Foundations of Law and Education Law

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W Bray
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Critical readers: JL Beckmann, G Carpenter and JM Squelch

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Introduction

This study offers guidance on the nature of the law and its influence in people's lives. The focus of the study is on the application of the law in the public education sector and its implications for the relationships that exist in education.

The purpose of the law is to regulate relationships in society in order to ensure peace, order and justice. This study briefly explains what the law is, how it regulates relationships, which rights we have under the law, what the sources of the law are, and how we interpret the law. The place and application of education law in the legal system is discussed, and specific attention is given throughout to the *Constitution* as the supreme law of the Republic. Attention is also given to the role of the courts in the application of the law and the study includes notes on the proper reading of court decisions.

The most important law in South Africa is the *Constitution of the Republic of South Africa of 1996* (hereafter *Constitution*). The *Constitution* is the supreme law of the Republic and has brought far-reaching changes to the legal system of South Africa. It embodies the norms, values and principles underlying our constitutional democracy and also contains a *Bill of Rights* which entrenches the fundamental human rights of every person in South Africa.

Education law is a rapidly developing field of law which has become very important, particularly in the wake of the new constitutional dispensation and transformation in education. All persons interested in education and especially education officials, educators, school gover-

nors, parents and learners should have a basic knowledge of the law and how it functions in the education environment.

This study provides a stepping stone towards a better understanding of the law and of education law in South Africa. The chapters in this study are as follows:

- An introduction to the history of South African law – Chapter Two
- What is the law? – Chapter Three
- The supreme law – the *Constitution of the Republic of South Africa 1996* – Chapter Four
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The *Constitution* has been drafted in plain language to make it more accessible to most people. Because of limited space, abstracts from the *Constitution* and other relevant legislation mentioned in the study cannot be included in this volume and it is, therefore, highly recommended that you obtain copies of the *Constitution* and such other legislation for the purpose of this study.

Although many aspects of the law are touched upon in this study, it remains an *introduction* to the law. For more information on a specific topic, please consult the literature in the *List of Sources* at the end of the study.

Chapter Two

The History of South African Law – an Introduction

Outline of this Chapter

This Chapter highlights the history of South Africa and the impact that history has had on the legal system and its development.

The history of a country usually has a major impact on the development of its legal system and South Africa is no exception. It is quite easy to identify the influence of the Dutch settlement, British rule, African indigenous customs, apartheid and constitutional transformation on the moulding and development of the South African legal system. The history of South Africa reveals many aspects of its legal history and also explains the present character of its law.

If you are interested in a more comprehensive reflection on the history of South African law, please consult Kleyn & Viljoen (2002) as indicated in the *List of Sources*. What follows is a brief summary of South African legal history.

2.1 Roman-Dutch law

Roman law was the law of the Roman Empire and was received in Western Europe over the course of the many centuries of Roman occupation. In the Netherlands, Roman law merged with Dutch law and became known as Roman-Dutch law.

In 1652 Jan van Riebeeck came from the Netherlands to establish a refreshment station at the Cape for the ships of the Dutch East India Company (VOC) on their way to and from Asia. These settlers lived according to Roman-Dutch law, the system they were acquainted with. In this way, Roman-Dutch law became the common law of South Africa.

2.2 English law

Dutch rule at the Cape came to an end in 1806 when the British took over the Cape. As the years passed, certain territories gained independence but were again annexed and colonised by the British. Although Roman-Dutch law was never abolished by the British authorities, it was inevitable that English law would have a profound influence on the legal system. For example, the old courts of the *landdrost* and *heemraden* were replaced with the British system of resident magistrates. Because the official language became English, judges and advocates also received their training in England and turned to English legal authorities when deciding cases and resolving legal problems. English law was received more formally through legislation (e.g. the English law of procedure and evidence, the jury system (later abolished), insolvency law and company law). English law was also applied in Natal and later spread throughout the rest of South Africa (Unisa 2001-2004:26-30).

2.3 Indigenous law (customary law)

Although the Dutch and the British brought European or Western legal systems to the Cape, there were many indigenous people living in South Africa in accordance with their own laws and cultures. This legal system is called indigenous law or African customary law and was unwritten law.

Only during the second half of the nineteenth century these

systems of law were officially recognised by colonial authorities. In KwaZulu-Natal much of indigenous law is now contained in a code which is formally recognised. In the past, indigenous law was recognised as a special legal system which could be applied only to blacks but this has recently been changed.

The *Constitution* now provides that the courts must follow indigenous law where it is applicable. However, indigenous law must always be in line with the *Constitution*, which means that when a provision of indigenous law is in conflict with the *Constitution*, there is a strong chance that it will be declared unconstitutional. In this way, indigenous law is being adapted systematically by Parliament and the courts to comply with the *Constitution*.

2.4 Apartheid and constitutional transformation

In 1961 South Africa became a republic and gained independence from Britain. Years of political upheaval and civil unrest followed, during which legal mechanisms for airing black dissatisfaction were blocked and security legislation was tightened. Despite rising tension, international pressure and economic troubles, the white minority government expanded its policy of separate development during the late seventies and early eighties and instituted the so-called "independent states" as well as various self-governing territories.

As a result of the escalating violence and the determination of the majority of the population to increase its pressure on the apartheid government, the 1983 Constitution was adopted with the objective to broaden the democratic basis of government but also to absorb opposition to apartheid. Despite the changed government structures, the white minority remained in power while black majority failed to get representation in the central structures of government – actually forcing them to seek their constitutional future in the black homelands. This made the position of urban

blacks untenable and opposition to the white government intensified. Eventually, the white government succumbed to the escalating violence in the townships, and the increasing international political and economic pressure.

In 1990 the former State President, FW de Klerk, released Mr Nelson Mandela, unbanned the ANC, and negotiations for a non-racial democratic constitution could begin. All major political groupings participated in the negotiation process. The constitutional process evolved without significant violence and unrest and brought about a dramatic change from a non-democratic state to a full non-racial democracy. The process of democratisation comprised two stages. First, the old apartheid Parliament adopted the interim *Constitution of the Republic of South Africa, 102 of 1993*, as agreed upon at the Kempton Park negotiations. This *Constitution* came into effect on the historic date of the first democratic elections in South Africa – 27 April 1994. On that date Mr Nelson Mandela became the first democratic President of South Africa. The newly elected democratic Parliament then formed a Constitutional Assembly which took two years to adopt the final *Constitution of the Republic of South Africa of 1996*.

This final *Constitution* succeeded the 1993 Constitution in February 1997 after it was certified by the Constitutional Court that the *Constitution* complied with the basic democratic principles agreed upon during negotiations and included in the interim *Constitution*.

The *Constitution* is discussed more fully in Chapter Four. Suffice to say here that it is a value-laden document which, for example, enshrines the basic democratic norms and values a developing South African society aspires to. It also recognises the different legal systems that have contributed to the South African legal system but emphasises that all legal development must be in line with the *Constitution* (Kleyn & Viljoen 2002:37-40).

2.5 Conclusion

The history of South Africa has had a marked influence on the legal system. Equally remarkable is the fact that the intense political struggles of the last three decades have culminated in a constitutional democracy that is still evolving. The process of transformation has ensured that all the legal systems that have influenced the South African system over the years have obtained recognition in the *Constitution*, provided they are not inconsistent with the *Constitution* as the supreme law.

Chapter Three

What Is The Law?

Outline of this Chapter

This Chapter highlights the basic characteristics of the law, the impact of the law on people's lives and on the public education sector, in particular.

3.1 Introduction

Before one examines what the law is, it is important to know why (or to what extent) the law affects the individual, other persons and the South African society. The purpose of the law is to regulate the relationships in society orderly and equitably. There must be law and order, but there must also be justice. We must respect and observe the law, because if everyone does whatever they want, there will be no order or justice. We will have anarchy.

The law accordingly impacts our lives in many ways. For example, the law tells me to register my child at birth; when people marry, they may conclude a contract of marriage which is recognised in law; people may enter into legal contracts to buy and sell goods from one another; the law determines the norms and standards of the education system and prescribes rules and regulations for school governance. The law regards every person as a bearer of rights and duties (e.g. I have the right to human dignity and basic education; I also have the duty to respect another person's right to

dignity and basic education). All adult South African citizens have the right to vote for their representatives in government; in turn, the government governs the country and expects citizens to obey the law and to pay taxes. (Rights and duties are discussed more fully in *Chapter Six*).

It is apparent that the law forms part of the daily life of every person in South Africa. Before the individual characteristics of the law are discussed, here is a summary of these characteristics:

- The law is a body of norms and rules that govern private (e.g. personal) and public (e.g. governmental) action and interaction
- Society must accept these norms and rules as the law
- The law must create (legal) order, certainty and justice in society
- The law is applied and enforced by the institutions of the state (e.g. government departments and the courts)
- The law must be obeyed by all members of society, including the state, and, when it is disobeyed, the (legal) balance should by restored

3.2 The law is a body of norms and rules that must be accepted by society as its legal system

Not all norms and rules in society are "legal" norms and rules. For example, some of the norms and rules that govern human behaviour (e.g. moral and ethical rules) are not legal norms and rules. Moral norms and standards do not bind the whole community. For example, many people in South Africa regard adultery as immoral and wrong, but it is not regarded by the law as a crime. In other instances, moral or ethical norms may also be legal norms. For example, the religious commandment "thou shall not kill" also constitutes a legal norm, because murder is a capital offence and refers to the killing of a person intentionally and without justification (Unisa 2001-2004:3-8).

It is not easy to determine the nature of the body of legal rules and

norms (the legal system) but it will become clearer as you progress with the study. However, at this stage one may conclude that the legal system embraces many branches of the law such as human rights law, constitutional law, administrative law, law of persons and the family, law of contract, commercial law, and labour law. Once a norm or rule has been accepted as a legal norm or rule (either through common law, legislation or a court decision), it has the force of law. Legal norms and rules are enforced in a court of law or by bodies or institutions empowered to exercise such control. For example, the provisions of the *Constitution* (including the human rights included in the *Bill of Rights*) and the provisions of the *South African Schools Act of 1996* are legal norms that must be obeyed and, ultimately, may be enforced by the courts and other appropriate bodies.

Legal norms and rules are found in the different sources of the law, for example, in legislation (the *Constitution* and other legislation like the *South African Schools Act* made by competent legislative bodies); in unwritten law that has developed over time (common law); and in the judgments of courts (in other words, court cases). The sources of the law and the respective "law-making" bodies are discussed in *Chapter Seven*.

If society has to observe the law of the country, it is evident that it has to approve and accept the body of norms and rules as the law of the country. The law should therefore not be enforced by a brute display of state (or government) power, but should be observed because it reflects the shared values of the majority of society. This also means that the law cannot be static, but has to evolve (grow) with society to reflect its aspirations and changing needs, circumstances and values. When legal norms and rules do not reflect the current values and norms of society, people lose belief and confidence in their legal system, and may eventually proclaim the law to be "unjust". The law made under the former apartheid regime in South Africa, which excluded the majority of the population from

representation in government, bears witness to this. (Kleyn & Viljoen 2002:6-8; Hosten et al 1995:25-33).

Finally, the law should reflect the shared values of society because it is this underlying value system that holds society together. The *Constitution* has introduced a new system of constitutional democracy for South Africa and not only is the *Constitution* the supreme law of the country, it is also a value-laden document which enshrines human dignity, equality and freedom as the most important underlying values of the South African society. The *Constitution* and fundamental rights are discussed in *Chapters Four* and *Six*.

3.3 The law governs relationships

One of the most important characteristics of the law is that it consists of rules and norms that regulate action or interaction between (or among) legal subjects (or bearers of rights and duties). In other words, the law regulates and facilitates relationships that have significance in law (legal relationships).

3.3.1 Introduction

Legal relationships and the persons involved (legal subjects) may vary. Before one examines the different legal relationships, one must determine who these "persons" are. In the eyes of the law a "person" may be any of the following:

- A natural person (a human being – e.g. a child, an adult, an educator, a parent)

Human beings are born and they die; they also go to school, enter into contracts, and participate in the governing of their school and the government of the country. However, not all human beings have the same capacity to participate in (legal) relationships (e.g. a child may not enter into a contract without assistance by the parent or guardian; only pensioners are entitled to certain old-age benefits).

- A juristic person (also called an abstract entity or legal person – e.g. a school, a university, a company)

A juristic person has the capacity to perform legal actions such as buying and selling, suing or being sued, and acting as a party in a court case. Juristic persons are not natural persons, but have some of the competencies of a natural person. They exist in law as abstract (intangible) entities and usually have a body of people looking after their interests and acting on their behalf. For example, a company, university or public school are all entities that may enter into (legal) relationships. They take part in legal activities through a body of persons (e.g. a board of directors of a company, the council of a university, the governing body of a school) which acts in the name of the juristic person, on its behalf and in its interest. Juristic persons have their own "life span" which is not dependant on the life of these bodies acting on their behalf. The juristic person exists until it is dissolved/terminated in terms of the law, but the bodies acting on their behalf are elected or appointed regularly and their membership changes.

A "person" in terms of the law is therefore either a natural person or a juristic person. The person is a legal subject and is a bearer of legal rights and duties. A juristic person does not have all the rights and duties of a natural person (e.g. a company or school cannot get married or go to prison!), but it certainly has the capacity to perform its functions well and to be held accountable for it.

