Human Rights in Education
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Chapter One

Introduction

Education is universally acknowledged as the basis for the cultivation of respect for human rights. The objective of education is to strengthen and develop the inherent dignity and freedom of every human being and promote self-esteem and respect for other human beings.

The introduction of a new constitutional democracy for South Africa through the adoption of the Constitution of the Republic of South Africa of 1996 (hereafter Constitution) which includes in Chapter Two a Bill of Rights, means that South Africa has turned its back on the past and that the changes being brought about are both fundamental and irreversible. The protection of fundamental human rights is crucial as we aspire towards democratic, open and accountable government and there is no doubt that education holds the key to the achievement of these goals. The Bill of Rights, therefore, has a pervasive influence on society in general and on education in particular. Educators have a key role in fostering a human rights culture and their personal conduct and the example they set are as important as their teaching.

In this study the focus is on the significance and the application of human rights in the field of education. The chapters are arranged as follows:

♦ The constitutional context and fundamental human rights – Chapter Two
♦ What is protected by the Bill of Rights? – Chapter Three
♦ The interpretation of the Bill of Rights – Chapter Four
♦ Application of the Bill of Rights – Chapter Five
♦ Limitation of fundamental rights – Chapter Six
♦ Enforcement of the Bill of Rights – Chapter Seven
♦ Specific fundamental rights – Chapter Eight
The Constitution is the supreme law of the Republic and is our most important legal document. South Africans have, through their representatives, contributed in its adoption as the supreme law. It is imperative that you obtain your own copy of the Constitution and that, for the purpose of this monograph, you become particularly acquainted with the content of Chapter 2, the Bill of Rights.

A wealth of research and literature is available on the development of fundamental human rights in South Africa and some information on this topic is also found in the monograph on the foundations of law. For the purpose of this study a few documents have been used as basic research literature:


Of course, this study remains an introduction to human rights in education. If you require more information on specific topics, please consult the List of Sources at the end of the study.
Chapter Two

The Constitutional Context and Fundamental Human Rights

Outline of this Chapter

The Chapter examines the nature and development of fundamental human rights and their significance in the South African constitutional context.

2.1 Background to the constitutional context

South Africa has had a turbulent political past and for many years a minority government ruled the country. During the seventies and eighties political unrest increased and internal pressure from the majority as well as the international community culminated in the initiation of a negotiation process which changed South Africa from a non-democratic state into a non-racial constitutional democracy. The process was conducted peacefully and all political groupings participated in the Codesa and multi-party negotiations in Kempton Park. These negotiations resulted in the adoption of the Republic of South Africa Constitution Act 200 of 1993 (also called the interim Constitution; hereafter the ‘1993 Constitution’) as the first democratic Constitution of South Africa. On 27 April 1994 the first democratic election was held and on the same date the 1993 Constitution came into operation. The 1993 Constitution had a limited duration and within two years the Constitution of the Republic of South Africa 1996 (the Constitution) was adopted. The Constitution reinforced and refined the constitutional principles of the 1993 Constitution and steered South Africa on the road to a constitutional democracy. On 4 February 1997 this Constitution came into operation after it was certified by the Constitutional Court as the Constitution of South Africa (Kleyn & Viljoen...
The Constitution has been adopted as the supreme law of the Republic and it is, therefore, the most important piece of legislation in the legal system of the country. The obligation in section 2 that no law or conduct may be inconsistent with the Constitution in effect means that our rights are secure and firm because “nothing which is against the Constitution (also the violation of our human rights) will be tolerated” (Nieuwenhuis 2007:89). It provides the norms and standards for everybody’s actions and expresses the values and sentiments the developing society aspires to. The Constitution has been adopted in the spirit of reconciliation and co-operation and strives to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations (RSA 1996a, preamble).

If one has to summarise the general characteristics of the Constitution, the following should be mentioned:

- A Bill of Rights (embodied in Chapter 2) in which fundamental rights are protected. The courts (with the Constitutional Court as the highest court in constitutional matters) watch over fundamental rights and also maintain and promote the objectives and spirit of the Bill of Rights.

- A democratic system of government in which democratic principles such as the right for all adults to vote, proportional representation, regular elections, decentralisation of authority, public participation, and open and accountable government play a central role.

- Co-operative government (in Chapter 3) recognises and distinguishes the three spheres of government (national, provincial and local) and bonds them together as
interdependent and inter-related spheres of government. In this co-operative context peace, national unity and the indivisibility of the Republic must be secured by means of the practicing of effective, transparent, accountable and coherent government.

- The aspiration to build one nation in which the diversity of interests in South African society is accommodated to ensure justice for all.

It is important to remember that all government bodies, including Parliament, are subject to the **Constitution**, and that –

- any law (including parliamentary and provincial legislation, as well as a school’s code of conduct), and
- all conduct (e.g. a decision by the education authority or governing body to suspend a learner), that is inconsistent with the **Constitution** is invalid and can be struck down by the courts.

### 2.2 The Bill of Rights as part of the Constitution

The concern for fundamental human rights originated in international law and led to the adoption of international instruments for the protection of internationally recognised human rights. For example, the following three international documents are collectively known as the “International bill of rights”:

- the United Nations Universal Declaration of Human Rights
- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights

Various other conventions provide for the international protection of particular rights, such as the Convention on the Rights of the Child. Regional groups of states have also adopted their own human rights charters (i.e. the African Charter on Human and People’s Rights – also called the Banjul Charter, and the European Convention on the Protection of Human Rights and Fundamental Freedoms). Today most modern democratic nations have included bills of rights in their national constitutions (e.g. the Canadian Charter of Rights in the Canadian Constitution, the Bill of Rights in the Constitution of the Republic of Namibia) (Kleyn & Viljoen...
The Constitution is the supreme law of the Republic but also the most important source of “state law”. In other words, it has to do with state (or government) structures and powers and how these powers and functions are exercised and performed. It concerns the legal relationships between the different spheres of government (e.g. between the national and provincial governments) and also the legal relationship between government bodies and individuals (e.g. between the education authority and the learner – for example in the case of expulsion from a public school). In the latter case, the provincial Head of Department has powers (in terms of state authority) which are not shared by the individual who is in the subordinate position in this vertical public-law relationship. It is clear that such powers, unless controlled and actively monitored, are wide open to abuse.

In a democratic state the protection of fundamental human rights constitutes one of the most important constraints (or limitations) on the abuse of government power. Through the recognition of fundamental human rights in a bill of rights, the state guarantees protection to the individual against the abuse of state powers in the public-law relationship. (The nature and development of fundamental rights are discussed more fully in paragraph 2.3.)

The Bill of Rights in Chapter 2 of our Constitution is an important milestone and is the result of the multiparty political negotiations that led to the adoption of the Constitution. A closer look at the South African Bill of Rights reveals provisions that –
- define particular rights of people
- provide to whom and how the Bill of Rights applies, and
- regulate when and how the rights may be limited.

Furthermore, the rights in the Bill of Rights enjoy special protection which is provided for in two ways:
- The Constitution (including the Bill of Rights) is entrenched and may only be amended by Parliament following a more difficult procedure than for the amendment of ordinary laws. For example, to amend a provision in the Bill of Rights requires a majority of two-
thirds in the National Assembly and the support of six of the nine provinces represented in the National Council of Provinces.

- The fundamental rights are justiciable (enforceable) because the courts exercise control to ensure that they are observed. If the rules regarding fundamental rights have not been observed, the infringement may be taken to court which may declare the action unconstitutional and invalid.

No right in the *Bill of Rights* applies absolutely and people are not allowed to exercise their rights without any limits. I have a duty to respect another person’s rights (e.g. human dignity, privacy and confidentiality of information, etc). In this way every right implies a duty to respect and uphold the rights of others. My right to freedom of expression does not give me the right to use vulgar or defamatory language against another person. A learner has a right to freedom of expression which may be limited in the school environment to ensure discipline, and to protect education interests and the rights of others. The *Bill of Rights* prescribes specific rules for the lawful limitation of fundamental rights – see Chapter Six.

One may conclude that the *Bill of Rights* is a chapter in the entrenched and supreme *Constitution* that sets out the rights of every person which can be enforced against the state (vertical application) and, sometimes, also against other individuals (horizontal application). The *Bill of Rights* also provides for the enforcement of the rights by the courts (Rautenbach & Malherbe, 1998:8-9) – see Chapter Five.

The content of the *Bill of Rights* and specific fundamental rights are discussed more fully in the following chapters.

### 2.3 The development of fundamental human rights

#### 2.3.1 Introduction

‘Human rights’ is one of the buzzwords of our age; it is an expression which has been used (and abused) in a variety of contexts. Modern human-rights protection was initiated on the international level and gained impetus after the Second World War when the atrocities committed during the war necessitated the
protection of individual rights against the power of the state. The United Nations played a leading role in the promotion of human rights among nations, and various documents which today form part of public international law were adopted (see above).

Subject-specific or group-based protection of human rights is also recognised on the international level (e.g. the protection of women, children and refugees and the elimination of all forms of discrimination). The protection of human rights was also accepted at the regional level and later enshrined in the national constitutions of individual states (e.g. Germany, India, Brazil and Zimbabwe).

2.3.2 The characteristics of fundamental human rights

In terms of the doctrine of fundamental human rights, each human being has rights which may not be encroached upon by the state or other people; except to the extent that such encroachments are authorised by law and meet certain requirements. One may conclude that:

- A human right accrues (belongs) to someone on account of his or her being a human being; it is not something to be deserved or worked for. It is not granted by any person but is inalienable (inherent, inborn or natural) (Nieuwenhuis 2007:26). For example, a learner who is found guilty of sexual assaulting another learner cannot be mistreated because his right to be treated in a dignified manner cannot be taken away or made dependent on something; eg the way he behave.

- A right is “stronger” than a privilege; it is an entitlement which can be enforced legally.

- Human rights are equal in that they are the same for all people (Nieuwenhuis 2007:26). There are many misconceptions amongst educators about children’s rights. Many educators think that children cannot or should not be bearers of rights and equate acknowledging children’s rights with surrendering control to children. Even if children are recognized as bearers of rights there is a tendency to regard their rights as being of lesser value than those of adults or persons in authority. Human rights, however, place children on an equal footing with adults;
“not equal in authority but equal as humans with equal dignity and equally worthy of respect” (Coetzee 2010:479).

- Rights are not absolute, may be limited, and have to be weighed against other rights as well as against the public interest. The authority of the state to encroach upon (limit) someone’s right is itself subject to limitations; if such a limitation is exceeded, the individual may go to court to have the limitation being declared invalid.

- Today no-one can deny the universal character of human rights. Human rights are not country-bound but are enforceable over country borders and apply equally and without discrimination to all human beings (United Nations Office of the High Commissioner for Human Rights Nd:3). Virtually every state in the world has included measures for the protection of human rights in its national constitution or other legislation. Most national bills of rights embody the right to life, the right to equality before the law, the right to a fair trial and a whole range of other rights which may claim universal acceptance. The interpretation and application of human-rights norms may vary from one generation to another, and from one culture to another, but the principle that human rights should be protected, is universally accepted.

- Human rights are also indivisible, interrelated and interdependent. The violation of one right will affect several other rights (Kleyn & Viljoen, 2010:232). It is thus insufficient to respect some rights but not others (United Nations Office of the High Commissioner for Human Rights Nd:3).

2.4 Conclusion

In this chapter the background to the present constitutional framework has been discussed, with particular reference to the entrenchment of a comprehensive set of fundamental human rights as part of the Constitution. The development of the modern approach to the protection of human rights has been traced, and comments were made about the characteristics of human rights.
Chapter Three

What is protected by the Bill of Rights?

Outline of this Chapter

This Chapter provides a short summary of the different fundamental rights that are protected in the Bill of Rights. Some of these rights are discussed more fully in Chapter Eight.

3.1 Introduction

In this Chapter the fundamental human rights protected in the Bill of Rights are mentioned briefly without elaboration of their content. Some of these rights (and recent court decisions) are particularly relevant to education and are discussed more fully in Chapter Eight.

Those provisions of the Bill of Rights concerned with the interpretation, application, limitation and enforcement of fundamental rights, are discussed in more detail in subsequent chapters.

3.2 Rights protected in the Bill of Rights

The following rights are protected in the Bill of Rights:

♦ Civil rights
The right to equality and non-discrimination (s 9); human dignity (s 10); life (s 11); freedom and security of the person, which includes the right not to be detained without trial, and not to be tortured, or treated or punished in a cruel, inhuman or degrading way (s 12); not to be subjected to slavery and forced labour (s 13); privacy (s 14); freedom of religion, belief and opinion (s 15); freedom of
expression (s 16); freedom of assembly, demonstration, picket and petition (s 17); freedom of association (s 18); citizenship (s 20); freedom of movement and residence (s 21); and property (s 25).

♦ Political rights
These rights are guaranteed in section 19 and include the right to form and join a political party, to vote and to stand for election. Other rights, such as the right to freedom of expression; assembly, demonstration and petition, association; information and administrative justice, are also fundamental to free political activity.

♦ Procedural rights
Access to information is guaranteed (s 32); as well as the right to just administrative action (administrative justice) (s 33); access to the courts (s 34); the rights of arrested, detained and accused persons (s 35).

♦ Social and economic rights
Freedom of trade, occupation and profession (s 22); labour rights (s 23); environmental rights (s 24); access to adequate housing (s 26); the right of children to basic nutrition, shelter, health care and social services (s 28(1)(c)); access to health care, sufficient food and water, and social security (s 27); and education (s 29).

♦ Cultural rights
The right to use the language and participate in the cultural life of one’s choice is guaranteed (s 30); the right to a basic education in the language of one’s choice (s 29(2)), the protection of cultural, religious and linguistic communities (s 31); the language rights of arrested, detained and accused persons (s 35(4)).

3.3 A hierarchy of rights?
It is a contentious issue whether the Bill of Rights creates a hierarchy of rights. For example: would the right to human dignity always take precedence over the right to freedom of expression, or vice versa? The court decisions and authoritative writings on this question have not been unanimous and range from remarks that the Constitution does not create a hierarchy of fundamental rights to the statement that the right to life and to dignity are the most important
of all rights. It is, however, generally accepted that it is wrong to arrange rights in a strict hierarchical order. Although certain rights are, in an abstract sense, more important than others, the relative importance of conflicting rights will vary according to the context in which a dispute occurs.

The court will ultimately be guided by the values of an open and democratic society based on human dignity, equality and freedom, rather than by ready-made rules and hierarchies (Rautenbach & Malherbe, 1998:9-10).

