CHAPTER 20
EDUCATION RIGHTS IN INDEPENDENT SCHOOLS
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INTRODUCTION

Since the end of apartheid, South Africa’s education system has emphasised the need to harness private resources in both the public and the independent schooling sectors, to assist it in addressing the tremendous backlogs and inequalities in education caused by apartheid-era education policies and spending practices.

Though independent schools serve a relatively small percentage of the country’s learners, the industry has seen significant growth over the past decade. This growth has been due in part to the growth in low- and middle-fee independent schools that market themselves as an alternative for private individuals and associations to establish and run independent schools that are of an adequate quality and socially just. These schools provide education for children whose household income qualifies them for fee waivers.

At the forefront of these legal considerations is the impact that the right to a basic education and other rights have on the constitutional right to a basic education and the state’s ability to develop a quality public education system that advances constitutional notions of equality, social justice and transformation. These are also things we will touch on in this chapter.

TYPES OF SCHOOLS IN SOUTH AFRICA

The notion of public versus private education is in some ways difficult to distinguish in South Africa. This is because state school funding policies have relied on school fees to maintain quality schools for middle-class and wealthy learners, who attend mostly formerly white schools.

Around 60% of South African learners attending public schools attend no-fee schools. The rest go to schools that charge fees. Some of these schools charge less than R1 000 a year, while others charge more than R30 000 per year.

School fees are used to enhance the level of education offered at schools in a number of ways. The money can be used to hire additional teachers, top up teacher salaries, and to offer extracurricular arts and sports programmes and a greater array of subject choices.

It can also be used to improve the school’s infrastructural and sports facilities, which are often far superior to begin with due to their having been inherited from grossly unequal apartheid spending practices. Fees may also pay for a wide range of learning and teaching support materials that are usually not available to learners who attend no-fee or low-fee public schools.

The state’s school-fee policy results in a public education system that offers schools of vastly varying levels of quality. Under this system, schools located in wealthier areas and attended by wealthier learners are able to offer more in terms of educational resources and quality school outcomes than schools that do not collect or collect very little in school fees.

South Africa’s public education system therefore features largely unequal public schools that in many ways resemble a quasi-privatised system of public education. This inequality has an impact on learners’ performance. Learners in poor, rural and township areas tend to go to under-resourced and often dysfunctional public schools, and their academic outcomes are generally lower. Learners who go to better-resourced and high-functioning public schools generally have better academic results. Learners may also attend independent schools. Unlike public schools, independent schools are permitted to limit admission to only learners who are able to pay tuition fees, as well as a number of other admission requirements that will be discussed below.

Despite their private nature, however, independent schools may receive state subsidies if they satisfy a number of criteria, including that they charge limited tuition fees, submit to a quasi-privatised system of public education. This inequality has an impact on learners’ performance. Learners in poor, rural and township areas tend to go to under-resourced and often dysfunctional public schools, and their academic outcomes are generally lower. Learners who go to better-resourced and high-functioning public schools generally have better academic results. Learners may also attend independent schools. Unlike public schools, independent schools are permitted to limit admission to only learners who are able to pay tuition fees, as well as a number of other admission requirements that will be discussed below.

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Some private schools charge very high tuition fees, with some annual fees exceeding 20 times the average amount that provinces spend on each public school learner each year. These schools offer:

- low learner-teacher ratios
- small classroom sizes
- broad curriculum choice, taught by highly credentialed teachers
- a history of high learner achievement
- extracurricular opportunities not available at public schools
- state-of-the-art facilities and learning and teaching materials.

At the other end of the spectrum are independent schools that are marketed to parents as low-fee schools. These schools claim to provide superior educational opportunities compared to competing neighbourhood public schools, which are often overcrowded and widely described as dysfunctional. The DBE has reported that many public schools, particularly in township and rural areas, are staffed with teachers with low levels of subject knowledge and a low degree of pedagogical skill, and suffer from high rates of absenteeism. They often lack essential facilities such as adequate classroom space and stocked libraries, and consistently demonstrate poor learner results.