Government bodies or institutions such as Parliament, Cabinet, the National Department of Education, the provincial education departments, the South African Police Services and local governments, are all juristic persons. Because they are public juristic persons, they are not so much bearers of rights, but they do have duties and they are subject to the law. This will become clearer in the ensuing paragraphs.

3.3.2 The different legal relationships

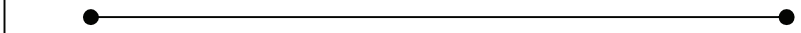
Persons act and interact in different legal relationships. What follows is a short explanation of the nature of these relationships.

Private-law relationships

The law governs the conduct of natural persons in their legal relationships with one another. For example, if Janet Buyer decides to enter into a contract to purchase a car from Joyce Dealer, she and Joyce Dealer decide voluntarily to contract with each other without anybody forcing them into it. Each party decides on her own performance (e.g. the purchase price and the type of car) and they enter into the transaction voluntarily and on equal terms, each person acting in her own (private) capacity.

Private-law relationships are usually identified as equal (horisontal) relationships between parties acting voluntarily, on equal terms and in their own (private) capacity.

Figure 1: Private-law relationship



Natural person/
Natural person/
Juristic person
Juristic person

- Horizontal (equal) relationship
- Voluntary agreement

If Janet decides to buy a second-hand car from the Department of Transport at its annual second-hand vehicle sale, or when the Department of Transport buys a car from the car company Auto Dealer, the relationship remains a private-law one. The juristic person (e.g. the Department, the company) acts via its spokesperson (e.g. the official in charge of second-hand vehicles of the Depart-

ment, the salesman of Auto Dealer) who acts on behalf and in the name of the entity he or she represents. The horisontal nature of this legal relationship remains intact because the contractual parties act within the ordinary contractual (horisontal or equal) relationship regulated by private law. None of them may force the other into signing the deal and they therefore contract on equal terms.

You might have realised quite rightly that the Department of Transport is a government body (a bearer of government authority), but in this case it enters into a private-law relationship. It cannot negotiate the contract from a position of authority (e.g. it cannot force Janet into the contract or force her to buy a specific car or to pay an amount she has not agreed upon as the purchase price). The public-law relationship is discussed more fully below.

Finally, it is apparent that natural persons as well as natural persons and juristic persons (entities) may enter into private-law contracts with each other. In each case one has to consider carefully who the parties are, the type of relationship and the legal position of each party (e.g. do they act as equals, or is one party in a position of authority?).

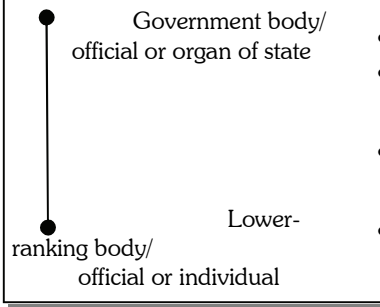
Contractual relationships (which fall under the law of obligations) usually fall within the private-law domain of the law and are called private-law relationships. Other private-law relationships occur in family law, the law of persons, property law and indigenous law, to name but a few. Private law is a branch of our law and has its origins in common law: common law (unwritten law) is therefore an important source of private law. However, it is important to understand that the private-law branch of the law does not function in isolation and in a watertight compartment of the law. Like the other branches of the law, private law has been influenced and developed by other branches of the law. The sources of law are discussed in *Chapter Seven*.

Public-law relationships

When one refers to public law or public-law relationships, the authority of the state comes to mind. When one of the persons (or parties) involved in a legal relationship is vested with government authority (acts from a position of power), it is clear that the relationship cannot be an equal or horisontal one because the other party is in a subordinate (subservient) position. This means that such a legal relationship can also not be an horisontal or equal one because the other party is in a subordinate (subservient) position. This means that such a legal relationship will be a vertical one, or a relationship of authority, and the position of power is held by a body/official bearing *government authority* (e.g. the Department of Transport, the Department of Education, the head of the provincial education department, the public school). The meaning of government or state authority will be discussed more fully in *Chapter Four*.

Government officials, bodies or institutions who act on behalf of government always derive their authority from the law. It is one of the most important characteristics of a democratic and constitutional state that no government body has any authority not conferred on it by the law. Legislation is a very important source for such authority and consists of laws (or statutes) made by Parliament, the provincial legislatures (e.g. the *South African Schools*

Figure 2: Public-law relationship



Acts of 1996 and the Gauteng *School Education Act of 1995*), or municipalities. An official or a body acting in such an authoritative manner may coerce (force) the other party to act in a certain manner (e.g. to pay rates and taxes, to comply with municipal building regulations, to endure punishment for a criminal act, to adhere to employment conditions of the public education sector, to be subjected to disciplinary measures in the public school, etc).

It is clear that government bodies/officials may use their state authority in the public-law relationship to coerce the other party (lower body or individual) into acting in a specific way. However, the objective of the government must be to act in the interest of society (the people) and to serve the public interest. Despite occupying a subordinate position, the other party (lower body or individual) is not helpless in terms of the law. In fact, the state (via its government bodies) is supposed to recognise and protect the other person in this relationship (e.g. by protecting fundamental human rights) and in this way shields a person from the abuse of state authority.

It is apparent that the official/body in the authoritative position can be an organ of state (e.g. a provincial department of education, the Minister of Education, the principal of a public school acting on behalf of the provincial education department, or the public school acting via its governing body). The person in the subordinate position could be a private individual (a parent of a learner or a local business person) or a private entity (e.g. a private company providing textbooks). However, the party in the subordinate position is not always a person or entity outside the public sphere (e.g. private individuals or companies), but may be another government body/official under the authority of a superior body/official. For example, the Director-General of the National Department of Education may order an official in the Department to perform certain functions; and the provincial Head of Department may dismiss the principal of a public school under certain circumstances and according to

certain procedures.

In these instances a superior government official or body exercises its authority over the subordinate (lower-ranking) official or body. The relationship is a public-law relationship: the subservient official or body is compelled (coerced) to comply with the authoritative power exercised by the superior official or body (e.g. an educator is subjected to a disciplinary inquiry by the provincial Head of Department, or the Head of Department may dismiss the principal). However, these subordinate officials/bodies are also protected by the law against abuse of superior (state) power. The law prescribes, for example, the procedures that must be followed in order to give the official or body an opportunity to state their case.

Finally, public law is an important branch of the law and includes fields such as constitutional law, administrative law and criminal law. The most important source of public law is the *Constitution*, but there are also other very important pieces of legislation in the field of public law (statutes such as the *National Education Policy Act of 1996*). Because the *Bill of Rights* contains rights affecting private law relationships, the adoption of the *Constitution* has brought about even greater interaction between private law and public law.

3.3.3 The public-law relationship in education

At this stage we have to pause to examine the significance of the public-law relationship in the public education sector.

Educators working in the public education sector are in the service of the State (i.e. the National Department of Education or the provincial Departments of Education). These authorities exercise state authority over educators in a typical public-law relationship – the vertical relationship. Both parties are in the public education sector, but the superior party (the employer) exercises authority over the other party in the subordinate position (the employee, in other

words the educator).

Another important facet of the public-law relationship in the education situation is the fact that the educator in the public school in addition holds a position of authority (as the representative of the Department of Education vested with state authority) *vis-à-vis* private individuals (the learners and parents). The application of this aspect in the education situation will be discussed again in *Chapters Four* and *Six*.

Finally, the public education sector functions mainly within the public-law domain. Education authorities and their officials / representatives are vested with state authority, but must always serve the best interests of the learner, of education, and of society. The protection provided in the *Constitution* and the law to the lower-ranking body/official or the individual in the subordinate position will become clearer in the ensuing paragraphs. (The administration of the public education sector and school governance is the title of another monograph in this series.)

3.3.4 Conclusion

Private law regulates equal or horisontal relationships which traditionally fell outside the public-law sphere. The state may be involved in a private-law relationship – then it does not act as the bearer of government authority, but as an equal party to the relationship.

Public law regulates relationships in which the state is involved as the bearer of state authority. Public law determines the extent of state authority and regulates the organisation of the State, the relationship between the different organs of state and between the State and the individual. It is a vertical (or unequal) relationship in which an organ of state (government body/official) is always in the authoritative position.

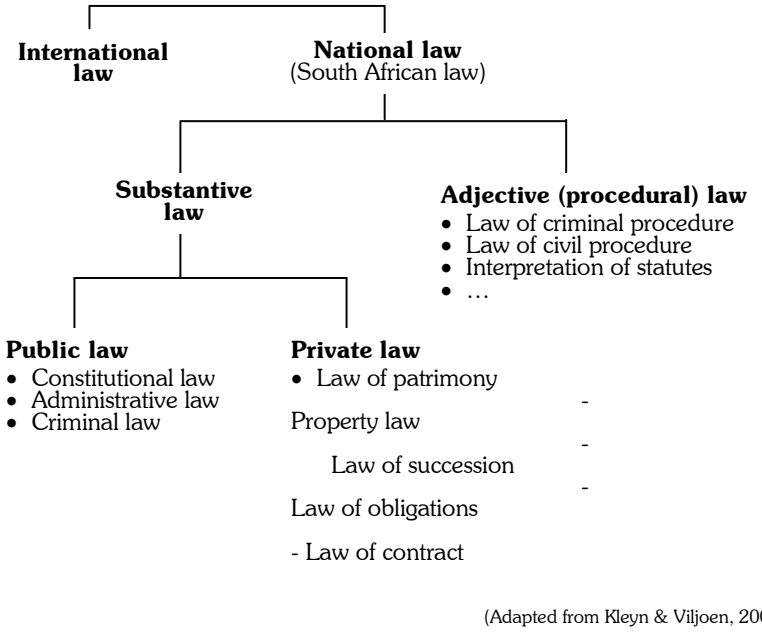
Relationships within the public education sector fall squarely within

the public-law sphere.

The distinction between public law and private law has become artificial and unrealistic. The modern State is powerful and dictates many private-law relationships through legislation (e.g. employment contracts are governed by legislation, the fundamental rights of a child are protected by the State in terms of the *Constitution* and other legislation). The *Constitution*, in particular, which guarantees rights that apply in private-law relationships, has served to blur the distinction between private and public law.

The preceding discussion has touched upon the broad distinction between the two main branches of the law (private law and public law). A wealth of literature is available on these topics and if you are interested in more information on the classification of the law, you should consult the *List of Sources*.

Figure 3: Classification of law



(Adapted from Kleyn & Viljoen, 2002-97)

Bear in mind throughout that legal disciplines have become increasingly interdependent and interrelated and should be studied in their broader constitutional context.

3.4 The law ensures order and justice in society and restores balance

The purpose of the law is to regulate relationships in society in such a way that there is order, peace and justice. Note that mere order is not the purpose of the law; a totalitarian regime also seeks to ensure order. In a democratic system the law must also bring about justice. Accordingly, the *Constitution* aspires to a society based on democratic values, social justice and fundamental human rights (Preamble).

The law is often disobeyed and then peace, order and justice are compromised. Many examples of disobedience come to mind. For example, an educator neglects his duties; a learner is caught peddling drugs on the school grounds; a provincial Head of Department embezzles money earmarked for text books; a parent mistreats his or her child; the employer dismisses the employee unfairly; children and woman are raped and abused; people and industries pollute rivers.

When the law is ignored or disobeyed, the culprit may be charged (or prosecuted) and punished, or the injured party may approach the authorities or the courts for assistance. In this way the law restores the legal balance and maintains harmony in a community or society. For example, the learner who peddled drugs on the school grounds may be suspended or expelled from school; the educator who neglects his duties may be dismissed on the grounds of misconduct; the educator may approach a court to review the case in which the provincial Head of Department dismisses him; a parent or educator may be fined for speeding by the traffic authorities; a court may confiscate the assets of a company found guilty of tax

evasion; the Head of Department who embezzled money may be dismissed for misconduct; the court may sentence the rapist to imprisonment, perhaps even for life; the party who failed to fulfil his or her obligations in terms of a contract may be taken to court and forced to pay damages (compensation) to the other party (Unisa 2001-2004:8).

3.4.1 Institutions and procedures for enforcement

From the examples given above, it is clear that it is not only the courts that are involved in the enforcement of legal norms and rules. In fact, different institutions or bodies may use various means to enforce legal norms and rules. The bodies or institutions responsible for enforcement of the law and the different mechanisms and procedures for enforcement are usually provided for in the *Constitution* and the law.

Internal or administrative control

The *Employment of Educators Act of 1998* determines that the provincial Head of Department may dismiss an educator who is found guilty of misconduct. The Act also makes provision for an appeal to the Member of the Executive Council for education in a province (MEC) if the educator is dissatisfied with the decision of the Head of Department to dismiss him or her. In terms of the *South African Schools Act of 1996*, a provincial Head of Department may expel a learner from a public school, but the Act also makes provision for appeal procedures to the higher authority, the MEC. The *Road Traffic Act of 1989* empowers traffic officers to impose a fine if one exceeds the speed limit, but there are also procedures to challenge their actions.

These forms of enforcement or control are exercised by bodies or officials within the various government administrations (e.g. the national and provincial education department, the transport and traffic department), and are therefore called *internal administrative*

controls. Specific measures are available to punish the transgressor or compensate the aggrieved person (e.g. educators may be warned or fined for misdemeanours, or dismissed for serious transgressions such as sexual harassment of a learner; a learner who has damaged the educator's books may be ordered to pay for the damage he or she has caused). Administrative control forms part of the day-to-day activities of the government administration and ensures that it operates in an open, fair and accountable manner.