3.4 Conclusion

The Bill of Rights protects a range of fundamental human rights and has been hailed as one of the most advanced human rights documents. Whether the Bill of Rights creates a hierarchy of rights is a moot point and, as said above, the courts will be guided by the values of an open and democratic society based on human dignity, equality and freedom. Moreover, the internationally recognised view that human rights are interdependent and indivisible may also have a persuasive influence in this regard.
Chapter Four

The Interpretation of the
Bill of Rights

Outline of this Chapter

This Chapter briefly examines the interpretation clause of the Bill of Rights and its impact on the interpretation of the Constitution and the law in general.

4.1 Introduction

The Constitution is the supreme law of the Republic and, therefore, not a piece of ordinary legislation. Because it embodies the values the South African society aspires to, it cannot be interpreted in a literal or mechanical way. It is also a living document for a developing nation, but cannot be amended easily. It is, therefore, evident that a measure of flexibility is needed to allow future generations to interpret the Constitution in the light of changing circumstances and morals.

What follows is a brief explanation of the interpretation clause in the Bill of Rights. The interpretation of the Constitution and other legislation is dealt with more fully in the monograph on the foundations of the law.

4.2 The interpretation clause

The interpretation clause, section 39 reads:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum –
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

The interpretation clause indicates that constitutional interpretation requires a value-oriented and purposive approach. The provisions of the Constitution (and the Bill of Rights) should not be read in isolation, and the traditional rules of statutory interpretation should be applied flexibly. When interpreting a specific right the textual provision of the right should not be considered or construed in isolation, but within the context of the whole Constitution (Currie & De Waal, 2013:135). Three special rules should be borne in mind when interpreting the Bill of Rights:

- In interpreting a specific right, the values underlying the Constitution must be promoted. These values are openness, democracy, freedom, equality and human dignity. It is clear that in some instances these values may be in conflict with one another and the courts will have to weigh and balance conflicting values (e.g. as the Constitutional Court did in the judgments on the death penalty and corporal punishment for juvenile offenders in S v Makwanyane 1995 6 BCLR 665 (CC) and S v Williams 1995 ZACC 6, respectively). However, the text should not be ignored. As Kentridge AJ emphasized in S v Zuma 1995 (2) SA 642 (CC) par 17 “If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination …”

- The relevant public international law must be taken into account. The importance of international human rights documents (see above) and how states cooperate to promote human rights have already been mentioned (e.g. in S v Makwanyane and S v Williams the Constitutional Court did extensive research on the universally recognised fundamental right to life and the right to be free from cruel and inhuman punishment, respectively, to shed light on the interpretation that should be followed in the South African context). The Court explained, however, that it is not bound to apply international law, only to consider it. It is bound to apply the Constitution, and will follow international law only if it complies with the Constitution.
Foreign law may be taken into account (e.g. in both the above Constitutional Court cases the Court looked for guidelines in foreign law, especially foreign case law; in S v Williams Namibian and Zimbabwean cases on corporal punishment were consulted).

4.3 Conclusion

In interpreting human rights provisions, a generous, purposive and contextual interpretation should be followed. Nevertheless one should also be mindful not to neglect the language of the Constitution because it remains a written document.
Chapter Five

Application of the Bill of Rights

Outline of this Chapter
In this Chapter we concentrate on who is protected by the Bill of Rights and against whom such protection is afforded.

5.1 Introduction
Questions regarding the application of the Bill of Rights include:
- Who is protected by the Bill of Rights?
- Against whom does the Bill of Rights afford protection; in other words, who are bound by the Bill of Rights and what are their duties?
- What is protected by the Bill of Rights?
- What are the requirements for the lawful limitation of the rights? Only the first two questions will be dealt with here. The last two questions are dealt with in Chapters Three, Six and Eight.

5.2 Who is protected by the Bill of Rights?
Section 7(1) of the Bill of Rights reads as follows:
“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

In addition, every right in the Bill of Rights provides that “Everyone has the right to ...” As a general rule, one may then say that the Bill of Rights protects all the people (natural persons) in the country. However, certain rights protect only particular people:
Only South African citizens have political rights, in other words, rights in respect of political parties, political activities and political choices. Citizens also have the right to enter or remain in the country and to reside anywhere; and they may choose a trade, occupation or profession freely.

- Certain rights protect only specific people such as children, workers and employers.
- A number of rights protect everybody but will be exercised only when a person is arrested, detained or an accused before a court of law.

Clearly then, natural persons are protected by the Bill of Rights. What about juristic persons, such as a school? Juristic persons (juristic persons) also enjoy protection in terms of the Bill of Rights.

Section 8(4) reads:

“A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”

Juristic persons (e.g. companies, public and private schools, clubs) are considered “persons” in the eyes of the law and protected by some of the rights in the Bill of Rights. Whether a particular juristic person is protected by a particular right, depends on the nature of the juristic person and what it does, and the right in question (e.g. a company has a right to its good name and reputation (dignity/integrity), but not a right to life that clearly applies only to human beings).

Government institutions are also juristic persons (e.g. the national, provincial and local governments; the national and provincial and local governments; the national and provincial education departments). Because these institutions form part of the state and are therefore bound by the Bill of Rights, the Bill of Rights does not afford them rights and their disputes are regulated by other provisions of the Constitution. There are exceptions, however. The state also establishes (e.g. by means of legislation) juristic persons such as universities, technikons, public schools, parastatal institutions such as the SABC, and professional organisations (i.e.
the South African Council of Educators (SACE)). These bodies may have certain rights against the state (e.g., the public school has a right to its dignity and integrity, or the freedom of expression, of its educators and learners; the SABC has the right to freedom of the media). These institutions are “organs of state” in terms of section 239 of the Constitution (see paragraph 5.3.2.1), and may not infringe the rights of others (Rautenbach & Malherbe, 1998:10-11; Currie & De Waal, 2013:43-44).

5.3 Against whom does the Bill of Rights afford protection?

Before explaining the provisions of the application clause; eg section 8, it is important to note that section 7(2) provides for both vertical and horizontal application of the Bill of Rights. Section 7(2) reads as follows:

The state must respect, protect, promote and fulfill the rights in the Bill of Rights.”

5.3.1 Vertical and horizontal application

This provision confirms that the state has a duty to what is necessary for us to enjoy and exercise our rights. But this provision also confirms the traditional vertical application of the Bill of Rights in the state-individual relationship (public-law relationship). It protects the individual against the abuse of state powers.

Section 7 places the following obligations on the State with regard to the right to a basic education (Nieuwenhuis 2007:89-90):

To respect: This means the State has a negative duty not to act in a manner that will arbitrarily deprive learners of their right to a basic education. For example by closing down a school without providing the learners with access to other schools or expelling a learner without making an arrangement for placing the learner at another school. This obligation also requires the State not to unfairly discriminate against certain learners, for example, by denying learners with severe intellectual disabilities their right to a basic education. (See the discussion of Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa
To protect: The State is obliged to protect individuals against interference of third parties in the exercise of their right to education. An example of such protection can be found in the Basic Condition of Employment Act 75 of 1997 which prohibits the employment of children under the age of 15 or who is still of compulsory school going age in terms of section 31(1) of the South African Schools Act 84 of 1996 (hereafter the Schools Act). This Act also gives effect to children’s constitutional right (s 28(1)(f)) not to perform work or provide services that would be harmful to their education (RSA 1997, ss 43(1), 43(2)(b)).

The Constitutional Court has considered the meaning of the State’s obligation to protect the rights in the Bill of Rights in Head of Department, Department of Education, Free State Province v Welkom High School and Another [2013] ZACC 25 at 83-88. The HoD of the Free State Department of Basic Education contended that “he was empowered to instruct the principals to ignore the pregnancy policies (eg those of their respective schools) in order to counteract what he believed to be their unconstitutional content, particularly in the light of his obligations under section 7(2) of the Constitution” (at 83). Khampepe J confirmed that this section indeed imposed a positive obligation on the HoD to protect the rights of learners but emphasized that this obligation must also be discharged in compliance with the Constitution (at 84-85). He stated that this obligation must be read together with section 1(c) of the Constitution which requires that State’s obligations be discharged in accordance with the rule of law (at 85). Section 7(2) read with section 1(c) thus “obliges an organ of state to use the correct legal process” which includes that “where clear internal remedies are available, an organ of state is obliged to use them” (at 86). Khampepe J contended that since section 7(2) binds the Executive (in this case the HoD of the provincial education department) and the Legislature, it will constitute usurpation or disruption of the legislatures powers if the Executive simply disregard the remedies Parliament made available (at 87, 105).

Several guidelines on how schools’ pregnancy policies can protect learners’ rights can be deducted from the Welkom High School case report. Those include: (1) learner pregnancy may not be treated as a
form of misconduct (at 52), (2) pregnancy policies may not “compulsorily exclude pregnant learners from school for the remaining portion of the year following the birth of their children” because that will amount to a violation of the learner’s right to a basic education (at 53, 114), (3) policies should not require a learner to report suspected pregnancy to school authorities. Other learners may also not be requested to report it if they suspect that a learner is pregnant. Such practices stigmatizes pregnant learners (at 115), (4) policies should not be inflexible because that would violate learners’ right to have their best interests be regarded as of paramount importance (at 116), (5) policies should not discriminate between sexes and provisions regulating paternity and maternity ‘leave’ should be non-discriminatory (at 113).

To promote: The State should actively inform people of their right to a basic education and expand educational opportunities. An example of the State fulfilling this obligation can be found in the Regulations for the exemption of parent from the payment of school fees which provides for automatic exemption from paying school fees for persons who have the responsibility of a parent in respect of a child placed in a foster home, place of safety and an orphanage (RSA 2006, s 1). By removing the lack of funding as a barrier, promotes access to schools.

To fulfill: The State has a positive obligation to take measures to advance the right to education. For example by providing schools, by funding public schools and by providing transport for learners in rural areas.

The Bill of Rights goes further than the traditional vertical application and also applies horizontally between individual and individual (the private-law relationship) (Kleyn & Viljøen 2010:236). Because the Bill of Rights binds all the legislatures (law-making bodies) and applies to all law, it also applies to legal rules regulating private relationships amongst people (e.g. in the private-law domain where state authority is absent and the parties act voluntarily, on an equal footing and in their private capacity). Examples of such relationships are the parent-child relationship (e.g Family Law) or in contractual relationships where an employer exercises discipline over the employee. In the same vein, an
independent school (a juristic person) will be bound by the *Bill of Rights* in its private-law relationships.

The State’s obligations in terms of section 8(2) cannot be transferred to or be placed on private persons (Smit 2013:64). Section 8(2) regulates the extent to which the *Bill of Rights* applies to private persons. A case in point here is *Governing Body of the Juma Musjid Primary School and Others v Essay NNO (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae)* (2011) 8 BCLR 761 (CC) at 57-59, 62. The Constitutional Court emphasised that the purpose of section 8(2) is “not to impose the duties of the state in protecting the Bill of Rights” on private persons … but to “to require private parties not to interfere with or diminish the enjoyment of a right” (at 58). It confirmed that the primary obligation with regard to learners’ right to a basic education lies with the State but that a secondary obligation arises from (in this case) the Trust’s willingness to allow its property to be used as a public school in terms of an agreement (at 62).

In all these private-law relationships the nature of the parties, the type of relationship, the nature of the right involved and the nature of the duty imposed by the right have to be scrutinised. Albertyn and Goldblatt (2014:35-29), gives the example of section 9(1) that provides that “Everyone is equal before the law and has the right to equal protection and benefit of the law”. They contend that this right, due to its nature and the nature of the duty it imposes, cannot apply horizontally.

### 5.3.2 The application clause

The relevant provisions of section 8 of the *Constitution* (RSA 1996a) are as follows:

1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
2. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

### 5.3.2.1 The state and “organs of state”

Section 8(1) sets out in more detail the extent of the state’s duties in this public-law relationship and provides that the *Bill of Rights*
binds the legislature, the executive, the courts, and all other organs of state. Organs of state (such as public schools) are bearers of government power (they are vested with state authority), and because they are in a position to exceed or abuse their powers and violate people’s rights, they are all bound by the *Bill of Rights*.

Even institutions or bodies that are not formally known as “organs of state” (see s 239 (b) below) are bound in terms of the definition in section 239 of the *Constitution* (RSA 1996a):

“Organ of state” means —

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution —

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation.”

5.3.2.2 Law-making bodies

It is apparent clear from section 8(1) that the *Bill of Rights* binds all government bodies that make laws. This means that Parliament, the provincial legislatures and all municipalities are bound by the *Bill of Rights*. The common law and customary (indigenous) law have been developed over the years by communities themselves (the unwritten sources of our law) and they are not law-making bodies of government. However, section 8(1) expressly provides that the *Bill of Rights* “applies to all law”. This means that common law and indigenous law are also subject to the *Bill of Rights* and will be invalid insofar as it is inconsistent with the *Bill of Rights*.

5.3.2.3 The executive

Section 8(1) also refers to the “executive” which means that all organs of state that apply and enforce the law, are bound by the *Bill of Rights* (e.g. all national and provincial (including education) government departments, local governments, and law enforcement agencies such as the Police and Defence Force). The *Bill of Rights* prescribes in section 33 (administrative justice) how executive organs (e.g. the education authorities) must treat people (e.g. administrative justice ensures that all action by the administration is
lawful, reasonable and procedurally fair). See the discussion in Chapter Eight.

5.3.2.4 The judiciary

In terms of section 8(1), the judiciary (the courts) is also bound by the Bill of Rights. The courts are said to be the “watchdogs” over democracy and human rights, and they have a key function in enforcing the Bill of Rights. But because they are bound by the Bill of Rights, they may only act in accordance with the provisions of the Bill of Rights. However, in specific cases the court may infringe (limit) the rights embodied in the Bill of Rights to administer justice (e.g. the accused in a criminal trial may be detained).

5.3.2.5 Natural and juristic persons

In terms of section 8(2), the Bill of Rights binds all natural persons and juristic persons in their relationships with one another if the Bill of Rights can be applied to these relationships. This means that private persons like you and I may not conduct ourselves in a way that violates the protected rights of Jim and Janet. To determine whether the Bill of Rights can be applied, the following aspects should be considered:

• The nature of the right: Certain rights do not apply in private relationships. Usually only the state may deprive a person of citizenship, and only the court may encroach upon the rights of an accused. These rights are therefore not involved in the private-law relationship.

• The nature of any duty imposed by the right: The state has a duty to institute courts to afford persons access to the courts. This duty does not apply to private persons.