Low-fee independent schools often charge fees that are less than the average amount that provinces spend on each learner in public schools, and may under certain conditions rely on state subsidies to meet their basic operational needs. While some private schools function as non-profit institutions, other independent schools – particularly those marketed towards poor or working-class parents – are owned and operated by for-profit, publicly traded corporations. Accordingly, independent schools in many ways mimic the public school system, in that independent schools marketed towards learners from different socio-economic classes offer education at widely varying levels of quality. Still, in a country with high rates of poverty and unemployment, it must be stressed that the majority of South Africans cannot afford to send their children to independent schools.

Regardless of the reason for attending independent schools, increased enrolment in that sector carries a number of social costs … [including] continued inequality in education, and a lack of diversity and integration along class, linguistic and – invariably – racial lines.

THE IMPACT OF INDEPENDENT SCHOOLS ON THE PUBLIC EDUCATION SECTOR

Regardless of the reason for attending independent schools, increased enrolment in that sector carries a number of social costs. These costs, which will be explored further below, include continued inequality in education, and a lack of diversity and integration along class, linguistic and – invariably – racial lines. The privatisation of education in South Africa and the inherent inequalities stemming from the unequal public and independent school systems inevitably have an impact on the degree to which education can contribute to the social transformation envisioned by the South African Constitution.

Unequal access to quality education is particularly significant in South Africa, where generations of apartheid-era education policies and unequal government educational expenditure along racial lines have persisted for generations. The consequences of these policies have been severe, and have resulted in massive educational backlogs for black learners that continue to persist in schools and communities today, and invariably, contribute to the most unequal distribution of income in the world, and very limited opportunity for socioeconomic mobility.

As difficult as it is to improve the public education system, the task only gets harder when wealthier learners buy their way out, and so, leave behind a public system attended by only the poorest and most vulnerable learners from marginalised communities.

Greater movement towards privatised education bears the additional cost of a stratified society, in which everyone gets the education that he or she can afford.
Section 29 of the South African Constitution states that:

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.

Section 29 of the Constitution guarantees that all South Africans, regardless of how rich or poor they are, must be able to access a basic education. In addition to providing for the right to access a basic education, Section 29(3) of the Constitution also provides that private parties, such as religious institutions and non-profit organisations, have the right to establish their own educational institutions at their own expense.

The South African Constitution and Independent Schools

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The Constitutional Court touched on this issue when it reviewed whether a private land owner could evict a public school from its property for failing to pay rent. In that case, the Court stressed that while private parties did not have the same duties as the state to advance the rights guaranteed in the Bill of Rights, the Constitution did require private parties not to interfere with or diminish the enjoyment of the right to a basic education.

In this case, the Court noted that while the owner – in this case a trust – had allowed the school to be operated on its property, it was obligated, at least, to minimise the potential impairment of the learners’ right to a basic education.

Likewise other private parties, independent schools must therefore act in a way that minimises the harm that their actions or activities have on their students’ right to a basic education.

ADMISSIONS

One of the primary characteristics that distinguishes independent schools from public schools is the ability of independent schools to be far more selective in their admission process than public schools.

Public schools are prohibited from denying admission to learners on a number of grounds. The South African Schools Act precludes public schools from administering tests to applicants during the admission process. The Schools Act also prohibits public schools from denying admission on the grounds that a learner’s parents are unable to pay school fees, or that the learner does not subscribe to the mission statement of the school.

Independent schools’ admission processes, on the other hand, do not carry the same restrictions.

Independent schools are permitted to administer admission tests, and to deny admission to any learner who is unable to pay school fees or who does not subscribe to the school’s mission statement or ethos.

While independent schools are able to implement far more stringent admission criteria than public schools, they are not allowed to discriminate against learners on the basis of race. They are also prohibited from making admission decisions or employing admission practices that unfairly discriminate against learners on the grounds set out under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

THE RIGHTS OF LEARNERS APPLYING TO AND ATTENDING INDEPENDENT SCHOOLS

Learners attending independent schools have rights that may easily be understood as falling into two or more specific rights.

Firstly, learners have private contractual rights with their schools.

