

**CHAPTER 1**



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

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# INTRODUCTION

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

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

Apartheid left South Africa with a deeply unequal and dysfunctional education system. More than twenty years into democracy, the pace of change has been slow. A fortunate few receive a world-class education; for the majority, a basic education remains a hope rather than a reality.

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

## THE CONSTITUTION

South Africa has had two Constitutions since 1994.

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

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

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

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

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

## THE CONSTITUTION

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

## THE BILL OF RIGHTS

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

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

## WHO BENEFITS FROM THESE RIGHTS?

Most of the rights in the Constitution apply to everyone, including the right to a basic education. As we explain in greater detail below, this means that any person in South Africa possesses these rights, including non-citizens.

## WHO HAS DUTIES?

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

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

has a duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

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

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

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

Private individuals, including people, companies, and other organisations that are not a part of the state, also have duties under the Constitution. Section 8(2) provides that private individuals have constitutional duties, where this is required by the nature of the right and the nature of the obligation arising from the right. This means that the nature of the duty that a private individual owes will depend on the context.

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

The question of whether or not private individuals have a duty to take positive steps to provide a basic education will depend on the circumstances. The extent of these positive duties is a matter of great debate, particularly in the case of independent schools.

### LIMITATIONS

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

The state also has to make difficult choices about how best to allocate its time, capacity and resources to many competing demands. Improving the education system is a priority, but the government also has to address many other pressing needs in society.

This means that some restrictions of the right may be permitted to allow the state to meet other needs.

When a right is restricted or is not sufficiently protected or fulfilled, we say that it has been 'limited'. Section 36(1) of the Constitution permits limitations of rights, provided that these limitations are authorised by law and that they are reasonable and justifiable. A strong justification is required for the limitation of any rights.

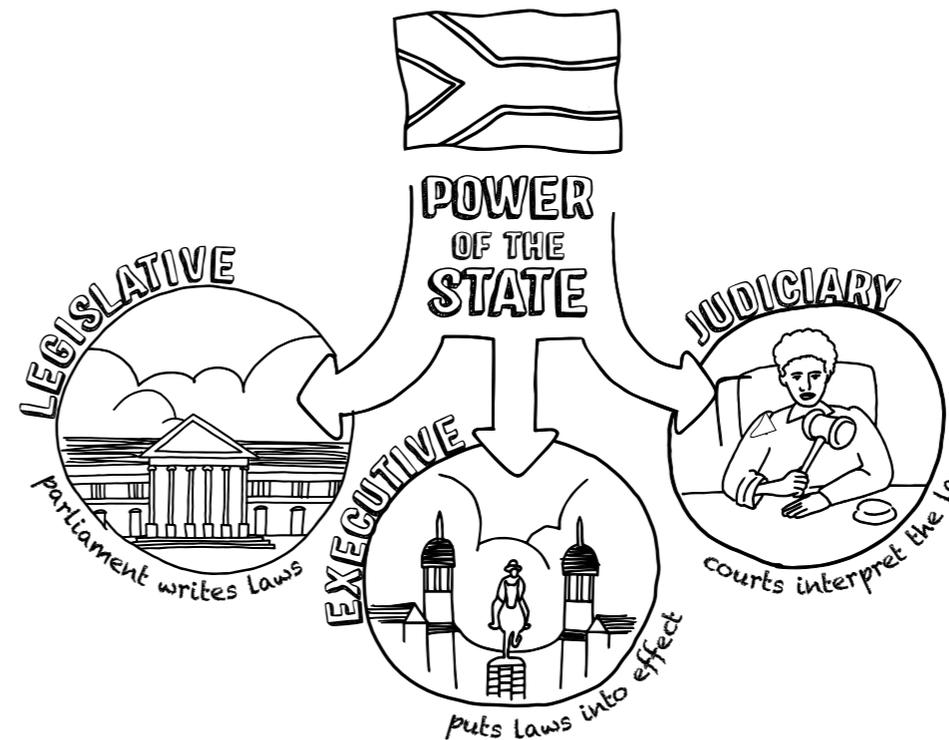
### REMEDIES

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

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

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

- An order requiring the state or a person to do something or not to do something (called an interdict). An example of an interdict is an order requiring the state to provide textbooks to all learners
- An interdict combined with an instruction to report to the court on the progress in carrying out the order (known as a 'structural interdict') – for instance, an order directing the state to provide desks and chairs to all learners within three months, and to report to the court every month on progress made



- An order that the parties enter into genuine discussion in an attempt to resolve their problems ('meaningful engagement'). For example, a court could order the state to consult with schools, parents and learners about whether their school should be merged with another one
- An order that the state or a person pay money to another person to compensate them (pay them back) for the violation of their constitutional rights ('constitutional damages'). This is reserved for exceptional cases
- Any combination of these remedies.

