entitlements to basic goods and services that are necessary for a decent standard of living. The right to a basic education is one of these socio-economic rights, alongside the rights to further education, housing, healthcare, food, water and social security.

### WHO BENEFITS FROM THESE RIGHTS?

Most of the rights in the Constitution apply to everyone, including the right to a basic education. This means that any person in South Africa possesses these rights, including non-citizens.

### WHO HAS DUTIES?

For every right there is a duty. This means that if a person possesses a right, then someone else is legally required to do something or to avoid doing something. This leads to the questions of who bears these duties, and what do these duties require?

The state has extensive duties under the Constitution. Section 8(1) of the Constitution provides that "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state". Section 7(2) of the Constitution tells us that the state has the duties to

"respect, protect, promote and fulfil the rights in the Bill of Rights".

The 'state' is a broad term used to refer to everyone from the president to the lowest-level government employee. Government schools are 'organs of state', and their principals and teachers (acting in their official capacity) carry out the functions of the state. School governing bodies, although they can make some decisions independently of the government, must also carry out the functions of the state.

The duty to "respect, protect, promote and fulfil the rights in the Bill of Rights" includes positive and negative duties:

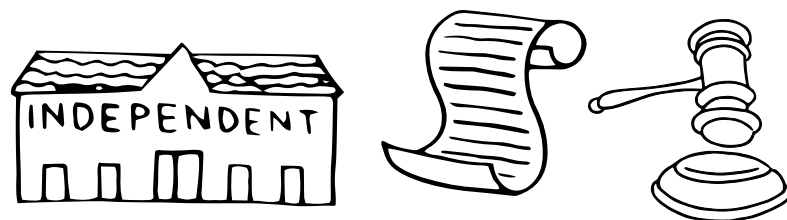
- A positive duty is a duty to do something, such as the duty to provide learners with teachers and textbooks
- A negative duty is a duty not to do something, such as a teacher's duty not to hit learners, or a school's duty not to prevent learners from writing exams.



## THE DUTIES OF INDEPENDENT SCHOOLS

In *AB v Pridwin Primary School* 2020 (5) SA 327 (CC), the Constitutional Court explained that Section 8(2) of the Constitution places a particular duty on independent schools to respect the rights of learners:

“In subjecting private power to constitutional control, section 8(2) recognises that private interactions have the potential to violate human rights and to perpetuate inequality and disadvantage. Independent schools, like Pridwin, are not exempt from constitutional obligations and the demands for transformation of private relations. Indeed, section 8(2) has particular significance given the expanding role of independent schools in the South African education system. In 2015, independent schools catered for approximately 566 195 South African learners. This amounted to a 40% increase in relation to the number of learners attending independent schools in the preceding decade. Independent schools no longer only cater to the wealthy. The independent school sector is now dominated by comparatively low-fee independent schools, which educate up to 73% of the learners in this sector. This change has been driven, in large part, by the fact that the public school system is, unfortunately, ailing. As the Chief Executive Officer of the Anglican Board of Education put it, ‘there is a crisis in [South African] education. ... That is why independent schools are thriving.’ As the power and significance of the independent school sector continues to grow, so too does the need for constitutional protection. Children should not be excluded from this protection merely because parental choices or circumstances have placed them in independent schools.”



Private individuals, including people, companies, and other organisations that are not a part of the state, also have duties under the Constitution.

Section 8(2) provides that private individuals have constitutional duties where this is required by the nature of the right and the nature of the obligation arising from the right. This means that the nature of the duty that a private individual owes will depend on the context.

In all cases, private individuals have a negative duty not to prevent others from receiving a basic education. For example, a person who owns the land on which a school is built has a duty not to prevent learners from gaining access to the school.

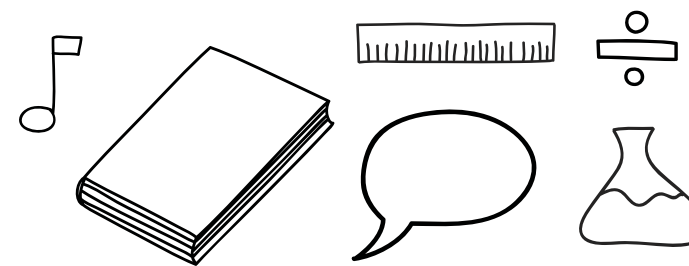
The question of whether or not private individuals have a duty to take positive steps to provide a basic education depends on the circumstances.

### LIMITATIONS

Rights and duties are not absolute. Often rights are in tension, requiring choices to be made between competing interests. For example, corporal punishment in schools (beating learners) may be an expression of religious belief for some teachers and parents, but we prohibit corporal punishment to protect the rights of children.

The state must also make difficult choices about how best to allocate its time, capacity and resources to many competing demands. Improving the education system is a priority, but the government must also address many other pressing needs in society. This means that some restrictions on a right may be permitted to allow the state to meet other needs. Sometimes external factors may lead to a limitation, such as a public health emergency which may require a temporary closure of schools.

When a right is restricted or is not sufficiently protected or fulfilled, we say that it has been ‘limited’. Section



36(1) of the Constitution permits limitations of rights provided that these limitations are authorised by law and that they are reasonable and justifiable. A strong justification is required for the limitation of any rights.

### REMEDIES

Where rights have been unjustifiably limited, the courts must decide how best to fix this situation. This is called a ‘remedy’.

A court must declare the offending law or conduct to be unconstitutional, known as a ‘declaration of invalidity’. Beyond this declaration of invalidity, the courts can choose from a range of other remedies. They must exercise this choice by determining what is ‘just and equitable’ in the circumstances.

Some of the remedies that a court can give include, but are not limited to:

- An order requiring the state or a person to do something or not to do something (called an interdict).