• The nature of the private-law relationship: As you may have an unequal component (e.g. where the parent exercises control over the child in the private-law (parent-child) relationship; where an employer exercises disciplinary measures against an employee in the private-law contractual (employer-employee) relationship; the sports club or church has a duty to apply the rules of administrative justice (s 33) in a disciplinary inquiry against a member).
Where a right in the Bill of Rights is violated and a conflict arises, the rights and duties of the parties in the relationship must be balanced (e.g. how important is it for me to exercise my right in that particular way; how seriously will your right be infringed, and whether there are other means available to me to exercise my right without infringing your right). This weighing process has always been followed in private law and is now incorporated in the limitation clause of the Bill of Rights (see Chapter Six).

5.4 Development of common law

If the court decides that the Bill of Rights can be applied in a particular case, and finds that the right in question is not protected sufficiently by the existing law, the court must develop the law to protect the right sufficiently (e.g. the court may develop the common law if legislation does not provide adequate protection for the right – section 8(3)) (Currie & De Waal, 2013:60-61).

5.5 Conclusion

The Bill of Rights protects natural persons and juristic persons in their actions against the state and other organs of state. Apart from its traditional vertical application, the Bill of Rights also applies horizontally to private-law relationships. The courts may even develop the common law to afford sufficient protection in particular cases.
Chapter Six

Limitation of Fundamental Rights

Outline of this Chapter

As said before, no right apply absolutely and any right (even a fundamental right) may be limited (or restricted) in specific circumstances. In this Chapter we concentrate on the various ways in which fundamental rights may be limited. We specifically discuss the requirements in the Constitution for a lawful limitation of fundamental right.

6.1 Introduction

Fundamental rights and freedoms are not absolute and their boundaries are set by the rights of others and by the legitimate needs of society (the public interest). For example, the learner does not have absolute freedom of expression in the school environment because the right to privacy and confidentiality of other learners and educators has to be respected as well as the rules of discipline of the school and public education in general. Nevertheless, a law or action that limits a right is still an infringement of that right. If the limitation takes place in accordance with the requirements in the Bill of Rights, one may conclude that such and infringement or limitation is reasonable and justifiable and therefore lawful.

6.2 Limitation of rights

There are various ways of limiting a right in terms of the Bill of Rights:

♦ Some rights may be limited in a state of emergency in terms of section 37 of the Bill of Rights

This happens under exceptional circumstances and strict
requirements must be complied with. It means that some rights may be “suspended” during a state of emergency but that others (i.e. the right to human dignity and to life, the right to be free from cruel or inhuman treatment) may not be suspended, not even during a state of emergency. These rights are “non-derogable” rights (Kleyn & Viljoen 2010:238).

♦ **The formulation of a right may itself imply a limitation**

Section 29 of the *Bill of Rights* provides that everyone has the right to a “basic” education which implies that the right does not, for example, include a right to a university education. In other words, the right to education is qualified by the word “basic”. In the same vein, section 17 provides, for example, that everyone has the right “peacefully and unarmed” to assemble and demonstrate, which implies that the right to demonstrate or assemble is qualified to the extent that it must be exercised peacefully and unarmed. In section 9(3) it is stated that no “unfair discrimination” will be tolerated, which implies that some forms of discrimination may be regarded as “fair” discrimination (e.g. affirmative action). Section 29(2) provides for education in the official language or languages of one’s choice where it is “reasonably practicable” and this implies that one cannot at all times demand to be taught in the language of one’s choice. Such “Internal qualifiers” thus form part of a right and limit its content and scope. Of course, these qualified rights are still subject to the general limitation clause in section 36 for a further limitation.

♦ **The general limitation clause in section 36 applies to all rights in the Bill of Rights and provides for the most common form of limitation**

Section 36(1) reads as follows:

“(1) 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 relations between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”
6.3 **Content of section 36**

If one analyses the general limitation clause, the following requirements must be met to lawfully limit a right.

- **A right may be limited only in terms of law of general application**

  There must be a legal rule that provides that a right may be limited. This means that a provincial education department may not by itself decide to suspend or expel a learner from school (an action which limits the right to basic education), but that a legal rule of general application must authorise it to do so (e.g. the national *Schools Act* provides for suspension and expulsion of learners in specific cases only).

  Rules of law that limit, authorize or allow rights to be limited by the executive, must be made known and must be clear and understandable. In terms of the *Schools Act*, the various provincial education departments, public schools and their governing bodies are, for example, able to determine beforehand to what extent a learner’s right to basic education may be limited in the case of suspension or expulsion.

  Laws that limit rights may not be made only for a specific person or for a specific case. The *Schools Act* does not instruct the governing body of Freedom Primary School to suspend Freddy Cool. The Act applies generally to all public schools in the country and sets the standards and rules on how suspensions and expulsions should be dealt with in all schools. However, when Freddy Cool is suspended from school in terms of the Act, the limitation authorised by the law (e.g. one week suspension from school for consuming alcohol on the school premises) must be considered to determine whether under the circumstances Freddy’s suspension is reasonable and justifiable. The meaning of “law of general application” was considered in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 JDR 0375 (WCC). The respondents offered three Acts; e.g the *Schools Act*, *The National Education Policy Act 27 of 1996* and the *Mental Health Care Act 17 of 2002* as law of general application (at 33). However, the court declined to accept these Acts as the relevant laws of general application because none of these Acts contain any
provision which authorizes a violation of the rights of the learners with a severe intellectual disability. The respondents’ arguments that were rejected were:

- that the Schools Act is a relevant law of general application because it authorizes the MEC to take action in terms of policy adopted under the National Education Policy Act (at 35).

- that the Mental Health Care Act 17 of 2002 applies as a law of general application in this case because it provides for differentiation in that it coordinates the access to mental health care, treatment and rehabilitation to various categories of mental health care users (at 36).

- that the policy (White Paper 6) is authorized in terms of the National Education Policy Act and because the policy applies country-wide and allows for discrimination against the affected learners, it applies as a law of general application (at 34). The court emphasized that mere policy or practice such as White Paper 6 cannot qualify as ‘law’ or a law of general application (at 40). This notion that policy cannot be regarded as a law of general application was also supported in Head of Department, Department of Education, Free State Province v Welkom High School and Another [2013] ZACC 25 at 230.

♦ The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality

This requirement means that there must be an appropriate balance between the limitation of the right and the purpose for which the right is being limited (e.g. whether an appropriate balance exists between Freddy’s suspension and the purpose for which he is being suspended).

The following factors have to be considered:

(a) The nature of the right. The question here is what is being protected by the right and what is its significance in an open and democratic society based on human dignity, freedom and equality. The right to (basic) education is certainly a very important right, particularly because Freddy is a primary school learner. Education is an
essential component of an open and democratic society and enhances human dignity, freedom and equality.

(b) **The importance of the purpose of the limitation.** The question is what public purpose or interest is promoted or protected (or which rights of others are protected) by the limitation, and how important is this purpose in an open and democratic society based on human dignity, freedom and equality. In examining Freddy’s suspension one should acknowledge that the suspension may have been inspired by the fact that discipline is an important part of education and that Freddy’s fellow learners also have a right to (basic) education. The purpose of the limitation of Freddy’s right is then the protection of the educational process and the rights of other learners.

Alcohol has a bad and disruptive influence on education (and on individual learners) and should not be tolerated on the school grounds. To suspend a learner for this reason would be acceptable in an open and democratic society based on human dignity, freedom and equality. The purpose of the suspension seems then to justify the action taken against Freddy.

(c) **The nature and extent of the limitation.** One should examine the seriousness of the limitation. In Freddy’s case the serious nature of being in possession of and consuming alcohol on the school grounds among other young learners is beyond any doubt. But say he is just an unruly boy who made a mistake once and that stricter discipline will rehabilitate him. Then one may argue that to suspend him (leading up to a permanent expulsion) would be too harsh. Then the nature and extent of the limitation seems not to support the purpose for which it is done.

(d) **The relation between the limitation and its purpose.** Eventually, the question is whether the limitation (suspension) will, at all, further the purpose of the limitation (protecting education) and, if so, how effectively does it serve the purpose. The purpose with suspension is usually to remove the culprit from school
temporarily as a form of punishment but also to protect the other learners from this bad influence. In Freddy’s case, his parents had been notified about the seriousness of the transgression and which rights of others are protected) by the limitation, and how they had offered their cooperation and better supervision of the boy. Then there seems to be a rational relationship between the limitation and its purpose.

(e) The availability of less restrictive means to achieve the purpose. One should determine whether alternatives exist for achieving the purpose in a less restrictive way. One should determine in this case whether a good reprimand and warning, or other forms of reasonable punishment, will be enough to solve the problem. If Freddy has had previous warnings for being in possession of alcohol on the school grounds, one could, however, argue that less restrictive means had already been exhausted without any success. Then suspension seems to be an appropriate disciplinary measure (Currie & De Waal, 2013:164-171).

Along these lines, the conclusion could then be that in this case Freddy’s suspension was reasonable and justifiable as required by section 36, and therefore lawful and valid.

6.4 Conclusion

An action that limits a right is an infringement of that right. However, if a limitation is effected in accordance with the requirements of the Bill of Rights, such a limitation may be lawful. The general limitation clause in section 36 provides the requirements for lawful limitations of rights. It basically means that a limitation of a right must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
Chapter Seven

Enforcement of the Bill of Rights

Outline of this Chapter

In this Chapter various aspects relating to the enforcement of the Bill of Rights are highlighted, for example, access to the courts, the requirement of legal standing (locus standi), jurisdiction and procedures of the courts, the enforcement of human rights and the remedies available to an aggrieved person. In the last paragraph other institutions provided for in the Constitution for the promotion of human rights, are briefly dealt with.

7.1 Access to the courts

In terms of section 34 of the Bill of Rights –

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

A dispute that can be resolved by the application of the law may be referred to as a “justiciable dispute”. A justiciable dispute concerns rights (e.g. human rights), privileges, competences, duties, prohibitions or orders laid down or recognised by the law (e.g. in terms of the Constitution, legislation or common law). Such a dispute may be resolved in a fair public hearing before a court or, where appropriate, an independent and impartial tribunal or forum (i.e. specialised administrative bodies created in terms of legislation for the adjudication of administrative disputes). Suffice to say that the courts are regarded as the “watchdogs” of democracy and of the Bill of Rights, and control and enforcement by the courts is the best way to ensure that fundamental rights are observed. (Enforcement is
also dealt with in the monograph on the foundations of the law.) Special provision is made for human rights disputes by the courts. In terms of section 38 of the Bill of Rights, any person or institution listed in this section (see below), has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief. A dispute concerning the Bill of Rights is a constitutional matter. All the ordinary courts of law (e.g. the magistrates’ courts, the High Courts, Supreme Court of Appeal and the Constitutional Court) may adjudicate human rights disputes, depending on the provisions relating to the jurisdiction of the courts in Chapter 8 of the Constitution (in particular ss 167 – 172).

Section 172 of the Constitution, for example, provides that when a court finds that any law or conduct is inconsistent with the Bill of Rights, it may declare such law or conduct invalid to the extent that it is inconsistent and may make any order that is just and equitable – see Chapter Two paragraph 2.1 for an explanation of “law” and “conduct”. However, in terms of the principle of avoidance a court may only declare legislation or common law rules unconstitutional if those laws cannot be interpreted in line with the Constitution (Kleyn & Viljoen 2010:233). The court may also order that the person or authority responsible for conduct or a law that does not comply with the provisions of the Bill of Rights be afforded an opportunity to rectify the defect within a specified period and on specific conditions. The conduct or law will remain valid until the specified period expires (see also the discussion on remedies in paragraph 7.3). Bear in mind that the Constitutional Court is the final (or highest) court for adjudicating constitutional matters, including human rights disputes. This means that if a High Court or the Supreme Court of Appeal decides a human rights case, one may still appeal the decision to the Constitutional Court.

7.2 Who may approach a court to enforce the Bill of Rights?

Before a person (party) may approach a court of law, such a person must have locus standi (legal standing, or the capacity to appear in court as a party or a litigant). In terms of section 38, the following persons or institutions have the right to approach a court alleging
that a human right in terms of the *Bill of Rights* has been infringed or threatened:

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of person;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

We may explain this with the following examples: the educator may act in her own interest (against her dismissal); the parent may act on behalf of his or her child, the learner; an educator may act as a member of, or in the interest of, a group of educators (e.g. female educators); an educator may act in the public (education) interest; and a teachers’ union may act in the interest of its members. Both natural and juristic persons who have an interest in a matter may, in terms of the court rules, apply to be admitted as a party to a case. These parties are referred to as *amicus curiae* (Skelton 2009:271). Examples of interested parties who acted as *amicus curiae* in cases dealing with education are: the Centre for Child Law (see *Governing Body of the Juma Musjid Primary School and Others v Essay NNO* (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae) (2011) 8 BCLR 761 (CC)); the Federation of Governing Bodies for South African Schools (FEDSAS) (see *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC)); Freedom of Expression Institute (see *Le Roux and Others v Dey* (2011) 3 SA 274 (CC)). Bear in mind that although legal standing of a party may be one of the questions serving before the court, the court still has to argue the case and give its judgment.

### 7.3 Remedies in terms of the Bill of Rights

The Bill of Rights protects the individual against abuse of state power or violation by another individual. To be an effective shield against abuse or violation of human rights, the *Bill of Rights* must have “teeth” and provide remedies to ensure that the government or other individuals comply with the *Bill of Rights*. Where an abuse of rights has already occurred, compensation for victims must be provided insofar as this is possible.
In terms of section 38, a court may grant “appropriate relief”, including a declaration of rights. Because of the vague term “appropriate” relief, the Constitutional Court has decided in *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) par 19, that depending on the circumstances of each particular case, the relief may be –

“a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

In the light of the Constitutional Court judgment, “appropriate relief” for human rights infringements would include delictual damages (i.e. material damages or damage to the personality); a court interdict (i.e. an order to stop an infringing action or order to prevent a threatening infringement); constitutional damages; administrative law remedies (i.e. judicial review); a mandamus (i.e. ordering a government body to perform its statutory duty), and a declaration of rights (i.e. the court determining a legal or factual issue without necessarily deciding in anyone’s favour). An example of a mandamus can be found in *MEC for Education KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC). The Constitutional Court ordered the governing body to consult with learners, parents and educators and amend the school’s code of conduct so that it will provide for reasonable accommodation of deviations from the code on religious or cultural grounds and for a procedure according to which such exemptions can be sought and granted (Currie & De Waal 2013:198).

### 7.4 State institutions supporting constitutional democracy

In Chapter 9, the *Constitution* (RSA 1996a) provides for a number of institutions to strengthen constitutional democracy in South Africa. These institutions are independent, and subject only to the *Constitution* and the law. They must be impartial and act without fear, favour or prejudice and all organs of state must assist and protect them in their work. They are all accountable to Parliament. These institutions include the South African Human Rights
Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality. An aggrieved person may, for example, complain to the South African Human Rights Commission to assist in securing redress in a court of law.