### SEPARATION OF POWERS AND DEFERENCE

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

The separation of powers requires that the power of the state should be split between three branches: the legislature (those who make the law at Parliament), the executive (those in government who give effect to the law), and the judiciary (those who interpret the law and resolve disputes in courts or other forums). Each of these branches has distinct powers. They also have powers to keep the other branches in check. The aim is to prevent any branch from gaining too much power or abusing their powers. It also allows for specialisation, so that these branches of the state can concentrate on what they do best.

For example, one of the laws made by the legislature is the South African Schools Act 84 of 1996, which affects many of the issues discussed in this handbook. Among other things, the Schools Act sets out how schools will be organised, governed, and funded.

### DEFERENCE AND THE RIGHT TO A BASIC EDUCATION

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

## THE LIMITATIONS CLAUSE

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

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

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.'

## EDUCATION RIGHTS IN INTERNATIONAL LAW

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

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

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

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



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

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

### INTERNATIONAL LAW

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

International treaties (agreements signed by countries) are binding on South Africa when they have been signed and ratified. These treaties become binding law within South Africa when parliament passes legislation giving effect to these treaties.

Courts are also required to consider international law when they are interpreting and applying South African law. According to Section 233 of the Constitution, all legislation must be interpreted to be consistent with international law. Section 39(1)(b) of the Constitution also requires courts to consider international law when interpreting the Bill of Rights.

# HOW TO PROTECT AND PROMOTE CONSTITUTIONAL RIGHTS

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

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

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

Usually, the best first step to take is to enter into negotiations with the other party. This might involve writing letters or arranging meetings to raise concerns. This may open up the possibility of resolving

the dispute without the cost and time delays involved in taking the matter to court. It may also help to maintain good relations between the parties.

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

Another option is to enlist the help of so-called 'Chapter 9 institutions'. These are the institutions that are set up in terms of Chapter 9 of the Constitution. They serve as a check on government in

order to hold it accountable, and they also play a role in guiding the transformation of South Africa as envisaged in the Constitution. These Chapter 9 institutions include the South African Human Rights Commission (SAHRC), the Public Protector, the Commission for Gender Equality and the Commission for the Protection and Promotion of Cultural, Religious and Linguistic Communities (CRL Commission).

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

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

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

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

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

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

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

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



## WHERE TO GO FOR HELP?

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

- Centre for Applied Legal Studies (CALS)
- Centre for Child Law
- Equal Education Law Centre
- Legal Aid Justice Centres
- Lawyers for Human Rights
- Legal Resources Centre (LRC)
- Probono.org
- SECTION27
- Socio-Economic Rights Institute of South Africa (SERI)
- University law clinics

Chapter 9 institutions are also available to assist:

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



## THE RIGHT TO A BASIC EDUCATION

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

Section 29(1) provides:

‘Everyone has the right –

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.’

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

First, the right to a basic education is

guaranteed to everyone. Who is ‘everyone’?

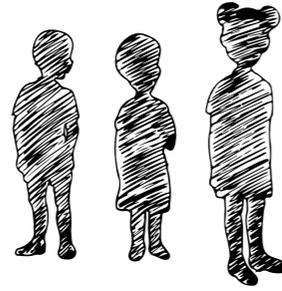
Second, Section 29(1) distinguishes between a basic education and a further education. What, then, is the content of a ‘basic’ education?

Third, there is an important difference in the way that the two rights to education in Section 29(1) are worded. The right to a further education is qualified by the additional statement that the state must take ‘reasonable measures’ to make a further education ‘progressively available and accessible’. By

contrast, the right to a basic education does not have this additional wording; it is unqualified. What does this mean for the content and application of the right to a basic education?

Fourth, under what circumstances may limitations to the right to a basic education be justified under Section 36(1) of the Constitution?

Fifth, how will courts determine appropriate remedies for unjustified limitations to the right to a basic education?