An example of an interdict is an order requiring the state to provide textbooks to all learners.

- An interdict combined with an instruction to report to court on the progress in carrying out the order (known as a ‘structural’ interdict). For instance, an order directing the state to provide desks and chairs to all learners within three months, and to report to the court every month on the progress.
- An order that the parties enter into genuine discussions in an attempt to resolve their problems (‘meaningful engagement’). For example, a court could order the state to consult with schools, parents and learners about whether their school should be merged with another one.
- An order that the state or a person pay money to another person to compensate them (pay them back) for the violation of their constitutional rights (‘constitutional damages’). This is reserved for exceptional cases.
- Any combination of these remedies.

## THE LIMITATIONS CLAUSE

Section 36(1) of the Constitution is known as the limitations clause. It provides:

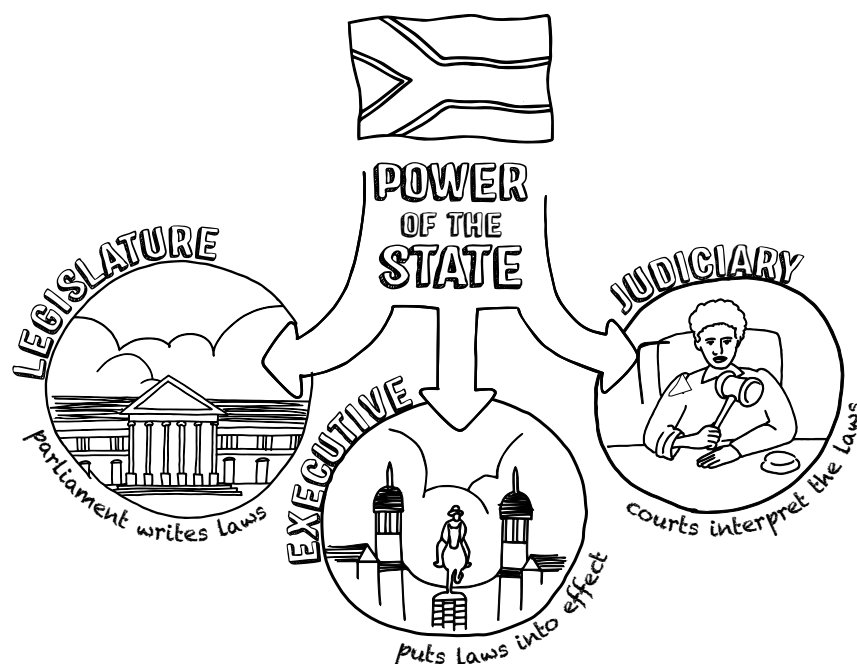
“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”



## DEFERENCE AND THE RIGHT TO A BASIC EDUCATION

Some degree of deference is always required in constitutional matters, particularly in matters as complex and controversial as education issues. Judges are smart and competent people, but they could never have the knowledge, skills or time to fix the education system single-handedly. They also are not voted into office by the public, so they lack the democratic mandate to make many of the difficult decisions that are required in shaping education policy and implementation. This does not mean that the courts should be timid, or that they should avoid dealing with education rights. Deference is best shown by the sensitive handling of education issues, rather than avoidance of these issues.



### SEPARATION OF POWERS AND DEFERENCE

In this handbook you will often see references to the 'separation of powers' and 'judicial deference'.

The separation of powers requires that the power of the state should 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 of these branches has distinct powers. They also have powers to keep the other branches in check. The aim is to prevent any branch from gaining too much power or from abusing their powers. It also allows for specialisation, as these branches of the state can concentrate on what they do best.

Judicial deference' is an attitude that courts adopt in dealing with

the other branches of state. A court 'defers' to these other branches when it leaves certain matters, to some extent, to the control and expertise of the other branches. For instance, a court may find that the Department of Basic Education's failure to deliver textbooks to all learners is a violation of the right to basic education, but a court may defer to the department by leaving it to the department to decide how it will deliver those textbooks.

Deference can be good or bad, depending on the reasons for showing deference. Good deference is where a court defers out of appropriate respect for the other branches' constitutional powers, their proven capacity, knowledge or skills, or their legitimate democratic mandate. Bad deference occurs when a court shows undue caution or avoids dealing with an issue out of fear, favour or prejudice.



### INTERNATIONAL LAW

In this chapter and the chapters to follow, you will find many references to rights and duties in international law.

International treaties (agreements signed by countries) are binding on South Africa when they have been signed and ratified.

These treaties become binding law within South Africa when parliament passes legislation giving effect to these treaties.

Courts are also required to consider international law when they are interpreting and applying South African law.

**According to Section 233 of the Constitution, all legislation must be interpreted to be consistent with international law. Section 39(1)(b) of the Constitution also requires courts to consider international law when interpreting the Bill of Rights.**

## EDUCATION RIGHTS IN INTERNATIONAL LAW

Some particularly important international treaties to consider when interpreting the right to education are:

- The Universal Declaration of Human Rights (UDHR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The International Convention on Economic, Social and Cultural Rights (ICESCR),
- The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)
- The African Charter on Human and Peoples' Rights (African Charter)
- The African Charter on the Rights and Welfare of the Child (ACRWC)

There is also a category of international law known as 'soft' law. This consists of general comments, guidelines, declarations and recommendations by international bodies. These are not 'binding' law, but they are persuasive guides to interpreting and applying rights. Many of the most helpful guides to the meaning of the right to a basic education are found in this body of soft international law.

In January 2015, South Africa ratified the International Covenant on Economic, Social and Culture Rights (ICESCR). However, this ratification included the declaration that South Africa would only take progressive steps to realise the right to education within its available resources. As will become clear below, this declaration is inconsistent with the unqualified right to a basic education under the Constitution.