The various forms of administrative or internal control are discussed more fully in *Chapter Ten*.

Judicial enforcement/control

The *Constitution* and other legislation also make provision for access to the courts (the judiciary). The judiciary is the branch of government which administers justice: the courts interpret and apply the law to resolve a specific dispute. For example, private persons involved in legal disputes may go to court to have their dispute resolved by means of a *judicial decision* (e.g. company A sues company B for breach of contract; Mrs. A institutes divorce proceeding in the High Court against her husband, Mr. A). In the same way, administrative decisions made by officials in terms of internal administrative control (see above), may be controlled by the courts by means of *judicial control* (e.g. the learner (or her parent) applies to the High Court for judicial review of the case in which the provincial Head of Department expelled her).

The courts resolve legal disputes finally and authoritatively by means of a judicial decision which is published in the law reports. A hierarchy of courts exists in which lower courts, higher courts and special courts have their respective jurisdictions as provided for in the *Constitution* and legislation. Judicial control is dealt with in more detail in *Chapters Nine* and *Ten*.

3.5 Conclusion

The basic characteristics of the law may be summarized as follows:

- The law is a body of norms and rules that must be accepted by society as its legal system.
- The law governs various legal relationships.
- The law may be enforced by the state exercising its authority
- The law maintains harmony (order and justice) in society and restores the (legal) balance whenever legal rules are ignored or disobeyed

Chapter Four

The Supreme Law – the Constitution of the Republic of South Africa

Outline of this Chapter

In this Chapter the nature of a constitution, the basic characteristics of the South African Constitution and why it is called the highest (supreme) law of the country, are discussed. The influence of the Constitution on the public education sector is also highlighted.

4.1 Introduction

A constitution of a state (a country) contains the most important rules of law concerning its political system, it determines the powers and functions of the government of that state, and it regulates the relationship between the state and its citizens. It is important to understand what is meant by the concepts "state" and "government".

It must be stressed from the outset that the term "state" or "government" may be used in different ways, depending on the facts and surrounding circumstances (the context in which they are being used). Your attention is accordingly drawn to the particular characteristics of a state and its government.

- There can be no state if there are no *people* who live in a specific *territory* in which there are *government bodies* that exercise *government (state) authority*. The government bodies of the South African state are elected by the South African people (the citizens)

who actually also grant authority to their government to govern the South African (national) territory. This means that governments may change (e.g. when another political party wins the general election and forms a new government), but the South African state (the abstract entity) remains, provided it retains its other features (territory, citizens, etc) as a state.

- There can be no state if institutions from outside the territory can freely exercise authority inside the territory – the state must therefore be *independent*.
- Since the state has its own "law-making" bodies (e.g. government bodies such as Parliament and the provincial legislatures, courts, common law), it follows that every state has a particular *legal system* – in our case, the South African legal system.
- In most states we find *symbols* which express nationhood, such as national flags, anthems and coats-of-arms – such as the South African flag, anthem and coat-of-arms.
- In quite a number of legal systems, the state is conveniently regarded as a *legal person* (a bearer of rights and duties) – the South African State has a right to collect taxes, may sue and be sued, and must provide public education and protection to its people, for example.
- In most states, government authority is exercised at different *levels* or in different *spheres* – the national, provincial and local spheres of government in South Africa.
- Finally, the legal system of a state always reflects a particular approach to *the relationship between the individual and the government* – the *Constitution* protects the fundamental rights of the individual against the power of the state as exercised by the government (Rautenbach & Malherbe 2004: 1-2).

Finally, one may conclude that the "state" is an abstract (intangible) entity made up of people; it has an independent territory; its government is elected into power by the people; government bodies are vested with authority (i.e. in the public-law or vertical relationship) to govern the state by means of a legal system which re-

flects, among other things, the relationship between the individual and the government.

4.2 What is a constitution?

Most organisations (i.e. clubs, societies, schools) have constitutions. A constitution is a legal document in which the structure and functioning of the organisation is regulated. Most states (also called nations or countries) have written constitutions, although there are others (the United Kingdom is an example) that do not have a single written constitution, but are governed by a number of different statutes, as well as numerous constitutional practices and customs that have developed over a long period of time.

South Africa recently became a constitutional democracy and adopted a new written constitution (the Interim Constitution followed by the 1996 Constitution – also called the "final" *Constitution*). Although we have a written constitution, not all our law is incorporated into this one document. This means that we still have to use various other sources to find the law.

A constitution sets out the legal rules whereby a country is governed. These include legal rules defining the institutions of government in the country (e.g. national, provincial and local government), their powers and how they must exercise these powers. A constitution therefore empowers government bodies, defines and qualifies their powers and, as such, determines the relationship between the people of the country and their government bodies. A constitution therefore forms an important component of the legal system of a state and provides the (legal) norms and standards in accordance with which everybody's actions may be measured.

A very important feature of a constitution is that it also sets outs the standards that have to be used to protect the individual against any abuse of power by the state. A constitution should therefore express the values and sentiments of the society it serves (Rautenbach

& Malherbe 1998: 1-2). In an emerging democracy such as ours a constitution also contains ideals to which society aspires (see the Preamble).

4.3 General characteristics of the South African Constitution

As mentioned earlier, the *Constitution* is a value-laden document which encapsulates the spirit in which it was conceived and the aspirations of a young developing nation on the road to constitutional democracy. The spirit of the *Constitution* is reflected in its Preamble, which reads:

> "We, the people of South Africa,
>
> Recognises the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land;
>
> Respect those who have worked to build and develop our country; and
>
> Believe that South Africa belongs to all who live in it, united in our diversity.
>
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society 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
>
> May God protect our people.
>
> Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
>
> God seën Suid-Afrika. God bless South Africa.
>
> Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika."

The *Constitution* is regarded as the foundation of our democracy and therefore provides a detailed plan for the running of the country. It is a long document which deals with matters such as:

- government in the national, provincial and local spheres of government;

- the division of powers and sharing of powers between the national and provincial spheres of government (e.g. the division and sharing of the functional area of education)
- co-operation between and among these spheres of government (e.g. the principles of co-operative government);
- legislative powers (law-making – the legislatures) and processes in the different spheres;
- executive powers, in other words the execution or enforcement of the laws of the country;
- the administration of justice by the different courts (the judiciary);
- rules relating to the holding of regular elections for government bodies;
- the functioning of the police, army and other security services;
- the manner in which the finances of the country must be managed;
- the position of traditional leaders;
- the public administration based on democratic values and norms such as participation, transparency and accountability;
- the relationship between the state and the people as embodied in the rights guaranteed in the *Bill of Rights*
- the establishment of institutions to watch over and support constitutional democracy, such as the Human Rights Commission, the Commission for Gender Equality and the Public Protector.

The *Constitution* recognises eleven official languages, the national symbols (flag, anthem and coat of arms) and, as mentioned, includes a *Bill of Rights* (ch 2) which entrenches fundamental human rights such as the right to equality, the right to human dignity and security of the person, the right to education, the rights of a child, the right to freedom of religion and the right to administrative justice. See also the discussion in *Chapter Six*.

The *Constitution* has laid the foundation for democracy and must

guide and watch over the new democracy. It, therefore, contains special built-in features such as:

- **The supremacy of the entrenched Constitution**

This is the most salient feature of the *Constitution* since it has put an end to the sovereignty of Parliament which dominated our previous constitutions (the Constitutions of 1909, 1961 and 1983) in which Parliament was the highest authority in the state. The *Constitution* is the supreme law of the Republic, and Parliament and all other government bodies are subject to the *Constitution*. If the law and actions of these government bodies are inconsistent with the *Constitution*, they may be declared unconstitutional and invalid by a court of law. Any High Court may declare a law of Parliament or a provincial legislature invalid, but the declaration must be confirmed by the Constitutional Court. Any High Court may declare the actions of executive bodies invalid.

The powers of the state are separated and divided into three branches of government:

- *The legislative authority* (law-making bodies – they function in the national, provincial and local spheres of government);
- *The executive authority* (the executive applies and implements the laws in all three spheres of government) and
- *The judicial authority* (the judiciary applies the law and adjudicate legal disputes – the structure (hierarchy) of independent and impartial courts).

The separation of powers into legislative, executive and judicial branches is essential in a democratic state, because if too much power is concentrated in any one branch of the state, this may easily lead to abuse (e.g. under the 1983 Constitution Parliament was the highest authority in the State and could make laws ("ouster clauses") which excluded the judicial competence of the courts). By giving specific powers (legislative, executive and judicial powers) to each of the three branches of government, the *Constitution* ensures

that one branch can keep a check on the powers exercised by the other(s), but cannot take over the other's function – a *system of checks and balances* (e.g. the executive has to implement the law which are made by the legislature and close co-operation should exist between these two branches; the judiciary administers justice and therefore exercises control over both the legislature and the executive).

Figure 4: Branches of government

Legislature (law-making bodies)

• National sphere	• Provincial sphere	• Local sphere
— Parliament: - National Assembly - National Council	— Nine provincial	— Different categories of local

Executive (implementing laws of law-making bodies)

• National sphere	• Provincial sphere	• Local sphere
- President - Cabinet/Ministers - Public service/	- Premiers - Executive councils - Public service/ pro -	- Different categories of local government:

Judiciary (administering justice)

- Interpretation and application of legal rules and norms to resolve legal disputes
- An independent judiciary: exercises control over the legislature and executive in all spheres of government
- A system (hierarchy) of courts (e.g. the Constitutional Court, other higher and lower courts and special courts)

In the previous paragraph it was mentioned that not only *laws* made by legislatures, but also the *actions* of other government bodies may be declared invalid or unconstitutional. This means that not only legislation or common-law rules (the sources of law) must be in line with the provisions of the *Constitution*, but also the acts performed by government bodies / officials in term of these laws (e.g. the disciplinary measures meted out to the learner by the edu-

cator must be fair and reasonable; the educator must not be dismissed unfairly by the provincial Head of Department). In essence it means that such actions (conduct) of the education authorities and officials will be scrutinised inside the administration by means of internal control and, ultimately, by the courts to test their validity or constitutionality by means of judicial control.

♦ **The *Constitution* provides for a democratic system**

Various important democratic principles are entrenched (guaranteed) in the *Constitution*, for example, equal franchise (voting rights) for all adult South African citizens to elect their representatives in government; citizens are now entitled to equal participation in the election of government bodies which exercise authority over them; there is a multi-party system and every citizen has the right to form or join the political party of their choice; an electoral system of proportional representation whereby a direct relation exists between the support for a political party (the number of votes received) and the number of seats it receives in the law-making body (Parliament of provincial legislature). Elections must take place regularly and the *Constitution* provides that all elected legislatures have a term of five years.

♦ **The *Bill of Rights***

The *Bill of Rights* forms part of the entrenched *Constitution* and protects everyone's defined rights against infringement. The independent courts, including the Constitutional Court, determine whether any action, including the laws of Parliament, is consistent with the *Constitution*. (Fundamental human rights are the topic of another monograph in this series.)

♦ **Co-operative government**

The principle of co-operative government is entrenched in Chapter 3 of the *Constitution*. The three distinct, interdependent and interrelated spheres of government (national, provincial and local governments) have the duty to co-operate with one another, but also

to respect each other's unique character. Co-operative government means that the functions of government are not only exercised by the national government but are decentralised to be exercised also by provincial and local governments and with the intention to bring government as close as possible to the people. An important example of co-operation between the spheres of government is the sharing of powers (concurrent powers) on school education between the national and provincial government. (Rautenbach & Malherbe 1998:4-5; Kleyn & Viljoen 2002:235). (See more on this topic in the monograph on the administration of the education system).

- **A public administration based on democratic values, norms and principles**

Chapter 10 of the *Constitution* determines that the public administration (which includes education) is subject to the *Constitution*, and that services must be rendered to the public in a transparent, participatory and accountable manner (section 195). (See more on this topic in the monograph on the administration of the education system.)

4.4 Conclusion

The impact of the supreme *Constitution* on the South African legal system is far-reaching. It impacts on every branch of the law and, over time, the legal system is being transformed through legislation and court decisions to bring it in line with the values and requirements of the *Constitution*. It is against this constitutional background that the nature and role of education is discussed in *Chapter Five*.

Chapter Five
What is Education Law?

Outline of this Chapter

This Chapter examines the nature and scope of education law and its place in the constitutional context.

5.1 Introduction

Many facets of education law have already been touched upon in the previous chapters, for example:

- legal norms and rules that apply to education (e.g. education legislation)
- legal relationships in education (the public-law relationship in education)
- the interpretation, application and enforcement of the law in the education environment (e.g. disciplinary inquiries; expulsions or dismissals, court decisions on education)
- the impact of the *Constitution* on education (e.g. school education is shared between the national and provincial governments; protection of the human rights of educators, parents and learners)

When one analyses these points more closely, it transpires that not only have the characteristics of the law in general become clearer, but also the functioning of the law in the public education sector.

5.2 The nature and scope of education law

If one were to be asked to explain to a colleague the nature of education law, and its content and place in the South African legal system, the following are some of the aspects that should be mentioned:

First of all, education law deals with the law relating to education. In fact, education takes place within the legal system of South Africa and, consequently, does not exist in a vacuum, or somewhere outside the ambit of the law. All the national and provincial laws regulating education in detail make up education law. These laws deal with the provision, control and management of education at all levels, the composition, powers and functioning of decision-making education bodies, the legal position and rights and responsibilities of educators, the legal status and rights and responsibilities of parents and learners, and the content of education in terms of the structuring, recognition and content of educational qualifications and syllabi. It has become necessary to present the comprehensive legislative framework regulating all this in an analysed and systematic way in order to bring clarity, certainty and direction.