This means that learners have the contractual right to the goods and services that schools promise to them and their parents in contractual agreements or promotional materials. These rights can include things such as:

- The length of the school year or number of school days.
- The material that will be completed in the curriculum throughout the school year.
- Subject availability.
- Maximum class size.
- Learner-teacher ratios.
- Teacher credentials.
- Access to learning and teaching resources such as libraries, computers and science equipment.
- Extracurricular activities.
- Sports and art facilities.

Learners and their parents may have the right to take legal action against a school that promises certain goods and services but fails to deliver them.

Secondly, learners at independent schools have rights that are set out in the South African Constitution, and other laws and regulations. These rights include the right to a basic education, and the right to not be subjected to unfair discrimination.

PROHIBITION AGAINST DISCRIMINATION BASED ON RACE AND OTHER FORMS OF UNFAIR DISCRIMINATION

Section 29(3) of the South African Constitution explicitly prohibits independent schools from discriminating on the basis of race.

This means that independent schools may not discriminate against learners who attend or apply to the school, or teachers or other school staff, on the basis of race. The prohibition applies to both direct and indirect forms of racial discrimination.

The Department of Basic Education (DBE) has further pointed out that unlawful racial discrimination covers both school policies and actions that explicitly discriminate against learners on the basis or promotional materials. This is one example of how access to education is limited by factors such as those that cover a school’s attempt to discriminate on the basis of race.

The DBE’s position has helped to identify instances in which a school’s policies or actions may be suspect.

One example of a suspect policy that could be judged to be covering up racial discrimination would be a school’s decision to refuse admission to learners because they reside in certain geographic areas.

These areas are known to be demographically comprised of populations that fall within a certain race.
The prohibition against racial discrimination in independent schools extends beyond the admission process. Schools are also required to treat incoming learners differently, based on their race, while they are attending school.

In 2015, the Gauteng Department of Education (GDE) investigated a Curro Holdings school that had been reported for a number of racially suspect practices, including segregating classrooms by race, not being able to make friends with children of their own race, and being threatened if and not including African languages as part of the school’s curriculum.

Curro Holdings is a for-profit chain of independent “Christian values” schools that provides instruction in both English and Afrikaans. The chain of schools advertises that it offers varying levels of educational quality and classroom size depending on the tuition fees that the parents of the school’s learners are able to afford.

After the GDE threatened to close the school for its unlawful practice of segregating classrooms by race, the school admitted that its practice of segregation was wrong and, according to the GDE, acted quickly to respond to the complaint by realigning learners of minority groups throughout the school’s three English classrooms.

The school initially denied that it had acted in a discriminatory manner by claiming that it had segregated the classrooms by race as a way of ensuring that children were able to make friends with children of their own culture. After further investigation, however, the GDE admitted that it had separated the Grade 11 learners by race in order to prevent a repeat of the white-flight that had occurred two years before, when (according to the school) white parents removed their children from the school due to the racial composition of the classrooms.

The findings at the Curro school highlighted a number of issues that are central to concerns that have been voiced over the rise of independent schools in South Africa.

The practice of the schools make clear that racial segregation in schools is unlawful and must not be permitted by government, who in this instance protected the rights of the learners at the school by intervening.

Secondly, the discriminatory practices used here show that schools may not use race when determining how to treat learners who attend a school. The Constitution’s prohibition against racial discrimination makes it illegal for a school to use race as the basis for classroom placement – a form of discrimination reminiscent of the harmful apartheid policies that mandated racial segregation in schools.

Finally, the schools’ practice of segregating classrooms based on race highlights the inherent dangers that exist in the private education system. Independent schools are often vulnerable to conflicts of interest between the desire to respond to perceived market demands, and the obligation not to discriminate based on race or for other unfair reasons.

These conflicts become even more problematic when independent schools are run by for-profit companies, as Curro Holdings was here. These schools have a fiduciary duty to maximise profits for their shareholders.

Profit interests create an incentive structure that promotes unwitting and unwitting racial discrimination in schools. Private schools also have the right to establish independent schools in order to preserve linguistic, cultural, religious and linguistic associations and attitudes of people in society.