## COMBINING STRATEGIES: THE CASE OF MINIMUM UNIFORM NORMS AND STANDARDS FOR PUBLIC SCHOOL INFRASTRUCTURE

In many cases, litigation works best when it is combined with other strategies. The litigation and activism over norms and standards for school infrastructure is a good example.

For a number of years, activists from Equal Education (EE) had been lobbying the Minister of Basic Education, Angie Motshekga, to create norms and standards setting out basic requirements for safe and functional school facilities. These norms and standards would help to improve school infrastructure and allow parents and learners to hold provinces to account for the atrocious conditions in their schools.

Minister Motshekga at first refused to hear these demands. EE launched a national campaign in response. Activists and learners around the country protested this inaction, leading to a march on Parliament in Cape Town. EE also created social media campaigns and videos which received a wide following.

In the meantime, EE – represented by the Legal Resources Centre (LRC) – took the Minister to court to force her to pass these norms and standards. The combined pressure of activism and litigation eventually resulted in the Minister agreeing to pass norms and standards.

This shows that litigation, negotiation and activism can be used together to apply pressure for positive change.

## HOW TO PROTECT AND PROMOTE CONSTITUTIONAL RIGHTS

When a person's rights are threatened or violated, one of the solutions is to take the matter to court. This is called litigation, and it can be a powerful tool in resolving legal disputes. Much of this handbook highlights litigation over the right to a basic education.

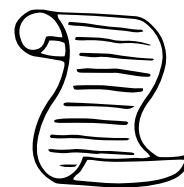
However, it is important to remember that going to court is not the only option to promote and protect the right to a basic education, and in many cases it is not even the best option. In most cases, litigation is used when all other efforts have failed. Litigation also tends to work best when it is combined with other strategies (see the box below on 'Combining Strategies' for a good example of this).

Other options include negotiation, activism and lobbying, and help from Chapter 9 institutions. Each of these will be discussed briefly.

Usually, the best first step to take is to enter into negotiations with the other

party. This might involve writing letters or arranging meetings to raise concerns. This may open up the possibility of resolving the dispute without the cost and time delays involved in taking the matter to court. It may also help to maintain good relations between the parties.

If negotiation is unsuccessful, or while negotiations are ongoing, the techniques of activism and lobbying can be very effective. This might involve marches and protests, social media campaigns, and other forms of mass mobilisation. The aim is to put pressure on the party that has failed to fulfil its obligations in order to convince them to do the right thing.



Another option is to enlist the help of so-called 'Chapter 9 Institutions'. These are the institutions that are set up in terms of Chapter 9 of the Constitution. They serve as a check on government in order to hold it accountable, and they also play a role in guiding the transformation of South Africa as envisaged in the Constitution. These Chapter 9 institutions include the South African Human Rights Commission (SAHRC), the Public Protector, the

Commission for Gender Equality, the Auditor General, and the Commission for the Protection and Promotion of Cultural, Religious and Linguistic Communities (CRL Commission).

The SAHRC has conducted investigations into education issues, including learner and teacher support materials (LTSM) and scholar transport. Members of the public have assisted these investigations by sending comments and concerns to the SAHRC.

While litigation is a very important tool for enforcing the right to education, it is important to remember that it is not the only tool that can be used for this purpose. Negotiation, activism, lobbying and support from Chapter 9 institutions can all be used instead of or together with litigation.

## WHERE TO GO FOR HELP?

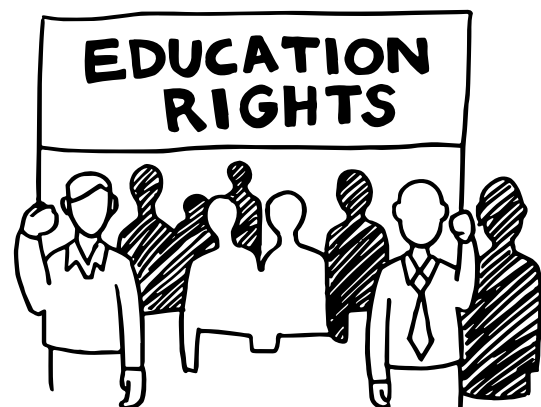
If you suspect that the rights of learners are being infringed and the relevant individual, school or departmental official does not deal with your complaint satisfactorily, you can contact a number of public interest law organisations around the country which offer free advice and legal services. These organisations include:

- Centre for Applied Legal Studies (CALS)
- Centre for Child Law
- Equal Education Law Centre
- Legal Aid Justice Centres
- Lawyers for Human Rights
- Legal Resources Centre (LRC)
- Probono.org
- Section 27
- Socio-Economic Rights Institute of South Africa (SERI)
- University law clinics

Chapter 9 institutions are also available to assist:

- South African Human Rights Commission
- Public Protector
- Commission for Gender Equality
- Commission for the Protection and Promotion of Cultural, Religious and Linguistic Communities (CRL Commission)





## THE RIGHT TO A BASIC EDUCATION

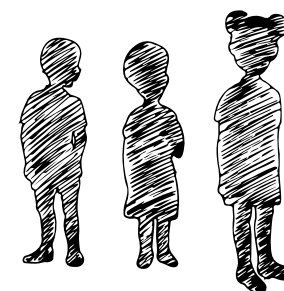
With this background in mind, we now turn to explaining the meaning and content of the constitutional right to a basic education. Section 29(1) of the Constitution contains the right to a basic education and the right to further education.

Section 29(1) provides:

- “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.”