Secondly, one should determine which specific areas of the law apply to education. In other words: "Is the law relating to education (education law) a specific area or branch of law which can be identified or distinguished as *education law*?" This is not an easy question, because one has to think very carefully about the various places (areas) in which education law may be found. As a matter of fact, illustrations of how the law governs education relationships have been mentioned throughout the previous discussion. From those examples it becomes clear that rules of the law of persons, the law of contract, the law of delict, administrative law, labour law, constitutional law, and human rights often find application in an educational context. Taken to its logical conclusion, one may then say that education law is also a collection of all those rules of law

from various other branches of the law, as they apply in education.

The content and scope of education law may then be summarised as follows:

- the right to education in section 29 of the *Constitution*, as the starting point for education law, because every law made or action taken by the state (or anybody else involved in education) in respect of education must comply with the right to education.
- specific rules of law (national and provincial legislation) applicable to education (e.g. the *South African Schools Act of 1996*). These rules regulate the provision of education in South Africa.
- the rules from various other branches of the law that are applicable in education, such as those mentioned above and which regulate the legal relationships one finds in the education environment.

5.3 Conclusion

Education law is fast becoming a separate field of law with its own unique norms and rules as laid down in legislation. It is, however, at the same time still also a hybrid field of law which comprises norms and standards borrowed from the entire field of law (even from international and foreign law). Education law is therefore partly a distinguishable field of law, and partly made up of rules borrowed from other branches of the law. These rules are, however, certainly identifiable in the legal system by reason of their application in the field of education. In the first place for analytical and study purposes, it is therefore suggested that education law be accepted as a separate branch of the law. Certainly, enough is being written about education law, numerous court cases are handed down in this field, and there is enough interest in the development of the field from lawyers, educators and parents alike to warrant this conclusion. In the second place education law should be recognised as a separate field of law in order to increase awareness among all those involved (the state, educators, parents, learners) of

the applicable rules in education which affect their rights, responsibilities and duties.

Most education law sources and its actions emanate from the public -law sphere in which the public-law relationship (vertical, with state authority) features predominantly. This means that public-law disciplines (e.g. constitutional law – the *Constitution* and the *Bill of Rights*; administrative law – education legislation) have a significant impact on education law. As mentioned, education law is also a hybrid system of law and many aspects of the law of contract, the law of delict, the law of persons, labour law, etc are applied in education.

Chapter Six

Law and Rights

Outline of this Chapter

In this Chapter a short explanation is given of rights and duties and how they function in the education sector and the broader legal context.

6.1 Introduction

The concepts "rights" and "duties" are difficult ones and a wealth of research and literature has appeared on this topic over the years. What follows is a short, simplified discussion of a complex field which you may read more about in the *List of Sources*.

In the discussion on the characteristics of the law, the importance of legal relationships and the rights and duties of the parties in such a relationship, were highlighted. Refresh your memory on the different legal relationships by turning to *Chapter Three, paragraph 3.3.2*.

Here are a few illustrations of how rights and duties function in different situations.

6.2 Rights in the private-law relationship

6.2.1 Nature

Janet Buyer owns a car: she is the legal bearer of a right (e.g. she

has the right to her car).

The bearer of a right is called a legal subject (e.g. the learner, educator or parent as natural persons; the school, teachers' union or education department as juristic persons). The object of a right is called a legal object: a legal object (e.g. a car or a sum of money) cannot be a bearer of rights.

The connection between Janet and her car usually stems from a relationship recognised in law, in this case, a contract between legal subjects (Janet Buyer and Joyce Dealer) in terms of which Janet has bought the car (the object of her right) from Joyce for a specific amount of money. When Janet has fulfilled her legal duty (also called "obligation") in terms of the contract to pay the amount specified as the purchase price, she receives the right (of ownership) to her car.

If we approach the relationship between the legal subject and legal object from the other side, we may say that Joyce Dealer (legal subject) has a right to the specified amount of money (the legal object) when she fulfils her obligation of handing the car over to Janet. This means that legal subjects have rights against one another in respect of the objects of their rights (e.g. Janet has a right against Joyce Dealer who has sold her the car; and she also has a right to her car).

You will notice that when a legal subject (Janet) has a right (to her car), she also has a duty to perform (to pay for the car). The other legal subject (Joyce Dealer) has a right to the purchase price, but has a duty to place the car in Janet's possession. Other legal subjects who are not involved in this particular relationship (i.e. Simon, Anne and Janet's younger brother Jake who always "borrows" her car without asking her!) also have the duty to recognise and respect Janet's ownership of the car.

There should, therefore, always be a balance which indicates to us

that every right has its corresponding duty. If this balance between a "right" and its "duty" (or obligation) does not exist, the law applicable to a relationship has no meaning (Unisa 2001-2004:14-20).

However, as is mentioned above, certain "rights" vest in a person (a natural person or juristic person) outside the context of a relationship. For example:

> Janet Buyer is the owner of a brand new car. She proclaims: "I have the right to sell, use or destroy my property!"

These "rights" to sell, use or destroy your property, are not rights in themselves but relate only to the content and scope of the right to ownership. One should rather say that Janet as the owner of the car, has the "power" (or the capacity) to sell, use or destroy her property. If I say: "I have a right to appear in court" this "right" is obviously also not a right in the sense in which it is being used here, because it does not have an object and does not involve a relationship with another person (a legal subject).

The "rights" and "duties" illustrated above, have their origin in private law. Private law acknowledges that legal subjects can have an interest in certain objects and it recognises such an interest by making it possible for the legal subject to have a right to the object. One characteristic of a legal object (i.e. a car, house) is that it has monetary value.

To conclude this discussion, one may summarise as follows:

- a legal subject is anyone (a natural or juristic person) who is subject to (or under the control of) the norms and rules of the law and who also may be the bearer of rights and duties
- legal subjects have rights against one another in respect of the object of their rights
- every right (and its corresponding duty) concerns a relationship made up of two parts:

  - a relationship between a legal subject (a natural or juristic per-

son) who is the bearer of the right and the legal object of the right

- a relationship between the legal subject who is the bearer of the right, and other legal subjects (Unisa 2001-2004:14-20).

6.2.2 Grouping of rights

Private law distinguishes between four different groups of rights that a legal subject can have with respect to traditionally recognised legal objects.

- **Real rights**

Real rights are rights to physical, material things – in other words, things that we can touch, such as a pen, a car, a herd of cattle. We can usually attach economic value to these things. When you are the holder of a real right you may, for example, use your car, alienate (sell or give away) your land, destroy your pen – the ownership rights. Bear in mind that a company, school or church (juristic person) may also be a bearer of real rights.

- **Personality rights**

These rights are the rights each one of us has in respect of elements of our personality, for example, to physical integrity (of our bodies), to a good name or reputation and to honour. These objects also have economic value in a broad sense but no market value. However, what gives them value is not because we can sell them, but because they are inherent – we have them because we are legal subjects. Do you think that juristic persons can be bearers of personality rights? Yes, indeed, because a school or company certainly has a right to its good name and reputation, and may even go to court when defamatory or false information that may cause damage to it, is published.

- **Intellectual property rights**

Intellectual property rights (also called immaterial property rights) relate to "things" we as human beings create, for example, objects

such as works of art, an invention or a trade mark. It is against the law to photocopy a whole textbook because the author of the work has copyright over what has been written and may take the school or university to court on the ground of copyright infringement. Can a juristic person also be the bearer of an intellectual property right? The movie company that created a movie certainly has the copyright of the movie, but can a company or a school be the artist of a painting? Therefore, one has to look at each case individually to determine who the bearer of the right is. However, the school or university may, just like any other person, buy or sell a work of art or a book.

♦ **Personal rights**

Because a personal right is a right to performance (to demand that the other party act, or do something), it is also called a claim. This claim to perform an "act" may mean to do something (e.g. the seller must deliver the car to the buyer) or not to do something (e.g. to refrain from trading in another municipal area which is prohibited in your trading permit). Juristic persons may also be bearers of personal rights or claims (Unisa 2001-2004:16-18; Hosten *et al.* 1995:544-547).

6.3 Fundamental human rights

You have also come across other important "rights" and "duties" in this study, namely, fundamental human rights and their corresponding duties.

The fundamental rights guaranteed in the *Constitution* include many of the rights mentioned above (the right to dignity, the right to security of the person, the right to privacy, the right to own property, the right to access to the courts, etc). Other fundamental rights relate to the relationship between the state and its citizens (the right to vote, the right to form and join political parties, etc). The purpose of the fundamental rights in the *Constitution* is to elevate

those rights to a higher status, to show how important they are in an open and democratic society.

The development of fundamental human rights is a study on its own and if you are interested in reading more on this topic, consult the List of Sources. Human rights in education is also the topic of another monograph in this series and what follows is, therefore, a very brief discussion.

6.3.1 Development of fundamental human rights

Fundamental rights have developed primarily for the protection of the individual against the power of the state. The modern state (through its government bodies) has become increasingly powerful and diverse in its actions and, quite frankly, one cannot think of many instances where the state does not interfere in the day-to-day lives of people (e.g. we register births, marriages and deaths; pay rates and taxes; use public transport, education, health, housing and welfare systems). As you know from your study so far, the state may use its authoritative power to coerce the other party in the public-law relationship to perform (e.g. pay compulsory rates and taxes; adhere to building regulations; be subjected to disciplinary measures, or be dismissed). However, the State has to act in the public interest (the interest of the people or society), and the individual is a member of society.

Today fundamental human rights are recognised and protected in international law and also in most modern constitutional democracies like South Africa. In this regard see the discussion in *Chapter Four*. The *Bill of Rights* (ch 2 of the *Constitution*) is the cornerstone of our democracy and affirms the democratic values of human dignity, equality and freedom which the state and other persons and organisations must respect, protect and fulfil. The *Constitution* has also entrenched (guaranteed) the protection of fundamental human rights by the courts and has even instituted special courts (e.g. the Constitutional Court) and institutions (e.g. the Human Rights Com-

mission and the Commission for Gender Equality) to promote and act as "watchdogs" over human rights.

6.3.2 Nature of fundamental human rights

It is difficult to give a simple answer to a question about the nature of human rights. One may answer that human rights (because they are "fundamental" rights), primarily protect individuals from the power of the State. It can thus be said that they apply in this vertical relationship. But the fundamental rights also apply in horisontal relationships between individuals – as individuals we may also not violate each other's rights. Another important feature is that every person is born with these rights (hence: "human rights") and they therefore form part of a human being's inborn dignity. This means that the *Bill of Rights* protects all the people in South Africa. Also bear in mind that certain rights protects only particular categories of people. For example, South African citizens have rights in respect of political activities and political choices, like the right to vote, which foreigners living in the country do not have. However, foreigners do enjoy the other rights in the *Bill of Rights*. Certain rights protect only children, or workers or employees and employers, and a number of other rights are exercised only by arrested or detained persons.

As we have mentioned before, the law also regards juristic persons (legal persons) as "persons" – bearers of rights and duties. Legal persons (or abstract entities) such as companies or schools are not entitled to all the rights in the *Bill of Rights*, but they may be entitled to certain rights, depending on the nature of the right and the nature of the juristic person and its activities (e.g. a school or company has the right to its own integrity, dignity and security, and to own property, but does not have the right to life or to human dignity). Certain government institutions (e.g. a provincial education department or municipal council) are, as a rule, not protected by the *Bill of Rights* since they form part of the state apparatus which

must respect and protect the fundamental rights – they are therefore bound by the *Bill of Rights*.

Sometimes the state establishes bodies that are legal persons and although they may have certain rights against the state (e.g. a university may act against the state to secure its academic freedom), they are still bound by the *Bill of Rights* (e.g. the university must protect and recognise the fundamental rights of its employees and students).

6.3.3 Grouping of fundamental rights

There are different kinds of human rights which help us to understand the content of the rights. However, it does not mean that one kind of right is more important than the other. So-called first-generation rights are civil rights, procedural rights and political rights. For example, the right to human dignity, the right to freedom of expression and the right to freedom and security of the person. These rights protect the individual from abuse of state power (e.g. officials acting dishonestly, educators abusing their authority over learners). Second-generation rights became important during the industrial revolution and relate to socio-economic issues in society. For example, these rights allow people to demand from government that their basic socio-economic needs such as the right to education and the right to access to health care services and to sufficient food and water, be fulfilled.

6.3.4 Application of the Bill of Rights

It is important to know who is bound by the *Bill of Rights*. In other words, against whom does the *Bill of Rights* afford protection, and who must respect the rights in the *Bill of Rights*? In short, the *Bill of Rights* binds –

- all government bodies that make laws (e.g. Parliament, the provincial legislatures and local councils)

- all organs of state that apply and enforce rules of law (e.g. government departments in the national, provincial and local spheres – education, social welfare, police, defence force; also public schools and universities as organs of state)
- the courts – courts have a key function in enforcing the *Bill of Rights* in accordance with the provisions laid down in the *Bill of Rights*
- all natural persons in their relationships with one another, and also all juristic persons if the *Bill of Rights* can be applied to these relationships depending on, for example, the nature of the right involved, the nature of the duty imposed by the right, and the nature of the relationship between private persons (Rautenbach & Malherbe 1998: 8-14).