## WHO IS EVERYONE?

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

The Supreme Court of Appeal confirmed the wide application of ‘everyone’ in its judgment in *Minister of Home Affairs v Watchenuka*. The court connected the right to an education with the right to human dignity in the Constitution:

‘Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human.

...

‘The freedom to study is ... inherent in human dignity; for without it, a

person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education.’ (paras 25, 36)

Here, the Court emphasises that everyone has a right to human dignity, citizens and non-citizens alike. Since education is essential to a life with dignity, it is also not limited to citizens. The word ‘everyone’ in Section 29(1) confirms this wide application.

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

### THE WATCHENUKA CASE

Ms Watchenuka and her son were refugees from Zimbabwe who sought asylum in South Africa. They were issued with a permit allowing them to remain in the country while their asylum application was being considered, but they were prohibited from working or studying during this time. The Supreme Court of Appeal held that this blanket restriction was unlawful.

The court found that the state had acted unlawfully by prohibiting asylum seekers from studying while their asylum applications were being processed.

The Supreme Court of Appeal avoided answering the broader question about whether the state has a duty to provide an education to non-citizens. This issue is discussed in more detail in Chapter 7 of this handbook which deals with refugees.

## WHAT IS A BASIC EDUCATION?

The Constitution does not define the term ‘basic education’. There was once speculation about whether a ‘basic’ education was a period of time in school (the time-based approach) or an education of an appropriate standard (the adequacy-based approach). Policy-makers and courts have increasingly favoured the adequacy-based approach, and for good reason.

The first reason for an adequacy-based approach is the wording of Section 29(1)(a). This section includes the right to ‘adult’ basic education. This means that a basic education cannot be confined to particular ages, or to time spent in school.

A second reason is that an adequacy-based approach best fits the purposes of the right to a basic education. The Constitutional Court summarised some of these purposes in its important decision in *Governing Body of the Juma Masjid Primary School v Essay*. In that judgment, Justice Bess Nkabinde explained that:

‘The significance of education, in particular basic education, for individual and societal development in our democratic dispensation in the light of the legacy

of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.

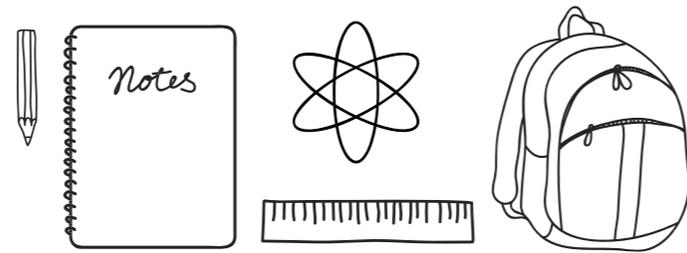
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‘[B]asic education is an important socioeconomic right directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities.’

### THE SIGNIFICANCE OF JUMA MUSJID

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

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

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



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

The final reason for the content-based approach is that it is strongly supported in international law. The phrase 'a basic education' has its origins in the 1990 World Declaration on Education for All. This is one of the non-binding 'soft' law instruments discussed above, but it has been hugely influential in shaping the international understanding of the right to education. Article 1 of the World Declaration explains that the right to a basic education is a guarantee that:

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

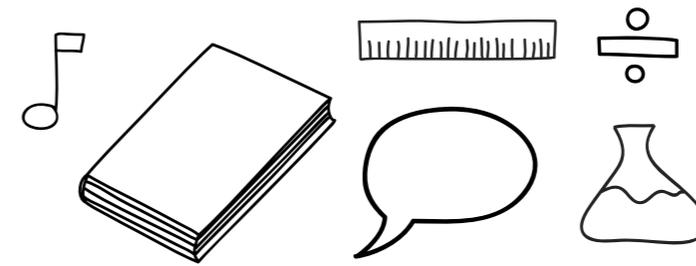
In this understanding of a basic education, the process of defining the content of this right involves three stages:

- First, we need to identify the purposes that an education should serve, which include individual and societal development
- Second, we need to identify learners' basic learning needs in light of these purposes, such as literacy, numeracy, problem-solving skills, and so on
- Third, we need to identify the materials and resources required to meet these basic learning needs, such as adequately trained teachers, textbooks, classrooms, and adequate school furniture.