To understand the content and application of the right to a basic education, we need to answer five important questions:

- First, the right to a basic education is guaranteed to **‘everyone’**. Who is ‘everyone’?
- Second, Section 29(1) distinguishes between a basic education and further education. What, then, is the content of a **‘basic’** education?
- Third, there is an important difference in the way that the two rights to education in Section 29(1) are worded. The right to further education is **‘qualified’** by the additional statement that the state must take ‘reasonable measures’ to make further education ‘progressively available and accessible’. By contrast, the right to a basic education does not have this additional wording; it is **‘unqualified’**. What does this mean for the content and application of the right to a basic education?
- Fourth, under what circumstances may limitations of the right to a basic education be **justified** under Section 36(1) of the Constitution?
- Fifth, how will courts determine appropriate **remedies** for unjustified limitations of the right to a basic education?



## WHO IS EVERYONE?

‘Everyone’ refers to all people within South Africa’s borders. This means that the right to a basic education is not restricted to citizens.

The Supreme Court found in *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA) that the state had acted unlawfully by prohibiting asylum seekers from studying while their asylum applications were being processed. Here the Court emphasised that everyone has a right to human dignity, including citizens and non-citizens. Since education is essential to a life with dignity, it is also not limited to citizens. The word ‘everyone’ in Section 29(1) confirms this wide application.

In *Centre for Child Law v Minister of Basic Education* 2020 (3) SA 141 (ECG) the High Court held that no child can be denied admission to a school or excluded from a school

for failing to provide the school with a birth certificate, or valid passport, or permit. It stated that

“the right to education extends to ‘everyone’ within the boundaries of South Africa; the nationality or immigration status is immaterial” (para 90).

It is important to remember that the fact that the right to a basic education is available to everyone in the country does not mean that it cannot be limited in some cases. As explained above, rights are not absolute and can be restricted, provided there is a strong justification for this. However, the possibility of limitations does not deprive non-citizens of the right.

## CENTRE FOR CHILD LAW V MINISTER OF BASIC EDUCATION

This case was brought on behalf of 37 learners at Phakamisa High School in the Eastern Cape who were facing exclusion due to the fact they did not have identification documents such as birth certificates, passports or permits. The problem arose because the Department of Education issued a circular saying that funding of schools would depend on the numbers of children registered with the required forms of identification. The schools were then obliged to only accept children who could produce the correct documents. Some of the affected children were undocumented South Africans, while others were children from other countries. The High Court found that the new rules issued by the Department were impermissible, as ‘everyone’ has the right to basic education. The actions of the Department of Basic Education and the Provincial Department and aspects of the circular were found to be unconstitutional. The court ordered that all children in the Eastern Cape province should be admitted to schools, and principals of the relevant schools were permitted to accept alternative forms of identification for the purpose of admissions.



## THE SIGNIFICANCE OF JUMA MUSJID

The Constitutional Court's 2010 decision in *Juma Musjid* is a landmark in the development of education-rights law in South Africa. This was the first time that the Court provided a detailed analysis of the right to a basic education.

This case was about the eviction of a government school from privately owned land. While the Court allowed the eviction to proceed, it put in place measures to protect the rights of learners at the school.

The Constitutional Court also confirmed that private landowners have a negative duty not to unjustifiably prevent learners from receiving a basic education.

## WHAT IS A BASIC EDUCATION?

The Constitution does not define the term 'basic' education. There was once speculation about whether a 'basic' education was a period of time in school (the time-based approach) or an education of an appropriate standard (the adequacy-based approach).

The Constitutional Court settled the issue in *AB v Pridwin Primary School* 2020 (5) SA 327 (CC), where it favoured an adequacy-based approach to a basic education. This case dealt with the exclusion of two children from a private school without a proper hearing because of their parents' behaviour. The parents had entered into a contract with the school when the learners were enrolled. The contract contained a termination clause that provided that either party could terminate the contract for any reason on a term's notice. The school invoked the clause and children were asked to leave school with a term's notice. One of the arguments made by the school was that a hearing was not necessary

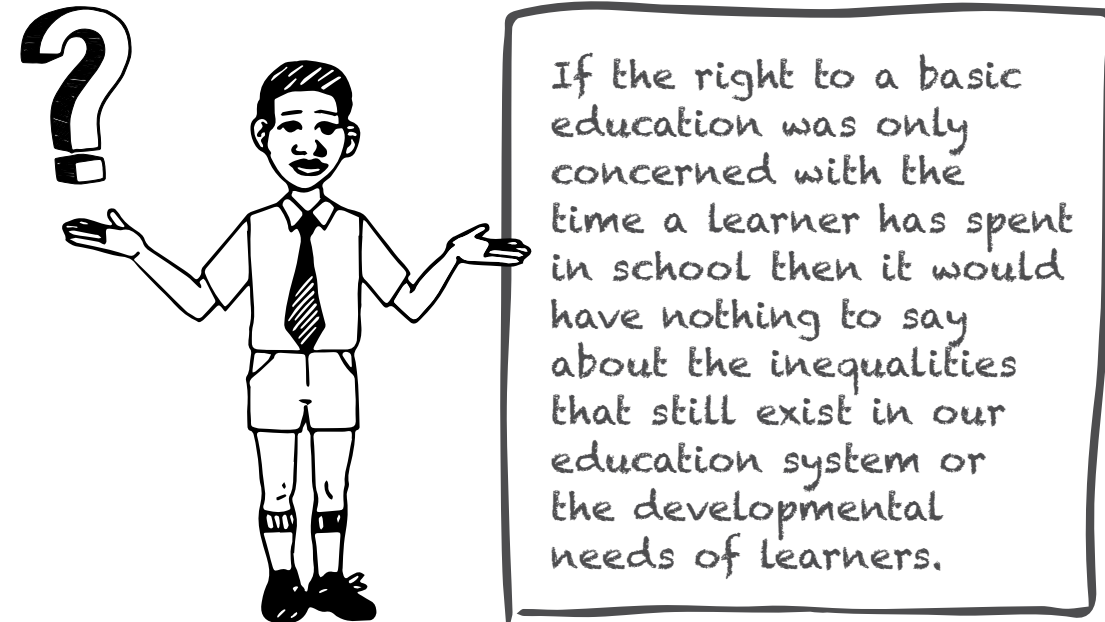
because the right to basic education did not apply at a private school, and therefore the school was not bound by the principles of due process that would apply in a public school. The Court held that a basic education

"refers primarily to the content of the right to education" and that this is a "legal entitlement to [have] one's basic learning needs met".