In other words, the *Bill of Rights* applies –

- *vertically*: between government bodies/organs of state (all vested with state authority) at the one end, and the individual (in the sub-ordinate position) at the other end (i.e. the public-law relationship)
- *horisontally*: outside the sphere of the state in the private domain between all natural and juristic persons in their relationships with one another (e.g. the right to equality may apply between individuals or private institutions in the sense that one individual may not unfairly discriminate against another in the employment situation) – the typical private-law relationship.

6.3.5 Limitation of fundamental rights

The question that is often asked is whether there is any restriction or limitation on the application of fundamental rights. The answer is that no right applies absolutely and that all rights may be limited. For example, I cannot say that my freedom of expression protected in the *Bill of Rights* gives me the power to speak or publish false or defamatory information about somebody else. After all, I have a duty to respect the freedom of expression of other persons and their right to privacy, dignity and confidentiality. The *Bill of Rights*

contains provisions and rules which prescribe by whom, how and for which purpose a right(s) may be limited in a lawful way. Limitation of a right may be achieved via –

- *qualifiers* (qualifying words) which form part of the rights itself (e.g. the *Bill of Rights* says that a person has the right to assemble, demonstrate and present petitions but only if it is done *peacefully and unarmed*) – these latter two words qualify (limit) the content and scope of this right. Strictly speaking, these words are part of the definition of the right and not really limitations.
- the *general limitation* provision which must be applied under specific circumstances. A limitation of a right may be imposed only in terms of *law of general application* (e.g. the *South African Schools Act of 1996* is a national law which has general application and provides that a learner may be expelled from a public school, which may certainly limit the fundamental rights of such a learner to receive basic education). The limitation must be *reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality*. To determine this, certain factors must be taken into account, for example:

  - the *nature* of the human right in question (e.g. how important is the learner's right to basic education?)

  - what is the *purpose, nature and extent* of the limitation, and whether there is a rational relationship between the limitation and its purpose (i.e. expulsion is a serious disciplinary measure which infringes this right – it is usually a permanent exclusion from a school)

  - whether other less restrictive means of limitation could not achieve the purpose (i.e. would suspension from school for one week not have been more suitable in the case?) (Rautenbach & Malherbe 1998:14-20; Kleyn & Viljoen 2002:250-252).

Along these lines one can determine whether a limitation on a right is reasonable and justifiable and therefore lawful. Note that every time a right in the *Bill of Rights* is limited, one must apply the gen-

eral limitation clause to determine whether the limitation is lawful.

6.4 Conclusion

This Chapter dealt with the nature of "rights" and "duties" and how they function in the legal context. In the first section the emphasis was on rights in the private-law relationship, that is, between legal subjects and their objects, and how the law regulates these rights and duties and balances them.

In the second part the focus was on fundamental human rights and how the *Constitution* protects these rights and makes provision for their application and enforcement. Fundamental values such as human dignity, freedom, and equality constitute an integral (or inherent) part of every human being's existence. It is apparent that not only natural persons but also juristic persons may be bearers of these rights and duties, and that protection against the infringement of fundamental rights applies in the private-law as well as the public -law relationship.

The overlap between private law and public law, and the dominant position of the state in the affairs of people, must be seen in the context of the *Constitution* and its recognition of private law (common law) alongside public law (Hosten *et al*. 1995:547-551).

Chapter Seven

Sources of the Law

Outline of this Chapter

This Chapter examines the most important places where one may find the law. The sources of education law are highlighted by the way of illustrations.

7.1 Introduction

The "sources" of the law refer to the places where one may find the law. The basic sources of the law is legislation (laws made by competent legislative bodies, which may include the regulations or delegated legislation made by a member of the executive), the rules of the common law (which developed over centuries), and court decisions (which courts hand down when they interpret and apply the law). What follows is a few examples illustrating where the most important sources of South African law are to be found. A short summary of the most authoritative sources of law is found at *the end of this chapter*.

7.2 How to find the sources of law in specific situations

Here are a few examples to illustrate where to look for the sources of the law.

- Freddy Cool is a boisterous learner who has been expelled by the

provincial Head of Department from his public school, Get Tough Primary School. Freddy and his parent want to find out what the law says about this and what they can do to get Freddy back in school.

- Mrs Liberal receives a telephone call from the principal of Freedom Secondary School informing her that her son John will be suspended from school if he continuous to wear badges which promotes a left-wing political party.

The moral or ethical dimensions of the situations sketched above are not addressed at all. Your aim is to determine where to find the legal norms and rules that apply to each situation.

Freddy Cool – his expulsion from school

Freddy and his parents will most probably find that the most important sources of education law (in particular in a case where a public education authority is involved) are the *Constitution* and other legislation.

The *Constitution* creates the broad constitutional framework but cannot address individual problems (e.g. expulsion in schools). These matters have to be regulated by education legislation. However, the *Bill of Rights* includes the fundamental right to basic education, as well as the right to just administrative action which would be infringed if Freddy is expelled unfairly. But as you know, fundamental rights may be limited, and if Freddy has been found guilty of peddling drugs on the school grounds, for example, his right to education may be limited and under such circumstances expulsion may be reasonable and justifiable. The *Constitution* also provides that school education is a matter that is primarily governed in the provincial sphere of government. Therefore, provincial school education legislation will have to be scrutinised as well. Nevertheless, the *Constitution* also provides that national education norms and standards that would apply uniformly in the country, should be provided by national laws.

If one starts studying national legislation, of paramount importance in this case is the *South African Schools Act 84 of 1996* which applies to all public schools in South Africa and contains important provisions on the expulsion of learners. Matters such as the following are dealt with in the Act: who has the power to expel a learner, what constitutes expulsion, which procedures should be followed, and when and how a learner may appeal to a higher authority against his or her expulsion. The National Minister of Education may also issue regulations in terms of the *South African Schools Act* and such regulations (also termed delegated legislation) may regulate certain specific issues regarding school education in greater detail.

The *South African Schools Act* also determines that public schools should have their own constitutions, policy documents and codes of conduct. These legal documents will definitely also have to be examined by Freddy and his parents to determine what the school policy and rules of Get Tough Primary School provide about discipline and disciplinary measures, such as expulsion. In the same vein, provincial school laws, for example the Gauteng *School Education Act 6 of 1995*, govern public school education in a particular province. Freddy and his parents have to look at the provisions that apply to discipline in the provincial school law of their province. Provincial regulations (delegated provincial legislation) should also be consulted because such regulations issued by the Member of the Executive Council (MEC) in charge of education, may contain detailed information on how to deal with expulsion (e.g. describe the conduct that warrants expulsion and the procedures that should be followed before expelling a learner).

In Freddy's situation you have therefore encountered the following sources of law:

- The *Constitution* and *Bill of Rights* – the supreme law
- Legislation (original and delegated legislation of both the national and provincial legislatures)

♦ The school's code of conduct – a legal document

But remember that all legislation, regulations and school documents are subject to the *Constitution*. If the code of conduct of the school provides, for example, that a learner may be expelled without a fair hearing, such a process would be inconsistent with the right to just administrative action guaranteed in the *Constitution* and would be invalid.

Mrs Liberal and John – suspension from school

Once again one has to start with the *Constitution* and the different pieces of education legislation, both original and delegated. As in Freddy's case, Mrs Liberal will have to study national and provincial laws relating to education policy and, in particular, school policy and governance. The same legislation that applies to Freddy's case may also be applicable here. Freedom Secondary School's rules and policies have to be examined as well. The School's policy documents are very important to determine how the school will deal with this form of freedom of expression (i.e. John's right to express himself either verbally, in writing or by way of his conduct – wearing a badge).

The *Bill of Rights* contains the fundamental human rights. Freedom of expression is a fundamental human right included in the *Bill of Rights* and every person has a right to freedom of expression. However, you (and Mrs Liberal) must have found that the School's code of conduct and the other pieces of legislation indicate that discipline is an important component of school education. In fact, school discipline is an essential element in maintaining a proper and uninterrupted education and training process. It is imperative that Freedom Secondary School's rules of discipline are in place and in line with the *Constitution* and other enabling legislation (i.e. national and provincial laws). These documents indicate that a learner's freedom of expression may be limited to the extent that he or she cannot claim freedom of expression at the expense of

other learners' right to receive their education in an uninterrupted and safe environment: it is the school's duty to provide safe and uninterrupted education and training. Once again, the general limitation clause of the *Bill of Rights* will give guidance on how and to what extent John's right to freedom of expression may be limited lawfully in the school situation. In determining whether a limitation should be considered, the various pieces of national and provincial education legislation have to be assessed with the *Bill of Rights* to shed more light on the education situation and the importance of freedom of expression and discipline.

Another important source of law is case law (judicial precedent). Mrs Liberal would want to find out whether the higher courts have already dealt with a similar case and therefore created a judicial precedent which may have to be followed in John's case. To date the South African courts have dealt with only one case on freedom of expression in the school environment (i.e. *Danielle Antonie v Governing Body. The Settlers High School and Head, Western Cape Education 2002 4 SA 738 (C))*. Other cases on the general interpretation of freedom of expression do not give us much guidance on how this right would be applied in a school situation. Suffice to say that the *Bill of Rights* also makes provision that international law (e.g. the international conventions on human rights) must be consulted, and that foreign law (e.g. Canadian or Namibian law) may be consulted in cases where South African law does not yet give sufficient guidance (e.g. especially in the developing field of human rights).

In John's case, one must certainly look for guidance in the international law conventions (international legal instruments that states have agreed to) and other legal documents regulating to the education of children and school discipline. South Africa has agreed to many of the international-law documents that deal with children and their education on an international level (e.g. the *United Nations Universal Declaration on Human Rights of 1948*; the *United*

Nations Convention on the Rights of the Child of 1991). Our courts will most definitely not slavishly follow the international principles, but will look for guidance if there are not enough convincing local sources on the topic. This means that international law and foreign law may also be an important source in interpreting and developing South African law. (In the landmark case on the death penalty, S v Makwanyane 1995 3 SA 391 (CC), the Constitutional Court did extensive international and foreign law research to interpret the right to life in the *Bill of Rights* and its application in the particular South African circumstances.)

Mrs Liberal will be interested to know that a landmark case on freedom of expression in the school was decided in the United States of America (USA) in 1969. Our courts may consider this case if John's case goes to court. In *Tinker v Des Moines Independent Community School District* (1969) 393 US 503 a group of students was suspended from school for wearing black armbands to demonstrate their objections to the war in Vietnam. Although the school authorities argued that the wearing of armbands was banned because it might result in a disruptive atmosphere, the court argued that –

> "an undifferentiated fear of disturbance is not enough to overcome the right to freedom of expression. … students do not shed their constitutional rights … at the schoolhouse gate … these rights may be circumscribed because of the special characteristics of the school environment. … school officials … may enforce reasonable regulations necessary for the school to function properly …"

Therefore, in some instances foreign law (e.g. case law from the USA or other countries) may also become a source to interpret and develop our South African law.

In John's case you have therefore scrutinised the following sources of law:

- the *Constitution* and *Bill of Rights* – the supreme law
- legislation (original and delegated legislation of both the national and provincial legislatures)

- the school's code of conduct
- case law – judicial precedent
- international law (conventions or treaties applicable to South Africa)
- foreign law (US or other case law)

7.3 Conclusion and summary of sources of law

There are other sources of South African law that have not been discussed in the illustrations above. One may thus summarise the most important sources of law as follows:

- **The *Constitution***

The *Constitution* with its *Bill of Rights* is the supreme law of South Africa and no other law (legislation, case law, common law, customary law or indigenous law) may be in conflict with it. It is therefore the most authoritative source of law.

- **Legislation**

Legislation is an important source of law because most of the South African law is drafted in this form; legislation is regarded as a primary source of law. Legislation takes various forms:

- *Original legislation*:

Original legislation (statutes or Acts) passed by Parliament in the sphere of national government. The *South African Schools Act*, the *Labour Relations Act* and the *Employment of Educators Act* are examples.

Original legislation passed by the nine provincial legislatures in the sphere of provincial government; e.g. the school education laws passed for each province (e.g. the *School Education Act 6 of 1995* (Gauteng); *School Education Act 9 of 1995* (Northern Province))

Original legislation passed by an elected municipal council in the

local sphere of government. These by-laws are not directly relevant to education because local governments are not directly involved in the functional area of education.

- *Delegated legislation*:

Delegated legislation passed in terms of the enabling (original) legislation. In the national government sphere it is passed by office-holders who are vested with these rule-making powers: the Minister of Education makes regulations under the *South African Schools Act*; proclamations are made by the President in terms of his executive capacity.

Delegated legislation passed in the provincial sphere of government by officials vested with rule-making powers: the MEC for education makes regulations under the provincial school education laws (e.g. regulations made under the Gauteng *School Education Act of 1995*)

Delegated legislation passed in the local sphere of government by officials of local government: these regulations or rules made under local by-laws are not directly concerned with education but may relate to town planning, health and traffic control in the municipal area, which may affect a school.

- *Administrative directives:*

An important mechanism is the school code of conduct and other policy documents that are passed by public schools: the school constitution, policies and code of conduct have to be drafted by the governing body in terms of national laws (e.g. the governing body drafts a code of conduct in accordance with the *South African Schools Act* and the guidelines offered by the MEC in this regard). These are legal documents that may be described as administrative directives which the school may enforce within the school.