The Constitutional Court also emphasised in Gauteng Provincial Legislature v Minister of Education 86/1995 that individuals and associations have the right to establish independent schools in order to preserve linguistic, cultural, religious beliefs and practices. Consequently, independent schools may be entitled to greater latitude than public schools when implementing a curriculum that demands that learners participate and adhere to certain linguistic, religious and cultural practices.

The public education system has a constitutional mandate to advance notions of equality and provide education at a level that creates opportunity for socio-economic mobility, social transformation, and social cohesion. A vibrant private education system, on the other hand, carries the inherent risk that it will protect the status quo in order to satisfy the demands of the parents who are willing to pay the most – regardless of the social cost of their demands.

Or does an independent school have the right to further its chosen linguistic, cultural and religious practices and beliefs by mandating that all learners participate in religious practices, as a way to foster a school environment that it believes is capable of advancing its chosen beliefs and custom? Section 15 of the Constitution specifies that state and state-aided schools may conduct religious observances, so long as attendance at them is free and voluntary. It is not as clear, however, whether non-state-aided independent schools must comply with the rights of opt-out of such observance.

Chapter 4 explains when forms of discrimination may be found to be unfair. In summary, a reviewing Court will look at:

- The impact that the discrimination has on the learner, and the degree to which the affected learner is part of a group that suffers from patterns of disadvantage in society.
- The degree to which the discrimination is narrowly tailored to achieve a legitimate purpose.
- Whether and to what extent the discrimination achieves that purpose, and
- The extent to which the school has attempted to accommodate the learner.

As an example in applying these considerations, would an independent school’s policy requiring all students to participate in religious practices as part of the school’s curriculum be found to be unfairly discriminatory against learners who do not wish to participate, due to their personal religious beliefs? A 1998 High Court judgment in Wittmeyer v Deutscher Schularven, Pretoria and Others, provides an example of what can happen when the religious rights of an independent school conflict with the rights of its learners.

In that case, the court held that a Christian German independent school was free to expel a learner who refused to attend religious instruction classes and school prayer. The court justified the expulsion because (1) the school’s rules and regulations required the learner to attend religious classes, (2) the learner had agreed to abide by the school’s rules and regulations, and (3) the learner had the opportunity to ‘opt out’ by attending school elsewhere.

But was this case correctly decided? Did the school’s decision to expel the learner for refusing to participate in religious instruction classes and prayer unfairly discriminate against the learner on the basis of religion, conscience, or belief? The school’s decision to expel the learner would inevitably have had a negative impact on the learner’s right to a basic education. An expulsion disrupts the school year and forces the learner to adapt to a new school setting, and to endure the educational and social difficulties caused by relocation.

The School’s policy to mandatorily participating in educational instruction and prayer also impairs the learner’s right to freedom of conscience, thought, belief and opinion. The Constitutional Court in Christian Education South Africa v Minister of Education emphasised that freedom of religion includes both the right to have a belief and the right to express such a belief. It also brings about the freedom to manifest that religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to that person’s beliefs.

Here, the school arguably sought to coerce the learner into participating in religious practices and observance by threatening expulsion.
But the school would argue that it has a right to advance its religious beliefs. It would further say that fostering an environment in which all learners participate in religious instruction and prayer is the best way to achieve that legitimate purpose. Finally, the school would argue that it accommodated the learner by giving her the option to opt out by enrolling in a public school or a different private school. How would you decide? Was the impact of the discrimination severe enough here to justify intervening against the school’s policy on religion practices? Could the school have taken narrower means to achieve its purpose of fostering a religious environment and furthering its religious beliefs, for instance by mandating participation in classes about religion, but making prayer and other forms of religious observation optional?

These issues highlight the complex considerations that must be taken into account when determining whether an independent school’s policies or actions unfairly discriminate against its learners.