The first reason for an adequacy-based approach is the wording of Section 29(1)(a).

This section includes the right to adult basic education. This means that a basic education cannot be confined to particular ages or time spent in school.

A second reason is that an adequacy-based approach best fits the



purposes of the right to a basic education. The Constitutional Court summarised some of these purposes in its important decision in *Governing Body of the Juma Musjid Primary School v Essay* NO 2011 (8) BCLR 761 (CC) (*Juma Musjid*). In that judgment, Justice Bess Nkabinde explained that:

The significance of education, in particular basic education, for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. 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.

...  
[B]asic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental

and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities.

These passages indicate that a basic education must be capable of achieving goals of individual and societal development, and in doing so, it must help to eradicate the effects of apartheid. According to this view, a basic education must have a certain content and quality. If the right to a basic education was only concerned with the time a learner has spent in school then it would have nothing to say about the inequalities that still exist in our education system or the developmental needs of learners.

The final reason for the content-based approach is that it is strongly supported in international law. The phrase 'a basic education' has its origins in the 1990 World Declaration on Education for All. This is one of the non-binding 'soft' law instruments discussed above, but it has

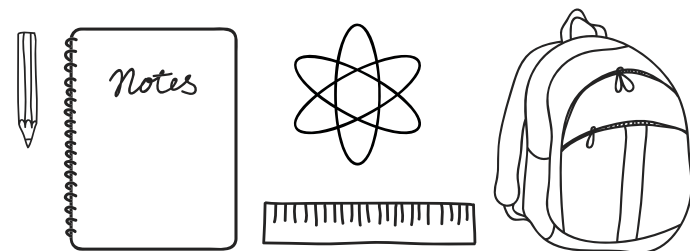
been hugely influential in shaping the international understanding of the right to education. Article 1 of the World Declaration explains that the right to a basic education is a guarantee that:

Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.

On this understanding of a basic education, the process of defining the content of this right involves three stages:

- First, we need to identify the purposes that an education should serve, which include individual and societal development.





- Second, we need to identify learners' basic learning needs in light of these purposes, such as literacy, numeracy, problem-solving skills and so on.
- Third, we need to identify the materials and resources required to meet these basic learning needs, such as adequately trained teachers, textbooks, classrooms, and adequate school furniture.

The content of a basic education is not fixed. As Article 1 of the World Declaration goes on to say,

"basic learning needs and how they should be met" will vary with the context and will "[change] with the passage of time".

The adequacy-based approach is demonstrated in a series of court judgments. For example:

- In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC) the High Court noted that a basic education for learners with severe intellectual disabilities may be very different to that provided to learners in mainstream schools. What is important is that the learner receives an education that "will enable him or her to make the

best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be".

- In *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM), the High Court held that access to basic school furniture was required for children to receive a basic education. The Court supported an adequacy-based understanding of the right to a basic education, explaining that

"[t]he state's obligation to provide a basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners" (para 20).

- There was some uncertainty in the law about whether grades 10, 11 and 12 were included in the definition of 'basic education', because in the *Juma Masjid* case, the Constitutional Court appeared to equate this with compulsory education which ends at the age of 15 or the end of grade 9. This uncertainty was resolved in the case of *Moko v Acting Principal of Malusi Secondary School* 2021 (3) SA 323 (CC). The case involved a

Grade 12 learner who was prevented by the school from writing a matriculation exam, on the grounds that he had not attended extra lessons. The Constitutional Court found that this was a breach of the learner's right to basic education. The Court favoured the adequacy approach, and quoted *AB v Pridwin Primary School* 2020 (5) SA 327 (CC), where it was said that basic education is a flexible concept

which must be defined so as to meet the appropriate learning needs of the learner and should also provide access to nationally recognised qualifications. In the *Moko* case, the Court found that to exclude grades 10, 11 and 12 would be

"an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right" (para 32).

It is important to remember that the courts are just one of the many institutions that have a role in defining the content of a basic education. Law-makers and policy-makers play a crucial role in expanding on the content of this right through detailed laws and policies. Teachers, learners, parents, activists and community organisations also have an important role to play. Through lobbying and activism, ordinary people can create changes in the way the right to a basic education is understood and applied. Defining the right to a basic education is ultimately a democratic and cooperative exercise.

## THE DEMOCRATIC AND COOPERATIVE EXERCISE

*Mazibuko & Others v City of Johannesburg* 2010 (4) SA 1 (CC) explained the ideal relationship between courts, lawmakers and society in giving content to socio-economic rights such as the right to a basic education:

"[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice."

This does not mean that courts have no role to play in determining the content of socio-economic rights. Courts will still need to consider whether the state's policies and programmes give proper effect to the right to a basic education. Courts will show a measure of deference to the state's choices, but that deference has its limits.



# WHAT DOES IT MEAN TO SAY THAT THE RIGHT IS 'UNQUALIFIED'?

As mentioned earlier, the right to a basic education is different to the right to further education and other socio-economic rights because it is 'unqualified'.