♦ **Case law**

Case law (court decisions – by the higher or superior courts – or judicial precedent) is used to determine how the legal norms and standards are interpreted and applied by the courts in a specific case (e.g. in *S v Williams* 1995 3 SA BCLR 632 (CC) the Constitutional Court interpreted and applied a legal norm (the *Criminal Procedure Act of 1977*) relating to corporal punishment of juvenile criminals, and found that it was in conflict with the fundamental right to security of the person in the *Bill of Rights*. The Court accordingly declared the provision unconstitutional, and eventually the principle found its way into section 10 of the *South African Schools Act*, prohibiting corporal punishment in school.)

♦ **Common law**

Common law (or the traditional private-law branch of law) is the unwritten law of a country which is not contained in legislation. Roman-Dutch law, English law and indigenous or African customary law have all influenced the South African legal system. Common-law rules that are particularly important in the education field include: the *loco parentis* principle (the educator acting in the place of the parent in the school environment), and negligence (the test of the "reasonable" person). Many common-law rules are now included in legislation and are also found in case law.

♦ **Custom**

Custom is made up of unwritten rules which a community has carried down from generation to generation. Indigenous or African customary law also forms part of the broad definition of custom. Custom has to meet certain requirements to be recognised as a legal rule: custom must be reasonable, have existed for a long time, must be generally recognised and observed by the community, and the content of the custom must be definite and clear.

♦ Other sources

Other sources of South African law have also been touched upon and although they are not authoritative sources they may have a *persuasive* influence in our law.

For example, the influence of international law, particularly in the field of human rights law; the law of foreign countries such as the USA, Canada and England, particularly where more guidance is needed in deciding new cases that our courts have not dealt with before (e.g. in the field of human rights law).

Chapter Eight

Interpretation of the Constitution and Legislation

Outline of this Chapter

This Chapter outlines the new approach to the interpretation of the Constitution and legislation. It is important that persons involved in education understand the legal meaning of the Constitution and education legislation.

8.1 Introduction

The *Constitution* provides that all legislation have to be drafted, interpreted and applied within the framework set by the *Constitution*. This means that the courts (whose prime function it is to interpret and apply the law), organs of state, government officials, and individuals such as you and I, have to follow the rules and guidelines about the interpretation of legislation as prescribed by the *Constitution*.

The interpretation of laws is a rapidly developing field of law on which a variety of literature has appeared. What follows is a brief discussion based on some sections of the book *Statutory Interpretation: An Introduction for Students* (1998) by Christo Botha. If you are interested in reading more on the topic, please consult this book as well as other relevant literature in the *List of Sources*.

8.2 Influence of the Constitution on the interpretation of statutes

8.2.1 Introduction

The new constitutional order has changed the way in which we interpret statutes. Not only was the principle of parliamentary sovereignty replaced by constitutional supremacy, but the interpretation clause in the *Bill of Rights* now stipulates that the spirit and purport of the *Bill of Rights* (i.e. the protection of fundamental rights) must be taken into account during the interpretation of all legislation (e.g. statutes and regulations).

Section 39 of the *Bill of Rights* instructs the courts (and other interpreters) not to ignore *value judgments* and to look beyond the actual words in the text of the *Constitution* and legislation to the underlying democratic values and norms which our society aspires to. Apart from the constitutional values, interpretation of statutes was transformed by four provisions of the *Constitution* and because they are so important they are quoted in full.

Section 1

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage (i.e. the right to vote), a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Section 2

"The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Section 8

"(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."

Section 39

"(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."

In the light of the sections quoted above, one may conclude that the traditional difference between the interpretation of ordinary legislation and constitutional interpretation should not be overemphasised. For example, South African courts now have to interpret *all legislation* in the light of the fundamental rights embodied in the *Bill of Rights*. Therefore, every court, tribunal and forum will have to become involved in constitutional interpretation to some degree. Furthermore, section 39(2) ensures that, generally speaking, "ordinary" interpretation should be based on a contextual and purposive method similar to that used in constitutional interpretation. It is interesting to note that in *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592(SE) Judge Froneman already distinguished between constitutional and "ordinary" interpretation as follows:

> "The interpretation of the *Constitution* will be directed at ascertaining the foundational values inherent in the *Constitution*, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the *Constitution*" (597).

8.2.2 Basic principles of constitutional interpretation

These are only a few of the general principles that have been formulated by the courts in recent decisions:

- **The supreme *Constitution* must be given a *purposive* interpretation**

This basic principle has been confirmed in court cases. For example, in *Nyamakazi v President of Bophuthatswana* 1992 4 SA 540 (B) the court held that a purposive interpretation takes into account more than legal rules –

> "These are the objectives of the rights contained therein, the circumstanced operating at the time when the interpretation has to be determined, the future implications of the construction, the impact of the said construction on future generations, the taking into account of new developments and changed in society" (567).

Purposive interpretation refers to a liberal or generous interpretation: meaning a flexible interpretation which takes into account the provisions of the *Constitution*, its spirit and purport, the "intention" of its drafters (the people) and the objectives of and reasons for adopting it. This means that constitutional interpretation does not consist of a set of hard and fast rules, but that it is an inherently flexible process which allows for changing circumstances. All this implies that in the process of interpreting "ordinary" legislation, this more adaptable and flexible method will have to be followed as well.

- **During the interpretation of the *Constitution*, its spirit and purport must be promoted**

The *Constitution* is the driving force in creating a society based on democratic values, social justice and fundamental human rights. It therefore strives to improve the quality of life of all citizens and free the potential of every person. In essence, the *Constitution* is the foundation and instrument of reconciliation, reconstruction and transformation. This means that these values and moral standards

underpinning the *Constitution* must be taken into account throughout the entire interpretation process, and the courts have to respect, protect, promote and fulfil these constitutional values.

The interpretation of "ordinary" legislation must recognise and promote the values, spirit and purport of the *Constitution* and *Bill of Rights* as well.

- **A provision in the *Constitution* cannot be interpreted in isolation, but must be read in the context as a whole**

The context includes historical factors (i.e. factors that led to its adoption in general, and fundamental rights, in particular). This means that a similar contextual approach has to be followed in interpreting "ordinary" legislation.

- **The language of the *Constitution* must be respected**

Various contextual factors are used during interpretation, but the context is anchored in the particular constitutional text. Therefore, various contextual factors cannot reflect a purpose that is not supported by the contextual text as a legal instrument. You will notice that this "balanced" approach is also followed in the interpretation of "ordinary" legislation.

8.3 The interpretation of legislation (statutes)

8.3.1 Introduction

Interpretation of statutes is the juridical understanding of legal texts. One looks for the legal meaning of a provision or section in a legal text (i.e. legislation) and then applies it to a practical situation (for example, what does the *Employment of Educators Act of 1998* say about redeployment and rationalisation and the effects on the position of senior male or female educators?).

Unfortunately the body of rules and principles dealing with interpretation of statutes does not form a neat and compartmentalised

set of rules. These rules overlap and it is often difficult to determine which rule applies in a particular case (e.g. facts and circumstances differ from case to case; and value judgments are necessary to give effect to the spirit and aim of the *Bill of Rights*).

8.3.2 The contextual (or purposive) approach to the interpretation of statutes

As mentioned earlier, the search for the purpose of legislation requires an objective purpose-orientated approach. This approach requires the recognition of a contextual framework in which all the surrounding circumstances are taken into account right from the outset.

We must mention that the contextual or purposive approach only recently received its place as the generally accepted approach to the interpretation of statutes in South Africa. As you might have guessed, the transition to a constitutional democracy has had a major impact in this regard.

Through contextual or purposive interpretation the interpreter seeks to fulfil the spirit and purport of the *Constitution* (e.g. by means of a "value judgment"). The interpreter uses not only the constitutional text (the document itself) but the whole constitutional context to give meaning to the underlying and evolving values, norms and standards that our South African society aspires to. To apply this to the interpretation of ordinary legislation means that the constitutional context must filter through or permeate the field of ordinary legislation to enable the interpreter to seek (and hopefully find) the purpose of the particular piece of legislation in question.

The contextual framework in the interpretation process must be recognised right from the outset. Interpreting legislation in its contextual environment ensures that flexibilities and peculiarities of language, and all other textual (the text of the legislation) and extra

textual factors are accommodated (Botha 1998:31-32)

The interpretation process is discussed below in three phases: initial, research and concretisation. However, this is not a conscious process; it is merely broken up to make it easier for you to follow. The courts do not actually interpret laws in these three phases.

8.3.3 The initial phase of the interpretation process: basic principles

During the initial phase of the interpretation process, the following aspects are covered:

- the impact of the supreme *Constitution* and, in particular, the *Bill of Rights*, is taken into account
- the purpose of the legislation is determined in the light of the *Constitution* and the *Bill of Rights*
- the initial meaning of the text of the statute is studied, bearing in mind other basic common-law principles and with the objective of striking a balance between the text and the purpose and context of the relevant statute (Botha 1998: 37-38)

The supreme Constitution and the Bill of Rights

If one reads sections 1, 2 and 39(1) and (2) of the *Constitution* together, the message for the interpretation of statutes is:

Everything and anybody, all law and conduct, all traditions and perceptions and procedures are subject to and qualified by the Constitution (Botha 1998: 40). In *Holomisa v Argus Newspaper Ltd* 1996 6 BCLR 836 (CC) Judge Cameron summarised this principle very well:

> "The Constitution has changed the "context" of all legal thought and decision-making in South Africa" (863).

Bear in mind that the spirit, purport and objects of the *Bill of Rights* must be promoted during the process of interpretation. Of cardinal

importance is that the *courts are the guardians and enforcers of the values underlying the Constitution*, and they have to make certain value judgments during the interpretation and application of all legislation. Since these values are not absolute, the interpretation process is also an exercise in the *balancing of conflicting values and rights* (Botha 1998: 44).

The purpose of the legislation

The most important rule of interpretation is to establish the purpose of the relevant legislation and to give effect to it. Various factors are taken into account to determine the purpose, and here in the initial phase only a preliminary purpose is determined. This must be done in the light of the *Constitution* and the *Bill of Rights*.

The initial meaning of the text of the legislation

The interpretation process begins with the reading of the text of the legislation. However, there are many more factors that influence the "meaning" of the words in the text, for example:

- It makes sense that the ordinary meaning should be given to the words of the text
- Highly technical legislation (i.e. on nuclear energy, patents and trademarks, electronic media) assigns specific meanings to certain words
- A meaning should be assigned to every word
- Meaning of words changes over time and is influenced by many linguistic, social and political factors

However, all these factors mentioned above are subject to the promotion of the spirit and purport of the *Bill of Rights*.

Balance between text and context

The courts previously held that the broader context of the legislation only applies when the text of the legislation is ambiguous or confusing. Otherwise only the text of the law itself may be used.

This approach does not hold water any longer. From the outset of the interpretation process something outside of the text must be taken into account, namely the *Constitution*. Moreover, from the outset the purpose of the statute as a whole and the surrounding circumstances should all be taken into account as well, together with the words of the provision in question.

Common law presumptions

Common law presumptions of interpretation may be explained as unwritten legal assumptions about the meaning of legislation. Because they are "presumptions" they are not hard and fast legal norms, but may be "rebutted" in certain cases (overruled by stronger facts/circumstances). Many of the values underpinning the presumptions of interpretation are now to a large extent reflected in the *Bill of Rights* (e.g. the presumption that harsh, unjust or unreasonable results are not intended).

8.3.4 The research phase: finding the purpose of legislation

The second phase in our theoretical interpretation process is the research phase. In order to find (or establish) what the purpose of the legislation is, the interpreter may use a wide range of aids. In practical terms it means the interpreter has to research these factors and this process is often referred to as *contextualisation*. The aids used in this research process fall into two categories: intra-textual (internal) aids and extra-textual (external) aids.

Intra-textual aids

Intra-textual aids include:

- The legislative text in another official language (e.g. the *Constitution* and the texts of all new national and provincial legislation have to be signed by the President or a provincial premier respectively. One would suggest that in the case of an irreconcilable conflict between the different language versions of the same text,

the text which best reflects the spirit and purport of the *Bill of Rights*, must prevail)

- Preamble (e.g. a number of new statutes such as the *South African Schools Act of 1996* and the *Constitution* have preambles, but otherwise preambles to laws are not common – see *Chapter Four paragraph 4.3*). Preambles contain a programme of action or a declaration of intent with regard to the broad principles contained in the statute
- Express purpose and interpretation guidelines (e.g. the so-called "plain language" use in legislation to make texts more user-friendly – the *Constitution* and *Labour Relations Act of 1995*)
- Definition clauses (most statutes contain a definition clause, for example, section 1 of the *South African Schools Act* includes a definition of "parent" and "public school")
- Schedules (e.g. in some cases schedules form part of a statute, in other cases not: the *Labour Relations Act of 1995* contains several flow diagrams explaining procedures for dispute resolution (e.g. Schedule 4) but states that they are not part of the Act. By contrast, the schedules of the *Constitution* do form part of it and must be read together with the specific section it refers to.)

Extra-textual aids

The interpreter should consult extra-textual aids such as:

- International human rights law (and foreign law)
- Discussions that preceded the legislation (e.g. debates about specific bills, explanatory memoranda, debates and reports of committees which form part of the legislative process)
- Surrounding circumstances and conditions that prevailed before and during the adoption of the legislation and led to its creation – the "context" of the legislation
- Dictionaries and linguistic evidence
- The *Interpretation Act 33 of 1957*. This Act deals with several important aspects of the interpretation process (e.g. the application

of the Act, methods of calculating time, the commencement, repeal and substitution of legislation and the effects). A new Act which will reflect the present approach to the interpretation of legislation is under consideration.