### 7.5 Stages in human rights litigation

Human rights litigation in the courts takes place in distinct stages, namely an initial procedural stage and a substantive stage.

During the procedural stage the following questions have to be asked:

- Does the *Bill of Rights* apply to the particular law or conduct (e.g. act or behaviour) that the applicant has alleged to be unconstitutional on the ground that it violates a fundamental right? And is the respondent bound by the right?
- Does the court have *jurisdiction* in respect of the issues raised in the litigation?
- Does the particular applicant have *legal standing* in respect of the particular relief (remedy) that is sought? And is the applicant a bearer of the right in question?
- Is the issue to be decided a *justiciable* dispute which can be brought before a court of law?

Only when the answer to each of these questions is yes, will the litigation proceed to the second stage.

During the second or substantive stage, the court examines the substance of the applicant’s allegation (e.g. has the right been infringed by a law or conduct of the other party); and the court has to interpret the *Constitution* and, in particular, the *Bill of Rights* to assess the merits of the allegation.

During the substantive stage the following questions are important:

- **Has the law or conduct of the respondent infringed a fundamental human right of the applicant?**

If the answer is yes, the court has to consider whether the
infringement is reasonable and justifiable. If the answer is no, the application must be dismissed.

- **Is the infringement a justifiable limitation of the right in question according to the criteria set out in the general limitation clause (s 36)?**
  
  If the answer is yes, the law or conduct of the respondent is not unconstitutional and unlawful, and the application must be dismissed. If the answer is no, the law or conduct is unconstitutional and unlawful, and the question of an appropriate remedy must be examined.

- **What will the appropriate remedy in the particular case?** (Currie & De Waal, 2013:151-175).

### 7.6 Conclusion

Having fundamental human rights guaranteed in a bill of rights means nothing if those rights cannot be enforced. In this Chapter we considered legal standing, jurisdiction and procedures of the courts, the enforcement of human rights, the remedies available to an aggrieved person and the stages of human rights litigation.
Chapter Eight

Specific Fundamental Rights

Outline of this Chapter

In this final Chapter only a few fundamental rights which may be relevant in the education environment are discussed.

8.1 Introduction

It is, strictly speaking, incorrect to single out certain human rights that are relevant to education. The applicability of a right in a specific situation will depend on the issue that is at stake, the particular relationship and the context in which it takes place. In addition, human rights do not exist in isolation and very often more than one human right will be involved in a particular case (e.g. the right to freedom and security of the person (s 12) which, for example, applies to corporal punishment and searches and seizures in schools, may also affect the right to human dignity (s 10) and privacy (s 14)).

It is against this background that the discussion of specific human rights and their application in the education situation are being discussed. One should be warned not to take the examples or illustrations used in this study as “model” answers for resolving similar questions. Although the same right may be in question in similar cases, the outcome of each case may be different depending on the facts and circumstances (the context) of each case. This means that each case has to be considered in terms of its own facts and circumstances and on merit.

In the ensuing paragraphs, the following fundamental rights and their application in an education situation will be highlighted:
Equality (s 9) in par 8.2
Freedom of expression (s 16) in par 8.3
The right of access to information (s 32) in par 8.4
The right to privacy (s 14) in par 8.5
Freedom of religion, belief and opinion (s 15) in par 8.6
Children’s rights (s 29) in par 8.7
Culture, language and education (s 29-31) in par 8.8
Administrative justice (s 33) in par 8.9

Rights that have a bearing on the education employment relationship (e.g. assembly, demonstration, picket and petition (s 17); freedom of association (s 18); labour relations (s 23)) are also discussed in the monograph on labour law.

Although the rights to assemble and demonstrate (s 17) and to exercise one’s freedom of association (s 18) are very important for both educators and learners, these rights are not discussed here. However, the following illustrations reflect some of the issues involved in this regard:

- School A bans the holding of a political meeting by learners on the school grounds during break
- A group of educators and learners participate in a march on the school grounds to express support against child abuse
- The learners organise a sit-in at school to protest against escalating violence and drug abuse in their school
- The educator is forced to join the local teachers’ union in order to get promotion

8.2 Equality

The right to equality is one of the most important rights, because it underpins most of the other fundamental rights – there full enjoyment depends on equal treatment for all. Section 9 of the Bill of Rights reads as follows:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken
The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

Discrimination on one or more of the grounds listed in subsection (3), is unfair unless it is established that the discrimination is fair.

8.2.1 Introduction

Typical “equality” questions that may arise in the field of education include the following:

• Would the admission policy of a public school prescribing minimum academic standards for each grade be discriminatory, and if so, would it amount to unfair discrimination?
• Is the enforcement of the payment of school fees discriminatory against those learners whose parents are too poor to pay?
• Would the refusal of a learner with HIV/Aids to a public or independent school amount to unfair discrimination?
• Would the appointment to a Muslim primary school of an educator who is a Muslim be discriminatory against another educator who also applied and is not a Muslim but has more teaching experience?
• A black male educator with less teaching experience than a black female educator has been appointed as the principal of a primary school. Does this amount to unfair discrimination against the female educator?
• School X refuses admission to learners on the grounds that their parents are illegal immigrants. Does this amount to unfair discrimination?
• Would all the recipients of “special education” under the previous education system not have a strong case for being identified as a minority disadvantaged group in need of urgent affirmative action programmes?

You will agree that equality questions are complex and in many
cases no straightforward answer is possible. The equality clause is not easy to interpret and its scope is very wide. However, a strong equality jurisprudence has been developed by the courts, especially by the Constitutional Court. In what follows, only a few guidelines are offered on the content and interpretation of this clause.

8.2.2 Substantive equality

Equality is a fundamental value of the Constitution and, therefore, requires a deliberate break from the apartheid order which was based on discrimination and the denial of equality. In this context, the Constitutional Court held in Fraser v Children’s Court, Pretoria North 1997 2 BCLR 153 (CC) par 20, that –

“the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.”

Equality must be interpreted in terms of the contextual (purposive) approach underlined by the Constitution. It means that the actual social and economic conditions of groups or individuals have to be considered to determine whether the commitment to equality is being upheld. What is important to ultimately ensure equality of outcome, is the result or effect of the conduct. This “substantive” form of equality has been accepted and confirmed by the Constitutional Court. In the education sector it may imply, for example:

- accelerated and enhanced training opportunities and promotion for previously disadvantaged educators
- making available more state subsidies to previously disadvantaged schools
- implementing differentiated school programmes to enable disabled learners to reach their full potential

In essence, substantive equality in the education context means that over and above the abolition of laws on racial discrimination, all social, economic and political stumbling blocks which hamper access to education should be removed. Thus, the right to equality does not merely offer protection against unfair discrimination but also mandates the achievement of equality in line with the Constitutional vision of social justice (Albertyn & Goldblatt 2014:35-29).
8.2.3 Differentiation

Laws almost invariably differentiate, and it is virtually impossible to regulate the affairs of people and the state without differentiation and without classifications which treat people differently and have different impacts on their lives. The equality clause allows for two instances in which a law or conduct might differentiate between people:

- Differentiation which does not involve any discrimination (e.g. learners are treated differently to educators; disabled learners are treated differently to other learners; boys are treated differently from girls, for example in what is expected from them in sports). This type of “mere” differentiation, does not involve any discrimination.

- Differentiation which does involve constitutionally impermissible discrimination (e.g. refusing a learner admission to a school on the basis of her colour; forcing rural primary schools to offer a school programme that is inferior to similar schools in urban areas).

Therefore, in a substantive context, “unfair” discrimination does not simply distinguish between different kinds of differentiation, but between permissible and impermissible discrimination. Discrimination is “fair” (permissible) if it is justifiable in relation to the purposes underlying the value of equality (e.g. the ultimate outcome in education must be equal). In this light the advancement of previously disadvantaged individuals and groups to achieve the full and equal enjoyment of their right to education, for example, must be regarded as “fair” discrimination (s 9(2)).

The Constitutional Court has identified certain criteria to distinguish between fair (legitimate) and unfair (impermissible) discrimination. The basic question is whether the alleged discriminatory provision differentiates between people or categories of people. If it does, the next question is whether the differentiation has a rational connection to a legitimate government purpose and, if it does not, a violation of section 9(1) has occurred. This is a difficult issue because even if a rational connection exists, the differentiation may still amount to discrimination. For example, the previous government defended a separate system of “special (and specialised) education” because it was cost-effective and
promoted “equal” opportunities for “disabled” learners to reach their maximum potential. Although a separate system might have seemed rational in view of the government’s goals (i.e. cost-effectiveness, differentiation, achievement of full potential), large-scale discrimination occurred as a result of it being “secluded (and its state of neglect) and it prevented many learners from enjoying equal treatment and opportunities in education and in society.

To determine if such discrimination should be tolerated (is permissible), one must apply section 36 (the general limitation clause – see Chapter Six). It must be determined whether the limitation of the right to equality (e.g. the alleged discrimination) will be reasonable and justifiable in a democratic society striving towards the values of human dignity, equality and freedom. In trying to “balance” the situation the following factors are examined: the nature of the right at stake, the importance of the purpose of limiting it, the nature and extent of the limitation, the means-end relationship (whether there is a rational relationship between the limitation and its purpose), and the question of whether less restrictive means are available to achieve the purpose. Through this balancing process the use of arbitrary forms of differentiation is excluded.

A guiding factor in interpreting a question on differentiation is that the worse the disadvantage suffered by the group, and the more sensitive the group affected, the stricter the test of permissibility should be (Bray & Maile, 1999:263-265).

8.2.4 Unfair discrimination

The concept “unfair discrimination” was analysed by the Constitutional Court in *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) par 23 and 28, and defined as –

“treated persons differently in a way which impairs their fundamental dignity as human beings who are inherently equal in dignity.”

Discrimination in education on the basis of disability, sex and race may be some of the most glaring examples of unfair discrimination. In terms of section 9, differentiation which involves unfair discrimination may be based upon –

- The enumerated grounds in section 9(3), in which case, as
stipulated by section 9(5), there is a presumption of unfairness;
• other grounds (not enumerated in section 9(3)) in which case there is no presumption of unfairness.

To take it one step further, one should now determine whether the discrimination amounts to “unfair” discrimination and for this purpose a two-stage approach has been advocated by the Constitutional Court in *Harksen v Lane* NO 1997 11 BCLR 1489 (CC) par 53:

♦ **Does the differentiation amount to “discrimination”?**
A differentiation based on a ground specified in section 9(3) is *prima facie* (on the face of it) discriminatory (e.g. refusing a learner admission to a public school on account of race or colour, or refusing a physically disabled educator a post at a primary school). In each case discrimination based on race and disability, respectively, has occurred). If the differentiation is not based on a ground listed in section 9(3), the question of whether or not discrimination has taken place, will depend, objectively speaking on whether it is based on attributes and characteristics which have the potential to impact on the human dignity of a person as a human being or affect such a person adversely and in a serious manner. Attributes and characteristics should not be narrowly defined and may include:

• immutable biological characteristics and attributes (e.g. race, sex, pregnancy, disability)
• aspects of the associational life of humans (e.g. sexual orientation, culture)
• intellectual, expressive, and religious dimensions (e.g. disability, language or religion)
• a combination of one or more of the above (e.g. disability).

♦ **If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”?**
If discrimination is based on a ground specified in section 9(3), then unfairness will be presumed, unless the contrary is proved (e.g. the refusal to appoint a physically disabled educator to a public school may seem unfair. However, if the post is for a physical education educator, it may be argued that a physically
disabled person will not be able to cope with the inherent requirements and demands of such a job).

If discrimination is based on an unlisted ground (e.g. those not listed in s 9(3)), the complainant will have to show that it is unfair. The Constitutional Court held that in such a case the question should be whether the unfair discrimination has encroached upon the human dignity of the complainant. Discrimination can be blatantly and obviously (directly) unfair (e.g. refusing a learner with HIV/AIDS admission to a public school on the basis of his or her illness), or can have indirect unfair results (e.g. instituting higher school fees at a public school to improve the quality of education, may seem neutral but could have unfair results if it discriminates against a large group of disadvantaged learners).

If at the end of the enquiry the differentiation is found to be “fair” there will be no violation of section 9(3) and (4). If the discrimination is found to be unfair, one should examine whether such unfair conduct may be justified in terms of the general limitation clause in section 36. It is quite possible that “unfair” discrimination may within the context of a particular situation be reasonable and justifiable, particularly in the face of other more intrusive or disruptive options. If, for example, the condition of the learner with HIV/AIDS is such (as a result of other diseases or aggressive behaviour) that it poses a serious danger to the life and health of other learners, and the condition cannot be improved with other reasonable preventative measures, the “unfair” discrimination against such a learner would most probably be rational and fair (Van Wyk, 1998:224-225).

In *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T) the High Court dealt with the alleged discriminatory admission policy of a public school. The Court held that the Potgietersrus Laerskool wanted to implement a racist admission policy under the guise of protecting cultural and language differentiation in terms of, *inter alia*, sections 8 (equality), 10, 24(a) and 32(c) of the 1993 Constitution. The Court held that the equality clause prohibits “unfair” discrimination and although discrimination on the basis of culture and language is not *per se* unconstitutional, the school could not prove from the facts and circumstances of the case that the refusal to admit black learners was not to further its racist
admission policy. The Court concluded that the school was seeking to accomplish indirectly what it could not do directly (Visser, 1999:307-313).

In another case decided in terms of the 1993 Constitution, *Larbi-Odam v MEC for Education (North-West Province)* 1996 12 BCLR 1612 (BSC), the Bophuthatswana Supreme Court had to decide whether discrimination against an educator on the ground of citizenship (an unlisted ground in terms of the equality provision of the 1993 Constitution) amounted to unfair discrimination. The Court used the two-stage approach (see above) and found that the non-citizen status of educators as referred to in the *Educators’ Employment Act of 1994* and the regulations in terms of this Act, had placed these educators as a vulnerable group in society. The Court held that the provisions (limitations) in the regulations could not be regarded as reasonable and justifiable in terms of the general limitation clause (s 33(1) of the 1993 Constitution) and declared the relevant provision of the regulation inconsistent therefore, invalid) with the right to equality in section 8 of the 1993 Constitution (Dufresne, Oosthuizen, Prinsloo & Zivanovic 1999:299-305). (The *Educators’ Employment Act of 1994* was repealed by the *Employment of Educators Act of 1998* and in terms of this Act, South African citizenship is no longer a prerequisite for permanent educator employment (RSA 1998b)).