The right to further education is 'qualified' by additional words that say that the state must take 'reasonable measures' to make further education 'progressively available and accessible'. That wording is similar to the wording used for other socio-economic rights. For example, Section 26, which addresses housing, provides as follows:

- “(1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

The right to a basic education contains none of this additional language qualifying the state's obligations to provide a basic education.

To understand the differences between the unqualified right to a basic education and the other qualified socio-economic rights, it is important to understand two things:

- The distinction between positive and negative duties, introduced briefly above; and
- The distinction between immediately realisable and progressively realisable rights.

## QUALIFICATIONS, AND POSITIVE AND NEGATIVE DUTIES

We mentioned earlier that all rights create positive and negative duties: duties to do something and duties not to do something.

All socio-economic rights create negative duties that are unqualified and 'immediate'. This means that the state and other individuals must not deprive people of existing goods, or prevent them from accessing these goods. For example, the state has a negative duty not to stop people from receiving a further education at university. The state cannot say that it is taking

reasonable measures, within its available resources, to comply with this duty.

Where a socio-economic right is 'qualified', that qualification applies to the positive duties flowing from the right. The state does not have a duty to provide further education to everyone immediately. It only has a duty to take reasonable measures over time and within its available resources to provide access to university and other further education opportunities. This duty to take incremental steps over time is known as 'progressive realisation'.

The right to a basic education is different. Both the negative and positive obligations flowing from this right are unqualified and 'immediately realisable'.

## THE IMMEDIATELY REALISABLE RIGHT TO A BASIC EDUCATION

The fact that the right to a basic education is unqualified and immediately realisable



has an impact on how we determine whether this right has been limited.

A limitation of a right is a restriction or failure to fulfil the right. If a limitation has occurred, the state must justify that limitation under Section 36(1) of the Constitution.

Where a socio-economic right is qualified and progressively realisable, the state's failure to provide does not amount to a limitation by itself.

Returning to the example of housing, a person does not have a positive right to a house from the state immediately. The mere fact that a person does not have a house is not necessarily a limitation of her constitutional right to housing. A limitation will have

occurred only if the state's programmes to provide access to housing over time are found to be unreasonable.

In comparison, it is much easier to establish a limitation of a learner's right to a basic education. If a learner is not receiving a basic education, then his or her right has been limited. A learner does not have to show that the state has failed to take reasonable measures over time, within its available resources, to provide access to a basic education. This is why we say that the right is 'immediately realisable': as a learner has a right to a basic education here and now, and does not have to wait for the state to take reasonable measures over time.

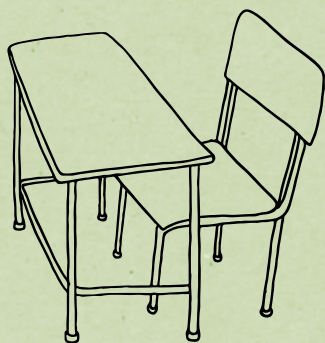
Such a limitation of the right to a basic education will be unconstitutional unless the state can justify the limitation under Section 36 of the Constitution.

## THE UNQUALIFIED, IMMEDIATELY REALISABLE RIGHT

In *Juma Musjid*, the Constitutional Court explained the difference between the right to a basic education and the qualified socio-economic rights as follows (para 37):

“Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible.'”





## THE SCHOOL FURNITURE LITIGATION

The litigation over school furniture in the Eastern Cape shows how the unqualified right to a basic education affects how courts assess limitations of this right.

In *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM), the applicants asked for desks and chairs to be provided to approximately 600 000 learners in the province. The government argued that they did not have the budget to provide this immediately. The Court found that desks and chairs are part of the right to education. Furthermore, it confirmed that the fulfilment of the right is not qualified by 'available resources'. Therefore, government cannot use a limited budget as a reason for non-delivery – they should have already planned and budgeted according to the right.

The Court allowed government 90 days to provide desks and chairs to those in need. However, the Court gave the state the opportunity to apply for extensions on this deadline if it could show good reasons for these extensions. Extensions were applied for and granted, but eventually all of the required desks and chairs were provided.

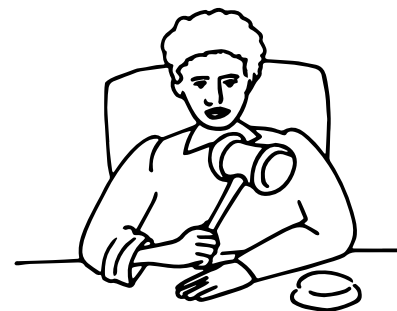
## WHEN IS A LIMITATION OF THE RIGHT JUSTIFIED UNDER SECTION 36?

As explained above, one of the requirements for a justifiable limitation of rights is that the limitation must be authorised by a law of general application. If there is no law permitting the limitation, then no further justification is permitted and the limitation must be declared unconstitutional.

This means that the state will have to show that any failure to provide a basic education is authorised by a specific law. In most cases where the state has failed to act, such as failing to deliver desks and chairs to learners, the state will not be able to point to any law that authorises that failure. It would be hard to imagine a law that says that it is acceptable to provide desks and chairs to some schools, but not to others. As a result, the limitation of the right to a basic education will be unjustified and unconstitutional.

Even if a law authorises the limitation of the right, the state must still present a strong justification to

show why the limitation of the right is outweighed by other important goals. For example, in a public health emergency such as a pandemic, the government may limit rights by passing regulations that prevent children from attending school. This limitation may be reasonable and justifiable in the short term, but it must be limited in time and has to be reviewed regularly, as the health crisis is monitored. At some stage, a total restriction on children attending school may become disproportionate, if the health risks can be managed in other ways such as mask wearing or social distancing.