The content of a basic education is not fixed. As Article 1 of the World Declaration goes on to say, 'basic learning needs and how they should be met' will vary with the context, and will '[change] with the passage of time'.

Our courts have increasingly supported the adequacy based understanding of the right to a basic education, and have started giving content to this right. For example:

- In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*, the High Court noted that a basic education for learners with severe intellectual disabilities may be very different to that provided to learners in mainstream schools.



What is important is that the learner receives an education that 'will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be.'

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

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

- Most recently, the Supreme Court of Appeal's decision in *Minister for Basic Education v Basic Education for All* confirmed that the right to a basic education gives every learner the right to adequate textbooks.

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

## THE DEMOCRATIC AND COOPERATIVE EXERCISE

In *Mazibuko & Others v City of Johannesburg*, the court explained the ideal relationship between courts, law-makers and society in giving content to socio-economic rights such as the right to a basic education:

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

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

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

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

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

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

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

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

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

### QUALIFICATIONS, AND POSITIVE AND NEGATIVE DUTIES

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

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

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

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

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

### THE IMMEDIATELY REALISABLE RIGHT TO A BASIC EDUCATION

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



All socio-economic rights create negative duties that are unqualified and 'immediate'.

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

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

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

Returning to the example of a university education, a person does not have the positive right to a university education immediately. The mere fact that a person is not receiving a university education is not necessarily a limitation of her constitutional right to

further education. A limitation will have occurred only if the state's programmes to provide access to further education over time are found to be unreasonable.

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

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

### THE UNQUALIFIED, IMMEDIATELY REALISABLE RIGHT

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

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

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

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

This means that the state would have to show that any failure to provide a basic education is authorised by a specific law. In most cases where the state has failed to act, such as failing to deliver desks and

chairs to learners, the state will not be able to point to any law that authorises that failure. It would be hard to imagine a law that says that it is acceptable to provide desks and chairs to some schools, but

not to others! As a result, the limitation of the right to a basic education would be unjustified and unconstitutional.

Even if a law does authorise the limitation of the right, the state must still present a strong justification to show why the limitation of the right is outweighed by other important goals.

## HOW DOES A COURT DETERMINE AN APPROPRIATE REMEDY?

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

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

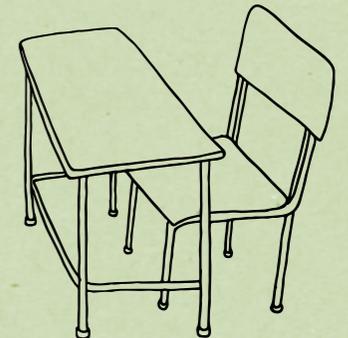
In designing remedies, courts will also be realistic about what the state can achieve, given its limited resources. The state does not have unlimited time or money. It also has many other pressing demands, such as providing health care, sanitation, and housing. A just and equitable remedy will need to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

This means that a court will not necessarily order the state to provide a basic education immediately. It may instead set deadlines for the state to deliver, or require the state to take all reasonable measures to realise the right to basic education with immediate effect, and require the state to report on its progress. What is important is that this remedy should require concrete steps to deliver a basic education, even if it cannot be provided overnight.

Take the example of schools that

lack desks and chairs. The failure to provide adequate school furniture would be a limitation of the right to a basic education. But the state may show that it needs time to plan and deliver desks and chairs to all schools. It may also argue that if it were to divert all its resources to school furniture, other important parts of the education system would suffer. The court will weigh up these considerations, and decide on an appropriate remedy. The court may give the state a deadline to deliver, giving it time to gather the resources and put together appropriate plans.

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



### THE SCHOOL FURNITURE LITIGATION

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

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

The Court ultimately allowed government 90 days to provide desks and chairs to those in need. However, the Court gave the state the opportunity to apply for extensions on this deadline if it could show good reasons for these extensions.

## COMBINING STRATEGIES: #TEXTBOOKSMATTER

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

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

In the build-up to the hearing in the Supreme Court of Appeal in *Minister of Basic Education v Basic Education, SECTION27 and BEFA* ran an extensive media campaign. The aim of this campaign was to ensure that the public understood the problem, as well as the importance of the case.