In *Head of Department, Department of Education, Free State Province v Welkom High School and Another* [2013] ZACC 25 the court identified the right to equality (not to be unfairly discriminated against) as one of the rights that must be observed when formulating and implementing pregnancy policies for learners (at 32). The court emphasized that “no governing body may adopt and enforce a policy that undermines, amongst others, the fundamental rights of pregnant learners to freedom from unfair discrimination and to receive an education” (at 71). Khampepe J applied the two-stage approach identifies in *Harksen* and found that various provisions in the schools’ pregnancy policies constitute unfair discrimination. Those include the practice to exclude pregnant learners from school in the year that they gave birth (at 111). The court argued the case of unfair discrimination on the ground of sex as follows (footnotes excluded):
First, the policies differentiate between learners on the basis of pregnancy. Because the differentiation is made on the basis of a ground listed in section 9(3) of the Constitution, it is both discrimination and presumptively unfair. Furthermore, the policies differentiate between male learners and female learners. A male learner at Welkom may only be given a “leave of absence” for paternity purposes if the pregnant learner can prove that he is the father of the unborn baby. What the exact standard of proof required by the Welkom school authorities is unclear, but it is apparent that this policy operates more onerously against female learners. At Harmony the differentiation is even more severe in that only pregnant learners (or learners who have given birth) are required to leave school – male learners who are equally responsible for the pregnancy are permitted to continue their education without interruption and the policy contains no provisions regarding a “leave of absence” for paternity purposes. For similar reasons, therefore, the policies lead to presumptively unfair discrimination on the basis of sex (at 113).

8.2.5 Affirmative action

Affirmative action (or “positive” discrimination) is used as a broad concept which includes all measures directed at improving the position of sensitive groups (e.g. blacks, women and the disabled) previously disadvantaged by unfair discrimination. As was mentioned before, the affirmative action provision in section 9(2) must be seen in the substantive context of equality (e.g. to promote the achievement of equality). In this context an affirmative action program does not encroach upon the right against unfair discrimination but is regarded as a manifestation of the right to equality in its substantive sense. However, in order to “promote the achievement of equality” a rational relationship should exist between ends and means: it must be shown that both the purpose of the programme and the means selected for its implementation, are reasonably capable of meeting that purpose.

In terms of section 9(2), legislation has to be adopted to further the purpose of affirmative action. A good example of the importance of affirmative action programmes in education, their purpose and implementation, is found in the education employment field. The Employment Equity Act 55 of 1998 (RSA 1998a) aims to address imbalances and discriminatory practices in employment by compelling employers to remove barriers to equal employment opportunities, specifically for black people, women and people with
human rights in education

In order to achieve the purpose of the Act and, in particular, employment equity, designated employers are required to prepare and implement an affirmative action plan, the Employment Equity Plan (s 20), which aims at achieving “reasonable progress” towards employment equity. The plan must set out objectives and numerical targets for achieving reasonable progress towards equity in the workplace including the following:

- the objectives to be achieved each year
- a timetable for achieving the objectives
- the positive affirmative action measures to be implemented
- an indication of where people from designated groups is underrepresented
- the procedures that will be used to monitor and evaluate implementation, and
- the procedures that will be used to resolve internal disputes. Affirmative action programs have already been referred to in recent court cases (e.g. Public Servants Association of South Africa v Minister of Justice 1997 3 SA 925 (T)) and also featured prominently in the inquiries into the racial conflict at Vryburg High School, especially the appointment by the Department of a black deputy principal to the school. (Education employment law is part of labour law and the topic of another monograph in this series.)

Finally, if the means and measures used in affirmative action programs are not reasonably capable of achieving equality, the program may be unfair and amount to “reverse” discrimination – this is not what section 9(2) aims to achieve. For example, if a program only benefits a portion of black learners who had been fortunate to attend private schools, the program could be unfair towards other black learners who had been disadvantaged by the inferior black education system. The programme could even be unfair towards all other learners who attended ordinary public schools.

An affirmative action program should therefore be inclusive and carefully constructed. If such a program amounts to unfair discrimination, the onus is on the education authorities to prove that
such discrimination is reasonable and justifiable in terms of the general limitation clause in section 36. For example, if an affirmative program has the effect of benefiting only white learners who are experiencing special needs in education or only special schools with highly trained educators, it would seem unfair towards the overall sphere of special needs education for which the programme was originally intended. However, if the education authorities prove, that although the measures to be implemented will not initially benefit the entire spectrum of special needs education, but that the more disadvantaged sectors and their learners will progressively enjoy increased benefits (as similar successful projects in neighbouring countries have proven), the program may well be in line with the objective of promoting substantive equality (equality in outcome) for these learners in education (e.g. Motala v University of Natal 1995 3 BCLR 374 (D); Bray & Maile, 1999:269-271).

**Finally,** we must take note of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*. This Act was adopted to give further effect to section 9. The Act identifies practices constituting unfair discrimination prohibited by section 9, and the following are listed as such unfair practices in respect of education:

(a) unfair exclusion of learners from educational institutions, including learners with special needs;
(b) unfair withholding of scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds in section 9(3) of the *Constitution*; and
(c) the failure to reasonably and practicably accommodate diversity in education.

**8.2.6 Examples in education**

Other examples of how the right to equality impact education can be mentioned. Racial, gender, disability and other forms of discrimination have been mentioned. Gender specific schools are generally accepted as non-discriminatory. Sexual harassment and age limitations are also contentious issues relating to the equality principle. In *Mfolo v Minister of Education*, Bophuthatswana 1994 1 BCLR 136 (B) regulations requiring the obligatory suspension of female students at education colleges who fall pregnant were held to discriminate unfairly on the basis of sex. In *Minister of
Education v Harris 2001 11 BCLR 1157 (CC) discrimination on the basis of age was alleged against a ministerial notice in which an age requirement of six years was imposed for admission to school, but the Constitutional Court declined the challenge and chose to strike down the notice on ultra vires grounds.

The Promotion of equality and prevention of unfair discrimination Act came into play in MEC for Education KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC). Langa CJ (at 40), with reference to Constitutional Court decisions on administrative and labour law, held: "... a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right". Thus, since the commencement of this Act equality challenges should be premised on the Act itself and not the Constitution (Currie & De Waal 2013:215, footnote 27). (This case is also addressed in sections 8.5.2, 8.6.2, 8.9.3).

Unfair discrimination based on disability was the subject of the Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 JDR 0375 (WCC) case. The court found that the Western Cape Department of Education’s failure to provide for the education needs of severely intellectually disabled children constitute an unjustifiable violation of their rights to a basic education, protection from neglect and degradation, equality and human dignity (at 45-47). It applied the stages identified in the Harksen case to determine whether there was an instance of unfair discrimination (see section 8.2.4). The court found that the learners with severe intellectual disabilities were treated differently because no provision was made for them to receive a basic education and that the differentiation did not bear a rational connection to a legitimate government purpose. The argument that the differentiation is connected to a rational government purpose because there is only limited funding available and no amount of education will beneficial to these learners was rejected by the court.

8.2.7 Conclusion

In this discussion only some basic issues in the equality debate have been highlighted. Equality is a complex and dynamic concept but also one of the core values of the Constitution. It must be
interpreted and implemented according to the spirit and purport of the Bill of Rights and a contextual (purposive) interpretation is therefore necessary to capture its substantive meaning.

8.3 Freedom of expression

8.3.1 Introduction

Freedom of expression protects all forms of communication. Section 16 of the Bill of Rights reads as follows:

“(1) Everyone has the right to freedom of expression, which includes –
   (a) freedom of the press and other media;
   (b) freedom to receive or impart information or ideas;
   (c) freedom of artistic creativity;
   (d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to –
   (a) propaganda for war;
   (b) incitement of imminent violence;
   (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

Typical school situations that relate to freedom of expression include the following:

- Joanne, a Grade 11 learner, has her English essay dealing with the topic “Protest poetry of the 1960s” returned unmarked because it contains vulgar language.
- The principal of a secondary school has banned an issue of the school magazine which is edited by an educator and a group of learners. The reason given for the banning is the publication of an article which openly criticizes the prefect system.
- John, a senior learner and chairperson of the debating society of the school, arranges a mass meeting at school to inform learners about their freedom of speech. He proclaims that learners have a duty to publish news on the personal and private affairs of educators.

The question is often asked: Why is freedom of expression protected, and why is it afforded the status of a “civil” right? There are at least three reasons for this:

- To speak or express oneself is a natural and essential human activity and part of being human; it leads to fulfillment of the human personality.
• Scientific, artistic or cultural progress (“education” in a wide context) would not be possible if people were not free to express their ideas and discoveries.
• Freedom of expression is essential to the functioning of a democratic state (e.g. to express grievances, to criticise, to contribute to peaceful progress and change in society)

8.3.2 The content of the right
“Expression” is a wide concept which includes:
• “speech” (i.e. the spoken word, music, displaying posters, painting, dancing)
• the written word and publications (i.e. the press and media)
• symbolic acts (i.e. burning flags, wearing certain items of clothing and physical gestures)

In principle, one could say that every act by which a person attempts to express some emotion, belief or grievance should qualify as constitutionally-protected “expression”. It also includes not to do or say anything, in other words, refusal to express oneself is also a form of expression.

The press and the media receive special reference because the Constitution recognizes their special function in a democracy and they therefore deserve a greater degree of protection than other speakers. However, this does not mean that journalists must enjoy special constitutional immunity beyond what is accorded to ordinary citizens (see e.g. Holomisa v Argus Newspapers Ltd 1996 6 BCLR 836 (W)).

Section 16(1)(b) is a new provision which confirms the notion that the right to freedom of expression does not only protect speakers, but speakers and listeners. However, this right refers to “information and ideas” only, it does not cover the whole spectrum of “expression” which will have to be determined by the courts.

The right to academic freedom and scientific research is included in subsection (1)(d) and does not only apply to academic institutions of higher learning (as in the 1993 Constitution) but includes any academic enterprise (including schools, colleges, technikons,
institutes). At the core of this right is the right of the individual to do research and teaching without government interference. It seems that this duty of non-interference also implies a positive duty by the state to promote research and teaching by providing at least the financial back-up needed by academic and scientific institutions to exercise their right to academic freedom and scientific research.

There are three exceptions listed in subsection (2) which circumscribe (limit) freedom of expression. One of these exceptions (in par (2)(c)) is usually referred to as hate speech. This restriction on the scope of freedom of expression is also found in international human rights documents. The hate speech provision excludes advocacy of hatred on race and similar grounds from the ambit (scope) of this right when it amounts to incitement to cause harm. Two elements must be present before an expression can be considered hate speech:

- advocacy of hatred on one of the listed ground and
- incitement to cause harm

The focus of both exclusions is on the effect the expression may have on its audience. Hate speech therefore also requires that the advocacy of racial hatred goes beyond mere “abstract teaching” and encourages its audience to practice what is preached. Therefore, the right to expression excludes forms of expression which amount to incitement, encouragement or indoctrination of an audience to cause harm to a target group. Before it may be excluded, the expression must urge its audience to cause narrowly defined categories of harm (i.e. physical, financial or emotional harm) to the target group. Hate speech is therefore a limited category of harmful expression (Currie & De Waal, 2013:356-360).

♦ Freedom of expression applied in education

Education is all about expressing, conveying and receiving of information and ideas. No one should therefore be prohibited from expressing their views and from receiving information, unless it is harmful or can disrupt or otherwise detrimentally affect the education process. The right affects the kind of books prescribed in the curriculum, the literature distributed among learners, and the use of official notice boards on campuses. The right to freedom of expression may clash with the right to freedom of conscience,
religion, thought and opinion (for example, when learners are confronted with study material that offends their personal religious beliefs, or those of their parents or legal guardians). Such cases require the application of section 36 in order to determine which of the competing rights should prevail, and to what extent, under the particular circumstances.

Freedom of expression in the school context is manifested in many ways (e.g. freedom to speak, to publish in the school magazine, to wear symbolic items, and through dress and hairstyle). For example, freedom of expression through dress or hairstyle featured prominently in the case of Danielle Antonie v Governing Body, The Settlers High School and Head, Western Cape Education 2002 4 SA 738(C). The court set aside Danielle’s suspension for wearing a cap (in breach of the code of conduct) under which she hid her dreadlocks, and held that in terms of the guidelines set by the Minister for consideration in adopting a code of conduct, a learner’s inherent dignity and respect for dignity have to be honoured. A Rastafarian hairstyle would also not disrupt the education process and school discipline per se, and suspending her on the basis of this reason alone could have a negative effect on her self-esteem, dignity and future development.

A case where the Constitutional Court considered defamation is Le Roux and Others v Dey (2011) 3 SA 274 (CC). A learner sent a computer-created image of two naked men sitting in a sexually suggestive position on which he has superimposed the heads of the principal and deputy-principal to a friend who distributed it. The case of Dr Dey claiming defamation and injury to his feelings went all the way to the highest court for Constitutional matters; eg the Constitutional Court. The applicants (the learners) then approached the Constitutional Court based on their right to freedom of expression and satirical expression in particular (at 29). The majority judgment of the Supreme Court of Appeal that the image was defamatory was upheld by the Constitutional Court. The majority judgment held that the reasonable observer would understand the image or statement conveyed by the picture as associating or connecting Dr Dey and the principal with the indecent situation that the picture portrays and that the average person would regard the picture as defamatory of Dr Dey.
The right to freedom of expression is not absolute and is normally limited by competing rights and freedoms and the public interest. In the education situation freedom of expression should be limited (balanced) by specific educational interests and the competing rights and freedoms of other learners and educators (e.g. the right of the learner or educator to have her personal information kept private and confidential; the right of the learner or educator to have his human dignity and integrity protected from defamatory or racist propaganda; or protecting the public (educational) interest from expression that is harmful and defamatory).

### 8.3.3 Conclusion

The right to freedom of expression is important in the educational environment and is manifested in various ways. For the purposes of advancing the best possible education for our children, the right should be protected at all costs, and limitations of the right should be strictly scrutinised in terms of section 36.

### 8.4 Access to information

Section 32 provides the following:

“(1) Everyone has the right of access to –
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights

(2) National legislation must be enacted to give effect to this right …”

### 8.4.1 Introduction

Typical issues relating to this right that may crop up in the school situation include:

- The governing body of a public school refuses to disclose the amount of school fees to the Department because it regards school fees as a “school” matter controlled by the parents.
- Should the medical record of a learner suffering with HIV/Aids be divulged to other educators and learners?
- Who should have access to medical records of learners?
- Can parents withhold any medical or educational information from the school and for what purpose and under which circumstances?
The right to access to information goes hand in hand with the freedom of expression (e.g. to express an opinion or to make a statement, relevant information is needed to prove the point or to substantiate the view).