The DBE has made clear that independent schools are prohibited from taking discriminatory actions, such as denying admission to learners who are pregnant, allowing pregnant learners, or refusing to admit a learner of a certain faith into a secular school. But how would you classify an independent school’s decision to deny admission to a learner with a physical disability, or expel a learner with a physical disability, or one who identifies as gay, expelling pregnant learners, or suspending learners who fail behind in the taking of tuition payments.

Many contracts that parents sign when they enroll their children in independent schools allow the school to suspend or expel the learner if tuition payments are not made on time. Some even go so far as withholding learner reports if tuition payments are not made, so that learners are prevented even from enrolling in a new school until the previous school receives the fees owed to it. These actions clearly interfere with the learner’s ability to access basic education, but the extent to which they are lawful is independent schools is not always clear under the law.

Section 25(3) of the DBE’s National Protocol on Assessment Grades R – 12 standardises recording and reporting processes for Grades R to 12, within the framework of the National Curriculum Statement. That policy document prohibits all schools, including independent schools that offer the National Curriculum Statement, from withholding a learner report for any reason.

Accordingly, independent schools that offer the National Curriculum Statement are prohibited from withholding learner reports in order to force parents to pay overdue school fees.

The Independent Schools Association of South Africa (ISASA), which advises its members against withholding learner reports, emphasised that the regulation does not prevent schools from using other means, such as legal action, to obtain fees that may be overdue in terms of the contract between the school and the parent. ISASA advises schools that they may exclude learners for non-payment, provided that due process has been followed.

In Christian Education South Africa v Minister of Education, the Constitutional Court held that all schools are prohibited from inflicting corporal punishment on their learners. The Court further emphasised that this prohibition applies even to independent schools that claim that their religious beliefs require them to use corporal punishment as a form of discipline.

This case is important for a number of reasons. Firstly, it shows that parents are limited in their ability to consent to violations of their children’s rights in school.

Secondly, the state may limit a parent’s ability to consent to a violation of his or her child’s rights, even if the consent is provided to the school in order to further the parents’ genuinely held religious beliefs. Finally, this case shows that the state may prohibit an independent school from acting in a way that violates the rights of its learners – even if the school’s conduct is religiously motivated. In reaching its finding, the Court emphasised the delicate balancing test that must take place between the school’s right to freedom of religion on the one hand, and the state’s compelling interest in protecting the rights of learners and children on the other.

**FREEDOM FROM CORPORAL PUNISHMENT**

The Schools Act prohibits all schools, including independent schools, from inflicting corporal punishment on their learners. Section 10 of the South African Schools Act provides that:

1. No person may administer corporal punishment at a school to a learner.
2. Any person who contravenes subsection (1) is guilty of an offence, and is liable on conviction to a sentence which could be imposed for assault.

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**COLLECTION OF TUITION FEES**

The commercial relationship between independent schools and the learners who attend them presents a number of concerns over the extent to which schools may suspend, expel or take other harmful actions against learners whose parents fall behind on tuition payments. Many contracts that parents sign when they enroll their children in independent schools allow the school to suspend or expel the learner if tuition payments are not made on time. Some even go so far as withholding learner reports if tuition payments are not made, so that learners are prevented even from enrolling in a new school until the previous school receives the fees owed to it. These actions clearly interfere with the learner’s ability to access basic education, but the extent to which they are lawful is independent schools is not always clear under the law.

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**STATE REGULATION OF INDEPENDENT SCHOOLS**

The Schools Act and the South African Schools Act contain a range of responsibilities that both the state and independent schools have towards learners applying to or attending independent schools. Taking as a whole, these responsibilities seek to ensure that all independent schools meet minimum standards, and that the rights of learners who choose to attend independent schools are protected.

Accordingly, provincial and national education departments must monitor independent schools to ensure that independent schools are complying with all statutory and regulatory requirements.
REGISTRATION OF INDEPENDENT SCHOOLS

According to the Constitution, all independent schools must be registered with the province in which they are located, prior to enrolling learners.

Section 46 of the Schools Act outlines the conditions under which the state must register independent schools. The Act requires each provincial education department to develop grounds on which the registration of an independent school may be granted or withdrawn by the provincial department. A head of department must then register an independent school if he or she is satisfied that:

• The standards to be maintained by such a school will not be inferior to the standards in comparable public schools.
• The admission policy of the school does not discriminate on the grounds of race.
• The school complies with the grounds for registration as defined by each provincial education department.