8.3.5 The concretisation phase: application to the practical situation

This is the final stage of the interpretation process. During this stage the interpreter (or court) wants to answer the particular question at hand or make a decision on a particular case that serves before it. The interpreter therefore has to apply the principles of interpretation to the actual facts of the case.

What is concretisation?

Concretisation also means correlation, harmonisation or realisation. Therefore, during this stage the legislation becomes a "reality" when the text and purpose of legislation as well as the facts of a particular practical situation are brought together to reach a conclusion.

The creative role of the courts

You will also realise that the role of the interpreter or the court becomes very important during this phase of application. It is usually during this phase that some modification or adaptation is needed to apply the *generality* of a structured piece of legislation to the *particularity* of the functional situation. The interpreter or the court will have to make some choices in moulding and shaping (applying) the legislation to the practical situation. The discretion so exercised is not a free discretion, though, but a *creative judicial discretion*.

The influence of the new constitutional order with its constitutional context (e.g. democratic values, and spirit and purport of the *Bill of Rights*) has brought even more flexibility in, or room for, creative judicial discretion. After all, the courts will, apart from their creative

law-making function, also have to make value judgments to promote and reinforce the spirit and objectives of the *Bill of Rights*. Nevertheless, judicial lawmaking is not unbridled. Judicial decisions are subject to review and appeal and judicial officers are accountable and responsible for their actions (e.g. judicial decisions are open to public debate and academic criticism to ensure accountability, responsiveness and openness) (Botha 1998: 113-114).

Possibilities during concretisation

There are many possibilities with regard to the modification and adaptation of the meaning of the legislation that may crop up during this phase. However, the only (and crucially important) certainty is that the final "result" of the interpretation process may not be in conflict with the *Constitution* in general, and the *Bill of Rights* in particular. In essence, modification or adaptation of meaning may be applied only if it is permitted by a legislative purpose that is consistent with the *Constitution*.

Modification of the meaning

In many cases there will be no difficulty in applying the text in question to the facts within the constitutional context. If this is the case, the process is completed and one may conclude that the interpretation and application have occurred simultaneously and automatically. However, be aware that such cases may easily create the wrong impression that interpretation only comes into play if the so-called "plain meaning" of the text is ambiguous or obscure. In many cases though, modification of the meaning is necessary when the initial meaning of the text does not correspond fully to the purpose of the legislation. This often happens when the text has said either more or less than its purpose, or when the initial meaning of the text is in conflict with the *Constitution*. There are then only two possibilities for the interpreter:

- the initial meaning of the text is reduced (restrictive interpretation), or

- the initial meaning of the text is extended (extensive interpretation)

Restrictive interpretation is applied when the word or the provision concerned embraces more that its purpose. The text must then be modified (restricted) to reflect the true purpose (e.g. in *Director of Education, Transvaal v McCagie* 1918 AD 616 the court found that the general words "other evidence" in the provision "a university degree or other evidence of the necessary qualifications" had to be interpreted restrictively. Other evidence could therefore only mean other evidence in the same category as a university degree.

Extensive interpretation is the opposite of restrictive interpretation. In this case the purpose of the legislation is broader that the initial meaning gleaned from the text of the legislation. The meaning of the text is then extended (widened) within the framework of the purpose of the legislation to give effect to the purpose (within the wider constitutional context). For example, when legislation confers powers on an official (e.g. the power of the provincial Head of Department to dismiss the educator) it also, by implication, confers those powers which are *within reason* necessary to achieve the principal aim (e.g. if a temporary suspension is necessary before an educator is dismissed, the power to suspend would be within reason to achieve the dismissal). There are many other forms of restrictive and extensive interpretation.

8.4 Conclusion

This Chapter touched on some of the important rules of constitutional and statutory interpretation. It is a difficult field of law but an area in which everyone encounters problems, sooner or later. It is therefore necessary for educators, educational administrators and others involved in education to acquire a basic knowledge of the rules of interpretation.

Chapter Nine

Reading Court Cases

Outline of this Chapter

*In this Chapter the focus is on **case law** as a **source** of law and on interpreting and understanding court decisions. The nature of the judiciary and its role in the enforcement of the law and, in particular, education law, are discussed in **Chapter Ten**.*

9.1 Introduction

Numerous references have been made to the judiciary (or the courts) throughout this study. For example:

- the judiciary is a branch of the government and, therefore, vested with state authority
- the courts are the "watchdogs" of democracy, the *Constitution*, and human rights
- constitutional and statutory interpretation is an important function of the courts
- the judiciary consists of a system (a hierarchy) of courts
- the judgments of the superior (higher) courts are followed by the lower courts
- case law (judicial precedent) constitutes an authoritative source of law

9.2 Who are the judicial bodies?

In all communities a need exists to settle disputes through a process of adjudication by people who are not themselves involved in the dispute. Some disputes about the law and its application may be referred to other individuals or bodies (i.e. government institutions) to be resolved *authoritatively*. Courts (as institutions of government) do not resolve all disputes, but only those disputes that can be resolved by *applying the law*. In *Chapter Ten* the courts, as well as these other institutions involved in resolving disputes, are dealt with.

The *Constitution* provides that the judicial authority of the Republic is vested in the courts (see section 165(1)). The *judiciary* is therefore constitutionally recognised as the third branch of government (i.e. legislature, executive, judiciary) and the *Constitution* provides for a structure of judicial bodies (a hierarchy of courts). Although the Constitutional Court is dealt with extensively in the *Constitution*, the composition, powers and procedures of the other courts are dealt with in greater detail in separate legislation (e.g. in the *Supreme Court Act of 1959* or the *Magistrates' Court Act of 1944*).

The ensuing discussion touches briefly on aspects of the courts. If you are interested in finding out more on this topic, please consult the *List of Sources*.

9.2.1 The Constitutional Court

The Constitutional Court is the highest court in all constitutional matters. This includes issues involving the interpretation, protection and enforcement of the *Constitution*. There are also other constitutional matters which only the Constitutional Court may deal with, for example, disputes between organs of state in the national or provincial sphere concerning the status, powers or functions of those organs; the constitutionality of any parliamentary or provincial bill, including constitutional amendments (provided certain

conditions are met), whether the President or Parliament has failed to fulfil a constitutional duty, and the certification of provincial constitutions.

9.2.2 The Supreme Court of Appeal

The Supreme Court of Appeal is the highest court in matters other than constitutional issues. It also decides appeals in any matter, including constitutional matters that do not fall within the exclusive jurisdiction of the Constitutional Court (jurisdiction is the competence of a particular court to hear a specific case). The Court is not a court of first hearing. For example, public education matters that are not resolved by means of judicial review in the High Court (see Chapter Ten), usually go on *appeal* to the (higher) Supreme Court of Appeal. The Court is, however, not the *highest* court of appeal in constitutional matters – the Constitutional Court is, and in a constitutional matter one may appeal from the Supreme Court of Appeal to the Constitutional Court.

9.2.3 The High Courts

The High Courts are located in the various provinces and have jurisdiction in all constitutional matters assigned to them in an Act of Parliament, except matters that fall within the exclusive jurisdiction of the Constitutional Court or matters assigned by an Act of Parliament to another court of a status similar to a High Court. The provincial High Courts have jurisdiction within their geographical (provincial) area. This means their decisions apply within the specific province.

The High Courts have extensive powers to review all administrative action (e.g. public education issues) and this power of review is an inherent (common law) power. More powers of review are conferred on them by the *Constitution* and Acts of Parliament. Judicial review is one of the most important forms of adjudication of public education disputes.

9.2.4 The other court (lower courts)

Lower courts only have jurisdiction on constitutional matters insofar an Act of Parliament assigns it to them. This has not happened. However, in most other matters, the magistrates' courts (and district/regional courts) are usually the first courts to hear a case and although their decisions are not reported in the law reports (i.e. they are not binding judicial precedent), the court proceedings are minuted and recorded. A judge of a high court must review all lower court decisions. Lower courts have jurisdiction within their magisterial area (or district), and they are bound by the decisions of the high courts in the particular province.

9.3 Reading court cases

What follows is a short discussion on reading court cases. More information on this topic is found in Kleyn & Viljoen (2002) in the *List of Sources*.

Some court cases contain important legal decisions and principles and are published in the law reports (see below). The law reports are found in the law libraries of universities or government institutions and in the libraries of legal practitioners and the courts. Try to obtain a copy of one of the following cases to guide you through the discussion.

Matiso v Commanding Officer, Port Elizabeth Prison 1994 4 SA 593 (SE)

Moletsane v Premier of the Free Sate and Another 1996 3 SA 96 (OPD)

Holomisa v Argus Newspaper Ltd 1996 6 BCLR 836 (W)

S v Makwanyane 1995 3 SA 391 (CC), also reported in 1995 6 BLCR 665 (CC)

Stellenbosch Wineries v Distillers Corporation (SA) Ltd 1962 1 SA 458 (A)

Director of Education, Transvaal v McCagie 1918 AD 616

9.3.1 Parties in a case

Where parties litigate (engage in legal proceedings before a court) in their private or personal capacity, the case is referred to as a *civil case*. It is clear that the *Holomisa* case is a civil case: Holomisa (a natural person) acted in his private capacity as the *plaintiff* (the aggrieved party), while Argus Newspaper Ltd (a legal person) is the *defendant* (the party whose conduct is complained of).

In cases involving a government authority acting against an individual/entity or another (lower-ranking) state official/body, the parties are referred to as *applicant* and *respondent*. Matiso, Moletsane and the Director of Education (Transvaal) are the *applicants* in the three cases mentioned above while the Commanding Officer, Port Elizabeth Prison, the Premier of the Free Sate and McCagie are the respective *respondents*.

When High Court cases (usually judicial review) go on appeal to a higher court (i.e. the Supreme Court of Appeal – previously the Appellate Division) the party lodging the appeal is the *appellant*, and the other party is the *respondent. Stellenbosch Wineries v Distillers Corporation (SA) Ltd* 1962 1 SA 458 (A) was heard by the Court of Appeal (A) and also *Director of Education, Transvaal v McCagie* 1918 AD, although this last case was heard many years back in 1918.

The case of *S v Makwanyane* 1995 3 SA 391 (CC), is a criminal case in which the state itself (and not a government body/official representing it), acts as a party against another party. This means that the state (S) acts against the accused, Makwanyane. Because it dealt with human rights issues (e.g. right to life), the Constitutional Court gave the final judgment.

9.3.2 Citation of court cases

The year in which the case is published in the law reports appears directly after the names of the parties. After that, the number 1, 2, 3 or 4 appears which indicates the volume of the law reports in which the case is published (e.g. 1994 4 indicates that the Matiso case was published in the fourth volume of 1994). The next reference in the title refers to the law reports in which the case is published. SA stands for the publication *South African Law Reports*, while BCLR refers to the new law reports, *Butterworths Constitutional Law Reports*. This means that the *Holomisa* case was published in the *Butterworths Constitutional Law Reports*, while the case of *S v Makwanyane* appeared in the *South African Law Reports*. Presently, constitutional court cases often appear in both publications (e.g. *S v Makwanyane* 1995 3 SA 391(CC)).

The number after the title of the law report indicates the page number of the case (*Holomisa v Argus Newspaper Ltd* 1996 6 BCLR 836 (W) was published in 1996 and published in the sixth volume of the *Butterworths Constitutional Law Reports* on page 836. the last letter(s) in the citation refers to the court that has adjudicated the case (e.g. (SE) refers to the Supreme Court of the Eastern Cape; (T) refers to the Supreme Court of the Transvaal; (W) refers to the Supreme Court of the Witwatersrand; (CC) indicates that the case was heard by the Constitutional Court; (A) indicates that the Appellate Division (now the Supreme Court of Appeal (SCA)) heard the case). The courts are in the process of transformation and although some of the old terms (e.g. Supreme Court of the Witwatersrand and Transvaal) are still being used, they will be phased out gradually as the new system comes into operation.

9.3.3 The judgment itself

When a particular case is found in the law reports, its full reference and the names of the judges who decided the case appear at the

top (e.g. Wessels J refers to judge Wessels; Corbett AJA refers to Corbett as the acting judge of appeal; Hiemstra JP refers to Hiemstra as judge president). The leading judge of the Supreme Court of Apeal is called the President. The leading judge of the Constitutional Court is the Chief Justice (CJ) of South Africa.

- *Outline of the case*: The most important points of the judgment are noted in telegram style at the beginning of the report.
- *Headnote*: The headnote is compiled by the editors of the law reports and although it has no official legal status, it usually sets out the ratio decidendi or reasons for the judgment. The *ratio decidendi* contains the legal rules or principles that are involved in the case and on which the court has based its judgment. The reason for the judgment is that part of the judgment that binds subsequent (and lower) courts. It forms the judicial precedent that is important as a source of law.
- After the headnote an indication of the type of case is given, namely whether it was an appeal, review or application.
- *Summary of the arguments*: In this section the court indicates the type of action that is instituted and the remedy that is required (e.g. an application (motion procedures) to a review court; an application for an interdict or a declaration of rights, an action for material damage or an action for damage to the personality). A summary of the arguments of the legal experts representing the parties (advocates, or "counsel" for the parties) follows with references to the sources they have used (e.g. relevant legislation, other case law, authoritative writings).
- *Conclusion and verdict:* The judgment concludes with a verdict and an order of the court. There is sometimes more than one judgment. This occurs when the judges do not agree and majority and minority judgments are given. Bear in mind that a minority judgment can, juridically speaking, be more sound than a majority judgment and can also be approved and followed in a later decision by a higher court. The judgment often deals with more than one aspect of the law, for example, the status of the public school, and safety and supervision by educators.