**8.4.2 Content of the right**

It is apparent that this right is binding on the state as well as on individuals:
- the individual may require access to any information held by the state – the vertical state-individual relationship
- the individual may require information from another person (the horizontal private-law relationship) insofar as the information is required for the exercise or protection of any rights

Access to information is a basic requirement in a democratic state that strives for openness, participation, transparency and accountability. In fact, section 195 of the Constitution stipulates that the democratic values and principles of the Constitution are binding on the public (including education) administration (RSA 1996a). Specific reference is made to the fostering of transparency and providing the public with timely, accessible and accurate information.

National legislation (the Promotion of Access to Information Act 2 of 2000) determines the content, scope and application of this right. Provisions which regulate access to information in the education sector have already been included in recent legislation (e.g. the Schools Act requires governing bodies of public schools to make information available to the provincial Head of Department and also to parents, learners, educators and other staff (s 18(2)); section 59 places a duty on the public school to make information available for inspection by any person insofar as such information is required for the exercise and protection of another person’s rights). As with most other rights, the right of access to information may be limited under circumstances that are reasonable and justifiable in an open and democratic society.
8.4.3 Conclusion

The right of access to information is crucial in the education environment, especially in the relationship of trust between the public school, its governing body and the parents, and also in the partnership relationship between the education authorities and the school community. Where education authorities require access to personal information of learners (or educators), the right to access such information should be balanced against the individual’s right to privacy and confidentiality.

8.5 The right to privacy

8.5.1 Introduction

Section 14 of the Constitution (RSA 1996a) provides:

“Everyone has the right to privacy, which includes the right not to have –
their person or home searched;
their property searched;
their possessions seized; or
the privacy of their communications infringed.”

The right to privacy represents an important part of the freedom of the individual, and also serves to protect everyone’s dignity.

8.5.2 Content of the right

The right to privacy has a direct impact on the intimate and sensitive school environment. Rules relating to school uniforms, dress codes for educators, hair codes and other rules on appearance such as the wearing of jewellery may be regarded as limitations on the right to privacy which have to be justified in terms of section 36. A suggested approach is not to interfere with such school rules unless they are arbitrary and unreasonable (the Pillay case about the wearing of a nose stud is discussed under cultural rights in par 8.6.2 and 8.9.3.1, but may also contain an element of privacy.). The right also affects disciplinary codes generally. Other issues concern the publication of examination and test results, random drug searches and drug testing, and the mandatory furnishing of personal health information. (As mentioned, there is clearly some tension between the right to privacy and the right of access to information.) In such cases limitations should be justified by a rational educational purpose, which could result in a less strict standard of
justification being imposed by the courts on schools than in other circumstances.

A specific example is personal searches for drugs, firearms, or other contraband or drug testing. Searches, seizures and drug testing inevitably presume a violation of learners' right to privacy (Coetzee 2009:30). The reasonableness standard (formulated by the Supreme Court in US case, *New Jersey v TLO*) aims at ensuring that the interests of learners are not invaded more than is necessary to achieve a balance between learners' legitimate expectations of privacy and the school's equally legitimate need to maintain an environment that is conducive to teaching and learning (Coetzee 2009:37). For a search to be reasonable, it should be

- **Reasonable at its inception.** There must thus be reasonable grounds for suspecting that the search will turn up evidence that the learner has violated, or is violating, either the law or a school rule and that the object is likely to be found in the place that is searched. The nexus and particularity requirements should be met. Thus, the following are required: a nexus (connection) between the particular learner and the suspected transgression; a connection between the object searched and the transgression; and a connection between the object and the place searched.

- **Reasonably related in scope to the circumstances that justified it.** Thus, the search should not be more invasive than required (Coetzee 2009:38).

Coetzee (2009:40) argues that random searches can never comply with the reasonableness requirement and it is thus questionable whether random searches (as provided for in the Schools Act) will withstand constitutional scrutiny.

### 8.5.3 Conclusion

The right to privacy points to the sensitive nature of human relationships, especially in the school environment. Educators should act with circumspection and integrity, always keeping in mind the privacy of the individual, their own educational responsibilities, and the best interests of everybody involved.
8.6 Religion, Belief and Opinion

Section 15 of the Bill of Rights provides:

“(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions provided that —

(a) those observations follow rules made by the appropriate public authorities;

(b) they are conducted on an equitable basis; (c) attendance at them is free and voluntary.”

8.6.1 Introduction

Questions relating to religious freedom that may crop up in the school situation include the following:

- A primary school prohibits Muslim girls from wearing their religious headscarves to school
- School A’s mission statement only promotes Christian values and principles
- Public school B is a multi-faith school but the governing body decides it is more practicable to conduct religious observances in the dominant religion only

8.6.2 Content of the right

Section 15(1) covers a wide spectrum of freedoms (e.g. religion, agnosticism and atheism) and, literally interpreted, one may say that this right protects an extremely wide range of world views. The right comprises the freedom to believe as one is led, and to manifest or practice those beliefs by expressing, confessing and observing them publicly.

Freedom of religion is a complex issue, as noted in the Constitutional Court judgment on the prohibition of the sale of liquor on “closed days” (Sundays) in terms of the Liquor Act of 1989 (S v Lawrence 1997 4 SA 1176 (CC)). This judgment dealt with the right to freedom of religion in the 1993 Constitution (s 14). From the judgment it is clear that in South Africa there is concern about the undue favouring by the state of one religion over others, but also about a particular religion or belief being treated in a discriminatory way. These issues are also covered by the right to equality in section 9 – especially section 9(1), (3) and (4) which
prohibits unfair discrimination on, among other grounds, religion.

In the *Lawrence* case the Constitutional Court held that the requirement of free and voluntary attendance at religious ceremonies in section 14(2) of the 1993 Constitution is an explicit recognition of the deep personal commitment that participation in religious ceremonies reflects. It also recognised that the freedom of religion requires that the state may not require such attendance to be compulsory. It protects the rights to conscience both of non-believers and of people whose religious beliefs differ from those that are being observed at the public institution.

The Court’s reasoning on section 14(2) – now section 15(2) of the 1996 Constitution – with regard to religious observances in schools, was as follows:

“Compulsory attendance at school prayers would infringe freedom of religion. In the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion. To guard against this, and at the same time to permit school prayers, s 14(2) makes clear that there should be no such coercion. It is in this context that it requires the regulation of school prayers to be carried out on an equitable basis. I doubt whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the “non-believers”. But whatever s 14(2) may mean … it cannot in my view be elevated to a constitutional principle incorporating by implication a requirement into s 14(1) that the state abstain from action that might advance or inhibit religion” (as per Chaskalson P, par 103).

The right to freedom of religion, belief and opinion places both a positive and a negative duty on the state (school) (Smit 2013:162). The negative obligation is to refrain from interfering with the individual’s freedom of religion, belief and opinion in a way which does not comply with the limitation clause (section 36). Malherbe (1998:681) identifies three positive duties:

- Abstain from favoring one religion
- Put rules and regulations in place in terms of section 15(2) of the Constitution which requires that the appropriate authorities make rules for religious observances
Create an environment where people can freely exercise and realize their religious convictions.

Religious observance “is an act of a religious character, a rite. The daily opening of a school by prayer, reading of the scripture (and possibly a sermon or religious message, and benediction) is such an observance. Religious education is not” (Wittmann v Deutscher Schulverein Pretoria 1998 4 SA 423 (T) at 449E). Farlam (2014:41-51) contends that the requirement that the religious observances must be conducted on an “equitable basis” does not require “equal treatment and parity of observance for all religious faiths”.

With regard to “religious education”, concern may be expressed about the “religion in education” policy of the Department of Education in terms of which the study of various religions is a compulsory subject, while single-faith religious observances are being made unnecessary difficult. It may be argued that the policy is unconstitutional for two reasons:

- The study of various religions specifically according to a declared state-determined approach and objective may infringe people’s religious convictions, and is therefore inconsistent with the right to religious freedom.
- If the exercise of a right (the right in section 15(2) to religious observances in school) is made so difficult that the exercise of the right becomes a practical impossibility, it is an infringement of the right. It is a question whether such an infringement can be justified in terms of section 36.

**Religious education:** Concern may be expressed about the “religion in education” policy of the Department of Education (now Department of Basic Education) in terms of which the study of various religions is a compulsory subject, while single-faith religious observances are being made unnecessary difficult. It may be argued that the policy is unconstitutional for two reasons:

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religious observances in school) is made so difficult that the exercise of the right becomes a practical impossibility, it is an infringement of the right. It is a question whether such an infringement can be justified in terms of section 36.

Other issues relating to religious freedom in schools include –

**Compulsory sex education.** There is sometimes little sympathy for the religiously inspired objections of parents. However, one should object to sex education that teaches children the mechanics of so-called safe sex without teaching them the moral considerations around the topic. Usually it is said that such an approach would involve moral choices which the school is not supposed to make. Actually, permissive sex education also involves a moral choice condoning if not encouraging pre-marital sex. In support of his view that parents should not be allowed to withdraw their children from sex education in school.

**Religious and cultural expression.** In *Pillay v Minister of Education*, KwaZulu-Natal 2008 (1) SA 474 (CC), the Constitutional Court held that even voluntary expressions of culture, such as the wearing of a nose-stud, are worthy of protection, and ordered the school to adapt its code of conduct to allow exemptions for cultural reasons to its strict dress code prohibiting the wearing of jewelry. The Court hinted that similar expressions of a religious nature should also be protected. (See below in par 8.9.3.1)

**Independent schools.** The Constitutional Court has not dealt with the question whether a “state-aided institution” (s 15(2)) includes an independent school that receives aid in the form of a state subsidy, or whether an independent school qualifies as an “organ of state” (s 239) and would therefore be bound by section 15(2). Although the horizontal application of the *Bill of Rights* in the examined to determine whether under specific circumstances an independent school is bound by section 15(2) in its private-law relationship. In *Wittmann v Deutscher Schulverein*, Pretoria 1998 4 SA 423 (T), the Transvaal High Court held (incorrectly in our view) that section 14 of the 1993 Constitution (now s 15) did not apply to a private German school because the *Bill of Rights* under
the 1993 Constitution did not apply horizontally. The Court further argued that the plaintiff’s freedom religion remained intact, but that the right to abstain from attending religious observances (s 14(2)) had been waived (relinquished) when the plaintiff subjected herself to the constitution and regulations of the independent school.

**Corporal punishment** (see also par 8.8.2). In *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) the Constitutional Court reiterated the horizontal application (to independent schools) of the *Bill of Rights* in the 1996 *Constitution* and held that independent Christian schools may not infringe individual rights (e.g. a learner’s right to be free from inhuman and cruel treatment (s12) by means of their community religious practices (in this case, the administration of corporal punishment). The court emphasised section 31(2) which states that community cultural, religious and linguistic rights may not be exercised in a manner inconsistent with any provision of the *Bill of Rights*.

### 8.6.3 Conclusion

It is apparent that educators need to be sensitive to the religious rights and freedoms of learners and educators. Schools have to consider the following points when developing a school policy for religious practices:

- the freedom of religion of both learners and educators
- the nature of religious education and religious observances
- the nature of collective worship
- religious clothing and attire, and
- religious holidays and festivals

It must be borne in mind throughout that all rights, including the right to religious freedom, may be limited provided the limitation is reasonable and justifiable in a democratic and open society (s 36).

### 8.7 Children’s Rights

Section 28 reads as follows:

“(1) Every child has the right –
(a) to name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that –
   (i) are inappropriate for a person of that child’s age; or
   (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained …
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child …
(2) A child’s best interests are of paramount importance in every matter concerning the child.
(3) In this section “child” means a person under the age of 18 years.”

8.7.1 Introduction

Because children are regarded as minors (i.e. under the age of 18 years), there are certain restrictions on their fundamental rights due to their youth and immaturity (e.g. they are not “adult citizens” and cannot vote). Apart from these restrictions every child enjoys the same protection in the Bill of Rights than adults (e.g. fundamental rights of a “person” or an “individual”). However, children are by definition vulnerable and also need additional protection. These forms of additional protection are set out in section 28 of the Bill of Rights, a provision which is based on the International Convention on the Rights of the Child.

8.7.2 Content of the right

Section 28 provides that every child has the right to a name and nationality from birth. It also provides children with certain socio-economic rights additional to the general socio-economic rights of access to housing, health care, nutrition and social security (sections 26 and 27). The case Centre for Child Law & Others v MEC for Education, Gauteng 2008 (1) SA 223 (T) deals with the socio-economic rights of children who had been removed from their parents via care and protected proceedings and then been placed in a school of industries. The circumstance under which these children lived was parlous with inadequate shelter, clothing and bedding. The court held that the socio-economic rights in section 28 do not contain an internal limitation subjecting their fulfillment to the availability of resources. Murphy J noted that the actions of the
State reflect a fundamental misunderstanding of the State’s constitutional duty and emphasised that the duty to provide care and social services to children removed from their parents belong to the State (at 226G-228G).

Children are accorded the right to family and parental care and the state has a positive duty to ensure that these basic needs are fulfilled. As a result of the horizontal application of the *Bill of Rights* in private-law relationships (i.e. the parent-child relationship), a constitutional duty is placed on the parent(s) of the child to provide for a child’s basic needs and not to abuse, exploit or require the child to perform unsuitable or unhealthy work.

The Convention on the Rights of the Child requires the national law of a state to be consistent with the provisions of the Convention. In addition to section 28, the Children’s Act 38 of 2005 accordingly updated and extended the legislative provision in this regard, and reflects the duties of parents and the state (e.g. public education educators as bearers of state authority) towards children. It, *inter alia*, give effect to the duties imposed by section 28 and international documents. The Act sets out clearly the rights of children and the duties of parents and the state in relation to children’s rights. For example, it makes, in section 110(1), reporting sexual offences committed against children compulsory for educators and establishes a register of persons unsuitable to work with children (RSA 2005). The Act also contains a list of *General principles* which are intended to guide the implementation of all legislation applicable to children and all “proceedings, actions and decisions by any organ of state in any matter concerning the child” (RSA 2005, s 6(1)). Section 6 establishes a child-centred, holistic approach in all matters affecting children (Skelton & Proudlock 2013:2-3). These principles which thus also bind public schools are:

(2) All proceedings, actions or decisions in a matter concerning a child must-

(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;

(b) respect the child's inherent dignity;
(c) treat the child fairly and equitably;
(d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
(e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
(f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has.