Section 46 of the Schools Act makes it a criminal offence to operate an independent school that has not been registered by the provincial head of department. Any person who operates such an unregistered school may be liable for a fine or imprisonment of up to three months upon conviction.

QUALITY ASSURANCE AND ACCREDITATION OF INDEPENDENT SCHOOLS

Umalusi is mandated to accredit private providers of education and training, including independent schools. While the provincial registration process enables independent schools to operate, independent schools must be accredited by Umalusi in order to offer qualifications on the General and Further Education Training Qualification Framework, including the National Senior Certificate.

Independent schools must be accredited by Umalusi every seven years, a process which includes periodic reporting and evaluations along with site visits, used to evaluate the level of quality provided by all registered independent schools.

Teachers employed by independent schools must be registered with the South African Council for Educators (SACE).

STATE SUBSIDIES FOR INDEPENDENT SCHOOLS

Independent schools may apply to their relevant provinces to be considered for state subsidies. In order to qualify for a state subsidy, independent schools must satisfy a number of criteria, including that they have been registered for at least one year, that they charge limited tuition fees, and that their learners meet performance and retention standards.

Section 48 of the Schools Act empowers the Minister of Basic Education to grant subsidies to independent schools, and to determine norms and standards for the granting of subsidies. It is up to each province to appropriate funds for independent schools, and to grant subsidies to qualifying independent schools.

The Department of Basic Education has justified granting subsidies to qualifying independent schools on the basis that it has the constitutional responsibility to provide basic education to all learners, and that independent schools perform a service that would otherwise have to be performed by the state. The National Norms and Standards for School Funding (NNSSF), a national policy implemented by the national DBE each year, sets standards for provinces in terms of when independent schools may be qualified to receive state funding, and the amount of funding that should be made available to them.

The policy further emphasises that there is a cost efficiency to subsidising independent schools, as public subsidies to independent schools cost the state considerably less per learner than if the same learners were enrolled in public schools. However, because of the extreme inequalities and backlogs in the provision of public education, the state has limited independent school subsidies to those schools that serve explicit social purposes. The NNSSF therefore only subsidises independent schools that are well managed, provide good-quality education, serve poor communities and individuals, and are not operated for profit.

THE STATE’S REASONS FOR SUBSIDISING INDEPENDENT SCHOOLS

The Department of Basic Education has justified granting subsidies to qualifying independent schools on a progressive five-point sliding scale. These amounts are payable at levels of 40%, 45%, 50%, 55% or 0% of the provincial average estimate per learner expenditure (PAEPL) at public schools. The PAEPL is calculated by dividing a province’s expenditure on public ordinary schools by the number of learners attending public ordinary schools. Only independent schools that charge tuition fees that are not greater than two-and-a-half times the PAEPL may be eligible for subsidies. Under the sliding scale, schools with lower tuition fees receive greater subsidies.

The NNSSF requires provincial education departments to communicate information to independent schools about the subsidies that they will receive for the following school year by 30 September each year.

The information provided to schools must include the provincial average estimate per learner expenditure for primary and secondary learners, and an indication of the subsidy category under which the independent school falls, so that independent schools may plan their budgets and fee schedules for the following year.

Provinces, however, may note in their subsidy letters to schools that the figures provided are only estimates, and may therefore differ from the actual subsidies allocated the following year.

Provinces are permitted to amend the subsidies communicated to schools once the provincial plans for the following fiscal year have been finalised. Provincial education departments may deviate from the subsidy and fee levels set out in the NNSSF ‘only on good cause shown’ to the Department of Basic Education.