## HOW DOES A COURT DETERMINE AN APPROPRIATE REMEDY?

A declaration of constitutional invalidity is not the end of the matter. As indicated above, the courts have a choice between available remedies depending on what is just and equitable in the circumstances.

In deciding on a just and equitable remedy, a court will take into account many factors. The most important consideration is that a remedy must be 'effective', meaning that it must offer some relief to those who are suffering a violation of their rights.

In designing remedies, courts will also be realistic about what the state can achieve given its limited resources. The state does not have unlimited time and money. It also has many other pressing demands, such as providing healthcare, sanitation, and housing. A just and equitable remedy will need to be sensitive to these other competing demands.

This means that a court will not necessarily order the state to provide a basic education immediately. It may instead set

deadlines for the state to deliver, or require the state to take all reasonable measures to realise the right to basic education with immediate effect, and to require the state to report on its progress. What is important is that this remedy should require concrete steps to deliver a basic education, even if it cannot be provided overnight.

Take the example of schools that lack desks and chairs. The failure to provide adequate school furniture will be a limitation of the right to a basic education. But the state may show that it needs time to plan and deliver desks and chairs to all schools. It may also argue that if it were to divert all its resources to school furniture, other important parts of the education system may suffer. The court will

weigh up these considerations and decide on an appropriate remedy. The court may give the state a deadline to deliver, giving it time to gather the resources and put together appropriate plans.

This may seem puzzling at first: how can the right to a basic education be immediately realisable if the court does not order the state to provide a basic education immediately? We need to remember that there is a difference between rights and remedies. The right to a basic education sets out what an individual ought to receive from the state. Remedies are about finding practical ways to achieve this goal. A court cannot order the impossible, so it must find a way to fix the rights violation, taking into account what is feasible.



## #TEXTBOOKSMATTER 2015 CAMPAIGN

As explained earlier, it is important to combine litigation with other strategies to achieve changes.

Another good example of this was the #Textbooksmatter campaign, in 2015. This formed part of a series of court cases challenging the government's failure to deliver textbooks to learners in Limpopo Province.

In 2015, in the build-up to the SCA appeal in *Minister of Basic Education v Basic Education For All (BEFA)*, Section27 and BEFA ran a media-savvy campaign utilising different media platforms under the banner of #TEXTBOOKSMATTER. The aim of this campaign was to ingrain the importance of textbooks into the public consciousness, particularly in the poorest schools; so that by the time the appeal was heard, there was an understanding of the importance of the case.

SECTION27 and BEFA did the following:

- Wrote op-ed articles (from SECTION27) on the role of textbooks in education;
- Produced videos of well-known, respected voices talking about the importance of textbooks. Some of the contributors included the writer Njabulo Ndebele; the journalist Justice Malala; ex-Wits SRC president Shaeera Kalla, from #FEESMUSTFALL; and Mary Burton, from Black Sash. These messages were distributed across various media platforms;
- Held district workshops in Limpopo, talking to schools/communities/ SGBs about the case;
- Organised a 'funeral march' in Polokwane with learners from Limpopo, just before the case. The march was symbolic, highlighting the 'death' of educational opportunities for poor learners;
- Recorded photo and video narratives of the voices of Limpopo learners, talking about their experiences.

## THE RIGHT TO A BASIC EDUCATION IN ACTION

We have covered many complex concepts in a very short space of time. It will be helpful to put these concepts into perspective by seeing how they would be applied in solving a real-life problem.

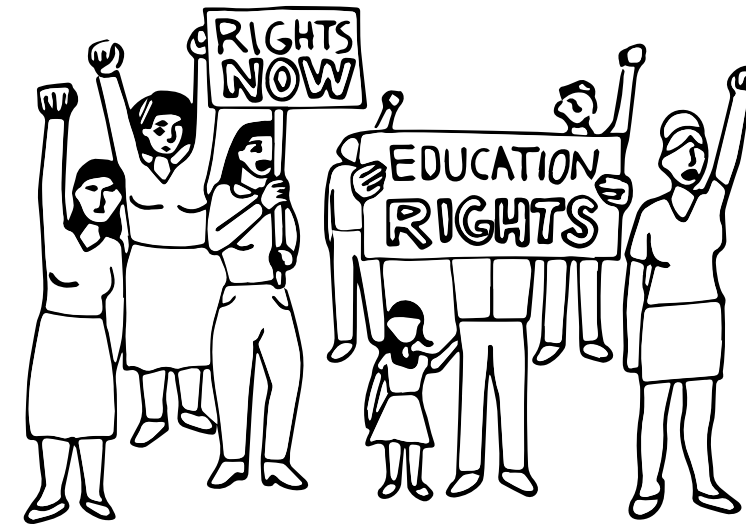
Take the example of a school near a busy and very dangerous road. Most learners at the school have to cross this road to get to school. Many learners have been hit by cars on this road, resulting in serious injuries and deaths. Some learners are so afraid of crossing the dangerous road that they skip school or arrive late for class.

To solve this problem, lawyers and the courts will ask a series of questions:

- Is this situation a limitation of the right to a basic education?
- If it is a limitation, is this limitation justified under Section 36?
- If it is not justified, what is the appropriate remedy?

The learners in this example are clearly being denied safe access to their school. Learners can only obtain a basic education if they are able to access school without fear of death or injury, so there is a limitation of the right. The unqualified nature of the right means that we do not need to assess whether the state is taking reasonable measures to fix the problem over time and within its available resources. The fact that children are being denied a basic education is enough to show their rights are being limited.

The next question is whether this limitation is justified under the Section 36 limitation clause. There is no law that authorises the absence of safe access to schools, so no further justification could be provided. The result is that



this situation is an unconstitutional violation of the learners' rights.