8.7.3 Best interests of the child

The “best interests” of the child referred to in section 28(2), is a controversial topic because, though it was addressed in some education court cases, it has not yet provided a reliable and determinate standard. Section 28(2) is similar to provisions in the Convention (see above) and the Organisation of African Unity (OAU) Charter on the Rights of the Child. Article 3 of the Convention provides useful guidelines on the best interests requirement and reads as follows:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties (i.e. South Africa) undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety and health, and in the number and suitability of their staff, as well as competent supervision.

Coetzee and Mienie (2014:114-117) have, based on international law and how South African courts have interpreted the best interests of the child stand, formulated guidelines for the application of the best interests of a child standard in schools:

- It is a right afforded to children only; eg persons younger than 18 years of age and thus only apply to learners younger than 18 years of age.
• The primary function of schools (e.g., to fulfill learners’ right to a basic education) should be considered when determining what is in the best interests of a child.

• The question of what is in the best interests of a child is a factual question and should be answered by taking into account the circumstances of the particular case.

• As Thring J emphasized in *Governing Body of Mikro Primary School v Western Cape Minister of Education* (2005) ZASCA 66 at para 51, legality is vital to an orderly society (and orderly school) and as such always in the best interests of children.

• South African children’s status as autonomous legal subjects and rights-holders with a right to self-determination that is related to their evolving capacities will inform the interpretation of what is in the best interest of a child or children (See Coetzee & Mienie 2014:98 for a more detailed discussion).

• Individual children, groups of children (learners with disabilities or Afrikaans-speaking learners for example) and children in general (e.g., all children) are afforded this right. To expel a learner from a particular school may perhaps not be in the best interest of that learner, but it may be in the best interest of the rest of the learners (as a group) if the learner makes it impossible for the educator to teach or if the learner is a danger to his or her co-learners. Another scenario we can consider that of an educator who is found guilty of sexually grooming a learner and possessing child pornography. In such instance, one will also have to consider the best interests of all other learners because if the educator is sexually grooming one learner and is in possession of child pornography he is most probably also grooming other learners or will do so if his or her actions goes unchallenged.

• Since section 28(2) of the *Constitution* is not only an interpretative tool (e.g., a tool to use when giving content to, determine the scope of or limiting other rights) but also as a fundamental right with its own standing, it can be limited in terms of the limitation clause. To refer back to the example above: it may be in the misbehaving learner’s best
interests to stay in a particular school (because his siblings and friends are in that school, it is the only school with English as teaching medium), but this right may be limited in terms of the limitation clause.

8.8 Human dignity and protection against cruel and inhuman treatment

8.8.1 Introduction

South African educators have important duties towards learners, not only in terms of the Bill of Rights and other legislation, but also due to the common law in terms of their in loco parentis status (i.e. the educator acting as “parent”). All these duties include responsibilities for the physical and psychological well-being of the learner.

Section 10 of the Bill of Rights deals with human dignity and provides:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

Section 12 deals with freedom of security of the person and provides, inter alia, that everyone has the right to freedom and security of the person which includes the right to be free from any forms of violence, not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.

It is apparent that the rights mentioned above belong to every person. In what follows, we focus on the corporal punishment debate only.

8.8.2 Corporal punishment

When one looks at section 28 together with the right to privacy (par 8.5), human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way, the intensity of the debate on corporal punishment in schools is both justified and necessary.

In S v Williams 1995 ZACC 6 the Constitutional Court held that the whipping of juvenile offenders (criminals) in terms of the Criminal
Procedure Act of 1977 is unconstitutional.

In *Christian Education SA v Minister of Education* of the Government of the RSA 1999 9 BCLR 951 (SE) a Christian organization argued that section 12 of the *Bill of Rights* is in conflict with section 31 which allows communities to practice their religion with other members of that community (e.g. Christian communities allowing corporal punishment in their own independent Christian educational institutions). After extensive research into international, foreign and national legal sources, the High Court of the Eastern Cape held that:

“to allow corporal punishment to be administered at Applicant’s schools, even if it is done in the exercise of the religious beliefs or culture of those involved, would be to allow applicant’s members to practice their religion or culture in a manner inconsistent with the Bill of Rights in contravention of section 31(2) of the Constitution.” [See the discussion of section 31 in paragraph 8.6.]

“… a logical and realistic approach to the matter does not allow a conclusion that there is any material difference between whipping of juveniles and the administration of corporal punishment at schools and it must therefore follow that the finding of the constitutional court in *S v Williams* … that the former is unconstitutional, must be equally applicable to the latter.”

The Constitutional Court gave a final judgment on corporal punishment in schools in *Christian Education v Minister of Education* 2000 4 SA 757 (CC). In essence the judgment emphasised the following points:

- corporal punishment is unconstitutional and therefore outlawed in all schools in South Africa;
- the *Schools Act* outlaws the administration of corporal punishment in all schools by both school officials (educators) and parents (the Court did not rule on corporal punishment administered at home by a parent);
- community rights (e.g. to practice a communal religion or culture (s31)), cannot be exercised in a way that violates other individual rights protected in the *Bill of Rights* (e.g. the right of a learner to be protected against cruel and inhuman treatment (s12) and the right to human dignity (s10)). The Court therefore reiterated the importance of section 31(2) of the *Bill of Rights*. 


8.8.3 Conclusion

In the light of the preceding discussion, educators should be aware of their duties towards learners as reflected in school legislation policies and rules, for example:

- their position of authority over the learner and its legal implications
- school discipline and fair procedures (so-called “due process”) – see par 8.10
- safety and supervision of learners (e.g. the establishment of “safe” schools)
- privacy of learners and confidentiality of information (e.g. respecting the human dignity, privacy and right to education of the learner with HIV/AIDS; when and how to conduct searches and seizures at school)
- what is expected of the “reasonable” educator in terms of the negligence test
- the circumstances under which learners’ rights may be limited; and
- the rights of the educator in the educator-learner relationship

8.9 Culture, language and education

Under this heading the following rights are discussed:

- The rights of cultural, religious and linguistic communities (s 31) in 8.9.2
- The right to participate in cultural life (s 30) in 8.9.3
- Education rights (s 29) in 8.9.4.

8.9.1 General background

South Africa is a land of minorities. It represents a complex, heterogeneous composition of a large variety of languages, religions, ethnic groups, races, creeds and cultures. The constitutional and political struggles of previous decades also accentuated the deep-rooted divisions existing on the cultural, religious and linguistic landscape of South Africa. Three constitutional principles in the 1993 Constitution addressed the protection of minority rights, indicating, for example, that minority rights would be catered for in the Constitution. It also authorised “a
notion of the right of self-determination by any community sharing a common cultural and language heritage”.

The essence if these principles are now embodied in several provisions of the Constitution, such as:

- equality (impermissible discrimination on the grounds listed in s 9(3) and (4))
- religious freedom, freedom of association and political participation (s 15, 18 and 19)
- the protection of cultural minorities from hate speech (particularly s 16(1)(c))
- education (particularly the right to education in the language of one’s choice and the establishment of private educational institutions (s 29(2) and (3)) and
- sections 30 and 31, which provides for cultural rights.

The Constitution also provides for the use and promotion of official languages and other languages used by communities in South Africa (RSA 1996a, s 6), inter alia through the work done by the Pan-South African Language Board, and requires the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic communities (RSA 1996a, s 185). Furthermore, it provides for the right of the South African people as a whole to self-determination, which does not preclude the recognition of the right of self-determination of a community sharing a common culture and language as determined by national legislation (RSA 1996a, s 235).

8.9.2 Rights of cultural, religious and linguistic communities

Section 31 reads as follows:

“(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
(a) to enjoy their culture, practice their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

8.9.2.1 Introduction

Section 31 is an individual right which is exercised communally
(e.g. in community with a group). It protects individual and group interests in their cultural integrity and is also recognised internationally (Art 27 of the International Covenant on Civil and Political Rights of 1966). Although individual and group interests in their cultural integrity often coincide they may also diverge, resulting in complications in the application of this “hybrid” right. It follows that the interpretation and implementation of this right require the balancing of these two aspects of this right. This means that although in essence it is an individual right for the protection of group interests, section 31 has an additional, purely individualistic, aspect. It protects individual interests in affiliation (e.g. in terms of membership of, participation in and association with cultural, linguistic and religious communities). The communal aspect of the right may be used to support arguments for group integrity (e.g. to exclude individual participants in the interests of group integrity, to set restrictions on individual membership to preserve group identity, etc).

Section 31 refers to membership of a “cultural, religious or linguistic community”. It avoids the terms “minority” and “ethnic” which have been tainted by the apartheid ideology, and uses the terms “cultural” and “community” which bear more positive associations. It is not easy to define the term “community”, but it usually relates to a group of people with a particular quality of relationship, held together by a common interest (e.g. a language or religion). The purpose of section 31 is to protect the same values of cultural pluralism and tolerance that are recognised internationally (see art 27 of the Covenant). International law recognises a “minority” as a separate and distinct group, distinguished on cultural, linguistic or religious grounds from other groups. To be a minority, a group must manifest a sense of community and a desire to preserve its identity. The group must be in a non-dominant position thus requiring rights to protect it. By analogy, a “community” for the purpose of section 31 should be –

- in a non-dominant position (e.g. its culture is not the dominant culture, its language is not the majority language, or its religion is not the official religion)
- an identifiable group
- united by a common religion, language or culture, and
- a group that is self-conscious of its community (e.g.
members identify themselves as part of the group and are identified by other members as such).

The purpose of section 31 is to enable such a community to preserve its distinct existence against the discrimination or assimilation to which it would otherwise be vulnerable. To claim protection in terms of this right, a claimant must be a person “belonging” to a cultural, religious or linguistic community. “Belonging” means one is bound by some or other tie to something and to prove membership of a cultural, linguistic or religious community some concrete tie of affinity must be proved to exist between the individual and the community (e.g. a claimant has to show that they practice a religion and are actively involved in the religious life of their community). What is important is that the claimant demonstrates a history of shared experience and identification and has chosen to maintain such association with the particular community (Currie & De Waal, 2013: 628-630).

8.9.2.1 Content of the right
With regard to the content of the right, the negative phrasing “may not be denied the right” indicates that members of communities may freely engage in the practice of culture, language and religion without interference by the state or from any other source. It seems that there is a commitment to the maintenance of cultural pluralism even where this requires positive measures to be taken by the state to ensure the survival and development of minority cultures where they are threatened by disintegration. In other words, a state committed to cultural pluralism cannot simply remain neutral. This right also advocates positive measures by the state in support of vulnerable or disadvantaged cultural, religious and linguistic communities that lack resources for the development and preservation of their culture.

The right to form, join and maintain cultural, religious and linguistic associations and other organs of civil society, is included in section 31(1)(b). The Constitutional Court in In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 2 SA 97 (CC) pars 23-27, referred to “associational individual rights” as “those rights which cannot be fully or properly exercised by individuals otherwise than in
association with others of like disposition”. These associational rights are now specifically conferred in section 31 on persons belonging to cultural, religious and linguistic communities. They are also included elsewhere in the Constitution where they apply universally (e.g. the individual rights of association in s 18; freedom to form political parties and participate in political activities in s 19; and collective employee and employer rights in s 23). “Organs of civil society” usually refer to private and unofficial associations of citizens of the state and, for the purpose of section 31, they could include examples of cultural and religious associations such as schools, churches, seminaries, publishing houses, and radio and television stations. In this context section 31(1)(b) means that persons may, in community with others, form, join and maintain such associations without interference from the state or any other source.

Finally, section 31(2) stipulates that the exercise of minority rights may not be inconsistent with other fundamental rights. This means that constitutional protection of community identity does not licence a community to violate the rights of its individual members.

8.9.3 A right to participation in cultural life

Section 30 of the Bill of Rights reads as follows:

“Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

8.9.3.1 Content of the right

One may say that section 30 provides for the right of the individual to use the language and participate in the culture of their choice, whereas section 31 (discussed above) provides for the collective exercise of the right together with others of the same language or culture. Therefore, since section 31 now protects communal interests in culture, religion and language (discussed above), section 30 provides additional ground as it were for the protection of an individual’s interest in joining or retaining associations with a particular cultural or linguistic community.

An interesting case in which the right to participate in the cultural life of one’s choice was applied in the school environment, is MEC
for Education, Kwazulu-Natal v Pillay 2008 (1) SA 474 (CC). In this case, the Durban Girls’ High School prohibited a Hindu girl from wearing a nose stud, because the school’s code of conduct banned the wearing of any other jewelry except elementary earrings. The Constitutional Court expressed explicit sympathy in favour of the effective accommodation of cultural and religious diversity. The Court held that the ban in the code of conduct and the absence of a mechanism to provide for exemptions on cultural and religious grounds, constitutes unfair discrimination. The Court accepted in the circumstances the wearing of a nose stud by a Hindu learner as a subjective expression of her cultural and religious identity. The fact that the learner wore the nose stud voluntarily did not make any difference to the court. According to the Court, the protection of mandatory as well as voluntary cultural and religious practices is in line with the Constitution which does not only allow, but confirms, encourages and celebrates diversity. It seems as if the Court sends a message with this judgment that it will not condone intolerance of the expression of religious and cultural practices and traditions, and that it will go out of its way to protect and promote diversity as recognised in the Constitution.

8.9.4 Conclusion

The Bill of Rights is primarily a document guaranteeing individual rights. Section accordingly 30 provides that everyone has the right to use the language and participate in the cultural life of their choice. However, section 31 provides that individuals belonging to the same cultural, religious or linguistic groups may associate with one another and act jointly in preserving their identity. Section 31 places this right in the context of a list of rights aimed at guaranteeing individual freedom and equality, though. The Constitution must therefore be interpreted as respecting collective cultural institutions and practices only in so far as they are compatible with the list of fundamental rights in the Bill of Rights (Currie & De Waal, 2013:624-642).

8.10 Education Rights

Something needs to be said about the education rights guaranteed in the Bill of Rights, because they are the starting-point for all laws and policies relating to education and have a profound influence on
education.

Section 29 of the Bill of Rights provides the following:

“(1) Everyone has the right –
(a) to a basic education, including adult basic education;
(b) to further education, which the state through reasonable measures to make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account –
(a) equity;
(b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.”

8.10.1 Introduction

There are many issues in the school situation related to the right to education, for example:

• How does the right to equal access to educational institutions affect the admission policies of schools?
• The importance of mother-tongue education in basic education
• The duty of parents to ensure that their children attend school
• The impact of disciplinary measures on the right to education. The education clause has had an eventful background and is the product of prolonged negotiations. The final version of the provision in the Constitution has been proclaimed a victory for continued commitment to consensus by everyone involved in its drafting.
8.10.2 The rights to basic and further education

The right to basic education imposes a duty on the state to provide such education in order for the right to be enjoyed and fulfilled. It is an unqualified right requiring the priority attention of the state, also in respect of budgetary allocations. The right requires the state to provide sufficient schools, educators and support and other incidental services in order to ensure reasonable access to basic education for everybody. The state is also obliged to provide the education in an official language of one’s choice where reasonably practicable.