The NNSSF directs that provincial education departments must ensure that the first term’s subsidy is paid to all qualifying independent schools by 1 April in each school year. Subsequent subsidy payments must be paid no later than six weeks after the beginning of each school term.
Reduced Subsidies to Independent Schools in KZN

In the annual audit of the public education department in KwaZulu-Natal, the Financial and Performance Audit Committee of the legislature found that the department had been overpaying subsidies to independent schools for many years. This was due to the department not accurately calculating the number of students in each school and the amount of subsidy that each school should receive. As a result, the department had been paying more subsidies to independent schools than it was obligated to pay. The audit committee recommended that the department take steps to correct this overpayment.

The provincial government has been criticized for its decision to cut subsidies to independent schools. The government claims that the decision was necessary due to budget constraints and the need to prioritize funding for public schools. However, many independent school parents and students have expressed concern about the impact of the subsidy cuts on their ability to continue attending independent schools.

The Constitutional Court of South Africa has ruled on several cases involving the government's obligations to independent schools. In one case, a group of independent school parents brought a case to court, arguing that the government was obligated to pay the promised subsidies to their schools. The Court ruled in favor of the parents, finding that the government had a legal obligation to pay the promised subsidies.

The government has appealed the decision, citing the financial constraints facing the province. However, the parents of independent school students have continued to push for full payment of the promised subsidies.

In response, the government has announced that it will provide additional support to independent schools. This includes increased funding for infrastructure and teacher salaries. However, many parents and students are concerned that this support is not enough to fully address the financial strain on independent schools.

The debate over subsidies to independent schools is likely to continue, as both sides have strong arguments and evidence to support their positions. The government must carefully weigh the financial constraints facing the province against the importance of providing quality education to all students.
The rise of privatised education in South Africa raises a number of legal and philosophical issues and concerns.

Many of these concerns arise out of conflicting rights and interests among various stakeholders in both the public and private sectors. This chapter has mostly provided space to address the various rights and responsibilities of these stakeholders. However, a review of education rights as it relates to independent schools would be incomplete without considering the impact and potential effect that privatised education has on South Africa’s public education system. It has consequences for constitutional notions of democracy, freedom, equality, human dignity and social transformation that the right to a basic education is intended to advance.

To what degree is the notion of privatised education consistent with the state’s interest in resolving South Africa’s history of racial inequality and segregation through a quality national system of schooling? Should the State be in the business of subsidising private low-fees schools that are permitted to exclude learners based on their inability to pay school fees? These questions and others have given rise to a debate over the degree to which the state should advance and provide incentive for growth in independent schooling. This debate is also particularly relevant when it comes to the for-profit education sector. Should we be concerned that for-profit schools or non-profit schools run by for-profit corporations will have the incentive to favour the rights and interests of shareholders over the best interests of learners?

ARGUMENTS FOR GREATER ACCESS TO INDEPENDENT SCHOOLS

These debates are taking place at a time when a great deal of national attention has been focused on the failures of South Africa’s public education system, which is frequently described as being in a state of crisis. The public sector’s poor performance has been blamed on the state’s failure to offer learners properly managed and adequately resourced schools, with sufficiently trained, skilled, motivated and supported teachers. Those in support of privatisation point to the private sector’s ability to resolve these shortcomings by: Improving the level of standardisation and assessment, of both learners and teachers Addressing poor management and teaching practices, by providing schools with incentives to function efficiently through marketplace accountability governed by consumer choice Reducing the power and influence of teacher unions. These are frequently viewed as corrupt, and as contributing to corrosive patronage networks.

The rise in independent schooling in South Africa has been blamed on the state’s failure with sufficiently trained, skilled, and adequately resourced schools, described as being in a state of crisis. The public sector’s poor performance has been blamed on the state’s failure to offer learners properly managed and adequately resourced schools, with sufficiently trained, skilled, motivated and supported teachers. Those in support of privatisation point to the private sector’s ability to resolve these shortcomings by: Improving the level of standardisation and assessment, of both learners and teachers Addressing poor management and teaching practices, by providing schools with incentives to function efficiently through marketplace accountability governed by consumer choice.