SECTION27 and BEFA did the following:

- Wrote articles on the role of textbooks in education.
- Produced videos from well-known, respected voices talking about the importance of textbooks. Some of the people include writer Njabulo Ndebele; journalist Justice Malala; ex-Wits SRC President Shaera Kalla from #FEESMUSTFALL; and Mary Burton from the Black Sash. These messages were distributed across various media platforms.
- Held district workshops in Limpopo, talking to schools/communities/ SGBs about the case.
- Organised a 'funeral march' in Polokwane with learners in Limpopo just before the case. The march symbolised the death of educational opportunities for poor learners.
- Produced videos of Limpopo learners talking about their experiences.

# THE RIGHT TO A BASIC EDUCATION IN ACTION

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

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

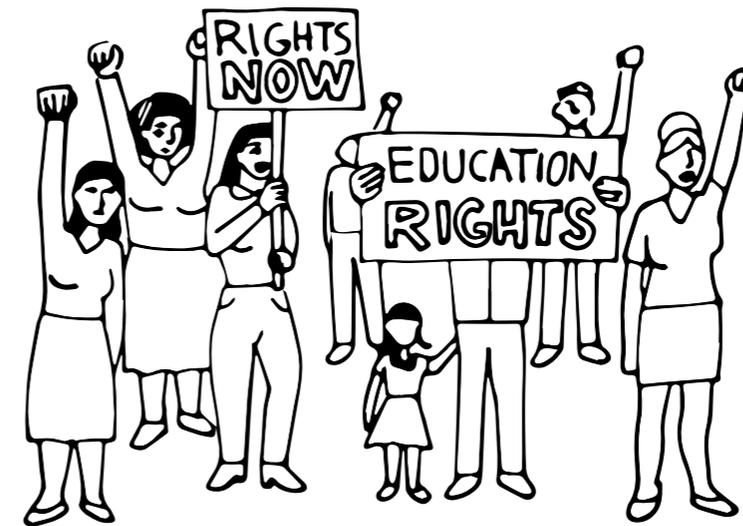
To solve this problem, lawyers and the courts will ask a series of questions:

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

The learners in this example are clearly

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

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



be provided. The result is that this situation is an unconstitutional violation of the learners' rights.

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

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

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

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

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

## OTHER CONSTITUTIONAL RIGHTS IN EDUCATION

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

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

### BEST INTERESTS OF THE CHILD

Children are the primary beneficiaries of the right to a basic education, and the main victims of inadequacies in our education system. Section 28(2) of the Constitution states that 'a child's best interests are of paramount importance in every matter concerning the child'. Section 28(2) is an important aid in interpreting other rights, including the right to a basic education. Section 28(2) is also a stand-alone right, generating its own set of obligations. In *Juma Musjid*,

the constitutional court said that all courts must consider the best interests of children before making a decision to evict a school from its premises.

### EQUALITY AND THE PROHIBITION OF UNFAIR DISCRIMINATION

Section 9 of the Constitution guarantees the right to equality and prohibits unfair discrimination. Apartheid has left deep patterns of inequality and disadvantage in our education system. The patterns of segregation under apartheid remain in many schools, and the imbalances in resources and outcomes are far from being made right. Unfair discrimination on the basis of race, gender, religion and sexual orientation, among other grounds, remains common in our schools.

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

### DIGNITY

The Section 10 right to human dignity informs all other rights contained in the Bill of Rights. Human dignity is based on the idea that all humans have equal worth, which should be respected and protected. However, human dignity is



not only an underlying value; it is also a stand-alone right. The right to human dignity protects all people from degrading, humiliating, exploitative or abusive treatment and conditions. The appalling conditions in which many learners are educated clearly violate their dignity.

### FREEDOM AND SECURITY OF THE PERSON

Section 12 of the Constitution protects the freedom and security of persons, and their right to physical and bodily integrity. The lack of adequate security and the dilapidated conditions in many schools pose a risk to learners' freedom and to security of the person. The conduct of principals and teachers can also place children at risk. For instance, in *Christian Education South Africa v MEC of Education*, it was held

that the use of corporal punishment in schools is an unconstitutional infringement of children's Section 12 rights.

### PRIVACY

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

### RELIGION

Freedom of religion and belief is protected in Section 15 of the Constitution, which

states that 'everybody has the right to freedom of conscience, religion, thought, belief and opinion'. The place of religion in schools is a complex topic that will be discussed in its own dedicated chapter.

### FREEDOM OF EXPRESSION

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

## CONCLUSION

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

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

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