This leads to the question of the appropriate remedy. A court must declare this situation to be an unconstitutional limitation of the right to basic education. However, it then has a choice of further remedies, based on what is just and equitable in the circumstances. At this stage, the court will need to consider the

extent of the limitation and the urgent need for a solution. It will also have to take into account the resources, capacity and expertise of relevant state authorities.

There are many different options available to resolve this problem, such as placing traffic officers at the crossing point or constructing a pedestrian bridge over the road. The court would not necessarily have the expertise to know which option is best. Instead, the court

may order the relevant state organs to fix the problem of unsafe access to the school within a certain period of time, leaving it to the authorities to decide on which solution would work best. The court could also order these authorities to report back to the court to allow the court to supervise their progress. This demonstrates that in most cases, the question of an appropriate remedy will often be the most complex issue.

Once the court has given its remedy, there is also the difficult task of making sure that the remedy is implemented. The state has often ignored court orders or failed to comply fully. This may require further negotiation, activism and litigation to make sure that the court order is fulfilled.



# OTHER CONSTITUTIONAL RIGHTS IN EDUCATION

The right to a basic education cannot be seen in isolation. The rights in the Bill of Rights are all deeply connected. As a result, a violation of the right to a basic education may also involve a violation of other rights, and vice versa. For instance, in the example we have just discussed, the dangerous road outside the school is not only a threat to the learners' right to a basic education, but also a threat to their right to freedom and security of the person, as they are at risk of being killed or injured.

In this section, we will briefly discuss some of the other constitutional rights that are often at stake in education matters. Many of these rights will be discussed in greater detail in the chapters to follow.

## CHILDREN'S RIGHTS

Children are the primary beneficiaries of the right to a basic education, and the main victims of inadequacies in our education system. Section 28(2) of the Constitution states that **"a child's best interests are of paramount importance in every matter concerning the child"**. Section 28(2) is an important aid in interpreting other rights, including the right to a basic education. Section 28(2) is also a stand-alone right, generating its own set of obligations. In *Juma Musjid* the Constitutional Court said that all courts must consider the best interests of children before making a decision to evict a school from its premises, and in *AB v Pridwin Preparatory School* the Court said that private schools must properly

consider the best interests of children before terminating a contract and causing children to be excluded from school.

Children also have a right under Section 28(1)(c) to 'basic nutrition'. Over nine million children in South Africa receive meals at school through the National Schools Nutrition Programme (NSNP). In *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP), the High Court found that a decision not to restart the NSNP as soon as learners began returning to school following closure caused by the COVID-19 pandemic was unconstitutional, because it unreasonably limited both the right to education (because learners need nutrition to concentrate and learn) and to nutrition. This case also shows how rights are connected to one another.

## EQUALITY AND THE PROHIBITION OF UNFAIR DISCRIMINATION

Section 9 of the Constitution guarantees a right to equality and prohibits unfair discrimination. Apartheid has left deep

patterns of inequality and disadvantage in our education system. The patterns of segregation under apartheid remain in many schools, and the imbalances in resources and outcomes are far from being set right. Unfair discrimination on the basis of race, gender, religion and sexual orientation, among other grounds, remains common in our schools.

The right to equality and the prohibition of unfair discrimination is therefore an important tool in education litigation. This was demonstrated in *Minister of Basic Education v Basic Education for All* where the Supreme Court of Appeal found that the failure to provide textbooks to learners in Limpopo not only deprived them of a basic education, but also unfairly discriminated against these learners.

## DIGNITY

The Section 10 right to human dignity informs all other rights contained in the Bill of Rights. Human dignity is based on the idea that all humans



have equal worth which should be respected and protected. However, human dignity is not only an underlying value, it is also a self-standing right. The right to human dignity protects all people from degrading, humiliating, exploitative or abusive treatment and conditions. The appalling conditions in which many learners are educated clearly violate their dignity. In *Komape v Minister of Basic Education*, which concerned the death of a five-year-old child in a pit latrine at his school, the High Court acknowledged that the absence of safe and adequate toilets was a violation of human dignity.

## FREEDOM AND SECURITY OF THE PERSON

Section 12 of the Constitution protects the freedom and security of persons and their right to physical and bodily integrity. The lack of adequate security

and the dilapidated conditions in many schools pose a risk to learners' freedom and security of the person. The conduct of principals and teachers can also place children at risk. For instance, in *Christian Education South Africa v MEC of Education* 2000 (4) SA 757 (CC) it was held that the use of corporal punishment in schools is an unconstitutional infringement of children's Section 12 rights.

## PRIVACY

Section 14 affords the right to privacy, which gives learners the right not to have their person or property searched, their possessions seized, or the privacy of their communications infringed. These rights are often restricted in the school environment to maintain discipline and safety. In many cases, these limitations may be justified, but in some cases these measures may go too far.

## RELIGION

Freedom of religion and belief is protected in Section 15 of the Constitution which states that "everybody has the right to freedom of conscience, religion, thought, belief and opinion". The place of religion in schools is a complex topic that is discussed in its own dedicated chapter.

## FREEDOM OF EXPRESSION

Freedom of expression is contained in Section 16 of the Bill of Rights. Freedom of expression plays a central role in the right to education. It is essential that both teachers and learners are allowed to express and explore different opinions and ideas. Unjustified restrictions of freedom of expression can prevent learners from receiving a basic education. In some cases unrestrained freedom of expression can also become an obstacle to teaching and learning, requiring a balance to be struck between these rights.



## CONCLUSION

This chapter has shown that the right to a basic education is basic only in name. It is a right with rich and flexible content. It also places urgent demands on the state to address the existing inequality and inadequacy of education in South Africa.

The chapters that follow in this handbook will explore the content and applications of this right to many areas of our education system.

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