The right refers to basic education, which means education up to a level of functional literacy, in other words, reading, writing, arithmetic, and an elementary knowledge or awareness of economics, culture and politics. That is an education probably equivalent to primary education, which in South Africa equals education to the end of the seventh grade. It refers in other terms to education of a standard that would enable a person to enjoy the rights and fulfil the duties identified with citizenship. In the South African context, “adequate” education could also refer to a standard of education that empowers people to rise above the poverty cycle and compete effectively in the labour market, enables people to understand and enjoy their newly acquired democratic values, rights and freedoms, encourages people to participate in and protect the fledgling democratic system, and enhances their dignity and feeling of self-worth as human beings.

The right to “further education” has been defined by the Department of Education to mean education from grades 10 to 12 (the highest school grade), including general and career-specific education provided by technical, vocational and other colleges and institutions, a definition which excludes higher education. There is no grammatical or legal basis for this restriction of the general inclusiveness of the ordinary dictionary meaning of the word “further”:

First, international and foreign law supports a view that further education should include all education above primary education. The narrow South African view seems unfounded in law and out of step with international norms. “Further education” should be
regarded as an open-ended concept that includes all forms of education above basic education.

Second, the fear that a right to higher education would impose an unbearable burden on the state is unfounded. Section 29(1)(b) provides that the state, through reasonable measures, must make further education progressively available and accessible. This specific limitation provision recognises that the enjoyment of the right to further education largely depends on state resources. All education above basic education is thus in any case subject to this condition. It may accordingly be asserted that insofar as higher education is indeed available and an applicant complies with reasonable admission requirements, he or she has a right to higher education at the institution and in the course of their choice, implying that a university cannot arbitrarily refuse anyone admission.

The qualification “which the state, through reasonable measures, must make progressively available and accessible” in section 29(1)(b) recognises the shortfall in current education provision and allows the state to move progressively towards full compliance. In dealing with the rights of access to health care services (s 27) and adequate housing (s 26), which are also subject to the availability of resources, the Constitutional Court expected from the state reasonable policies to fulfil them. It found government policies giving effect to the rights to be inadequate in certain respects and therefore not fulfilling the state’s reasonable obligations under those rights. Based on the same standard of reasonableness, it should be possible to scrutinise in similar fashion the constitutionality of the current state of education provision, especially to the very poor in the township and rural areas.

8.10.3 Education in the language of one’s choice

Although South Africa is recognised as a multi-lingual society (e.g. the recognition of 11 official languages), it is essential that the needs and sensitivities of our society are given express reference in this right (i.e. the right to education in a public educational institution in the language of one’s choice). In terms of this right, the state has an obligation to consider all reasonable educational alternatives when it decides on how to provide education in the
language of one’s choice, especially when it comes to the provision of basic education through mother tongue instruction.

Section 29(2) specifically provides that the state must consider all reasonable alternatives, including single medium institutions, taking into account equity, practicability and the need to redress the results of past discrimination. This does not constitute a right to single-medium institutions, but it imposes a duty on the state in choosing the appropriate means in general or in a particular case, to consider all reasonable alternatives in a bona fide way, taking into account what is educationally appropriate, as well as the listed factors of equity, practicability and the need for redress. The express reference to single-medium institutions means that within a range of possibilities that may also include dual and parallel medium instruction, at least this alternative should always be considered, and the authorities must be able to justify their actions if this alternative is not chosen. The factors of equity, practicability and the need for redress carry equal weight and must be balanced. The duty imposed by the right applies to particular institutions as well, meaning that when an education department or governing body of an existing facility decides on the medium of instruction, it must comply with section 29(2).

This provision has given rise to much controversy. The policy of the government favours English over any other official language, and there is a deliberate drive to force all schools not providing education in English, to change over to English instruction, even at the cost of mother tongue education. That this policy is regarded by many to be inconsistent with section 29(2) is borne out by the fact that several cases about this issue came before the courts so far. Examples are *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T), *Governing Body of Mikro Primary School v Western Cape Minister of Education* (332/05) [2005] ZAWCHC 14, *Western Cape Minister of Education v Governing Body of Mikro Primary School* (2005) ZASCA 66, *Seodin Primary School v MEC of Education, Northern Cape* 2006 4 BCLR 542 (NC).
8.10.4 Equal access to educational facilities

The right to equal access to educational facilities is another crucial element of the right to education. For example, a learner that has reached “school-going age” may not be refused admission to school even if the learner’s age is below the prescribed age for admission (as decided in Minister of Education v Harris 2001 11 BCLR 1157 (CC)). It is regarded as an overriding principle and no discrimination on the basis of race or any other ground is allowed (e.g. a language test for admission will be unlawful). In this context, single-medium institutions may not be used to deny anybody equal access or to frustrate redress policies, but education in the language of one’s choice remains a fundamental right. Even when a single-medium institution proves to be impracticable in a particular instance, the obligation to provide mother-tongue education remains on the state and only in exceptional circumstances would it be possible for it to maintain that it was impracticable to provide any other form of mother-tongue education.

Equal access to educational institutions was included in the 1993 Constitution but this right may now be covered as effectively by the general equality principle in section 9 (Malherbe, 1997:64-66).

8.10.5 Freedom of choice in educational institutions

The right to establish privately-funded educational institutions is recognised by section 29(3) and reflects the freedom of choice in educational institutions. The section also indicates that the state may not interfere with the establishment of such institutions. The predecessor to this right (s 32(c) of the 1993 Constitution) evoked a lot of criticism in In re: The School Education Bill of 1995 (Gauteng) 1996 4 BCLR 537 (CC), when the Constitutional Court held that section 32(c) referred to the establishment of private educational institutions based on a particular language, culture or religion and not to public educational institutions. This uncertainty has now been resolved with the express reference to independent institutions in section 29(3).

Participation in the cultural life of a community is hardly possible without the right to learn about a particular culture and to teach it. These “independent” schools would therefore cater for the
particular needs of cultural, linguistic and religious communities (see paragraph 8.9.2). However, these schools have to register with the state and maintain recognised public education standards. This requirement is in line with international law which, in essence, determines that the state may set the standards and conditions for the exercise of this right (Art 5(c) of the Convention against Discrimination in Education of 1960).

Section 29(3) contains another internal qualifier that independent educational institutions may not discriminate the basis of race. The fact that the reference is to race only, implies that a certain measure of discrimination may be necessary on other grounds in the exercise of this right. For example, a cultural, religious and linguistic community may wish to set up schools admitting only female learners, or learners practicing a particular religion or speaking a particular language. In such instances the discrimination will not be unfair or unreasonable. However, if the state wants to intervene and regulate or prohibit admission criteria based on other grounds than race, its actions will have to be tested against the general limitation clause in section 36 to determine whether they are reasonable and justifiable (Currie & De Waal, 2013:638-642).

Note finally that section 29(4) provides that the right to establish and maintain independent educational institutions does not exclude the state from subsidising such institutions. This provision recognises that private interest groups may be involved in the provision of education and that the state may co-operate with such interests.

The right of communities to practice their own culture, language and religion through the establishment of their own (private) educational institutions, is beyond doubt. But these “communal” rights may not be used to discriminate against or deny the individual his or her human rights guaranteed in the Bill of Rights. Note also that the Schools Act refers specifically to the option of home schooling as another form of independent schooling.

8.10.6 Conclusion
The education right provides a legal framework for the development of an education system that accommodates the
legitimate concerns, needs and aspirations of all South Africans. All role-players in education are involved in developing a system of education that facilitates –

- everyone’s right to education
- equal access for all to educational facilities
- mother-tongue instruction where reasonably practicable, and
- freedom of choice in educational institutions, including the right of cultural, religious and linguistic communities to establish their own institutions

8.11 Just Administrative Action

Section 33 of the *Bill of Rights* reads as follows:

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

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

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

   (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
   (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
   (c) promote efficient administration.”

In terms of the above section 33(3) the *Promotion of Administrative Justice Act 3 of 2000* (RSA 2000b) was adopted. This Act gives more detail on the content, scope and application of the right to administrative justice. It also determines the grounds for judicial review of administrative action.

8.11.1 Introduction

Administrative justice or “just administrative action” lies at the heart of administrative law and is dealt with more fully in the monograph on the foundations of the law (e.g. *Chapter Ten* on the enforcement of education law). It is a complex topic and only a few points are highlighted here. If you should require more information, please consult Currie & De Waal (2013) and other relevant sources.

There are many situations in school that involve the administrative justice question, for example:
• Two learners are suspended without “due process”
• The parents complain that superficial and irrelevant reasons were given for their suspension
• The disciplinary committee is accused of not being impartial and objective in its investigation into the learner’s misconduct.

The right to administrative justice belongs to everyone but is aimed particularly at protecting the individual in his or her actions (relationship) with –

• the state administration (e.g. national and provincial education departments and their officials), and
• other organs of state (defined in section 239 – e.g. public schools, teachers’ unions).

8.11.2 Administrative action

The term “administrative action” includes all the acts performed by officials or institutions exercising public power (see, for example, the reference in section 2 of the Act to “conduct” which includes administrative action (acts)). It includes –

• “law-making” administrative actions (e.g. the Minister or Premier issuing regulations in terms of education legislation; a school governing body drafting school policy in terms of the enabling legislation)
• “implementing” administrative actions (e.g. the Head of Department dismissing an educator in terms of the Employment of Educators Act 76 of 1998 on the ground of misconduct; or the school (governing body) suspending a learner for one week in terms of the Schools Act)
• “controlling” administrative actions (e.g. the Minister reviewing the dismissal of an educator by the Head of Department in terms of appeal procedures in the Employment of Educators Act; or the Head of Department reviewing the decision by the school to suspend the learner in terms of appeal procedures in the Schools Act).

8.11.3 Content of administrative justice

In terms of section 33 of the Constitution, government officials and institutions vested with state authority, as well as other organs of state, must refrain from abusing their powers in their actions vis-à-
vis the individual (e.g. abuse of discretionary powers, *mala fide* (acting in bad faith) and *ultra vires* (outside the scope of authority) conduct, unreasonable decision-making and unfair procedures during enquiries). All actions by the state administration and other organs of state must, therefore, be performed lawfully, reasonably and procedurally fair.

For an administrative action to be performed “lawfully”, it must comply with all the requirements of the law. In effect, it means that the relevant prescriptions of the *Constitution*, other legislation, common law and case law (i.e. the sources of the law) must be complied with. To be “reasonable” an administrative action must have a reasonable effect (e.g. the official must have exercised his or her discretion in a correct manner, the decision taken must be based on objective facts and circumstances).

A “procedurally fair” administrative action relates for example to the “fair hearing” and “due process” procedures referred to in section 9 of the *Schools Act* (RSA 1996b). Fair procedures ensure that both parties have the opportunity to present their case before a presiding officer who is objective and impartial. Detailed provisions on “due process” (which is actually an American concept) are found in recent education legislation (e.g. the *Schools Act* stipulates that a learner may not be suspended or expelled without “due process”, the *Employment of Educators Act* contains detailed prescriptions on how to conduct fair procedures during inquiries into educator misconduct).

A person whose rights have been affected by an administrative action, has the right to be furnished with “written reasons”. Reasons should be rational and suitable which, for example, means that the reasons must be justified and not arbitrary. The government official must be able to explain and to justify his or her decision through the furnishing of reasons. In *Moletsane v Premier of the Free State* 1996 2 SA 95(O) an educator suspended upon charges of alleged misconduct, questioned the reasons furnished by the Premier for the suspension. The Court laid down a general rule for the level of detail required in the furnishing of reasons:

“a correlation between the action taken and the reasons furnished: (t)he more drastic the action taken the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished” (1285B-C).
8.11.4 Judicial control by the courts
The High Courts have always had a common law (inherent) power to review all administrative actions. However, an important form of statutory judicial review will also be provided in terms of the Act, which codified administrative law to a large extent.

8.11.5 Administrative control by the state administration
Not only are the courts instructed to watch over administrative justice, section 33(3) also refers to control exercised by independent and impartial tribunals. This means that inside the state administration, important channels must exist for the internal control of administrative action (e.g. the controlling actions of the Minister, Premier or the Head of the Department to determine whether an administrative action by another official was performed lawfully).

8.11.6 Administrative justice: an underlying democratic value and principle
Administrative justice is essential to democratic, transparent and accountable government and features prominently in section 195 of the Constitution (RSA 1996a). The public administration and organs of state are compelled to adhere to these underlying democratic values and principles which stipulate, for example, that:
- services must be provided impartially, fairly, equitably and without bias
- the public administration must be accountable
- transparency must be fostered by providing the public with timely, accessible and accurate information

This means that the state (including education) administration and organs of state (e.g. public schools, universities, teachers’ unions) are bound by the Constitution and that they must strive to achieve the spirit and underlying values of an open and democratic society.

8.11.7 Conclusion
Administrative justice ensures democratic, transparent and accountable government. It is also an essential ingredient for
democratic, transparent and accountable education governance at all levels. If an action by an education authority or organ of state does not comply with the provisions of administrative justice, the High Court may intervene with judicial review. However, specific channels for internal control of administrative (education) action are provided for in legislation and these remedies must usually be exhausted before the Court is approached for judicial review.

Fair procedures or “due process” forms part of administrative justice and of all disciplinary actions in education. Enquiries and investigations into misconduct of officials and educators, and investigations and enquiries into misconduct and similar provisions must be included in the policies and codes of conduct of individual schools (e.g. s 9 of the Schools Act and guidelines issued in this regard). Some of the basic elements of “due process” that have to be addressed by the school governing body in adopting a code of conduct for the school, include:

• fairness requires the opportunity to be heard and being given adequate notice of any action
• fairness requires that the official in charge of the proceedings be an impartial official free of bias
• the right to information protected in terms of section 32 must be complied with
• legal representation is not necessary or permitted for all disciplinary actions; an individual may however require legal representation in complex cases or situations which may have serious consequences
• written reasons are compulsory where rights are affected; reasons that are vague, inappropriate and insubstantial are likely to be challenged and pronounced invalid
• the right of appeal to a higher authority is usually provided for in legislation; these authorities exercise control over the actions of other officials
• access to a court is a fundamental right (s 34) and refers to judicial review by the High Court when one is dissatisfied with a lack of administrative justice in the above process.
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