• Governments should recognise that the highest-quality universally available education for the lowest cost will always come from an effective public education system. • Education must be valued and safeguarded as a public good. Governments must guarantee and regulate both public and private educational institutions, to ensure that norms and principles of the right to education are respected in all situations. • The state, regardless of its policies towards private enterprise, must remain primarily responsible for fulfilling the right to education. It has constitutional and international legal obligations to protect, promote and realise the right to education. • Public-private partnerships in education should not lead to reduced government investment in education, but should rather be complementary to the maximum resources that governments can provide for the right to education. • The pursuit of private interests and the commercialisation of education should have no place in the education system of a country, or in any future education agenda. • To protect the rights of all learners, governments must carefully regulate private schools, with diligent monitoring and enforcement, especially in developing countries where the public system is overwhelmed and unable to cope with rapidly rising demand. These regulations must ensure that public-private partnerships in education are harnessed to the broader public interest, and reflect the humanitarian mission of education. It must also be centred on the concept of education as a social good.

• The universal right to education is an imperative and must be safeguarded as a public good. • The law must be changed to permit state funding for private schools. • It is critical for the state to further develop its regulatory capacity. • There must be a strong advocacy process to encourage education rights.

THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHT TO EDUCATION AND PRIVatisED SCHOOLS

In a 2015 report, Kishore Singh, the United Nations Special Rapporteur on the right to education, voiced a number of concerns over what he described as the need to protect education from the forces of privatisation. Mr. Singh’s concerns centred on the need for the state to ensure that all children, not just those from wealthy households, are able to access quality schools. The Special Rapporteur’s report highlighted a number of fundamental considerations and policy recommendations that states should adhere to when empowering and regulating privatised education, including that:

• Low-cost independent schools?

INDEPENDENT SCHOOLS

The rise in independent schooling in South Africa carries a number of social costs. They draw slightly or significantly more affluent families away from the public schooling sector, which has an unavoidable social consequence. For instance:

• Parents who might have professional or other skills becoming unavailable to participate in school governing bodies, or be vested stakeholders in the success of the public education system. • Students in public schools being denied access to the academic benefit of being in classrooms with slightly more affluent learners. • A society segregated by the socio-economic circumstances of its learners, without the benefit of having a public education system which offers a space for social cohesion. • The diversion of teachers (who probably benefited themselves from education and training from public educational resources) to the private sector. • Increased inequality, caused by a system where everyone receives the quality of education they can afford. • The long-term risk of undermining South Africa’s tax system, because the less the middle-class needs public service delivery in areas such as education and healthcare, the less inclined they will be to pay taxes to fund them. • In the case of subsidised independent schools, the diversion of limited resources away from public schools to a system governed by private enterprise which is empowered to exclude learners who are too poor to afford tuition.

These arguments for and against improved access to independent schools, either through direct government support or by the implementation of a regulatory environment conducive to the establishment and operation of independent schools, invite a number of legal, philosophical and policy-related questions, including:

• Should independent schools increase the quality and efficacy of the public education system through competition, when most learners are too poor to afford even low-cost independent education? • Do low-fees independent schools offer education of an adequate quality, when financial and profit considerations provide incentives to them to cut costs? • To what extent can or should subsidised independent schools be able to exclude learners based on their ability to pay – or on other reasons for which public schools are prohibited from excluding learners? • Should subsidised independent schools, like public schools, have a duty to consider the needs and interests of the broader school community, and not just those of the learners who happen to attend the school at the time? • Should the state be more concerned with independent schools that claim to be non-profit but may be creating the opportunities to profit in other ways, in the form of high administrative salaries or contracts with for-profit companies who perform services such as operating schools, supplying teachers, leasing property, or the provision of learning and teaching support materials and resources?
CONCLUSION

The laws and policies that govern South Africa’s independent schooling system raise a number of issues that are central to the rights and interests of the learners and parents of learners who attend independent schools, and the private individuals and organisations that establish and maintain them.

This chapter has provided an overview of the rights and responsibilities of the various role players involved in making sure that learners access quality independent schools that uphold the rights of learners. However, the legal and policy landscape governing independent schooling is complex, and continues to leave a number of issues and concerns largely unresolved and untested in courts; with social costs that for the most part have gone unacknowledged by government and industry.