9.4 Conclusion

Reading case law is not an easy task. Judgments are not always written in easy language or in a reader friendly and systematic way. However, if one knows what to look for, it becomes easier. The facts of the case help one to understand the case, but the actual purpose of studying the judgment is to determine the *essential legal principles and how the court applied them in the particular case*. It is sometimes easy to recognise the legal principles that are involved (the *ratio decidendi* or reasons for the judgment), but to understand how the court applied these principles to the facts and circumstances of the case, is sometimes quite tricky. We trust that this brief introduction to the reading of court cases will help to unlock the intricacies of court proceedings and judgments!

Chapter Ten
Enforcement of Education Law

Outline of this Chapter

In this final Chapter the enforcement of education law by means of administrative and judicial control is discussed.

10.1 Introduction

In *Chapter Nine* it was mentioned that legal uncertainties or disputes may be resolved by different persons or institutions using different procedures and mechanisms. It was also emphasised that the courts are not the only institutions that resolve disputes. Frankly, one does not run to court with every legal problem one encounters. However, the courts (the judiciary, which is a branch of government) resolve legal disputes by applying the law to the facts in question. Judicial control is, therefore, an authoritative way of resolving legal disputes. In this Chapter only two forms of control are examined:

- administrative control by public education bodies/officials
- judicial control by the courts

The following examples illustrate the difference between judicial control and administrative (also called "internal") control.

Administrative control

The school's governing body investigates whether a learner should be suspended for misconduct. If the learner is found guilty, the gov-

erning body may suspend the learner for one week. If the learner or parent is dissatisfied with the way in which the investigation was conducted by the governing body, an appeal may be lodged with the provincial Head of Department. The Head of Department will have to conduct a fresh investigation to determine whether the suspension was fair and reasonable. This is a form of administrative or internal control. Administrative control is the most common form of control and takes place within the public education administration. Legislation usually makes provision for the different channels of administrative control (e.g. the *South African Schools Act* makes provision for suspension of learners and appeal procedures against such suspension).

Judicial control

If the learner and parent are unhappy about the Head of Department's final decision to uphold her suspension, they may apply to the High Court to have the decision of the Head of Department reviewed by the Court. This will take the form of a judicial review in which the Court may decide to uphold or reject the Head of Department's decision. What usually happens, but not always, is that the Court refers the case back to the Head of Department for reconsideration. Judicial control by the courts is the final and most important form of control over administrative education disputes. The *Bill of Rights* provides that every person has the right to have his or her dispute adjudicated by the courts (s 34). The decision by the Court is an authoritative judicial decision which is sometimes published in the law reports. The decision is final unless one appeals to a higher court.

10.2 Internal (administrative) control

Most investigations and resolution of disputes take place inside the education administration. In fact, in most cases, the courts stipulate that all the internal procedures, controls and remedies have to be exhausted before the dispute is brought before the court. There are

many reasons for this ruling, most importantly, officials or bodies dealing with these disputes and problems are usually well equipped to deal with such matters (i.e. these education officials know the education situation and the rules and policies involved). They may fully review the matter and even gather more evidence and documents to confirm or overturn the decision of a lower official or body.

Court cases, on the other hand, are expensive and time consuming and often judicial officers have less "hands-on" knowledge of the situation than the people actually dealing with it. Internal control is, therefore, cheap and expedient and solves the problem or dispute there and then (e.g. bodies/officials may discipline, suspend, expel, impose a fine, demote, transfer or dismiss).

These internal administrative "checks and balances" are *vitally important in promoting and maintaining open, transparent and accountable practices and sound democratic government*. The education administration (a part of the broader public administration) is, after all, bound by the principles of democracy, openness, transparency and accountability as stipulated in section 195 of the *Constitution*.

Internal administrative control is then not the same as *judicial control* by the courts, but judicial control remains a last resort. Nevertheless, it is important that administrative controlling bodies/officials know how to evaluate an administrative case (e.g. action to suspend or dismiss) to determine whether a decision is fair and reasonable. In this sense, one may conclude that *all acts performed by the education administration must comply with the requirements for lawful administrative actions*.

10.2.1 Requirements for lawfulness

In *Chapters Seven* and *Eight* the different sources of the law and how to interpret the law were discussed. It also became apparent

that the "legal correctness" of an administrative action (e.g. the procedures followed in an investigation to suspend a learner, or the decision taken to dismiss an educator) must be tested in terms of the relevant legal norms. This means that *all the requirements for a valid action prescribed by the law* should be complied with.

- *First* of all, the administrative action must be evaluated in terms of the relevant provisions of the *Constitution* (and the *Bill of Rights*).
- *Secondly*, the action in question must comply with the provisions of the relevant legislation (i.e. a suspension must be dealt with in terms of the *South African Schools Act*).
- *Thirdly*, the action must comply with authoritative case law on the matter (e.g. is there a judicial precedent that should be followed?)
- *Fourthly*, relevant common-law principles should be adhered to – these principles usually feature in court cases
- *Finally*, the procedures followed in the investigation, and the decision made by the body or official must be in line with the values, spirit and objectives of the *Bill of Rights*

It means that the undertaking by the public (education) administration to promote democratic, open, participative and accountable government should be manifested, for example –

- in the way in which bodies and officials perform their administrative (education) actions in their day-to-day work situation (e.g. as educators, administrators, governors), and
- in the way controlling bodies and official within the administration evaluate cases and provide remedies to aggrieved persons (where necessary).

The requirements for a lawful administrative action are referred to in the *Constitution* as "administrative justice". Administrative justice includes the following:

- The administrative body/official must act/perform within the am-

bit of its authority (e.g. the governing body would act *ultra vires* if it suspends a learner of a neighbouring school. Although the governing body has the capacity to investigate and decide upon suspensions, it does not have any jurisdiction over the neighbouring school)

- Administrative justice (s 33 of the *Bill of Rights* – the administrative justice clause) is of crucial importance to all bodies/persons involved in the education administration. In fact, administrative justice forms the basis of fair, just and reasonable conduct and this concept has been included in all new education legislation to ensure efficient, lawful and accountable administration. Section 33 provides that –

  (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.

To perform a *lawful* act, means that all the requirements of the law must be complied with.

First, *reasonable* action requires that the decision taken by the official is reasonable (or justifiable) in terms of the offence that has been committed. In short, the penalty must fit the offence. A decision that is reasonable is taken objectively and is based on the correct facts and circumstances.

Second, *fair procedures* relate to the manner in which the investigation or hearing has been conducted (e.g. I must be informed of the charges against me and of the hearing or enquiry that is going to take place; I must be given details of the charges against me and need an opportunity to give my side of the story; I must be afforded time to prepare my defence and must be given reasons for the charges against me).

Thirdly, when a decision is taken that affects my rights, the official has to furnish *written reasons* for such a decision (e.g. if I am dismissed on the ground of misconduct, I am entitled to reasons that

explain the charges, the finding and the punishment). In other words, I must be able to understand the connection between the finding and the punishment (e.g. if I am found guilty on a first offence of arriving late at school and then punished with a dismissal, it is quite obvious that the reason given for dismissal would not be proportionate to the offence committed). The reason for demanding written reasons is to ensure that suitable, rational and justifiable decisions are made.

Finally, to secure efficient, democratic and accountable education governance, all bodies and officials (e.g. from the lower-ranking persons/officials to the most superior officials) must act within the parameters of the law. They may not exercise powers not conferred on them by law and they may not perform actions not authorised by law. In other words, lawful administrative acts must be performed.

Section 33 is the basic point of departure for administrative justice, but to give full effect to the right, the *Promotion of Administrative Justice Act 3 of 2000* was adopted. The Act codifies administrative law to a large extent and must be applied in all administrative justice cases.

We may summarise as follows the most important stipulations of one aspect set out in the Act, namely the right to procedurally fair administrative justice:

The following must be complied with:

- notice of the proposed action;
- an opportunity to make representations;
- a clear statement of the action; and
- notice of the right to reasons and of the right to appeal.

Depending on the circumstances, the right may also include the following (this means that these aspects are not necessarily part of the right):

- an opportunity to be assisted – in serious cases by a legal representative;
- to present and dispute information and arguments; and
- to appear in person.

The rules in the Act must always be applied. When a case comes before the courts, the courts will first and foremost look at the provisions of the Act to adjudicate the matter. One of the main themes of the administrative law (a public-law discipline) is administrative justice and if you are interested in reading more on this topic, please consult the *List of Sources*.

10.2.2 Other forms of administrative control

Many other forms of administrative control exist, for example:

- Special administrative tribunals (e.g. the *Atmospheric Pollution Prevention Act of 1965* established an Air Pollution Appeal Board to settle air pollution disputes)
- The *Constitution* (Chapter 9) makes provision for institutions to settle administrative disputes and hear complaints by the public (e.g. the Public Protector, Human Rights Commission, Commission for Gender Equality and the Auditor-General)
- Parliamentary control (e.g. all ministers are accountable to Parliament and the voters for the activities in their departments – the Minister of Education reports to Parliament and answers questions on the work of the National Department of Education; the various provincial MEC's for Education also report to their provincial legislatures and the Premier on the activities in their departments)
- Alternative dispute resolution (e.g. institutions are established for the settling of education labour disputes through collective bargaining processes by means of mediation, conciliation and arbitration). (Education labour law is dealt with in another monograph.)

10.3 Judicial Control

10.3.1 Introduction

We have seen above that when internal remedies are exhausted in a dispute, in other words within the administrative branch, the courts may be approached for a decision. (See also the discussion of the judiciary in *Chapter Nine*.)

The *Constitution* contains a general provision that the *judicial authority is independent, impartial, subject only to the Constitution and the law*. This is a very important provision which means that in the exercise of their powers, the courts are subject only to the law and that no person or organ of state may interfere with the functioning of the courts. Furthermore, all organs of state must assist and protect the courts to ensure their independence and impartiality. There are various mechanisms and procedures in the *Constitution* and other legislation which ensure and protect the independence of the judiciary and, in particular, its control over the legislature and the executive branches of government.

There are many forms of judicial control over private actions and administrative actions, and just as many remedies that the courts may apply to restore legal balance in a given situation. To approach a court the person (or party) must have the capacity to be a party in the case – the person (or party) must have *locus standi* (legal standing) as provided for in section 38 of the *Bill of Rights*. It usually means that a person, group or the public must have some interest in the case (e.g. the educator certainly has an interest in her dismissal and may approach the High Court for judicial review, the parent may sue the educator for negligence when his child has been injured on a school trip), but one may also go to court on another person's behalf or in the public interest.

Although the magistrate courts will also exercise judicial review of administrative cases in future, in this section the emphasis is on ju-

dicial review by the High Court. You will recall that the High Courts operate within the various provinces and are regarded as "higher" courts in the hierarchical structure of the courts.

10.3.2 What does the court do?

When the High Court reviews an administrative decision, it applies legal rules and principles to determine whether the investigation or hearing by the government body/official (in other words, internal control) was conducted in a fair manner and whether the decision taken was reasonable. In other words, the Court considers the case and has the power to either confirm the administrative decision, amend or repeal it, refer it back to the body/official for proper consideration, or make a decision itself.

What is important is the way in which the court applies the law to the specific case in question, and the grounds on which the judgment is based. When you read court cases as explained in *Chapter Nine*, you will notice how the courts interpret and apply the appropriate legal rules and principles to the facts of the case they have to resolve. The officers of the courts are legal experts, and many courts even specialise in particular legal fields (e.g. the family courts in family matters, the labour courts in employment disputes, the Constitutional Court in constitutional matters). Courts have to follow specific court procedures prescribed by law to conduct their work (e.g. in civil cases the rules of civil procedure have to be followed; criminal cases are conducted in terms of the rules of criminal procedure; specific rules deal with evidence in court proceedings – what type of evidence is allowed, and how it should be presented). You also know that specific rules and procedures have to be followed in the interpretation of the relevant legislation (and the *Constitution*) as discussed in *Chapter Eight*. All court cases are recorded, but only some of the cases of the higher courts are published in the law reports. This is because the reason for a judgment will be binding on lower courts and courts of similar ranking in the

same jurisdictional area.

It is essential that the courts and the officers presiding in court remain independent and free from undue influence. The courts are, after all, the "watchdogs" of the democratic principles and values enshrined in the *Constitution* (e.g. they ensure that the public (education) administration functions in terms of the democratic values and principles that underlie the *Constitution*).

10.4 Conclusion

In this *Chapter*, the final chapter of this study, the various forms of control over administrative acts were discussed. The importance of both forms of control (e.g. administrative and judicial) in the public education sector should not be underestimated as they provide crucial "checks and balances" to ensure open, participative, democratic and accountable government in South Africa.

The purpose of this study was to provide the reader with a bird's eye view over the law, the *Constitution* and education law, and to provide you with some tools to find your way around the law. Every day educators, parents, learners and those in educational governance are confronted with the law. We hope you can use this study to understand and apply the law better and with more effect in your particular situation in the education environment.

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